Apogee Retail LLC d/b/a Unique Thrift Store *and* Kathy Johnson. Cases 27–CA–191574 and 27–CA–198058

December 17, 2019

DECISION AND ORDER REMANDING

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue in this case is whether the Respondent lawfully maintained two written rules, one requiring employees to "maintain confidentiality" regarding workplace investigations into "illegal or unethical behavior" and the other prohibiting "unauthorized discussion" of investigations or interviews "with other team members." We overrule the Board's approach to investigative confidentiality rules set forth in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), enf. denied on other grounds 851 F.3d 35 (D.C. Cir. 2017), which demands a case-by-case determination of whether confidentiality can be required in a specific investigation. Applying the test for facially neutral workplace rules established in *Boeing Co.*, 365 NLRB No. 154 (2017), we hold instead that investigative confidentiality rules are lawful and fall within Boeing Category 1—types of rules that are lawful to maintain—where by their terms the rules apply for the duration of any investigation. However, the rules at issue in this case are not limited on their face to the duration of any investigation. As such, they fall within *Boeing* Category 2. We therefore find that a determination of their legality necessitates a remand of this case to the Region for further proceedings as to whether the Respondent has one or more legitimate justifications for requiring confidentiality even after an investigation is over, and if so, whether those justifications outweigh the effect of requiring post-investigation confidentiality on employees' exercise of their rights under Section 7 of the National Labor Relations Act.[1]

I. JURISDICTION

The Respondent, a State of Washington corporation with a headquarters in Bellevue, Washington, is engaged in the operation of retail stores selling second-hand clothing and other items in locations throughout the United States, including Aurora, Colorado (a location that has since closed). During the 12-month period ending on October 18, 2018, the Respondent, in conducting its business, derived gross revenue in excess of $500,000 and purchased and received at its Aurora, Colorado facility goods and services valued in excess of $5000 from points located directly outside the State of Colorado. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STIPULATED FACTS

At all material times, the Respondent has maintained the following employee rules, contained in two separate publications and disseminated to all employees nationwide. The first provision is contained in the Respondent's Code of Business Conduct and Ethics and provides in relevant part:

> *Report Illegal or Unethical Behavior*
>
> Team members are expected to cooperate fully in investigations and answer any questions truthfully and to the best of their ability. *Reporting persons and those who are interviewed are expected to maintain confidentiality regarding these investigations.* [Emphasis added.]

The second provision is contained in Respondent's Loss Prevention Policy and states in relevant part:

> The following list, neither all-inclusive nor exhaustive, are examples of behaviors that can have an adverse effect on the company and may lead to disciplinary action, up to and including termination: . . . . Refusing to courteously cooperate in any company investigation. *This includes, but is not limited to, unauthorized discussion of investigation or interview with other team members.* . . . [Emphasis added.]

The Respondent has not disciplined any employee for violating these rules.

The Respondent asserts the following business reasons for maintaining the above provisions:

- The retail industry experiences billions of dollars in theft each year. A significant portion of that theft involves various types of employee theft requiring diligent and effective investigations.

[1] Upon charges filed by Kathy Johnson on January 20 and May 3, 2017, the General Counsel issued a complaint and notice of hearing alleging that the Respondent violated Sec. 8(a)(1) by maintaining two handbook provisions. The Respondent filed an answer denying the commission of any unfair labor practices and asserting affirmative defenses. Following the issuance of *Boeing*, supra, the hearing was rescheduled and ultimately postponed indefinitely. On August 30, 2018, the General Counsel issued an amended consolidated complaint and notice of hearing. On September 13, 2018, the Respondent filed an answer denying the commission of any unfair labor practices and asserting affirmative defenses. On October 18, 2018, the Respondent and the General Counsel filed a joint motion to waive a hearing and decision by an administrative law judge and to transfer the proceeding to the Board for a decision based on the stipulated record. On December 13, 2018, the Board granted the parties' joint motion. Thereafter, the General Counsel and the Respondent filed briefs.

- Employees have expressed reluctance to cooperate in investigations out of fear of being labeled a "whistleblower," "rat" or "snitch." This hinders the ability of the employer to act quickly and decisively.

- [In c]ases involving multiple suspects, [the rules] prevent[] the potential leak of critical investigative information to other potential suspects.

- Proving false allegations or claims made in bad faith is difficult to do when the employer cannot get to the factual truth when people discuss what they know, believe or perceive what other witnesses say during investigations.

- The rule against required confidentiality of workplace investigations can place employees and the company at unnecessary risk, including physical risk.

- Allowing a company better controls to create and sustain stronger safe harbors for employees when reporting serious issues that require an investigation[] is necessary; prohibiting the employer from requiring confidentiality hampers effective and thorough investigations.

- Often, investigation yields facts later on in the process that would have indicated that confidentiality should have been required at the outset of the investigation.

- Employees interviewed during investigations almost always ask for confidentiality.

The Respondent further asserts that it has conducted multiple investigations in which the inability to require confidentiality has hindered the investigation. These investigations include cases in which (1) the Respondent was unable to substantiate allegations because the information gathered was not credible after "the parties were either coached or they discussed ahead of time what they would say," or employees took advantage of the lack of confidentiality to manipulate the outcome; (2) accusers openly discussed and attempted to influence others to make similar statements; (3) employees were put in uncomfortable situations or feared repercussions due to lack of confidentiality when a manager was under investigation; (4) a manager accused of favoritism engaged in threatening or intimidating behavior, and the employee receiving preferential treatment made disparaging comments to customers based on knowledge of the accusation and accusers; (5) details of a conversation with employee relations were shared with multiple employees and damaged an employee's reputation to the point that he/she was unable to return to work; (6) lack of confidentiality allowed an individual to threaten retaliatory behavior, including the threat of physical assault if the coworker did not support the accused in an investigation; and (7) an employee resigned rather than face retaliation as a result of reporting a situation when not assured of confidentiality.[2]

III. DISCUSSION

In considering whether the Respondent's rules are lawful, we must first determine the appropriate analytical framework. In recent years, the Board has followed the case-by-case approach to investigative confidentiality rules set forth in *Banner Estrella Medical Center,* supra. As explained below, we find the *Banner Estrella* standard deficient in several important respects, and we overrule it. We find that investigative confidentiality rules are properly analyzed under the Board's test for facially neutral workplace rules established in *Boeing Co.*, supra. Under that standard, we conclude that investigative confidentiality rules similar to those at issue here but that by their terms apply only to open investigations are categorically lawful under *Boeing*, but investigative confidentiality rules similar to those at issue here and not limited on their face to open investigations belong in *Boeing* Category 2, requiring individualized scrutiny in each case as to whether any post-investigation adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.[3]

[2] In the joint stipulation, the General Counsel took "no position on the veracity" of the Respondent's asserted business justifications and examples of the lack of confidentiality impeding the Respondent's investigations, asserting that they are "not relevant to the determination of whether Respondent's maintenance of the rules" violates the Act. In its brief to the Board, the General Counsel asserts that the Employer's business justifications for maintaining workplace investigation confidentiality rules "reflect interests that are common to all employers."

[3] By "similar to those at issue here," we mean rules that require participants in an investigation to maintain the confidentiality of the investigation and/or prohibit participants from discussing the investigation or interviews conducted in the course of the investigation. That is what an investigative confidentiality rule just *is*, by its very nature. Thus, our holding does not extend to rules that would apply to nonparticipants, or that would prohibit employees—participants and nonparticipants alike—from discussing the *event or events* giving rise to an investigation (provided that participants do not disclose information they either learned or provided in the course of the investigation). And our holding certainly does not extend to rules that would prohibit employees from making reports to, or filing charges or complaints with, government agencies. Accordingly, the dissent is incorrect when she claims that under our decision today, "any rule requiring investigative confidentiality during the course of an investigation is permissible, no matter how it is written." We also reject her apparent view that an investigative confidentiality rule

A. Banner Estrella is overruled

In *Banner Estrella*, the Board addressed whether an employer may lawfully instruct employees not to discuss ongoing workplace investigations with one another.[4] 362 NLRB at 1108–1113. In finding that the instructions violated Section 8(a)(1) of the Act, the Board observed:

> Employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. . . . Accordingly, an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights.

Id. at 1109. In so holding, the Board placed the burden on the employer to determine, on a case-by-case basis, whether its interests in preserving the integrity of an investigation outweighed presumptive employee Section 7 rights. Relying on *Hyundai America Shipping Agency*, 357 NLRB 860 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015), the Board found that an employer must supply specific evidence that "in any given 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."[5] *Banner Estrella*, 362 NLRB at 1109. Only after an employer presented a particularized showing that corruption of the investigation was likely to occur could the employer lawfully require employee confidentiality. Ibid.

The General Counsel and Respondent urge the Board to reconsider the *Banner Estrella* test, asserting that it fails to consider (1) Supreme Court and Board precedent recognizing that it is the Board's duty to balance an employer's legitimate business justifications against employees' Section 7 rights; (2) the importance of confidentiality assurances to employers and employees during an ongoing investigation; and (3) that requiring an employer to evaluate the need for confidentiality on a case-by-case basis is inconsistent with other Federal statutes. The General Counsel and the Respondent assert that application of the test set forth in *Boeing,* 365 NLRB No. 154, renders such rules lawful and supersedes *Banner Estrella,* supra.

For the reasons discussed below, we overrule *Banner Estrella,* supra, and apply the analytic framework set forth in *Boeing,* supra, to determine whether the Respondent's facially neutral confidentiality rules are lawful.

1. *Banner Estrella* failed to consider Supreme Court and Board precedent recognizing the Board's duty to balance an employer's legitimate business justifications and employees' Section 7 rights

In *NLRB v. Great Dane Trailers, Inc*., the Supreme Court recognized that it is the Board's duty to strike the appropriate balance between an employer's asserted business justifications and the exercise of employee Section 7 rights in light of the Act and its policy. 388 U.S. 26, 33–34 (1967) (citing *NLRB v. Erie Resistor*, 373 U.S. 221, 229 (1963)); see also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (recognizing it is the "primary responsibility of the Board and not the courts" to strike the proper balance between asserted business justifications and employee rights). The Court acknowledged that the Board's task in balancing these interests is a "delicate" one and includes

> weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.

NLRB v. Erie Resistor Corp., 373 U.S. at 229; see also *Banner Estrella*, 362 NLRB at 1120 (Member Miscimarra, dissenting in part).

Prior to its decision in *Banner Estrella*, the Board itself balanced employer and employee interests in assessing the lawfulness of investigative confidentiality rules. In *Caesar's Palace*, 336 NLRB 271, 272 (2001), the Board considered an employer's rule prohibiting employee

must expressly state it does not contain unstated prohibitions because otherwise, it does. Here, the dissent wrongly "presume[s] improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). We simply disagree that objectively reasonable employees would read the rules at issue here from our colleague's "assume the worst" perspective.

[4] Although *Banner Estrella* addressed oral confidentiality instructions delivered to employees, rather than written rules/policies (such as the one at issue here), the Board applies the same balancing test regardless of the employer's mode of communicating the policies. See *INOVA Health System*, 360 NLRB 1223, 1229 fn. 16 (2014) (finding that "the same balancing of [an employer's] business justification against employee rights in evaluating the lawfulness of a confidentiality rule likewise applies to determine whether a confidentiality instruction issued to a single employee violates the Act"), enfd. 795 F.3d 68 (D.C. Cir. 2015).

[5] The court declined to endorse the requirement that the employer must produce specific evidence in order to meet its burden of proof. *Hyundai*, 805 F.3d at 314 (internal quotations omitted).

The majority opinion in *Banner Estrella* vacillated between stating a conjunctive standard ("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. at 1109 (emphasis added), and a disjunctive standard ("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"), id. at 1111 (emphasis added). However, the *Banner Estrella* majority stated that it was reaffirming "the standard applied in *Hyundai*," id. at 1110, and *Hyundai* states the standard in the conjunctive. See 357 NLRB at 874.

discussion of an investigation. The Board found that an adverse impact on employees' Section 7 rights does not automatically render the employer's rule unlawful. Instead, "the issue is whether the interests of the [r]espondent's employees in discussing this aspect of their terms and conditions of employment outweighs the [r]espondent's asserted legitimate and substantial business justifications." Id. at 272. Cf. *Jeannette Corp. v. NLRB,* 532 F.2d 916, 918 (3d Cir. 1976) (emphasizing that it is the Board's responsibility to balance the effect on Section 7 rights and the employer's asserted business justification).

In *Banner Estrella*, however, the Board abandoned its obligation to balance employee and employer interests and shifted the burden to the employer to establish, on a case-by-case basis, that its interests in conducting a specific confidential workplace investigation outweighed the employees' interests in exercising their Section 7 rights. Moreover, the *Banner Estrella* majority adopted a standard under which Section 7 rights predominate, and the employer's interests are not even considered unless and until the employer demonstrates, with respect to each specific investigation in which confidentiality was required, that "witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, and there [was] a need to prevent a cover up." *Banner Estrella*, 362 NLRB at 1109. As former Member Miscimarra noted in his *Banner Estrella* dissent,

> [i]nstead of "weighing" and "balancing" the legitimate interest served by making a nondisclosure request in an investigative meeting against any interference with NLRA-protected rights, the majority engaged in reasoning similar to what one commentator has termed "push-button law." Employee Section 7 rights are the *only* interests taken into account, and factors favoring nondisclosure requests receive no weight at all.

362 NLRB at 1124 (internal citations omitted). We agree with former Member Miscimarra's view that the *Banner Estrella* test improperly applied an "all or nothing" approach in which reasonable confidentiality requests are assigned a value of zero unless an employer satisfies the high burden of proving, in a particular investigation, that there were "objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." Ibid. Thus, we find that the Board in *Banner Estrella* improperly ceded its own authority to balance the parties' interests, while simultaneously requiring the employer to sustain an unduly onerous burden of proof.

2. *Banner Estrella* failed to consider the importance of confidentiality assurances to both employers and employees during an ongoing investigation

There is no dispute that an employer has a legitimate interest in investigating charges of alleged employee misconduct. See *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001); *Manville Forest Products*, 269 NLRB 390, 391 (1984). And because full, fair, prompt, and accurate resolution of such complaints also benefits employees, they, too, possess a substantial interest in having an effective system in place for addressing workplace complaints. Confidentiality assurances during an ongoing investigation play a key role in serving the interests of both employers and employees.

The reasons underlying an employer's need for confidentiality during an ongoing investigation are numerous and self-evident. Four of the most compelling are (1) to ensure the integrity of the investigation, (2) to obtain and preserve evidence while employees' recollection of relevant events is fresh, (3) to encourage prompt reporting of a range of potential workplace issues—unsafe conditions or practices, bullying, sexual harassment, harassment based on race or religion or national origin, criminal misconduct, and so forth—without employee fear of retaliation, and (4) to protect employees from dissemination of their sensitive personal information.

Regarding the first of these, the integrity of any investigation depends on the investigator's ability to ensure that potential witnesses do not coordinate their accounts of relevant events. To achieve that assurance, an employer must be able to require that matters discussed in an investigative interview not be disclosed outside that room while the investigation remains open. Otherwise, it would be all too easy for the first employee interviewed to report what was asked and what he or she said in response to others, who could then frame their accounts accordingly. And even where employees would not deliberately falsify their testimony, hearing what others have said during their interviews could cause employees to doubt their own recollections or to confuse what they think they remember with what they heard others say.

As to the second and third reasons, being able to immediately assure employee witnesses that what they reveal will be held in confidence is vitally important both in creating a record while relevant events are recent and the memory of those events is fresh, and in quieting fears that truthful disclosures may lead to retaliation. If an employer must tell potential witnesses at the outset of an investigation that it cannot guarantee confidentiality—and under *Banner Estrella*, it must say that—this in itself may well be enough to chill employees into silence. Of course, the *employer* can guarantee that *it* will not divulge what is

said, and an interviewed employee may have a strong interest in keeping his or her counsel. But absent an investigative confidentiality *rule*, the interviewed employee can have no confidence that *other* employees would keep silent, and their disclosures could compromise others. In addition, without an investigative confidentiality rule, employees would have no defense against pressure—potentially intense pressure, even threats—from other employees to reveal what was asked and said. An investigative confidentiality rule gives employees a plausible defense against such pressure: "Sorry. I can't talk about it. If I did, I'd get fired!"

The Board addressed the fourth of these considerations in *IBM Corp. (IBM)*, where it recognized the importance of confidentiality during investigations of allegations that could reveal sensitive employee information, including "substance abuse allegations, improper computer and internet usage, and allegations of theft, violence, sabotage, and embezzlement." 341 NLRB 1288, 1293 (2004). The Board noted that confidentiality requirements help to prevent dissemination of sensitive information that, if revealed, could potentially damage employees' reputations:

> 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. . . .

IBM, 341 NLRB at 1293 (internal footnote omitted).

The Board's own investigative procedures recognize the need for investigative confidentiality[6] and confer upon parties the right to move to sequester witnesses during Board hearings.[7] Likewise, federal agencies such as the EEOC and OSHA require investigative confidentiality during their investigations of alleged wrongdoing, both for reasons of employee privacy and to maintain the integrity of the investigation.[8]

By requiring an employer to engage in a case-by-case assessment of whether the integrity of the investigation will be compromised without confidentiality, the Board in *Banner Estrella* ignored the obvious need to protect employee witnesses and the integrity of sensitive workplace investigations. Indeed, the Board disregarded the reality that a preliminary investigation is necessary in order to determine whether "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." Since the employer would not, at the outset, have the information it needs to make that determination, under *Banner Estrella* it is unable to provide the very assurances of confidentiality necessary to obtain the information it needs to make the determination *Banner Estrella* demands. As the Board found in *IBM*, the absence of an employer confidentiality policy "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." 341 NLRB at 1293; see also *Belle of Sioux City, LP*, 333 NLRB 98, 113–114 (2001) (lack of confidentiality in investigations could risk employees tailoring their accounts to support or undermine the claim).

Thus, we find that the majority in *Banner Estrella* failed to recognize and weigh the important interests of employers in providing, and of their employees in receiving, assurances that reports of incidents of misconduct or other workplace dangers will be held in the strictest confidence by all concerned, management and workers alike. There are obvious mutual interests to be served by encouraging and allowing employees to report wrongdoing without fear of reprisal from the subject of the investigation. Among other considerations, such reporting promotes the goals of the antidiscrimination statutes by helping employers eradicate workplace discrimination and deal with it promptly and effectively when it occurs. And this, in turn, also furthers the employees' collective interest in having a discrimination-free workplace.

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[6] See *Santa Barbara News-Press*, 358 NLRB 1539, 1541 (2012), incorporated by reference 361 NLRB 903 (2014) (discussing well-established policy against prehearing disclosure of witness statements). See also *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 222 (1978) (accepting Board's argument that "a particularized, case-by-case showing is neither required nor practical" when it comes to confidential witness statements).

[7] See *Greyhound Lines Inc.*, 319 NLRB 554, 554 (1995); see also Casehandling Manual, Part One, Unfair Labor Practice Proceedings Sec. 10394.1; Judge's Bench Book, Sec. 1–300 (Model Sequestration Order) and Sec. 10–100 et seq. (noting that the Board conforms to the statutory command to follow the Federal Rules of Evidence, including Fed.R.Evid. 615, "Exclusion of Witnesses," "so far as practical").

[8] See Confidentiality, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/employees/confidentiality.cfm, "Confidentiality" (last visited Jan. 29, 2019) ("Information obtained from individuals who contact EEOC is confidential" until formal charge is filed.); What are my rights during an inspection?, U.S. Department of Labor, Occupational Safety and Health Administration, https://www.osha.gov/workers/index.html (last visited Jan. 29, 2019) ("When the OSHA inspector arrives, workers and their representative have the right to talk privately with the OSHA inspector . . . [w]here there is no union or employee representative, the OSHA inspector must talk confidentially with a reasonable number of employees.").

3. *Banner Estrella* is inconsistent with other Federal guidance

The *Banner Estrella* test, which prohibits an employer from adopting investigative confidentiality rules, is inconsistent with the recommendations of the Equal Employment Opportunity Commission. The EEOC endorses blanket rules requiring confidentiality during employer investigations and advocates that employers should adopt such rules.[9] As the EEOC noted in its "*Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*," "[a]n employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible."[10] Such confidentiality rules are especially necessary during employer investigation of sexual harassment complaints, where victims of such discrimination are more likely to report abusive behavior if they are assured that their allegations will be investigated in a confidential manner. But assurances of confidentiality cannot be responsibly given unless employers can require confidentiality, and under *Banner Estrella* employers cannot lawfully adopt rules prospectively requiring investigative confidentiality.

In June 2016, the EEOC created a "Select Task Force on the Study of Harassment in the Workplace" to address, in part, the conflicting legal regimes under which employers operate regarding investigative confidentiality. After taking testimony on this issue, the EEOC task force advised the EEOC and NLRB to "harmonize the interplay of federal EEO laws and the NLRA," stating:

> We heard strong support for the proposition that workplace investigations should be kept as confidential as is possible, consistent with conducting a thorough and effective investigation. We heard also, however, that an employer's ability to maintain confidentiality - specifically, to request that witnesses and others involved in a harassment investigation keep all information confidential - has been limited in some instances by decisions of the [NLRB] relating to the rights of employees to engage in concerted, protected activity under the [NLRA]. In light of the concerns we have heard, we recommend that EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA.

EEOC, Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace at 42, June 2016.[11] With our decision today, we eliminate the dilemma faced by employers, who have been caught between the two regulatory schemes. See *Southern Steamship 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. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.").

For all the above reasons, we overrule *Banner Estrella,* supra, and as explained below, we apply the balancing test set forth in *Boeing*, supra, to analyze whether an employer violates Section 8(a)(1) of the Act by maintaining an investigative confidentiality rule.[12]

B. Boeing is the Appropriate Test

In *Boeing*, the Board announced a new standard for determining whether the mere maintenance of facially neutral work rules violates the Act. 365 NLRB No. 154, slip op. at 1–3, 7–8. Under *Boeing*, when analyzing a facially neutral rule that would potentially interfere with the exercise of employee Section 7 rights, the Board evaluates (1) the nature and extent of the potential impact of the rule on NLRA rights, and (2) legitimate justifications associated with the rule. *Boeing*, supra, slip op. at 3–4. The Board conducts this evaluation, consistent with its "'duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" Id., slip op. at 3 (quoting *Great Dane Trailers*, 388 U.S. at 33–34) (ellipsis and emphasis in *Boeing*)).

After conducting the analysis *Boeing* requires, the Board will designate the rule into one of the following three categories:

- Category 1 will include rules that the Board designates as lawful to maintain either because (i)

[9] More generally, an employer may be liable for its failure to promptly investigate a harassment allegation: "an employer is responsible for acts of sexual harassment in the workplace where the employer . . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR § 1604.11(d) (EEOC regulation). The Board's current rule requiring an employer to balance rights and interests on a case-by-case basis may be responsible for delaying the investigation, thereby subjecting an employer to an increased risk of liability.

[10] See "*Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors"* (June 18, 1999), Section V(C)(1) "Confidentiality," available at https://www.eeoc.gov/policy/docs/harassment.html (last visited February 4, 2019).

[11] See https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

[12] We also overrule *Hyundai America Shipping Agency*, 357 NLRB 860 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015), to the extent that the Board relied on it in *Banner Estrella*.

the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

- Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and
- Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with each other.

Boeing, supra, slip op. at 3–4. However, these categories "will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself." Id., slip op. at 4. The Board applied the new standard retroactively to "all pending cases in whatever stage." Id., slip op. at 16. After setting forth the standard, the Board applied it to determine whether the employer's maintenance of a no-camera rule violated the Act. The Board found the rule lawful because the employer's justifications for the rule—which assisted the company with its federally mandated duty to prevent unauthorized disclosure of information implicating national security—outweighed the rule's "comparatively slight" adverse effect on the exercise of Section 7 rights. Id., slip op. at 5, 17–19. The Board also stated that no-camera rules would generally be found lawful based on the considerations discussed in *Boeing*. Id. at 5, 17.

Under *Boeing*, in order to determine the lawfulness of investigative confidentiality rules applicable to open investigations, the Board must first determine whether the rules, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, and the General Counsel has the burden to prove that they would. *LA Specialty Produce Co*., 368 NLRB No. 93, slip op. at 2 (2019) (citing *Boeing*, supra). As we stated in *LA Specialty*, the outcome of this inquiry "should be determined by reference to the perspective of an objectively reasonable employee who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." Id., slip op. at 2. If that burden is not met, the Board need not take the next step in *Boeing* of addressing any general or specific legitimate business interests justifying the rule. Id., slip op. at 3–4 (categorizing rules that prohibit the disclosure of confidential and proprietary customer and vendor lists as lawful Category 1(a) rules). However, if the General Counsel shows that a reasonable employee would interpret a rule to potentially interfere with the exercise of Section 7 rights, then the *Boeing* analysis requires the Board to balance any potential interference with employee rights against the legitimate justifications associated with the rule. Id., slip op. at 3. When the balance favors the employer interests over the potential interference with the exercise of Section 7 rights, the Board will find that rule at issue lawful as a *Boeing* Category 1(b) rule. Id. When the potential for interference with the exercise of Section 7 rights outweighs any possible employer justification, the Board will find the rule unlawful and assign it to *Boeing* Category 3. Id. In some instances, "it will not be possible to draw any broad conclusions about the legality of a particular rule because the context of the rule and the competing rights and interests involved are specific to that rule and that employer." Id. Those cases will warrant individual scrutiny and fit in *Boeing* Category 2.

We find that the balancing test set forth in *Boeing* is appropriately applied here to determine whether the Respondent's facially neutral rules violate Section 8(a)(1) of the Act. The Board's *Boeing* test is similar to the balancing test the Board used pre-*Banner* for analyzing the legality of investigative confidentiality rules. In *Caesar's Palace*, supra, the Board upheld a rule prohibiting discussion of an ongoing investigation of alleged illegal drug activity in the workplace. The Board acknowledged that the employer's rule limited an employee's right to engage in protected discussions regarding discipline or disciplinary investigations involving fellow employees but found that any limited adverse effect on Section 7 rights was outweighed by the employer's compelling justifications, including guarding witnesses from retaliation and violence, protecting evidence, and ensuring that testimony was not fabricated. *Caesar's Palace*, 336 NLRB at 272.[13]

[13] See also *Lafayette Park Hotel,* 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), in which the Board evaluated whether the employer violated the Act by the mere maintenance of several handbook rules. In evaluating the lawfulness of the rules, the Board recognized that resolution of the issues presented in the case required "'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.'" Id. at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945)).

C. Investigative confidentiality rules are lawful under Boeing to the Extent they Apply to Open Investigations

Based on our review of the record, we find that as applied to open investigations, the Respondent's facially neutral investigative confidentiality rules may affect the exercise of Section 7 rights, but that any adverse impact is comparatively slight. Moreover, we find that the potential adverse impact on Section 7 rights is outweighed by the substantial and important justifications associated with the Respondent's maintenance of the rules. In addition, we believe that the justifications associated with investigative confidentiality rules applicable to open investigations will predictably outweigh the comparatively slight potential of such rules to interfere with the exercise of Section 7 rights, and therefore we find that investigative confidentiality rules, including the Respondent's rules, fall into *Boeing* Category 1(b) to the extent they are limited to open investigations. Accordingly, to that extent, the Respondent's maintenance of the rules at issue here does not unlawfully interfere with protected rights in violation of Section 8(a)(1) of the Act.

To begin, we find that the two provisions at issue here, when reasonably interpreted, would potentially interfere with employees' exercise of their Section 7 rights to discuss terms and conditions of employment. See *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). Employees have a Section 7 right to discuss their own or their fellow employees' discipline, or incidents that may lead to discipline, where doing so is not mere griping but rather looks toward group action. See *Caesar's Palace*, 336 NLRB at 271; *Meyers Industries* (*Meyers II*), 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). We do not underestimate the importance of an employee's ability to confer with his or her coworkers, particularly when that employee is the target of an investigation. However, we find that the impact on Section 7 rights here is comparatively slight. The rules at issue do not broadly prohibit employees from discussing either discipline or incidents that could result in discipline. Rather, they narrowly require that employees not discuss *investigations* of such incidents or *interviews* conducted in the course of an investigation. Employees not involved in an investigation are free to discuss such incidents without limitation,[14] and employees who are involved may also discuss them, provided they do not disclose information they either learned or provided in the course of the investigation.[15] Further, the rules do not restrict employees from discussing workplace issues generally or limit the employees' ability to discuss disciplinary policies and procedures. Finally, we note that the rules do not prohibit a union-represented employee from requesting the help of a union representative during such an investigation (if the Respondent's employees were to unionize), pursuant to *NLRB v. J. Weingarten,* 420 U.S. 251, 267 (1975).

In contrast to the comparatively slight impact on employees' Section 7 rights, we find that Respondent has asserted several substantial and compelling business justifications for the rules. The stipulated record contains a list of justifications for the rules, which roughly break down into three categories: (1) to prevent theft and respond quickly to misconduct through prompt investigations; (2) to protect employee privacy and ensure that there will be no retaliation by managers or other employees; and (3) to ensure the integrity of an investigation—including providing reliable and consistent protocols—for the benefit of both employers and employees. While these justifications are raised by the Respondent specifically with reference to its own interests and operations, one or more of them apply to employers in general. We address each category below.

First, one purpose of the Respondent's investigative confidentiality rules is to help prevent theft by ensuring prompt investigations. We find that justification

[14] Our dissenting colleague argues that the confidentiality provisions could be read to apply broadly to all employees (even those not involved in an investigation), requiring them also to refrain from discussion of an investigation. This is not a reasonable reading of either provision, in our view. Investigative confidentiality rules, by their nature, bind those who are privy to internal investigations from sharing information that might bias the investigation. Those outside the investigations would not be so bound, given that those employees would have no confidential information pertaining to the investigation itself to share. The text of the Respondent's "Prevention Loss" policy—i.e., prohibiting "[r]efusing to courteously cooperate in any company investigation" (emphasis supplied)—supports this reading.

[15] Of course, nothing in an employer's investigative confidentiality rules may interfere with an employee's right to file a charge or complaint with a State or Federal agency, including the NLRB, either before an investigation begins, while it is in progress, or after it has been completed. A holding to the contrary would most likely violate state law and would certainly violate the NLRA. See generally *Eastex v. NLRB*, 437 U.S. 556, 565–566 (1978) (Sec. 7 protects employee attempts to improve working conditions through resort to administrative and judicial forums); *Cordua Restaurants, Inc.,* 368 NLRB No. 43, slip op. at 4 fn. 15 (2019) ("Section 7 has long been held to protect employees while they pursue their legal claims concertedly."); *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 6 (2019) ("[A]s a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes."); *Pete O'Dell & Sons Steel Fabricators*, 277 NLRB 1358 (1985) (employee's meeting with U.S. Army Corps to discuss employer's compliance with Davis-Bacon Act is protected activity where union initiated the Corps' investigation), enfd. 803 F.2d 1181 (4th Cir. 1986); *Afro-Urban Transportation*, 220 NLRB 1371 (1975) (employee threat to report pay practices to Department of Labor is protected activity provided it is undertaken without malice or bad faith).

compelling. It is beyond dispute that the retail industry—and the clothing industry in particular—experiences billions of dollars in theft each year. According to a 2018 study by the National Retail Federation: "Whether perpetrated by a dishonest employee or organized retail criminals, . . . [theft] costs retailers about 1.33% of sales, on average—a total impact on the overall U.S. retail economy of $46.8 billion in 2017."[16] Employers have a legitimate and substantial interest in investigating suspected misconduct, see, e.g., *Manville Forest Products*, 269 NLRB at 391 ("[I]t is within an employer's legitimate prerogative to investigate misconduct in its plant . . . ."), and not surprisingly, an employer's ability to act swiftly in response to such theft determines whether and to what extent an employer may be able to combat such crime. Moreover, as the Respondent and the General Counsel stipulate, "[a] significant portion of that theft involves various types of employee theft requiring diligent and effective investigations." The Respondent's rules requiring confidentiality during the investigation process aid in preventing and addressing retail theft through prompt and unfettered investigations.

Second, the Respondent's rules, which allow the Respondent to give employees assurance of confidentiality, are necessary to protect employee witnesses from retaliation. As set forth in the joint stipulation, "[e]mployees have expressed reluctance to cooperate in investigations out of fear of being labeled a 'whistleblower,' 'rat' or 'snitch.'" As further stipulated, the lack of confidentiality assurances "hinders the ability of the employer to act quickly and decisively" and puts both employees and the employer at unnecessary risk. Reluctant employee witnesses who fear for their safety if their statements are made public may reasonably choose not to cooperate fully, thereby hindering the investigation. Moreover, the Respondent also asserts that employees interviewed during investigations "almost always ask for confidentiality," which supports its argument that confidentiality benefits both the employer and employees. Therefore, we find it is of the utmost importance that an employer can assure the employee safety and confidentiality during an ongoing investigation.

Finally, the Respondent has a compelling interest in guaranteeing the integrity of its investigations, to protect both itself and its employees.[17] As noted in the joint stipulation, the application of the confidentiality rules to "cases involving multiple suspects prevents the potential leak of critical investigative information to other potential suspects." Additionally, the Respondent asserts that confidentiality rules guard against false allegations or claims made in bad faith by preventing witness collusion during investigations. We agree that allowing an employer to require confidentiality at the outset of the investigation aids in protecting the integrity of the investigation. Thus, we find it is beneficial to both the employer and employees to have an established policy of confidentiality during ongoing investigations.

D. The Facial Validity of the Respondent's Confidentiality Rules Remains an Open Question Requiring Remand

Most justifications for requiring investigative confidentiality apply while the investigation is ongoing. However, we believe employees would reasonably interpret a rule that is silent with regard to the duration of the confidentiality requirement (like the rules at issue here) *not* to be limited to the duration of the investigation. We also recognize that there may be substantial and even compelling reasons, outweighing the potential adverse effect on the exercise of Section 7 rights, for extending a confidentiality requirement well beyond the end of particular kinds of investigations, such as where the circumstances give rise to a reasonable belief that the ability of an investigative target to identify an informant may pose a threat to the safety of the informant and/or his or her family or to the security of his or her property. There may also be reasons, based on the nature of the employer's business, for generally extending the confidentiality requirement beyond the end of any investigation.

Unlike investigative confidentiality rules limited to open investigations, which we find are lawful to maintain as a general matter under *Boeing* Category 1(b), we find that investigative confidentiality rules that are not limited on their face to open investigations fall into *Boeing* Category 2, requiring individualized scrutiny in each case as to whether any post-investigation adverse impact on NLRA-protected conduct is outweighed by legitimate justifications. Although the General Counsel and the Respondent both argue that *Boeing* should apply to determine the lawfulness of the Respondent's investigative confidentiality rules, they do not differentiate between open-investigation and post-investigation situations. Furthermore, the stipulation of facts does not appear to be adequate for the Board to conduct the individualized scrutiny necessary to determine the lawfulness of the Respondent's rules in this

[16] See 2018 National Retail Security Survey at p. 3; https://cdn.nrf.com/sites/default/files/2018-10/NRF-NRSS-Industry-Research-Survey-2018.pdf

[17] Indeed, as noted above (fn. 9), the Respondent would potentially be liable for not immediately taking action with respect to allegations of sexual harassment and discrimination, as Federal law provides that "an employer is responsible for acts of sexual harassment in the workplace where the employer . . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR § 1604.11(d) (EEOC regulation).

respect. Accordingly, we will remand this case to the Region for further consideration in light of this decision.[18]

E. Response to Dissent

Our dissenting colleague accuses us of reversing decades of Board law by finding lawful an investigative confidentiality policy that she alleges fails to protect employees who wish to exercise their Section 7 rights.[19] She describes the chilling effect that she believes will result from allowing an employer to maintain rules requiring confidentiality during workplace investigations. We respectfully disagree. While we acknowledge her concern that an employer's investigative confidentiality rules could potentially restrict an employees' exercise of Section 7 rights, we believe that our colleague grossly exaggerates this potential while simultaneously failing to give appropriate consideration to the compelling interests served by investigative confidentiality rules—interests held not only by employers, but also by their employees.

First, the dissent maintains that we have rejected precedent that requires the employer to balance the need for confidentiality in any given investigation against employees' Section 7 rights on a case-by-case basis. True. That is what *Banner Estrella* required, and we have rejected *Banner Estrella*. But we have done so, in part, because placing that burden on the employer was contrary to Supreme Court precedent. As discussed above, the Supreme Court long ago mandated that the Board, not the employer, has the "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Great Dane Trailers*, supra, 388 U.S. at 33–34 (internal quotation marks omitted). The *Banner Estrella* test, which required the employer to balance the interests before asserting confidentiality, did not adequately consider the needs of either the employer or the employees in keeping such investigations confidential. Accordingly, we have balanced those interests and concluded that an employer's right to maintain an investigative confidentiality rule outweighs an employee's interest in discussing that investigation with his or her coworkers, at least for the duration of the investigation. While our dissenting colleague may disagree with the balance we have struck, she cannot assert that we have failed to carry out the task mandated for us by the Supreme Court.[20]

Next, the dissent takes issue with the weight we assign to the Section 7 side of the balance. She disputes our view that the potential of an investigative confidentiality rule to interfere with the exercise of Section 7 rights is "comparatively slight." We stand by our assessment. As explained above, a rule that merely requires employees not to disclose what they say or hear during an investigative interview concerning an incident leaves employees free to discuss the incident itself. Moreover, such a rule has no impact whatsoever on employees' right to discuss workplace issues generally, including specific instances of discipline as well as disciplinary policies and procedures generally.

In addition, many conversations about investigative interviews do not implicate Section 7 rights at all. As noted by former Member Miscimarra in his *Banner Estrella* dissent, Section 7 relevantly protects *concerted* activity for the purpose of mutual aid or protection. See 362 NLRB at 1121. While an employee may wish to speak to a coworker about an investigative interview, activity that at its inception involves only a speaker and a listener is concerted only if it is "'engaged in with the object of *initiating*

[18] While our dissenting colleague argues that the Board should declare the rules unlawful insofar as they apply after the investigation has concluded, we disagree. As noted above, Category 2 designations require individualized scrutiny by the fact finder to determine the "context of the rule and the competing rights and interests" that are "specific to that rule and that employer." *LA Specialty*, supra, slip op. at 3. Because of the change in precedent set forth in this decision, the Respondent did not have the opportunity to address its need for confidentiality specific to the time period after the conclusion of the investigation. The Board has broad discretionary authority to remand a case for a more precise factual determination and/or application of law. This is particularly true where, as here, the interpretation and application of *Boeing* by administrative law judges is still in its relative infancy.

[19] As a preliminary matter, we again reject our colleague's oft-repeated charge that we wrongfully overrule precedent here without public notice and an invitation to file briefs, as the Board has frequently overruled or modified precedent without supplemental briefing. Nothing in the Act, the Board's Rules, the Administrative Procedure Act, or procedural due process principles requires the Board to invite amicus briefing before reconsidering precedent, and the Board has frequently overruled or modified precedent without supplemental briefing.

[20] Our dissenting colleague also claims that "[i]n more than 80 years, the Board has never before made a categorical determination that employers may always maintain confidentiality rules, without demonstrating any justification for them." However, for decades the Board did maintain its own categorical confidentiality rule, without requiring a case-by-case justification, that an employer has no obligation to turn over witness statements obtained in investigations of possible workplace misconduct to the employees' collective-bargaining representative. *Anheuser-Busch, Inc*., 237 NLRB 982, 984–985 (1978). A Board majority, including our colleague, overruled that precedent in *Piedmont Gardens*, 362 NLRB 1135 (2015), and substituted a case-by-case balancing test comparable to the one announced the same day in *Banner Estrella*, under which employers rarely will meet the substantial burden of proving a confidentiality interest that outweighs the union's interest in obtaining witness statements. The issue presented in *Piedmont Gardens* is not presented here. We would consider revisiting that decision if the issue is raised in a future case.

We also observe that our colleague was part of the majority in *Banner Estrella*, and that majority never suggested employees would interpret an investigative confidentiality rule to prohibit access to the Board. Our colleague here, with her claim of a chilling effect on such access, goes beyond *Banner Estrella* in suggesting that a violation should be found regardless of the weight of confidentiality interests asserted in a particular case unless the rule at issue expressly permits recourse to the Board and other Federal and State agencies, as well as to the union.

or inducing or preparing for group action or . . . had *some relation to group action* in the interest of the employees." Id. (quoting *Meyers II*, 281 NLRB at 887) (emphasis added, internal quotations omitted); see also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). "[M]ere talk" or "griping" that does not "look[ ] toward group action" would not be protected in any event. Id. Moreover, we agree with former Member Miscimarra's observation that "the great majority of workplace investigative meetings do not involve NLRA-protected conduct." Id. at 1121. Accordingly, for all these reasons, we are persuaded that the dissent vastly overstates the potential impact of investigative confidentiality rules on the exercise of the right to engage in protected concerted activity.

Our colleague's overstatement of the impact of our decision on Section 7 rights reaches an extreme when she asserts that investigative confidentiality rules will make it "virtually impossible" for employees to seek the help of a Board agent or union representative about an allegation of misconduct. There is absolutely nothing in this decision that would allow an employer to infringe upon an employee's Section 7 right to file a charge or complaint with the Board or with any other federal or state agency.[21] Neither of the rules at issue here expressly refers to, much less prohibits, employee discussion with the Board about conduct that an employer is investigating. If they did, they would clearly violate Section 8(a)(1) of the Act on their face.[22] Nothing in our decision supports such an extreme interpretation. While an employer may now maintain a rule requiring employee workplace investigatory confidentiality, an employer may not discipline an employee for exercising the protected right to pursue collective action. See *Cordua Restaurants, Inc.,* 368 NLRB No. 43, slip op. at 4–5 (2019) (upholding employer's policy requiring individual arbitration, but finding unlawful an employer's discharge of employee for filing a collective action). Further, we find the maintenance of the employer's rule here is lawful only to the extent that it requires confidentiality during the duration of the investigation. We reject the dissent's accusation that the Board "arbitrarily reads non-existent limitations into the rules" with respect to the duration of the confidentiality requirement. As explained above, we recognize that the rules at issue here are silent as to duration, and we believe employees would reasonably interpret a rule that is silent with regard to the duration of the confidentiality requirement *not* to be limited to the duration of the investigation.

We reiterate that employer rules, including investigative confidentiality rules, are to be viewed from "the perspective of an objectively reasonable employee who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job." *LA Specialty*, 368 NLRB No. 93, slip op. at 2 (internal quotation marks omitted) (citing *Boeing*, 365 NLRB No. 154, slip op. at 3 fn. 14 (Member Kaplan, concurring)). Our dissenting colleague also dissented in *Boeing*, and it is apparent that her opinion here has as much to do with the *Boeing* standard, including its "reasonable employee" definition and the greater consideration afforded to legitimate employer interests, as it does with the application of that test to the specific investigative confidentiality rules presented here.

It is also apparent that the dissent wants to empower employees to take collective action against employers that would use investigative confidentiality to shield their own wrongdoing or that of predatory "star" employees from exposure. It should go without saying that we share our colleague's deep indignation at such behavior. But we cannot agree with her that *Banner Estrella* is the remedy. While *Banner Estrella* may have increased the scrutiny of employers with ill intent, it also hobbled countless employers who have their employees' welfare at heart and in whose hands a workplace investigation is an instrument of

[21] See cases cited at fn. 15, supra. We disagree with the dissent's suggestion that a reasonable employee would read either of the two provisions as implicitly restricting his/her communications with third parties such as union representatives, Board agents or other governmental agencies. Both provisions refer to confidentiality in the context of the workplace investigation. Moreover, the loss prevention policy specifies that it applies to "unauthorized discussions of investigation or interview *with other team members*" (emphasis supplied). While it might be preferable for an employer to clearly state the exceptions listed above, we do not find that the absence of such exceptions renders the rule unlawful.

The dissent contends that our decision is "internally inconsistent" because we find that a reasonable employee would "read the rule's silence" regarding disclosures to Board agents as implicitly permitting such discussions, but we read the rules' silence as to "post-investigation disclosures" as implicitly prohibiting "such disclosures." First, to be clear, we do not read the Respondent's rules to prohibit disclosures to Board agents at *any* time, pre- or post-investigation. Second, our decision is not internally inconsistent. On the one hand, we believe employees would not reasonably read unstated prohibitions into the rules. On the other, employees would reasonably assume that a rule, being a rule, continues in force unless it states otherwise. These positions concern different issues: the first concerns the rules' *scope*, while the second concerns their *duration*. Accordingly, there is no inconsistency.

[22] While the issue presented here only concerns maintenance of the rules at issue, as opposed to enforcement, it is just as clear that if an employer were to enforce such a rule to interfere with an employee's right to participate in a Board investigation, file a charge with the Board, or otherwise resort to the Board, we would not hesitate to condemn that interference as an unfair labor practice. See *International Harvester Co.*, 271 NLRB 647, 647 (1987) ("'The prohibition expressed in Section 8(a)(4) against discharging or otherwise discriminating against an employee because he has filed charges or given testimony under the Act is a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of this Board without fear of reprisal and is clearly required in order to safeguard the integrity of the Board's processes.'") (quoting *Filmation Associate*s, 227 NLRB 1721 (1977)).

justice. Moreover, our decision today does not reduce the level of scrutiny applied to employers seeking to curtail the exercise of employee Section 7 rights, since nothing in our decision countenances investigative confidentiality rules that would prohibit employees from speaking with each other about events giving rise to an investigation or from blowing the whistle to the EEOC, the Board, or other Federal or State agencies.

Finally, the dissent predicts that investigative confidentiality rules will have a "chilling effect" on employee Section 7 rights, asserting that an employee may choose "safe silence over risky speech." While such rules will admittedly cut down on a certain amount of workplace talk regarding investigations (including idle gossip and chatter, which Section 7 does not protect),[23] we do not view such a curtailment as a negative. Indeed, an employer's ability to provide increased confidentiality assurances to employees will encourage greater employee candor in reporting workplace injustices as well as a more equitable investigative result. It is the rule of *Banner Estrella*, not our holding today, that likely causes employees to choose "safe silence over risky speech." *Banner Estrella* made it impossible for employers to give employees assurances of confidentiality from the outset of an investigation, and that has consequences. Indeed, the Respondent says that one of its employees resigned rather than face the risk of retaliation absent an assurance of confidentiality. It is this chilling effect on employees' willingness to speak openly and truthfully that we remove today.[24]

F. Conclusion

In sum, we find that the Respondent's asserted business justifications for maintaining its rules requiring confidentiality for the duration of an open investigation outweigh any comparatively slight impact on the employees' Section 7 rights. Furthermore, we note that many of the Respondent's asserted justifications for its rules—protecting employee privacy, protecting employees from retaliation, and ensuring the integrity of an investigation—reflect interests that are shared by all employers, and that these interests are shared by employees as well. And, as stated above, the potential adverse impact on Section 7 rights of rules requiring confidentiality during open investigations is comparatively slight. We therefore hold that investigative confidentiality rules limited to the duration of open investigations will fall into *Boeing* Category 1, types of rules that the Board will find lawful to maintain without engaging in a case-by-case balancing of interests. See *Boeing*, 365 NLRB No. 154, slip op. at 16.[25] We further hold, however, that investigative confidentiality rules not limited on their face to open investigations fall into *Boeing* Category 2 and require individualized scrutiny in order to determine their lawfulness. Because the Respondent's rules are not so limited, and because we find the stipulation of facts does not enable us to conduct the requisite individualized scrutiny, we will remand this case to the Region for further proceedings.

ORDER

Cases 27–CA-191574 and 27–CA–198058 are remanded to the Regional Director for Region 27 for further proceedings consistent with this decision.

Dated, Washington, D.C. December 17, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Again reversing precedent without notice or good reason,[1] the majority now permits American employers to violate the Act, depending on the particular circumstances presented in a given case. See *Boeing,* supra*,* slip op. at 3 fns. 15, 76, 84.

[23] The dissent misrepresents our point, accusing us of characterizing as "gossip" and "chatter" conversations about vital workplace matters that seek to initiate or induce group action and are therefore protected by Sec. 7 of the Act. Obviously, nothing could be further from the truth.

[24] Nor do we agree with the dissent's assertion that this decision will somehow induce an employer not to conclude the investigation or to fail to notify an employee of the investigation's conclusion. In most cases, an employer will have a built-in incentive to conclude an investigation, particularly where there is a disciplinary consequence and/or termination involved.

[25] Although the maintenance of such rules is lawful, their application to employees who have engaged in protected concerted activity may

[1] See, e.g., *MV Transportation, Inc*., 368 NLRB No. 66, slip op. at 25 (2019) (Member McFerran, concurring in part and dissenting in part); *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 368 NLRB No. 46, slip op. at 14 fn. 2 (2019) (Member McFerran, dissenting); *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 17 & fn. 25 (2019) (Member McFerran, dissenting); *UPMC*, 368 NLRB No. 2, slip op. at 18 & fn. 56 (2019) (Member McFerran, dissenting in part); *SuperShuttle DFW, Inc.*, 367 NLRB No. 75, slip op. at 15 & fn. 2 (2019) (Member McFerran, dissenting); *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 12 & fn. 18 (2019) (Member McFerran, dissenting); *E.I. Du Pont de Nemours, Louisville Works*, 367

hold gag rules over their workers if the rule is linked to an open investigation of workplace misconduct. The likely chilling effect on workers—who will feel compelled to choose safe silence over risky speech—is both obvious and alarming. A victim of sexual harassment will risk being fired if she dares to warn her coworkers or seeks help from an outside advocacy group. A union activist who believes she is being unfairly targeted for investigation by company officials looking for a pretext to discipline her will be left to wonder if asking for help from coworkers, consulting with the union, or even approaching the National Labor Relations Board during the course of the employer's investigation will put her job at risk. And even in the common scenario where an employer's investigation is pursued in good faith, workers who want to support the employer's efforts will be deterred from speaking with each other to gather and share evidence of misconduct that harms them, asking their union for help, or turning to a government agency if they believe that the employer is not doing enough. The majority's unspoken premise is that an employer-controlled investigation must be the one and only means of addressing workplace problems; employees have no necessary voice or agency of their own until the employer decides its investigation is done. But the National Labor Relations Act says otherwise.

Under the Act, employees have the right to speak and to act, to help each other and to protect each other, at work. They do not need their employers' permission to do so. Section 7 gives employees—whether or not they are represented by a union—the "right to . . . engage in . . . concerted activities for . . . mutual aid or protection."[2] That statutory right, as understood by the National Labor Relations Board and the federal courts, includes the right to discuss workplace matters—such as discipline and disciplinary investigations—not only with coworkers, but also with third parties who might help and protect employees: labor unions, civil rights organizations, government agencies like the Board or the EEOC, the employer's customers, the news media, and others.[3] There is simply no denying that employer gag rules infringe on employees' labor-law rights.

The Board decisions overruled by the majority today, including *Banner Estrella*, recognized that fact.[4] But they also recognized that employers can, indeed, have a legitimate interest in protecting the confidentiality of their investigations. In cases such as *Banner Estrella*, the Board has held that an employer is permitted to impose a confidentiality requirement on employees "where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights."[5]

This is the standard that the majority rejects today. The majority instead holds that employers' "investigative confidentiality rules limited to the duration of open investigations" are *always* "lawful to maintain" because the "potential adverse impact" on the statutory rights of employees is "comparatively slight." That conclusion is simply wrong.

I.

The legal background of this case is not complicated. Section 7 of the Act grants employees the right to act together for their "mutual aid or protection." It is well settled that this right includes employees' right to communicate with one another regarding their terms and conditions of employment.[6] Such communications among employees are often preliminary to action for mutual aid or protection and, as the Board has explained, "lie[] at the heart of protected Section 7 activity."[7] As a result, the right of employees to discuss terms and conditions of employment is broad. It protects employee discussions of a host of issues that may arise in the course of employment, such as sexual harassment, racial discrimination, workplace misconduct, and complaints about supervisors.[8] As relevant

NLRB No. 12, slip op. at 3–4 (2018) (Member McFerran, dissenting); *Boeing Co.*, 366 NLRB No. 128, slip op. at 9–10 (2018) (Members Pearce and McFerran, dissenting); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 22 (2017) (Members Pearce and McFerran, dissenting); *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 14, 16 (2017) (Members Pearce and McFerran, dissenting); *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156, slip op. at 36, 38 (2017) (Members Pearce and McFerran, dissenting), vacated 366 NLRB No. 26 (2018); *Boeing Co.*, 365 NLRB No. 154, slip op. at 30–31 (2017) (Member McFerran, dissenting in part); *UPMC*, 365 NLRB No. 153, slip op. at 17–19 (2017) (Member McFerran, dissenting).

[2] 29 U.S.C. §157. Sec. 7 rights are protected by Sec. 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Sec. 7. 29 U.S.C. §158(a)(1).

[3] See infra at fn. 13.

[4] See *Banner Estrella Medical Center*, 362 NLRB 1108, 1109 (2015), enf. denied in pertinent part 851 F.3d 35 (D.C. Cir. 2017) (finding record lacked substantial evidence that respondent employer actually maintained a categorical investigative nondisclosure policy); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 874 (2011), enfd. in pertinent part 805 F.3d 309 (D.C. Cir. 2015); *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003); and *Caesar's Palace*, 336 NLRB 271, 272 (2001).

[5] *Banner Estrella*, supra, 362 NLRB at 1109.

[6] See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

[7] See *St. Mary Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008).

[8] See, e.g., *Hyundai America*, supra, 357 NLRB at 860–861 (several employees raised concerns to management about an employee's unprotected threats and workplace drug use); *Phoenix Transit System*, supra, 337 NLRB at 510 (employees' right to discuss their sexual harassment complaints among themselves held protected); *Independent Stations Co.*, 284 NLRB 394, 394, 403–404 (1987) (employee complaints about a supervisor's favoritism and inconsistent disciplinary practices held protected); *Tanner Motor Livery, Ltd.*, 148 NLRB 1402, 1403–1404 (1964)

here, this broad Section 7 right also protects employee discussion of discipline or ongoing disciplinary investigations involving themselves or coworkers. The right of employees to discuss discipline and disciplinary investigations is well established in Board precedent,[9] and it has been recognized by the courts.[10] Indeed, the District of Columbia Circuit has favorably acknowledged the "settled Board precedent holding that employees have a protected right to discuss discipline or disciplinary investigations with fellow employees."[11] Moreover, the right to discuss terms and conditions of employment, including discipline and disciplinary investigations, is not limited to discussions among coworkers. As the Supreme Court has explained, employees often seek to improve their lot as employees through channels outside the immediate employer-employee relationship—and Section 7 protects their right to do so.[12] Consistent with this precedent, the Board has held that employees have a Section 7 right to discuss their terms and conditions of employment with third parties, including Board agents, other government personnel, and union representatives.[13] The Board has explained that employer restrictions on communications with third parties "inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than [their employer], and restrain[ ] the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection."[14]

Drawing on well-established precedent, the *Banner Estrella* Board explained the principles that have governed—and should continue to govern—cases like this one:

> Employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. Such discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their employer. Accordingly, an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights.

362 NLRB at 1109 (citations omitted), citing *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 155–156 (2014), and *Hyundai America*, supra, 357 NLRB at 874. Because an important Section 7 right is at stake, it is the "employer's burden to justify a prohibition on employees discussing a particular ongoing investigation," the Board observed. Id. at 1110.[15] The employer "must proceed on a case-by-case basis" and "cannot reflexively impose confidentiality requirements in all cases or in all cases of a particular type." Id.[16] Imposition of a confidentiality requirement, in turn, "must be based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." Id. In prior cases, the Board had found both that employers had satisfied these requirements[17] and had failed to do so,[18] based on the particular circumstances involved.

The requirements imposed on employers, the *Banner Estrella* Board correctly observed, "fully and fairly accommodate the competing interests at stake." Id. Requiring a case-specific determination of the need for confidentiality "permits the Board—and employers—to consider the relevant circumstances in particular cases as they arise" and "tends to minimize th[e] potential chilling

(employees' right to protest racial discrimination in their workplace held protected), enfd. in relevant part 349 F.2d 1 (9th Cir. 1965).

[9] See, e.g., *Advanced Services*, 363 NLRB No. 71, slip op. at 2–3 (2015), enf. denied on other grounds, No. 15-3988, 2018 WL 8806328 (8th Cir. Aug. 22, 2018); *Caesar's Palace*, 336 NLRB at 272; and *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999).

[10] See, e.g., *Hyundai America Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015) ("[T]his blanket confidentiality rule [prohibiting employees from revealing information about matters under investigation] clearly limited employees' § 7 rights to discuss their employment."), enfg. in pertinent part 357 NLRB 860 (2011).

[11] *Inova Health System v. NLRB*, 795 F.3d 68 (D.C. Cir. 2015), enfg. 360 NLRB 1223, 1228–1229 (2014).

[12] See *Eastex, Inc.*, supra, 437 U.S. at 565–566.

[13] See, e.g., *DirecTV U.S. DirecTV Holdings*, 359 NLRB 545, 546–547 (2013) (finding unlawful employer handbook rules that would be reasonably interpreted by employees to restrict their discussion of terms and conditions of employment with Board agents, other law enforcement or governmental officials, and union representatives), reaffirmed and incorporated by reference, 362 NLRB 415 (2015), enf. denied on other grounds 650 Fed.Appx. 846 (5th Cir. 2016); *Hyundai America*, supra, 357 NLRB at 871 (finding unlawful rule that required employees to "[v]oice your complaints directly to your immediate supervisors or to Human Resources through our 'open door' policy" because such rule implicitly prohibits employees from discussing complaints with other employees or entities other than the respondent); and *Kinder-Care Learning Centers,* 299 NLRB 1171, 1171–1172 (1990) (finding unlawful a rule regarding communications with parents because the rule interferes with employees' right to communicate with Board agents and third parties, including parents or a union).

[14] *Kinder-Care Learning Centers*, *Inc.,* supra, 299 NLRB at 1172.

[15] Accord *Midwest Division—MMC, LLC v. NLRB*, 867 F.3d 1288, 1302 (D.C. Cir. 2017) (enforcing Board's view that employer failed to justify a confidentiality rule by presenting a "legitimate and substantial business justification" that "outweigh[s] the adverse effect on the interests of employees," quoting *Hyundai America*, supra, 805 F.3d at 314), enforcing in pertinent part 362 NLRB 1746 (2015).

[16] In light of the Supreme Court's decision in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1976), the Board imposes an analogous requirement when an employer invokes confidentiality concerns in response to a union's request for information related to a workplace investigation. Blanket claims of confidentiality are disallowed; instead, a case-by-case balancing of interests is required. See *Metropolitan Edison Co*., 330 NLRB 107, 108 (1999); *Pennsylvania Power Co.*, 301 NLRB 1104, 1107 (1991).

[17] *Caesar's Palace*, supra, 336 NLRB at 272.

[18] *Phoenix Transit Systems*, supra, 337 NLRB at 510.

effect" on employees of confidentiality restrictions, by ensuring that "employees will better understand not only why nondisclosure is being requested, but also what matters are and are not appropriate for conversation." Id. at 1111–1113.

The *Banner Estrella* Board correctly rejected the view that imposing confidentiality requirements implicates only a minor statutory interest for employees. Id. at 1112. "The potential for interference with Sec[tion] 7 rights is obvious in the case of a disciplinary investigation,"[19] the Board observed, " but "[o]ther types of investigations implicate legitimate Sec[tion] 7 concerns as well, insofar as they involve . . . employees' terms and conditions of work and employees' possible desire to improve them by acting together, whether by making demands on their employer, by appealing to the public for support, or by taking their concerns to a government agency." Id. at 1112 fn. 16.[20] "The Act aims to create and preserve the space in which employees may act together to improve their terms and conditions at work," and "[e]mployer restrictions that narrow that space . . . clearly implicate Sec[tion] 7." Id.

Under the Board's established framework reflected in *Banner Estrella*, the employer confidentiality rules at issue in this case are clearly overbroad because they necessarily prohibit employees on pain of discipline—*and in all circumstances and at all times*—from discussing workplace investigations that implicate their Section 7 rights. The first provision, which appears under the heading "Report Illegal or Unethical Behavior" in the Respondent's nationwide "Code of Business Conduct and Ethics," instructs that "[r]eporting persons and those who are interviewed are expected to maintain confidentiality regarding these investigations. Additionally, they are not to conduct investigations themselves unless [the Respondent's] investigators request assistance." The second provision, contained in the sign-off provision of the Respondent's nationwide "Loss Prevention Manual," requires employees to "courteously cooperate in any company investigation" and states that "unauthorized discussion of investigation or interview with other team members" can "lead to disciplinary action, up to and including termination."

The investigations covered by the rules involve conduct that may subject employees to discipline or discharge, as well as conduct by others in the workplace that may affect employees' terms and conditions of employment. The rules do not provide that the employer will make any sort of case-by-case determination before imposing a confidentiality requirement. Nor do the rules establish any exceptions that would permit an employee to discuss an investigation (1) with other employees for purposes of mutual aid or protection or (2) with a union, a government agency, or other third parties who might aid employees. (Indeed, the rules' explicit prohibition on employees pursuing their own investigations could easily be read to explicitly prohibit seeking outside help.) In short, the rules are not narrowly tailored—and that makes them unlawful. As the District of Columbia Circuit has explained, "[a]n employer presumptively violates [the National Labor Relations] Act 'when it maintains a work rule that . . . tends to chill employees in the exercise of their Section 7 rights.'"[21] The Respondent here has offered no legitimate and substantial business justification for a blanket confidentiality rule—a justification that would *always* outweigh the chilling effect on employees of maintaining such a broad rule, so the rules would clearly be unlawful under Board precedent, including *Banner Estrella*.[22] (Under today's decision, of course, future employers will always be permitted to maintain rules broadly requiring

[19] As the Board has explained, "[i]t is important that employees be permitted to communicate the circumstances of their discipline to their coworkers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense." *Verizon Wireless*, 349 NLRB 640, 658 (2007). See also *Westside Community Mental Health Center*, 327 NLRB at 666 (observing that confidentiality rule "restricted . . . employees from possibly obtaining information . . . which might be used in their defense," "regardless of whether the rule was … discriminatorily motivated").

[20] See, e.g., *Phoenix Transit System*, supra, 337 NLRB at 513–514 (observing that "[e]mployees have a right protected by the Act to discuss among themselves their sexual harassment complaints" and holding that Sec. 7 protected employee's discussion of employer's failure to redress sexual harassment complaints after investigation, notwithstanding employer's confidentiality rule). See also *All American Gourmet*, 292 NLRB 1111, 1130 (1989) (employer unlawfully prohibited employee from discussing sexual harassment grievance with anyone other than supervisors; prohibition necessarily precluded discussions with other employees, as well as bringing issue to union's attention).

[21] *Midwest Division-MMC*, supra, 867 F.3d at 1302.

[22] Here, the Respondent's justifications for its rules fall into two broad categories. The first category involves the Respondent's assertions regarding why confidentiality is generally preferable in investigations. The second category is a review of various investigations the Respondent has carried out and an explanation of its view why, in those particular investigations, the inability to keep matters confidential hindered the investigation. Even assuming the Respondent's asserted justifications may warrant requiring confidentiality in the context of a particular investigation, they do not provide a legitimate business reason for broadly requiring employees to keep confidential all investigations regarding "illegal or unethical behavior" or prohibiting employees involved in "any company investigation" from "discussing [the] investigation or interview with other team members." Cf. *Hyundai America*, supra, 805 F.3d at 314 (court found that the employer's obligation to comply with federal and state statutes and guidelines may sometimes constitute a legitimate business justification for requiring confidentiality in the context of a particular investigation or particular types of investigations, but that the employer had not in that case shown that such concerns provided a legitimate business reason to ban discussions of all investigations, including ones unlikely to present these concerns).

confidentiality for the duration of the investigation, without being required to justify them.)

II.

Today, without notice and without inviting briefs from the public, the majority abandons the Board's longstanding approach to employer investigative-confidentiality rules, as reflected in *Banner Estrella* and the cases that came before it. The break with precedent is radical. Instead of requiring case-by-case balancing of employee rights and employer interests, the majority makes a categorical determination. It holds that *all* employer-imposed investigative confidentiality rules "are lawful to maintain," whether or not the employer offers (much less proves) any justification for them so long as they are limited to the duration of the investigation. In short, any rule requiring investigative confidentiality during the course of an investigation is permissible, no matter how it is written. The subject of the rule, not its terms, is all that matters.

The majority passingly acknowledges that the "*application* [of such rules] to employees who have engaged in protected concerted activity may violate the Act," but *maintaining* such rules is always lawful, for all employers (emphasis added). This approach, of course, largely ignores the chilling effect of confidentiality rules on employees. It does not matter how a rule is applied if it keeps employees from exercising their statutory rights in the first place. But the majority is blunt about its key premise here: that the "impact on Section 7 rights [of confidentiality rules as applied to open investigations] . . . is comparatively slight." Because it finds the impact of confidentiality rules on employee rights to be "comparatively slight," the majority has no difficulty in finding that Section 7 rights are always and everywhere outweighed by employer interests in maintaining confidentiality in open investigations.

The Supreme Court has observed that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[23] Such an explanation must address the agency's "'disregarding facts and circumstances that underlay . . . the prior policy.'"[24] And applying Supreme Court administrative-law precedent to a Board adjudication, the District of Columbia Circuit has made clear that the Board is not entitled to deference where it "entirely fail[s] to consider an important aspect of the problem" the Board seeks to address.[25] Today's decision falls short of the standard for reasoned decision-making by an administrative agency. The majority's key premise—that the impact of confidentiality rules on employees' statutory rights is "comparatively slight"—is false. Meanwhile, none of the reasons that the majority offers for breaking with Board precedent can withstand scrutiny.

A.

It should be obvious (and it has been obvious to the Board) that when an employer makes employees keep silent about a workplace investigation it will be virtually impossible for employees to engage in "concerted activities for the purpose of . . . mutual aid or protection" concerning the investigation. The impact of confidentiality rules on Section 7 rights is not "comparatively slight." It is drastic.

Certainly, employers may well have legitimate reasons for wanting to keep investigations confidential, as the Board's decisions recognize. But it is also true that confidentiality requirements can protect employers whose investigations are unlawfully motivated, biased, or simply flawed. In those situations, confidentiality requirements let employers hide from employees, from unions, from the government, and from the public alike ongoing problems in their workplace and prevent employees from taking action to aid and protect themselves and their coworkers.[26] For example, confidentiality requirements can be used by employers to shield highly-valued employees from misconduct allegations and to silence their accusers. Indeed, one need not look long in the news to find allegations of a workplace "superstar" whose misconduct was ignored or covered up by an employer, often at the expense of other employees.[27] In addition, the Board's case law is replete

[23] *Encino Motorcars, LLC v. Navarro*, -- U.S. --, 136 S.Ct. 2117, 2125 (2016).

[24] Id. at 2126, quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–516 (2009).

[25] *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017), quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

[26] See Maya Raghu & Joanna Suriani, *#MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability* 4, National Women's Law Center Report, Dec. 2017, *available at* https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/12/MeToo-Strengthening-Workplace-Sexual-Harassment-Protections.pdf ("Individuals may accept employment with a company without knowing if discrimination and harassment are particular problems at that workplace. Once employed, harassers and employers use a variety of legal tools in order to limit how, when, why, and to whom an employee can disclose details about harassment. Through employment agreements—entered into upon hiring at a new job, and settlement terms—agreed to when resolving a sexual harassment complaint—employees can be forbidden by contractual terms from speaking out about sexual harassment and assault. Such circumstances operate to isolate victims, shield serial predators from accountability, and allow harassment to persist at a company. Policy efforts to increase transparency regarding the incidence of harassment at a company would redress the power imbalance exacerbated by employer-imposed secrecy provisions, and restore victim's voices.").

[27] The EEOC's Select Task Force on the Study of Harassment in the Workplace specifically flagged this issue in its report. Chai R. Feldblum & Victoria A. Lipnic, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace* 24, June 2016,

with situations where employees were the target of an unlawfully motivated or unfair workplace investigation.[28]

For these and many other reasons, the Board's case law readily establishes that employees who are victims of workplace misconduct (whether committed by a coworker, a supervisor, or a manager) have an interest in being able to share information and take vital steps to help themselves or to protect others.[29] The same is true for those employees accused of wrongdoing in the workplace. The Board has emphasized that "[i]t is important that [such] employees be permitted to communicate the circumstances of their discipline to their coworkers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense."[30] Further, whether an employee is a victim of workplace misconduct or is accused of such activity, the employee has a statutory right to speak about the matter with third parties, including the Board or a union representative.[31] Without the ability to discuss disciplinary matters, employees would not be able to seek their coworkers' assistance in raising a workplace misconduct issue to their employer, ensure that their employer is timely and appropriately addressing an allegation of misconduct, defend themselves against false allegations of wrongdoing, or seek the help of a Board agent or union representative about an allegation of misconduct.

The statutory right of employees to speak to the Board, as well as other government agencies—whatever confidentiality rules an employer might maintain—deserves special focus. Under Section 8(a)(4) of the Act, employees have the right to be completely free to file unfair labor practice charges with the Board, to participate in Board investigations, and to testify at Board hearings.[32] Indeed, the Board has just unanimously emphasized the importance of this right in addressing mandatory arbitration agreements that implicitly prohibit employees from filing unfair labor practice charges with the Board.[33] More broadly, Section 7 protects employees' participation in investigative matters before other government agencies as well.[34] And, of course, employees have a statutory right to communicate with their union representative about workplace matters.[35] The Board has found employer-imposed confidentiality rules that restrict these important statutory rights to be unlawful.[36]

The particular rules at issue here provide no exception allowing employees to discuss employer investigations with the Board, with other government agencies, or with union representatives.[37] The majority believes this aspect of the rules does not invalidate them because they do not *expressly* prohibit an employee from discussing with a Board agent conduct that an employer is investigating or prohibit a union-represented employee from seeking the assistance of a union representative.[38] But Board law recognizes and condemns the *implicit* message clearly conveyed to employees by such broadly-worded rules that contain no exceptions.[39] Without an explicit exception for communications with third parties about disciplinary

available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf..

[28] See, e.g., *Con-Way Freight, Inc.*, 366 NLRB No. 183, slip op. at 3 (2018); *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 8–9 (2018); *Aliante Gaming, LLC d/b/a Aliante Casino & Hotel*, 364 NLRB No. 78, slip op. at 1 (2016); *Sheraton Anchorage*, 363 NLRB No. 6, slip op. at 2, 24 (2015); *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632, 1633, 1648–1649 (2011), enfd. 609 Fed.Appx. 656 (D.C. Cir. 2015); *Embassy Vacation Resorts*, 340 NLRB 846, 849–850 (2003); and *Greensboro News Co.*, 272 NLRB 135, 143 (1985), enf. denied on other grounds 843 F.2d 795 (4th Cir. 1988).

[29] See, e.g., *Phoenix Transit System*, supra, 337 NLRB at 510 (addressing rule prohibiting discussion of sexual-harassment complaints, which applied to affected employees, including those assembled by employer to solicit information); see also *Fresh & Easy Neighborhood Market, Inc.*, supra, 361 NLRB at 153 (discussing the protections afforded to employees in seeking their coworkers' assistance in raising a complaint to management).

[30] *Verizon Wireless*, 349 NLRB at 658, quoted by *Philips Electronics North America*, 361 NLRB 189, 190 (2014); see also *Westside Community Mental Health Center*, 327 NLRB at 666.

[31] See, e.g., *NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972); and *Cintas Corp.*, 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007)

[32] *NLRB v. Scrivener*, 405 U.S. at 121-122.

[33] *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 4–6 (2019).

[34] See, e.g., *T & W Fashions*, 291 NLRB 137, 137 fn. 2 (1988) (Sec. 7 protects employees' participation in investigative meetings with the U.S. Department of Labor); *Squier Distributing Co.,* 276 NLRB 1195, 1195 fn. 1 (1985) (Sec. 7 protects employees' concerted cooperation with the local sheriff in connection with their suspicion that a manager was embezzling company funds), enfd. 801 F.2d 238 (6th Cir. 1986).

[35] See, e.g., *Cintas Corp*., supra, 344 NLRB at 943.

[36] See, e.g., *DirecTV U.S. DirecTV Holdings, LLC*, supra, 359 NLRB at 546–547.

[37] Id. at 547 (confidentiality rule found unlawful where it did not exempt protected communications with third parties, such as union representatives, Board agents, or other governmental agencies concerned with workplace matters).

[38] In this respect, the majority's decision is internally inconsistent. As noted above, the majority says that because the rules do not *expressly* prohibit an employee from discussing with a Board agent conduct that an employer is investigating, a reasonable employee would read the rule's silence as permitting discussions with Board agents. But the rules also do not *expressly* prohibit postinvestigation disclosures, yet the majority finds that a reasonable employee would interpret that silence as meaning the rules *do* prohibit such disclosures. The majority cannot have it both ways. If silence as to postinvestigation disclosures is problematic, then so too should silence as to speaking with a Board agent.

[39] Board law does not require that a confidentiality rule expressly prohibit communications with third parties about disciplinary investigations to be found unlawful. See id.; see also *Kinder-Care Learning Centers*, supra, 299 NLRB at 1171 (confidentiality rule found to interfere with employees' Sec. 7 right to raise work-related complaints to third parties

investigations—all of which, of course, breach the confidentiality mandated by the employer—the chilling effect of such rules on employees who contemplate exercising their Section 7 rights is clear.[40] There is simply no legitimate and substantial business justification for allowing employers to deter employees from seeking help from the Board, another government agency, or their union.

B.

The majority simply glosses over this glaring problem with the rules at issue here and instead selectively focuses only on a different aspect of the rules that they concede is problematic. They find the rules potentially unlawful because employees would not reasonably understand them to apply only while an investigation is ongoing, and the Respondent's presently-asserted reasons for the rules do not justify their maintenance once an investigation closes. This should be enough to find the rules unlawful, even under *Boeing*.[41]

Rather than ending the inquiry there, though, my colleagues devote nearly all their attention to justifying why these the rules—and all similar investigative confidentiality rules—would be always lawful to maintain if they were, in fact, limited to the duration of an investigation. But the Respondent has failed to present any legitimate and substantial justification for maintaining the rules even as to open investigations.[42] Simply put, the majority's decision arbitrarily "runs counter to the evidence" before the Board.[43]

In justifying why the rules at issue here would be lawful if they were limited to "open investigations," the majority arbitrarily reads nonexistent limitations into the rules—limitations that are not spelled out in the rules at issue here, and that employees considering these (or any other similar) rules cannot reasonably be expected to foresee. Specifically, the majority first insists that the rules it approves are lawful because they do not prohibit employees from discussing discipline or incidents that could result in discipline. Instead, the majority contends, the rules only narrowly prohibit employees from discussing investigations of such incidents or interviews conducted in the course of an investigation. But when viewed from "the perspective of the employees," as even *Boeing* requires, it is far from clear that the fine distinction drawn by the majority would readily be drawn by employees.[44] The Respondent's particular rules provide that "[r]eporting persons and those who are interviewed are expected to maintain confidentiality *regarding these investigations*" (emphasis added) and prohibit "unauthorized discussion of *investigation* or interview with other team members" (emphasis added). If an incident is the *subject* of an investigation, and employees are prohibited from discussing the investigation, then an employee very likely would conclude that she may not discuss the subject of the

even though the text of the rule did not expressly prohibit employees from doing so). The same is true with respect to mandatory-arbitration agreements that interfere with access to the Board. See *Prime Healthcare*, supra, 368 NLRB No. 10, slip op. at 5–6 (finding agreement unlawful despite lack of "explicit prohibition" against filing Board charges).

[40] Relying on then-Member Miscimarra's dissent in *Banner Estrella*, the majority contends that "many conversations about investigative interviews do not implicate Sec. 7 rights at all" and that my view here "vastly overstates" the potential impact of investigative confidentiality rules on employees' Sec. 7 rights. My colleagues, however, gives far too little weight to the potential chilling effects of confidentiality on Sec. 7 activity. As the Board explained in *Banner Estrella*, employees may not always engage in Sec. 7 activity in response to a disciplinary investigation, but precedent and common sense establish that they very well might. See *Fresh & Easy Neighborhood Market*, supra; and *Phoenix Transit System*, supra. As a result, "[t]he Act aims to create and preserve the space in which employees may act together to improve their terms and conditions at work" and "[e]mployer restrictions that narrow that space . . . clearly implicate Sec. 7." *Banner Estrella*, supra, 362 NLRB at 1112 fn.16.

[41] This case was litigated under *Boeing*, and so the Respondent could— and did— present its asserted justifications for the rules. Having found those justifications insufficient with respect to closed investigations, the majority should invalidate the rules—they are unlawfully overbroad—and should order the Respondent to rescind or revise the rules to expressly limit their reach to ongoing investigations. Instead, the majority remands the issue so that the Respondent can provide *additional* justifications for the rules. The majority points to no Board precedent, including *Boeing*, supporting this course of action here. Worse, the majority then proceeds to suggest potential justifications for the rules that were not previously raised by the Respondent itself—effectively coaching the Respondent. That is not the Board's proper role.

[42] Meanwhile, my colleagues fail to explain how even a rule imposing confidentiality only for the duration of an investigation – which the employer determines and communicates (or not)—would provide any meaningful limitation on an employer's ability to compel employee silence. As our cases demonstrate, whether intentionally or not, an employer may indefinitely impose confidentiality requirements on employees by never formally concluding an investigation or by failing to inform employees that the investigation was completed. See *Kentucky River Medical Center*, 355 NLRB 643, 646 (2010) (noting employer's failure to formally conclude an investigation), enf. denied 647 F.3d 1137 (D.C. Cir. 2011); and *Phoenix Transit Systems*, supra, 337 NLRB at 513 (noting employer's failure to inform employees of the outcome of an investigation or that the investigation had been concluded). In these circumstances, employees would surely choose safe silence over risky speech. Moreover, as discussed below, even as limited to an open investigation, a confidentiality requirement would improperly chill employees in the exercise of their Sec. 7 rights.

[43] See *State Farm*, supra, 463 U.S. at 43

[44] Indeed, the majority's interpretation in this regard is hard to reconcile with the recent, unanimous Board decision in *Prime Healthcare*, supra, where my colleagues acknowledged the well-established principle that "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint." *Ingram Book Co*., 315 NLRB 515, 516 fn. 2 (1994) (cited with approval in *Prime Healthcare*, supra, 368 NLRB No. 10, slip op. at 6 fn. 12).

investigation or anything directly related to it, including potential discipline that might follow from the investigation. Certainly the rules do not explain what permissibly may be discussed, notwithstanding their prohibition—that is, the Respondent's rules, and all similar rules, to the extent they apply to open investigations—leave employees *not* involved in an investigation free to discuss such incidents without limitation and allow involved employees to discuss the investigations, provided that they do not disclose information learned or provided during the course of the investigation. Even with these supposed limitations, however, the confidentiality rules still broadly interfere with employees' Section 7 activity. The rules undeniably apply to employees involved in an investigation, prohibit revealing information from the investigation, and, as the majority acknowledges, remain in full force during the investigation. Thus, the employees who could benefit most from discussing the investigation with coworkers or third parties will be prohibited from doing so—at precisely the time when the help of others is most needed.

In any case, none of the supposed limitations relied on by the majority have a basis in the language of the rules themselves, nor would they be readily apparent to employees. The majority's error as to employees *not* involved in an investigation is highlighted by a review of the confidentiality rule in the Respondent's loss prevention manual. That rule provides that "unauthorized discussion of investigation or interview with other team members" can result in discipline. The prohibition is not limited to employees involved in an investigation and would reasonably be read by all employees, whether involved in the investigation or not, to restrict their right to discuss the matter under investigation. As to employees who *are* involved in an investigation, there is nothing in either of the two rules at issue to suggest that such employees can in fact talk about an employer's investigation so long as the employees do not reveal any information they learned or provided during the course of the investigation.[45] Here, again, the majority clearly runs up against the Supreme Court's admonition that agency action cannot be upheld where it is based on "an explanation . . . . that runs counter to the evidence before the agency."[46]

For all of these reasons, then, the majority is simply wrong when it insists the confidentiality rules that it approves have only a "comparatively slight" impact on the exercise of Section 7 rights by employees. Until today, the Board has had no difficulty in recognizing the true impact of such rules and in devising and applying a standard that carefully balances employees' statutory rights with employers' legitimate interests, on a case-by-case basis. The burden is on the majority to explain why it has chosen to break with precedent so completely. As I explain next, the reasons it offers are manifestly inadequate.

C.

The majority offers three reasons for overruling *Banner Estrella*, which, as the Board explained there, was itself firmly grounded in Board precedent. According to the majority, *Banner Estrella* (1) "failed to consider Supreme Court and Board precedent recognizing the Board's duty to balance an employer's legitimate business justifications and employees' Section 7 rights; (2) "failed to consider the importance of confidentiality assurances to both employers and employees during an ongoing investigation;" and (3) "is inconsistent with other federal guidance." None of these reasons support the majority's categorical determination today that employer confidentiality rules are always lawful to maintain.

1.

In attacking *Banner Estrella* as somehow inconsistent with precedent, the majority wholly mischaracterizes the Board's decision. Reading *Banner Estrella* is enough to refute the majority's claim.

As explained, under the established framework for assessing an employer's investigative-confidentiality rule—a framework that predates *Banner Estrella*—the Board engages in precisely the sort of balancing that the majority claims to want. Because confidentiality rules necessarily restrict employees' Section 7 rights, the Board has long (and properly) placed the burden on the employer to prove the existence of legitimate and substantial business reasons for its rule.[47] If that burden is met, then it is the "responsibility of the Board to strike the proper balance between the asserted business justifications and the invasion on employee rights in light of the Act and its policy."[48] In *Banner Estrella*, the Board applied this test and found, consistent with Board precedent, that the employer failed to meet its burden of proving legitimate and substantial

[45] In seeking to justify its decision, the majority contends that it is only approving rules that require participants in an investigation to maintain confidentiality of the investigation and/or prohibit participants from discussing the investigation or related investigatory interview. The majority asserts that its decision does not extend to confidentiality rules that would apply to nonparticipants in an investigation, would prohibit any employee (investigative participant or not) from discussing the events underlying the investigation, or would prohibit employees from reporting matters to third parties or filing charges with a government agency. But the rules under consideration today are not limited in this manner—thus, in approving these rules, the majority effectively insulates from future scrutiny all similar rules regardless of whether the language of the rule in fact adheres to the limitations purportedly approved by the majority today.

[46] See *State Farm*, supra, 463 U.S. at 43.

[47] See, e.g., *Caesar's Palace*, 336 NLRB at 272.

[48] See id. at 272 fn. 6.

business interests. Far from bucking precedent, *Banner* applied it faithfully.

Building on this mischaracterization, the majority asserts that *Banner Estrella* imposed an "unduly onerous" burden on employers of proving the need for investigative confidentiality. But that claim, as explained, is based on a false premise: that the impact of confidentiality rules on employees' Section 7 rights is "comparatively slight."

Moreover, the majority's new approach hardly returns Board law to some imaginary state that existed *before Banner Estrella*. In more than 80 years, the Board has never before made a categorical determination that employers may always maintain confidentiality rules, without demonstrating any justification for them. It would be one thing for the majority to adopt an approach that would give more weight to employer interests while retaining a case-by-case analysis. Instead, the majority holds that employer interests always trump employees' Section 7 rights. The irony in the majority's decision to adopt a categorical approach while criticizing *Banner Estrella* for failing to engage in a balancing of rights and interests is glaring.

2.

Similarly misplaced is the majority's claim that *Banner Estrella* somehow failed to consider the importance of maintaining the confidentiality of workplace investigations. As demonstrated, the Board's established framework gives appropriate weight to an employer's interest in confidentiality, where it can be demonstrated—and balanced against the statutory right of employees to discuss workplace investigations with each other and with third parties.[49]

Here, too, the majority effectively begs the question that the Board must answer in cases like this one: how to strike the balance between employee rights and employer interests in particular circumstances. Notably, even in making a categorical determination that confidentiality rules are always lawful to maintain, the majority does not require that such rules be narrowly tailored to serve the particular employer interests identified. Virtually any rule, it appears, will be permitted.

Moreover, the Board's decisions reveal that from an employee's viewpoint, blanket confidentiality requirements do not always aid resolution of workplace complaints and can actually prevent employees from obtaining the resolution they sought in reporting the matter.[50] Meanwhile, the majority fails to acknowledge that employers have tools for ensuring effective investigations, and imposing discipline, entirely apart from imposing confidentiality requirements on employees. For the overwhelming majority of at-will employees, who lack union representation, the employer can compel full cooperation with an investigation on pain of discipline and discharge—and, in turn, can discipline and discharge employees for misconduct with complete control over the investigatory and disciplinary process, as well as the grounds for discharge (provided they are not unlawful).[51] Rights under the National Labor Relations Act, in contrast, are one of the only protections employees have against arbitrary, unfair, incompetent, or unlawful employer conduct involving workplace investigations.

3.

As a final reason for overruling the *Banner Estrella* framework, the majority asserts that it is inconsistent with EEOC guidelines suggesting that information about sexual harassment allegations should be kept confidential, and points to an EEOC report suggesting that the NLRB and EEOC harmonize their law regarding confidentiality. The majority then paints employers as being impossibly "caught between two regulatory schemes." The majority's arguments on this score are baseless.

The majority's categorical approval of all employer confidentiality rules sweeps far beyond the workplace

[49] See *Michigan State Employees Association d/b/a American Federation of State County 5 MI LOC Michigan State Employees Assn., AFL–CIO*, 364 NLRB No. 65, slip op. at 2, 16–18 (2016) (addressing employer's general interest in protecting the integrity of an investigation); *Menorah Medical Center*, 362 NLRB 1746, 1766–1767 (2015) (addressing employer's interest in complying with state law and ensuring witnesses will freely share information with the employer to improve quality of patient care and protect welfare of patients), enf. in part 867 F.3d 1288 (D.C. Cir. 2017); *Praxair Distribution, Inc*., 357 NLRB 1048, 1063 (2011) (addressing employer's concern for cover up, evidence tampering, and testimony fabrication); and *Caesar's Palace*, 336 NLRB at 272 (addressing employer's interest in ensuring witnesses were not put in danger, evidence was not destroyed, and testimony was not fabricated).

[50] See, e.g., *Phoenix Transit System*, supra, 337 NLRB at 510 (during an investigation into several sexual harassment allegations against a supervisor, the respondent imposed a confidentiality rule on the affected employees and then did not further discuss the investigation with those employees and did not inform them if the investigation had ended, what the outcome was, or if any corrective action had been taken against the supervisor).

[51] The majority points out that the Board and other federal agencies maintain the confidentiality of their own investigations. It is true that agencies, including the Board, recognize circumstances where confidentiality can aid investigations, and the *Banner Estrella* test that the majority overturns freely acknowledges that employers can encounter such legitimate circumstances as well. But it merits notice that, at least with respect to the Board, these investigative confidentiality rules are often more narrowly tailored than the rule the majority blesses today—tailored to specific documents produced in the course of an investigation, for example—and clearly preserve the right to consult with representatives, at a minimum. See, e.g., NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings Sec. 10052.4 (explaining that a Confidential Witness Questionnaire "is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding").

investigations relevant to the EEOC. The EEOC materials cited by the majority address only instances of workplace sexual harassment. Nothing in those materials can be said to mandate an employer to require total confidentiality in *all* workplace investigations—or, for that matter, even in all sexual harassment investigations.

In any case, contrary to the majority's assertion, the *Banner Estrella* framework does not create some intractable conflict of laws between Section 7 and Title VII. The two statutory schemes can be accommodated, where an accommodation is required—and, of course, such an accommodation must treat Section 7 rights as no less important than Title VII. As the District of Columbia Circuit has said, nothing in the *Banner Estrella* framework prevents an employer, in its evaluation of whether confidentiality is necessary, from taking into account the nature of the investigation, including whether it involves allegations of sexual harassment.[52] In light of recent events, finally, it merits notice that public sentiment may be shifting regarding the issue of enforced confidentiality in workplace misconduct investigations. It seems clear today that victims of sexual harassment may not always benefit from employer gag rules and that they may prefer to speak out, rather than remain silent.[53]

III.

Today's decision continues an unfortunate pattern of overruling established Board precedent with the effect of reducing employees' protections under the National Labor Relations Act. There can be no doubt that under the majority's new approach, workers who are the targets of workplace investigations—whether fairly or unfairly—will be prevented from seeking the help of their coworkers, their union, or the Board, despite the "mutual aid or protection" guarantee of Section 7. The same is true with respect to workers who are harmed by the misconduct that the employer is investigating—or, in some cases, pretending to investigate. Indeed, the majority acknowledges that the result of its decision will be to "cut down" on workplace discussions regarding investigations, including potentially protected discussions it dismisses as "idle gossip and chatter." My colleagues candidly say that they "do not view such a curtailment as a negative" because, in their view, this will permit employers to better protect their employees. But these admissions reflect just how out of touch today's decision is with the realities of the modern American workplace and with the goals of federal labor law. A female employee who wants to talk to her coworker about an investigation related to her ongoing sexual harassment complaint is not engaged in "gossip"; and a union-supporting employee falsely accused of misconduct who wants the help of his coworkers to save his job is not engaged in "chatter." American workers may wish to protect themselves instead of relying entirely on their employers for protection—and the National Labor Relations Act gives them that right.

Despite the majority's protestations to the contrary, there is no good reason to discard the Board's existing, well-reasoned framework for carefully balancing the statutory rights of employees and the confidentiality interests of employers on a case-by-case basis. A categorical determination like the one made today may be easier for the Board to administer (not least because employees will be chilled from coming to the Board to begin with), and it certainly gives employers even greater control over the workplace. But workers will bear the burden – and so will the larger society, when workers are silenced about abuses that should be matters of public concern. Because I cannot condone this result, I dissent.

Dated, Washington, D.C. December 17, 2019

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Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[52] See *Hyundai America*, supra, 805 F.3d at 314.

[53] According to the National Conference of State Legislatures, in 2018, at least 16 states "introduced legislation aimed at limiting or prohibiting the use of nondisclosure provisions as they relate to sexual harassment." Suzanne Hultin, *Addressing Sexual Harassment in the Workplace*, 26 LegisBrief No. 17, May 2018, available at http://www.ncsl.org/research/labor-and-employment/addressing-sexual-harassment-in-the-workplace.aspx; see also Kathy Gurchiek, *States Take Action Against Nondisclosure Agreements*, Society for Human Resources Management (Aug. 28, 2018), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/states-take-action-against-nondisclosure-agreements.aspx (collecting articles on non-disclosure agreements ("NDAs") in the workplace) ("The proposed laws are the latest action in the wake of the #MeToo movement prohibiting NDAs. The agreements have long been used to protect employers' sensitive business information, but now lawmakers are questioning whether it is right to use them to silence victims of sexual harassment. Some also argue that company-required NDAs enable the abuse to continue.").