No. 05-477

In the Supreme Court of the United States

DOUBLE EAGLE HOTEL & CASINO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner committed unfair labor practices by disciplining employees for violating an unlawful work rule that prohibited employee discussion of petitioner's tips-splitting policy anywhere on its property.

2. Whether the Board reasonably concluded that petitioner unlawfully maintained a "Confidential Information" rule that specifically defined confidential information to include wages and other terms and conditions of employment, and warned that breach of the nondisclosure policy would lead to discipline.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 414 F.3d 1249. The decision and order of the National Labor Relations Board (Pet. App. 22-44) and the decision of the administrative law judge (Pet. App. 45-71) are reported at 341 N.L.R.B. No. 17.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2005. The petition for a writ of certiorari was filed on October 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees the right of employees "to self-organization, to form, join, or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Those Section 7 "organization rights are not viable in a vacuum; their effectiveness depends * * * on the ability of employees to learn the advantages and disadvantages of organization from others." *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 543 (1972). Therefore, Section 7 encompasses the rights of employees to solicit and communicate with other employees regarding wages and other terms and conditions of employment. See *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 491 (1978). Employers violate Section 8(a)(1) of the NLRA if they "interfere with, restrain, or coerce employees in the exercise of [those] rights." 29 U.S.C. 158(a)(1).

To strike an appropriate balance between employees' Section 7 rights and an employer's legitimate interest in maintaining discipline and production (see *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 802 n.8 (1945)), the National Labor Relations Board has articulated special standards in certain industries for assessing the legality of rules restricting employee discussion at the workplace. For casinos, the Board applies the same standards it developed for retail stores. *Dunes Hotel*, 284 N.L.R.B. 871, 875 (1987) ("the gambling area" of a casino "equates to [the] 'selling floor' areas") (quoting *Barney's Club*, 227 N.L.R.B. 414, 416 (1976)); see *Montgomery Ward & Co.* v. *NLRB*, 692 F.2d 1115, 1121 (7th Cir. 1982) (describing retail store rules), cert. denied, 461

U.S. 914 (1983). Under those standards, an employer can issue a rule banning employee discussion of wages and other terms and conditions on the casino gambling floor and its adjacent aisles and corridors. *Hughes Props., Inc.* v. *NLRB*, 758 F.2d 1320, 1322-1323 (9th Cir. 1985). An employee no-discussion rule that extends to other public areas is overbroad and violates Section 8(a)(1), absent a demonstrated particular and legitimate employer interest. *Ibid.*; see *Ark Las Vegas Rest. Corp.* v. *NLRB*, 334 F.3d 99, 108-109 (D.C. Cir. 2003).

Additionally, employer rules of conduct governing employee behavior violate Section 8(a)(1) when the rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999) (Table). See *NLRB* v. *Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992) (citing *Republic Aviation Corp.* v. *NLRB*, 324 U.S. at 803 n.10).

2. Petitioner operates a hotel and casino in Cripple Creek, Colorado. Pet. App. 2. Its casino workers include slot and security employees who work on the casino gambling floor and receive tips from customers. *Ibid.* Petitioner maintains an unwritten policy that dictates how tips are to be divided between slot and security employees. *Id.* at 2-3. In May 2001, Petitioner changed the tips policy. Petitioner also established an unwritten tips rule that prohibited employees from discussing tips anywhere on petitioner's property. *Id.* at 3. In late October, shortly after a union organizing campaign began among petitioner's employees, petitioner discharged employee Betty Ingerling and suspended

employees Carol Marthaler and Barbara McCoy for violating its tips discussion rule. *Id.* at 14-15.[1]

Petitioner's employee handbook includes rules concerning customer service and confidential information. Pet. App. 5, 18. The customer-service rule instructs employees "[n]ever [to] discuss Company issues, other employees, and personal problems to or around our guests," and to "[b]e aware that having a conversation in public areas with another employee will in all probability be overheard." *Id.* at 5. Petitioner's confidential-information rule states:

> Pursuant to Company policy . . . you may be required to deal with many types of information that are extremely confidential and with the utmost discretion must be observed. It is essential that no information of this kind is allowed to leave the department, other than by activity/job requirement, either by documents or verbally. A list, which is not all-inclusive, of the types of information considered confidential is shown below:
>
> - disciplinary information
> - grievance/complaint information
> - performance evaluations
> - salary information
> - salary grade
> - types of pay increases
> - amounts of pay increases

[1] Before the Board and the court of appeals, petitioner claimed that its rule only prohibited discussion of tips on the casino floor. The court, on substantial evidence grounds, upheld the Board's finding that the rule instead prohibited discussion *anywhere* on petitioner's property. Petitioner does not challenge that finding. Pet. 17 n.3.

> • termination data for employees who have left the company
>
> Information should be provided to employees outside the department or to those outside the Company only when a valid need to know can be shown to exist.
>
> * * * * *
>
> Any breach or violation of this policy will lead to disciplinary action up to and including termination.

Id. at 18-19, 28.

3. The Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by maintaining several unlawful work rules. The complaint also alleged that petitioner violated Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1),[2] by disciplining employees for breaking its unlawfully overbroad rule that prohibited employees from discussing tips anywhere on its property. Pet. App. 45.

The Board issued a decision finding, *inter alia*, that petitioner's maintenance of its rules on customer service, confidential information, and discussion of tips violated Section 8(a)(1) of the NLRA, and that petitioner's discipline of employees under the invalid tips rule violated Section 8(a)(3) and (1) of the NLRA. Pet. App. 22-

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[2] Section 8(a)(3) of the NLRA makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." A Section 8(a)(1) violation is "derivative" of a violation of Section 8(a)(3). *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 698 n.4 (1983).

41.[3] The Board explained that petitioner could lawfully maintain a rule prohibiting employees from soliciting each other and discussing their working conditions in the casino's gambling areas and in adjacent aisles and corridors frequented by customers. But the Board found the customer-service rule unlawful because it extended to discussions in public places outside the gambling area, such as restrooms, public restaurants, sidewalks, and parking lots. *Id.* at 26-27. The Board similarly concluded that petitioner's rule "proscribing the discussion of tips and its tip policy anywhere on [its] property, is overly broad and unlawful." *Id.* at 24 n.6.

The Board held that petitioner's rule on confidential information was unlawful because, "on its face and on threat of discipline, [it] expressly prohibits the discussion of wages and other terms and conditions of employment." Pet. App. 32 (applying the test of *Lafayette Park Hotel*, 326 N.L.R.B. at 825). As the Board explained, the rule "specifically defines confidential information to include wages and working conditions such as 'disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases and termination date of employees,' and then explicitly warns employees that '[a]ny

[3] Petitioner does not challenge certain other Section 8(a)(1) violations found by the Board, including that petitioner: maintained language in its employee handbook that prohibited employees from being on its property unless working their scheduled shift and from providing any information about petitioner to the media without prior approval; threatened to call, and called, the police to remove union supporters engaged in handbilling from public property adjacent to the casino; threatened employees with reprisals if they discussed their suspensions with other employees or talked with union representatives or distributed or read union literature; and removed union literature from the employee lunchroom. Pet. App. 3-4 & n.1, 22 n.1, 58-63.

breach or violation of this policy will lead to disciplinary action up to and including termination.'" *Ibid.*

Finally, the Board concluded that petitioner's discipline of employees for discussing the tips policy was itself unlawful because it was based on the invalid tips rule. Pet. App. 23-24 n.3. The Board explained that, "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." *Ibid.* (relying on *Opryland Hotel*, 323 N.L.R.B. 723, 728 (1997)).

Concurring in part and dissenting in part, Chairman Battista stated that, in his view, when the record clearly establishes that the discipline imposed was for conduct that an employer lawfully can proscribe, and the employer makes clear to the employees that their discipline is for that conduct, he would not find the discipline unlawful. Pet. App. 38.[4] On the record in this case, however, he concluded that it was not clear that the employees were disciplined for discussions that occurred on the gambling floor; rather, the record indicates that they were disciplined for their discussion of tips and not on the basis of where the discussion occurred. *Ibid.*

4. The court of appeals enforced the Board's order and denied petitioner's petition for review. Pet. App. 1-

[4] Chairman Battista's views are in accord with views that have been expressed by other former Board members. See *Saia Motor Freight Line*, 333 N.L.R.B. 784, 785-786 (2001) (Member Hurtgen, concurring); *Miller's Discount Dep't Stores*, 198 N.L.R.B. 281, 283 (1972) (Chairman Miller, dissenting), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). The Board, by contrast, permits an employer to escape liability for disciplining employees pursuant to an unlawful rule only when the employer can demonstrate interference with its business operations "and that this rather than violation of the rule was the reason for the discharge." *Id.* at 281.

21. The court agreed with the Board that the rules concerning customer service and discussion of the tips policy were invalid because they restricted employee discussion in places beyond the casino gambling floor and its adjacent aisles and corridors. *Id.* at 5-14.[5]

The court also upheld the Board's finding that petitioner had unlawfully disciplined employees for violating the invalid rule prohibiting discussions of the tips policy anywhere on company property. In so doing, the court rejected petitioner's contention that its disciplinary actions should be held lawful because it disciplined the employees for discussing tips in the casino gambling area, where petitioner could have prohibited such discussion under a valid rule. Pet. App. 15-17. Noting that it must uphold the Board's interpretation if it is "a reasonable one," the court concluded that the Board's "rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful" was a "reasonable" interpretation of the NLRA. *Id.* at 16. As the court explained, "[t]he Board has previously recognized the need to protect employees from rules that have a chilling effect on the exercise of their rights," and that the Board's rule "reduces the chilling effect that results from [the] imposition of overbroad rules." *Id.* at 16, 17 (citing *Lafayette Park Hotel*, 326 N.L.R.B. at 825; *NLRB* v. *Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992)). The court also noted that "[t]he situation under consideration is analogous to [] constitutional overbreadth challenge[s]," which "[c]ourts permit * * * because they facilitate the striking down of laws which have a chilling effect on per-

[5] The court, however, modified the cease-and-desist provision of the Board's order to limit the order to the areas outside of the gambling floor and the adjacent aisles and corridors. Pet. App. 13-14.

sons whose actions may not be lawfully proscribed." *Id.* at 16.

The court of appeals upheld the Board's finding that petitioner's confidential-information rule was unlawful because it expressly prohibited employees from discussing wages and other terms and conditions of employment. Pet. App. 18-21. The court agreed with the framework set forth in *Lafayette Park Hotel*, 326 N.L.R.B. at 825, to balance the interest of employers in maintaining confidentiality rules and the rights of employees under Section 7 to discuss their terms of employment. While recognizing employers' legitimate interest in maintaining the confidentiality of private information, the court reasoned that employers could not prohibit employees from discussing their wages or working conditions. Pet. App. 19. The court concluded that "confidential information cannot be defined so broadly as to include working conditions." *Id.* at 20. The court thus held that petitioner's "definition of 'confidential information' clearly violates Section 8(a)(1) because it expressly includes 'salary information[,] . . . salary grade[, and] . . . types of pay increases.'" *Ibid.* (alterations in original).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioner challenges (Pet. 16-24) the court of appeals' conclusion that petitioner unlawfully disciplined employees for violating its invalid rule prohibiting employees from discussing the tips policy anywhere on petitioner's property. While conceding that its rule was

overbroad and invalid (Pet. 17 & n.3), petitioner argues that its disciplinary actions should be found lawful because the disciplined employees discussed the tips policy on the casino floor, a location where petitioner could by rule validly prohibit such discussions. It is by no means clear, however, that petitioner could prevail under such a theory on the facts of this case. Chairman Battista determined in his concurring opinion that, even applying a policy under which "not * * * *all* discipline imposed pursuant to an overbroad rule is necessarily unlawful," the disciplinary action imposed in this case nonetheless was unlawful. He reasoned that the record showed that petitioner's discipline of the employees "was based on their discussion of tips and not on the locus where the discussion occurred." Pet. App. 38.

In any event, petitioner's claim does not warrant review. Specifically, petitioner claims that the court of appeals' decision (i) was based on a constitutional overbreadth doctrine that was improperly applied to NLRA jurisprudence, and (ii) conflicts with this Court's decision in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), and with Section 10(c) of the NLRA, 29 U.S.C. 160(c). Those contentions lack merit and do not warrant review.

a. Petitioner's assertion that the court of appeals' decision was based on a "constitutional overbreadth" doctrine misapprehends the court's opinion. In upholding the Board's conclusion that petitioner's disciplinary actions violated the NLRA, the court of appeals principally relied on law developed under the NLRA rather than on constitutional overbreadth principles. Pet. App. 14-17. The court explained that, "[b]y adopting the rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful, the Board reduces the chilling

effect that results from imposition of overbroad rules." *Id.* at 16.[6] The court also cited Board decisions that "recognized the need to protect employees from rules that have a chilling effect on the exercise of their rights," and the court concluded that "the Board's interpretation is reasonable." *Id.* at 16, 17 (citing *Lafayette Park Hotel*, 326 N.L.R.B. at 825; *Vanguard Tours*, 981 F.2d at 67). The court therefore held, in agreement with other courts of appeals, that the Board acted reasonably in concluding that "a disciplinary action for violating an unlawful rule is itself a violation of the NLRA." *Id.* at 17; see *NLRB* v. *McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 931 n.9 (5th Cir. 1993); *NLRB* v. *Lummus Indus., Inc.*, 679 F.2d 229, 232, 233 & n.6 (11th Cir. 1982).[7] Although the court of appeals added the observation that "[t]he situation under consideration is *analogous* to a constitutional over-breadth challenge," Pet. App. 16 (emphasis added), the court did not, as petitioner asserts (Pet. 17), base its holding "on a novel and unwarranted importing of a constitutional overbreadth doctrine as a new element of NLRA jurisprudence."

b. Petitioner also argues that the decision of the court of appeals is inconsistent with *Transportation Management*, which upheld, as a permissible construction of the NLRA, the Board's burden-shifting approach in cases in which the employer asserts both unlawful and

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[6] The Board cited *Opryland Hotel*, 323 N.L.R.B. at 728, and *Saia Motor Freight Line*, 333 N.L.R.B. 784 (2001). Pet. App. 23-24 n.3.

[7] Although petitioner argues (Pet. 18) that those decisions do not present the exact situation presented here, the decisions support the general principle approved by the court of appeals in this case, and petitioner does not suggest that the decisions conflict with the court of appeals' decision below.

lawful motives for a discharge or other adverse employment action.[8] Petitioner argues that the court of appeals' decision conflicts with *Transportation Management* because it denied petitioner the right to assert the affirmative defense that it disciplined employees for a lawful reason. Petitioner further claims that the decision conflicts with Section 10(c) of the NLRA, 29 U.S.C. 160(c), which provides that the Board shall not require reinstatement or backpay if an individual was suspended or discharged for cause.

Because petitioner failed to raise those arguments before the Board, including in a motion for reconsideration, the NLRA prevents the Court from considering those arguments in the first instance. See 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (bar against judicial review under 29 U.S.C. 160(e) applies when party fails to preserve objection to Board's decision by filing motion for reconsideration with the Board); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (same). Petitioner could have raised those issues to the Board in a motion for reconsideration of

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[8] Under that approach, the Board's General Counsel must first show that union activity was a motivating factor in an employer's decision to "discharge or [engage in] other adverse action" against a statutory employee. *Transportation Mgmt.*, 462 U.S. at 401. Once that showing is made, the employer can avoid liability by demonstrating as an affirmative defense that it would have made the same decision in the absence of any protected activity. *Id.* at 401-402.

the Board's conclusion that, "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." Pet. App. 24 n.3. Petitioner also failed to raise those arguments in the court of appeals. This Court typically does not consider claims that were neither raised nor decided below, see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984), and there is no reason to depart from that customary practice here.

In any event, petitioner's claim of a conflict with *Transportation Management* is without basis. Petitioner argues that, because it could have maintained a rule barring discussion on the casino floor, it therefore could discharge employees for that activity even in the absence of a valid rule. The Board has long held, however, that where, as here, an employer disciplines employees pursuant to an overbroad rule, proof that the employer would have disciplined the employee for a lawful reason requires proof that the employee interfered with the employer's business operations "and that this rather than violation of the rule was the reason for the discharge." *Miller's Discount Dep't Stores*, 198 N.L.R.B. 281, 281 (1972), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). That rule, which preceded *Transportation Management*, is not inconsistent with that decision, and it reasonably takes account of the danger that, absent such proof, the discipline would be understood in the workplace as enforcement of the overbroad rule (which, as Chairman Battista noted, is how the discipline was understood in this case, Pet. App. 38-39).

Petitioner made no claim that the particular employee discussions leading to the discipline actually in-

terfered with its casino floor operations. Indeed, in the court of appeals, petitioner argued that the discipline was lawful because its rule prohibiting discussion of tips was limited to the casino floor. As petitioner acknowledges (Pet. 17 n.3), the court rejected that factual contention, and petitioner does not challenge that rejection. Accordingly, having failed to make a particularized showing that the employees' discussion interfered with its casino floor operations and that such interference, rather than its unlawful rule, was the actual reason for the discipline, petitioner has failed to establish that the employees were discharged for cause within the meaning of Section 10(c). In those circumstances, the analysis approved by this Court in *Transportation Management* for situations in which discipline is based on both unlawful and lawful reasons is inapplicable. See *Saia Motor Freight Line*, 333 N.L.R.B. 784 (2001) (discipline for violating unlawful, overly broad rule itself constitutes violation of Section 8(a)(3), without consideration of dual-motivation analysis under *Transportation Management*); see also *Lummus Indus.*, 679 F.2d at 232, 233 n.6 (same).

2. Contrary to petitioner's argument (Pet. 25-30), the court of appeals' holding that petitioner's maintenance of its confidential-information rule was unlawful does not conflict with the decisions of other courts of appeals. In the cases relied on by petitioner, the courts upheld differently worded confidential-information rules but did not disagree on the applicable legal standard. Because those decisions, like this one, turn on the particular facts, there is no warrant for this Court's review.

In evaluating rules proscribing discussion of information, the Board determines whether maintenance of the rule "would reasonably tend to chill employees in the

exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. at 825; accord *Brockton Hosp.* v. *NLRB*, 294 F.3d 100, 106-107 (D.C. Cir. 2002), cert. denied, 537 U.S. 1105 (2003). In making that determination, the Board considers whether "employees could reasonably believe that the rule prohibits discussions among employees concerning wages, benefits, and other terms and conditions of employment." *Lafayette Park Hotel*, 326 N.L.R.B. at 826; accord *Brockton Hosp.*, 294 F.3d at 106-107. As the court of appeals explained below, the Board's test recognizes both the need of employees "to discuss their terms of employment" and the "substantial and legitimate interest" of employers "in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information." Pet. App. 19.

Under that test, the Board has upheld confidentiality rules that restrict disclosure of business information and do not explicitly refer to information concerning "employees," because those rules reasonably protect the employers' interest in maintaining the confidentiality of its proprietary information and "employees * * * reasonably would understand" that such rules are "designed to protect that interest rather than to prohibit the discussion of their wages." *Lafayette Park Hotel*, 326 N.L.R.B. at 826 (rule prohibiting divulging of "Hotel-private information"); see *Super K-Mart*, 330 N.L.R.B. 263, 263 (1999) (restricting disclosure of "Company business and documents"). On the other hand, the Board has invalidated those confidentiality rules that expressly prohibit employees from revealing information about "employees" and that define information about employee wages and working conditions as confidential. *E.g.*,

Brockton Hosp., 294 F.3d at 106-107 (affirming Board's invalidation of rule that provided that information concerning "associates [*i.e.*, employees] * * * should not be discussed either inside or outside the hospital, except strictly in connection with hospital business," because employees could believe that rule restricted their right to discuss wages and working conditions); *IRIS U.S.A., Inc.*, 336 N.L.R.B. 1013 (2001) (invalidating rule stating that information about employees is strictly confidential and cannot be disclosed to anyone, including other employees).

The court of appeals correctly applied those principles in upholding the Board's finding that petitioner's confidential-information rule was unlawful. As the court stated, petitioner's policy restricted employees from communicating information considered "confidential," a term that was explicitly defined to include information concerning salary, grievances and complaints, discipline, and other terms and conditions of employment. See Pet. App. 18-21. The court observed that, in conjunction with petitioner's rule prohibiting employees from communicating "confidential information," employees could reasonably conclude that discussion of salary information was proscribed. *Id.* at 20.

In the cases relied on by petitioner (Pet. 26-28), the courts, on different facts, determined that the specific language of the confidentiality rules at issue would not reasonably tend to chill employees' exercise of their right to discuss wages and terms and conditions of employment with other employees or with union officials. In *Community Hospitals* v. *NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), the rule at issue—which restricted the "[r]elease or disclosure of confidential information concerning patients or employees," *id.* at 1088—did not ex-

pressly define confidential information to include information about salary and working conditions. The court concluded that a reasonable employee would not believe that the rule would bar an employee from discussing his or her wages and working conditions. *Id.* at 1089. Petitioner's policy, unlike the rule at issue in *Community Hospitals*, explicitly encompassed salary information and information about grievances and discipline. In addition, because the policy in *Community Hospitals* expressly treated "confidential information concerning * * * employees" on a par with "confidential information concerning *patients*," *id.* at 1088 (emphasis added), the court concluded that a reasonable employee would not interpret the rule to prohibit discussion of his or her *own* wages or employment conditions, *id.* at 1089.

In *NLRB* v. *Certified Grocers of Illinois, Inc.*, 806 F.2d 744 (7th Cir. 1986), a company official, replying to an employee's question about how the union had obtained her address, stated that an employee's name and address were confidential and that the leak could only have come from petitioner's payroll, personnel, or data-processing departments. The court found that the official's statement "could only have been understood to mean * * * that it was against company policy for workers to disclose information to which they had access by virtue of their employment in the payroll, personnel, or data-processing departments," and not to implicate employees' rights under Section 7 to discuss their wages and other terms and conditions of employment. *Id.* at 747.[9]

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[9] *NLRB* v. *Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), on which petitioner relies (Pet. 28), is wholly inapposite. There, the Fifth Circuit summarily affirmed the Board's uncontested finding that the employer had unlawfully "promulgated a workplace rule that forbade

Petitioner contends (Pet. 29 & n.6) that its rule applied only to "information obtained through the course of employment," and that no employee would read the rule to limit discussion of his or her own working conditions. Petitioner made the same argument below in challenging the Board's fact-finding in this case. That challenge was correctly rejected by the court of appeals, and it does not warrant further consideration by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals."). In any event, petitioner's rule expressly defined confidential information in terms of working conditions, and the rule stated that its examples of confidential information were "not all-inclusive." Pet. App. 18. In addition, petitioner distributed the rule to all employees by placing it in the employee handbook under the general information section, along with other rules that unlawfully restricted employee communication and discussion at the workplace. See pp. 4-5 and note 3, *supra*. In those circumstances, the rule was susceptible to a broad reading that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. at 825.

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the discussion of confidential wage information between employees." 919 F.2d at 363. The quotation relied upon by petitioner—that Section 7 "does not extend to the unauthorized dissemination of information obtained from an employer's confidential files or records," *ibid.*—referred not to construing the employer's confidentiality rule, but instead to the legality of the employer's discharge of an employee who had stolen evaluations of co-workers and a list of wage increases from his supervisor's desk and had shared that information with others.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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