No. 11-1098

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

NEW YORK-NEW YORK, LLC,
d/b/a NEW YORK-NEW YORK HOTEL & CASINO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226, and BARTENDERS UNION, LOCAL 165,
Intervenor.

ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies that:

(A) Parties and *Amici*: All parties, intervenors, and *amici* appearing in this court are listed in Petitioner's Opening Brief.

Pursuant to Circuit Rule 26.1, the Chamber of Commerce of the United States of America states that it is a nonprofit corporation organized under the laws of the District of Columbia. It is not a publicly held corporation, and no corporation or other publicly held entity owns more than 10% of its stock.

(B) Rulings Under Review: References to the rulings at issue appear in Petitioner's Opening Brief, and *amicus* is not aware of any other rulings at issue.

(C) Related Cases: A list of related cases is provided in Petitioner's Opening Brief, and *amicus* is not aware of any other rulings at issue.

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GLOSSARY

"Chamber":	Chamber of Commerce of the United States of America
"Decision and Order" or the "Decision":	The National Labor Relations Board's March 25, 2011 Order in *New York New York, LLC d/b/a New York New York Hotel and Casino*, Case Nos. 28-CA-14519 and 28-CA-15148, reported at 356 NLRB No. 119 (March 25, 2011), which is the Decision and Order under review.
"NYNY":	The Petitioner, New York-New York Hotel & Casino, LLC d/b/a, New York New York Hotel & Casino.
"*NYNY I*":	*New York New York Hotel & Casino*, 334 NLRB 762 (2001) *rev. granted, enf. denied* 313 F.3d 585 (D.C. Cir. 2002).
"*NYNY II*":	*New York New York Hotel & Casino*, 334 NLRB 772 (2001) *rev. granted, enf. denied* 313 F.3d 585 (D.C. Cir. 2002).
"NLRA" or the "Act":	National Labor Relations Act
"NLRB" or "Board":	National Labor Relations Board

STATUTES AND REGULATIONS

29 U.S.C. § 152(3):

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer. . . .

29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of [29 U.S.C. § 158(a)(3)].

29 U.S.C. § 158:

> (a) Unfair labor practices by employer
>
> It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

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

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. More than ninety-six percent of the Chamber's members are small businesses with one hundred or fewer employees. The Chamber advocates on issues of vital concern to the nation's business community and has frequently participated as *amicus curiae* before this Court and other courts. The protection of property rights, and the appropriate balancing of those rights with employees' interests, is of vital and direct interest to Chamber members, since most of them are employers.

The parties have consented to the filing of this brief. Fed. R. App. P. 25(a).

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(c)(5)(A)-(B). No person or entity – other than *amicus*, its members or its counsel – made a monetary contribution intended to fund this brief's preparation or submission. Fed. R. App. P. 29(c)(5)(C).

STATEMENT OF THE FACTS

The New York New York Hotel and Casino ("NYNY") is situated on the Las Vegas Strip.[1] NYNY is a "theme" complex built on the desert floor to resemble, from some perspectives, the lower Manhattan skyline – from the Chrysler Building to the Statue of Liberty, but with a roller coaster imported from Coney Island weaving through this architectural array. Inside the complex, according to the NYNY's advertisements, "this themed hotel and full-service casino re-creates the ambiance and excitement of the Big Apple… bring[ing] to life the charm of Greenwich Village and the excitement of a bustling Times Square[,]" and "puts gamers right in the middle of all the action." Indeed, even "… the carpet paths in the casino carr[y] the design of an authentic New York street, complete with curbs and crosswalks that guide the visitor to the … gaming areas."

NYNY sits at one corner of the intersection of two main public thoroughfares, Las Vegas Boulevard (the Strip) and Tropicana Avenue. Its main or "front" entrance, which NYNY calls the "Porte-Cochere," features a wide bank of automatic swinging glass doors (9 sets of doors in all) each framed in polished brass, through which customers enter immediately into the casino. The entry doors face out to the Strip, but are set back at least 100 feet from it, separated first by a public

[1] The following facts are taken from *NYNY I*, 334 NLRB 762, 767-768 (2001); *NYNY II*, 334 NLRB 772, 776 (2001); and *New York New York LLC v. NLRB*, 313 F.3d 585, 586-87 (D.C. Cir. 2002).

sidewalk adjoining the Strip, next by hedgerows marking the perimeter of the private property, next by six private traffic lanes, and next by an 18-foot wide private sidewalk immediately in front of the entry doors. Customers in cars, taxis and shuttle vans must follow a privately-maintained roadway from a public street exit to arrive at the Porte-Cochere, where passengers and their luggage are discharged and collected, and where valet parking services are available. Pedestrian customers may likewise arrive at the Porte-Cochere by following private sidewalks from the public sidewalks adjoining the main thoroughfares.

In keeping with its overall promise of big-city fun and excitement, NYNY advertises that it "serves up tempting cuisine… with an array of restaurants… [e]ach… [p]roviding [a] variety of different fares[.]" NYNY does not own or operate these restaurants; rather, it leases space to independent restaurant management businesses such as Ark Las Vegas Restaurant Corporation ("Ark"), which operates at least two main restaurants in the complex ("America" and "Gonzalez y Gonzalez"), plus 6 or 7 small, fast-food outlets arranged together in an area called "Village Streets," a food-court setting designed to evoke the experience of dining in Greenwich Village. Ark also is responsible for preparing and furnishing room-service meals to NYNY's hotel guests.

All employees working within Ark's restaurants are employed exclusively by Ark. NYNY permits off-duty employees of Ark to visit and patronize the ca-

sino and the restaurants in the complex and to use routes open to the public, including through the Porte-Cochere, to enter or exit from the complex. NYNY (and Ark, in turn) impose only two restrictions on the visitation rights of off-duty Ark workers – that they not wear their work uniforms, and that they not patronize the bars. In addition, NYNY maintains "a policy against solicitation of any sort on its premises." 313 F.3d at 586.

In July 1997, three off-duty Ark employees entered upon NYNY's property and stood outside the main entrance to the hotel and casino complex where they attempted to distribute handbills to customers entering and existing the NYNY casino and hotel. The handbills stated that Ark paid its employees less than comparable unionized workers and urged NYNY customers to tell Ark to sign a union contract. NYNY representatives informed the Ark employees that they were not allowed to distribute handbills on NYNY property pursuant to NYNY's non-solicitation rule. The Ark employees refused to leave the NYNY premises, and NYNY summoned local law enforcement officers, who issued trespass citations to the handbillers. The Hotel Employees and Restaurant Employees Union ("Union") then filed an unfair labor practice charge with the NLRB, alleging that NYNY had violated § 8(a)(1) of the NLRA by allegedly restraining and coercing employees in the exercise of their rights to self-organization under § 7 of the Act.

On April 7, 1998, two off-duty Ark employees entered the casino and distributed handbills to customers in front of America, one of the Ark restaurants on NYNY's premises. That same day, two other off-duty Ark employees entered the casino and distributed handbills to customers in front of another Ark restaurant, Gonzalez y Gonzalez. On April 9, two off-duty Ark employees (one of whom had distributed on April 7 in front of America) went to the Porte-Cochere, where they distributed handbills to customers as they entered the facility. The handbills bore an area standards message, stating that Ark paid its employees less than unionized workers and urging customers to tell Ark to sign a union contract.

In each instance, NYNY's managers informed the handbillers that they were trespassing on NYNY's property. When the handbillers refused to leave, NYNY called the police, who issued trespass citations to all but one of the handbillers and escorted them off the premises. The other handbiller was escorted from the premises by NYNY's security officers. On April 20, 1998, the Union filed unfair labor practice charges, alleging that NYNY had violated § 8(a)(1) of the Act.

ARGUMENT

I. Introduction

It is of vital concern to the Chamber's members and to the business community generally that private property rights not be arbitrarily and unnecessarily eroded. That is precisely what the Board's Decision in this matter threatens to do.

If enforced, that Decision would create a new and potentially large class of persons who are presumptively empowered to trump a property owner's most basic property right – the right to exclude others.[2] The Board's Decision represents a significant departure from decades of Supreme Court and Board jurisprudence.

For over half a century, the Supreme Court and the Board have attempted to accommodate owners' property rights and employees' § 7 rights under the NLRA by distinguishing the broad access rights accorded to a property owner's "employees" from the narrower access rights granted to all other "nonemployee" organizers. Nearly twenty years ago, the Supreme Court, in *Lechmere, Inc. v. NLRB*, affirmed that this "critical distinction" provides the fundamental framework for determining the scope of a union organizer's right under § 7 to enter upon an employer's property in derogation of the employer's private property rights. 502 U.S. 527, 533 (1992).

The *Lechmere* Court reiterated that under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 & n.10 (1945) and its progeny, where union organizers are themselves employees of the property owner, "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the

[2] "[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others." *Kaiser Aetna v. U. S.*, 444 U.S. 164, 176 (1979).

employer can demonstrate that a restriction is necessary to maintain production or discipline." 502 U.S. at 533 (internal citations omitted).

On the other hand, where union organizers are not employees of the property owner, the *Lechmere* Court affirmed that under *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the property owner "cannot be compelled to allow distribution of union literature by nonemployee organizers on his property," unless "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them," in which case the property owner's property rights may be "required to yield to the extent needed to permit communication of information on the right to organize." 502 U.S. at 533-34 (citations omitted).

In this matter, the two ALJs initially ruling on the Union's charges concluded that Ark employees possessed expansive *Republic Aviation* access rights with respect to NYNY's property – even though they are not NYNY's employees – because they "work[ed] regularly and exclusively" on NYNY's property. 313 F.3d at 587. In its initial decisions, the Board affirmed in both cases. *See NYNY I*, 334 NLRB 762 (2001); *NYNY II*, 334 NLRB 772 (2001). Under these decisions, NYNY would be prohibited from enforcing its general non-solicitation policy against Ark's employees and be required to allow them to handbill its customers and guests on NYNY's property as if they were NYNY's own employees.

This Court consolidated the two cases in a single decision and denied enforcement of the Board's Orders, finding that the Board had "provided no rationale to explain why, in areas within the NYNY complex but outside of Ark's leasehold, Ark's employees should enjoy the same § 7 rights as NYNY's employees." 313 F.3d at 588. The Court acknowledged that "[t]he Supreme Court has never addressed the § 7 rights of employees of a contractor working on property under another employer's control," *id.*, and that "[n]o Supreme Court case decides whether the term 'employee' extends to the relationship between an employer and the employees of a contractor working on its property," *id.* at 590. At the same time, however, the Court concluded the Board had failed to "take[] account of the principle reaffirmed in *Lechmere* that the scope of § 7 rights *depends on one's status as an employee or nonemployee*." *Id.* at 588 (emphasis added). In remanding this matter for further proceedings, this Court instructed that "the critical question in a case of this sort is whether individuals working for a contractor on another's premises should be considered employees or nonemployees *of the property owner*." *Id.* at 590 (emphasis added).

On remand, the Board's principal task was to decide whether Ark's employees should be categorized as "employees" or "nonemployees" of NYNY under the *Lechmere* rubric. But the Board declined to do this. In its Decision, the Board expressly "reject[ed] this framework" and the applicability of *Lechmere*'s em-

ployee/nonemployee distinction. Decision & Order at 6. In its place, the Board created a new access standard "that reflects the specific status of the Ark employees as protected employees who are not employees of the property owner, but who are regularly employed on the property." *Id.* The Board explained that pursuant to this new standard:

> [A] property owner may lawfully exclude [the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner] only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where the exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline.

Id. at 13. Under this standard (the "*NYNY* standard"), Ark's employees possess essentially the same § 7 right to access NYNY's property that NYNY's own employees have under *Republic Aviation*.

The *NYNY* standard enunciated by the Board deviates from Supreme Court precedent. The new standard no longer makes the scope of a union organizer's § 7 access rights contingent upon his or her status as the property owner's employee. The Board seeks instead to grant certain union organizers broad, presumptive, *Republic Aviation*-like access rights against property owners regardless of the absence of an employment relationship with the property owner.

This new standard threatens to create significant uncertainty among property owners, unions, and employees regarding the scope of their respective rights. In place of *Lechmere*'s easy to apply, bright-line distinction between employees and nonemployees, the applicability of the *NYNY* standard depends on multiple, as-yet-undefined factors. Property owners, unions, and employees will be left to speculate, in the wide variety of circumstances in which property owners allow contractors' employees on their property, what it means (i) to be "regularly employed" on the owner's property, (ii) to be employed in "work integral to the owner's business," (iii) to direct "organizational" handbilling "at potential customers of the employer and the property owner," (iv) to engage in activity that "significantly interferes with [an owner's] use of the property," or (v) to justify an exclusion from property for a "legitimate business reason." These various factors, all of which are subject to interpretation, will almost certainly invite frequent disputes.

The Board's new standard also is unnecessary. The answer to the question posed by this Court in remanding this matter to the Board is that Ark's employees are not "employees" of NYNY under *Lechmere*. Under existing law, their § 7 right to access NYNY's property is thus defined by *Babcock*. The Board, however, expressed a general concern that contractors' employees who work "regularly" on the property of an owner other than their employer would face "serious obstacles" in exercising their § 7 rights under the *Lechmere* framework. Decision

& Order at 6. The Board did not find this to be so with respect to Ark's employees in this case. Nor did the Board consider that in such circumstances, the existing employee/nonemployee framework of *Lechmere* would provide adequate avenues for relief. Even under *Babcock*, a property owner would be required to yield its property rights to a contractor's employees who work regularly on its property "to the extent needed to permit communication of information on the right to organize" with fellow employees of the contractor who are otherwise inaccessible through reasonable efforts. In addition, in some circumstances, a property owner might be deemed a "joint employer" of a contractor's employees where the property owner "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325 (1984). In that class of cases, the joint employees might well possess *Republic Aviation* access rights against both the property owner *and* the contractor-employer, still staying within the existing *Lechmere* framework.

Even if the Board were justified in creating a new standard applicable to contractors' employees who work regularly on the property of another, the Board erred by creating a general presumption in favor of their having access rights. In fashioning this new presumption in favor of access rights to the detriment of property rights, the Board significantly undervalued property owners' interests and in-

flated those of contractors' employees. As a result, the accommodation struck by the Board is fatally and irredeemably skewed.

II. The Board's authority to grant individuals *Republic Aviation* or similar presumptive access rights is limited.

It has long been the rule that the broad access rights recognized under *Republic Aviation* depend on there being an employment relationship between the employee and the property owner.

In *Babcock*, the Supreme Court reviewed several Board decisions requiring employers to grant access to their property pursuant to *Republic Aviation* to non-employee union organizers and to allow them to distribute union literature in the employers' parking lots without regard to the property owners' general rules against pamphleteering. 351 U.S. at 107-08. In each of these decisions, the Board assumed that the employers could restrict the union organizers' activities only upon a showing that doing so was "necessary to maintain plant discipline or production." 351 U.S. at 109-10.

In reviewing the Board's orders, the Supreme Court observed that "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights" and that "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 112. The Court acknowledged that the determination of the proper adjustments between these rights "rests with the Board." *Id.*

Nevertheless, the Supreme Court refused to uphold the Board's determinations granting *Republic Aviation* access rights to these union organizers because the Board had "failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees." *Id.* at 112-13. That distinction is "one of substance," *id.* at 113, and based on it, an employer could, as a general rule, "validly post his property against nonemployee distribution of union literature," i*d.* at 112.

A. The Board is not authorized to grant access rights to individuals beyond those provided in *Babcock* in the absence of an employment relationship.

In *Hudgens v. NLRB*, the Supreme Court commented on the rationale for distinguishing the scope of union organizers' access rights based on whether they are employees or nonemployees of the property owner. 424 U.S. 507 (1976). There, the Court observed in *dicta* that employees are entitled to greater levels of access to an employer's property than nonemployee organizers, in part, because:

> A wholly different balance [is] struck when the organizational activity [is] carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests [are] there involved.

Id. at 522 n. 10 (1976). This comment highlighted in passing some of the features of the employment relationship that are consistent with granting employees broader access rights. These include the fact that employees presumably have some pre-existing right to be on the property in the first place due to their employ-

ment and that the property owner has some separate "management" authority over them. But the *Hudgens* Court did not suggest that the presence of these factors in the absence of a formal employment relationship might ever alone justify granting a union organizer greater access rights to a property owner's property.

Addressing the subject directly, the Court in *Lechmere* subsequently confirmed that in the *absence* of an employment relationship between a union organizer and property owner, the Board lacks the authority to engage in *any* balancing of § 7 rights and property rights beyond the exception identified in *Babcock*. The *Lechmere* Court explained:

> In *Babcock*, . . . we held that the Act drew a distinction of substance, between the union activities of employees and nonemployees. In cases involving employee activities, we noted with approval, the Board balanced the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time, with the employer's right to control the use of his property. In cases involving nonemployee activities (like those at issue in *Babcock* itself), however, *the Board was not permitted to engage in that same balancing* (and we reversed the Board for having done so). By reversing the Board's interpretation of the statute for failing to distinguish between the organizing activities of employees and nonemployees, we were saying, in *Chevron* terms, that § 7 speaks to the issue of nonemployee access to an employer's property. *Babcock*'s teaching is straightforward: *§ 7 simply does not protect nonemployee union organizers except in the rare case where the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels*.

502 U.S. at 537 (internal quotation marks and citations omitted; emphasis added).

Lechmere thus made clear that the existence of an employment relationship is a prerequisite to the Board's exercising its authority under the Act to grant union organizers' access rights that exceed the scope of *Babcock*. 502 U.S. at 537-39. If such a relationship does exist, the Board may balance the employee's § 7 rights against his or her employer's property rights. This balancing may result in the Board's granting the employee *Republic Aviation* level access rights or something less. *See, e.g.*, *Hillhaven Highland House*, 336 NLRB 646 (2001) (finding that union organizers who were employees of property owner were entitled to access employer's property at sites other than where they worked but that their access to these other sites might be more limited than that granted to on-site employees), *enfd.* 344 F.3d 523 (6th Cir. 2003); *ITT Indus. v. NLRB*, 413 F.3d 64 (D.C. Cir. 2005) (same). However, where there is no employment relationship, the Board is bound by § 7 as interpreted by the Supreme Court and may only apply *Babcock*.

B. The Board exceeded its authority when it purported to grant Ark's employees a presumptive right to access NYNY's property.

As noted above, the Board declined in this matter to decide whether Ark's employees were "employees" of NYNY under the *Lechmere* framework. It did, however, identify three reasons it believed Ark employees were not "nonemployees" under *Lechmere*. First, unlike the *Babcock* and *Lechmere* union organizers, the Board found that the Ark employees here were "directly exercising their own Section 7 right to self-organization." Decision & Order at 6. Second, the Board

believed, as a general matter, that applying *Lechmere* to the employees of a contractor who work regularly on another's property would unnecessarily accord them "diminished rights based merely on the location of their workplace." *Id.* Finally, the Board reasoned that Ark employees were not "strangers" to NYNY's property since they worked on the property every day for a party "that had both a contractual and a close working relationship with NYNY." *Id.* at 6 – 7.

However persuasive these factors might be for distinguishing the Ark employees from other categories of nonemployee union organizers, they do not demonstrate that the Ark employees are to be considered employees of NYNY for purposes of *Lechmere.* And whether or not they are NYNY employees is the "the critical question." 313 F.3d at 590. *Lechmere* is clear that the Board is authorized to balance § 7 rights with property rights outside the confines of *Babcock* only with respect to a property owner's own employees. The Board does not cite any authority for the proposition that it is also authorized to grant a nonemployee union organizer access rights beyond those identified in *Babcock* on the ground that the organizer is regularly present on the owner's property or based on any of the other factors discussed in the Board's Decision. *See* Decision & Order at 6-7.

Although *Lechmere* does not elaborate on the rationale for categorically distinguishing between employees and nonemployees in these circumstances, that distinction makes sense. There are good reasons for making employment the basis for

granting a union organizer relatively greater (*Republic Aviation*) or lesser (*Babcock*) rights against an owner's property rights. First, the employment relationship is a formal one, regulated in many respects by Federal, state, and local law. By choosing to enter into such a relationship, a property owner might be understood to be submitting to some incrementally greater diminishment of its property rights in favor of its employee pursuant to Federal Labor Law, among the numerous other obligations an employer assumes in hiring an employee. Second, when an employee engages in union activity on his or her employer's property, that activity is usually directed at affecting the very employment relationship that exists between that employee and the property owner. Finally, as a practical matter, the existence of an employment relationship is usually obvious, and it therefore provides an easy means for property owners and union organizers to quickly determine the extent of their respective rights.

Regardless of the Supreme Court's precise rationale for making employment the decisive factor in determining whether union organizers possess *Babcock* access rights or something more, the Board is bound by the *Lechmere* framework. This Court should therefore deny enforcement of the Board's Decision purporting to grant presumptive access rights to Ark's employees against NYNY, despite the fact they are not NYNY's employees. The Board lacked the authority to issue it.

III. The Board failed to reasonably accommodate NYNY's and the Ark employees' respective interests.

Even if the Board possesses the authority to formulate a new access standard for nonemployees who work regularly on the property of another, the Board's Decision in this matter should be denied enforcement. The balance struck by the Board unreasonably fails to protect the significant interests of property owners like NYNY.

To determine whether an agency's interpretation represents a reasonable accommodation of conflicting statutory purposes, this Court "must determine both whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether 'the agency considered the matter in a detailed and reasoned fashion.'" *ITT Indus. v. NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001) (citation omitted).

Here, the Board's *NYNY* standard creates a general presumption that a nonemployee who regularly works on the property of a third party possesses substantial access rights against that third-party property owner. In formulating this standard, the Board failed to consider in a "detailed and reasoned fashion" the interests of property owners that would be impaired. As a result, the Board could not, and did not, accurately weigh those interests against nonemployees' § 7 interests. The Board's new access standard thus fails to strike a reasonable accommodation of the important interests at stake.

A. The Board failed to give sufficient weight to property owners' interests in exercising their property rights.

In formulating its new access standard, the Board did not give any substantial consideration to property owners' interests. Indeed, the Board can hardly be said to have attempted to "accommodate" these property interests at all.

The Board did observe that a property owner has a "right to exclude others" that is impinged upon when access rights are granted to others pursuant to Federal Labor Law. Decision & Order at 10. The Board also stated that it must "give weight to that fact." *Id.* But the Board evidently considered this right only in the abstract without assigning it any value. *Id.* Indeed, in conducting its accommodation analysis, the Board did not mention this right again or explain how it weighed it, if at all. *Id.* at 12-13.

The Board also acknowledged that a property owner generally has an interest in "preventing interference with the use of its property. " *Id.* at 10. At the same time, the Board stated that the ALJs in this matter had found, and that it agreed, that Ark employees' handbilling "did *not* interfere with operations or discipline at NYNY's complex." *Id.* (emphasis in original). The Board also concluded generally that a property owner can adequately control the employees of its contractors indirectly by contracting with or informally working with its contractors. *Id.* at 10-11. The Board explained that a property owner is thus able "to fully protect its interests." *Id.* at 12. As a result of these conclusions, the Board gave no weight in

its accommodation analysis to owners' interests in preventing interference with the use of their property, which the Board considered otherwise already "fully protected."

The Board also failed to give specific and detailed consideration to any other potential interests of property owners. It did not consider, for instance, that property owners across the spectrum commonly adopt policies banning solicitors and handbillers for a variety of business reasons. These policies serve purposes such as avoiding litter and maintaining the appearance of a business property, increasing employees' and customers' safety and security on the property, and avoiding unwanted distractions in the workplace. Such non-solicitation and non-handbilling policies thus serve to reduce costs, facilitate customer service, and promote efficiency. The Board made no mention of such interests, all of which would be impaired if nonemployees who worked regularly on the property had a presumptive right to ignore the property owner's non-solicitation and non-handbilling policies.

In addition, the Board failed to consider that the right to exclude others provides a direct economic benefit to many property owners. Businesses operating vacation resorts, casinos, hotels, shopping malls, restaurants, movie theatres, retail stores, and other places of public accommodation often seek to create a controlled environment on their property as part of the product or experience that they offer their customers and guests. For these businesses, being able to exclude those who

would detract from their customers' experience is essential to fulfilling their customers' expectations. In this case, for example, NYNY offers its guests a chance to "get away" to a stylized New York City with the Big Apple's skyline and its bright lights but sanitized of the City's less desirable characteristics – like random solicitors and handbillers who might accost guests while they are attempting to enjoy their vacations. Forcing property owners such as these to grant access to nonemployee organizers whose presence and activities may diminish the overall experience of the property owners' customers would undoubtedly impose costs on these property owners, including in the form of lost business. Yet none of these interests was considered by the Board.

Finally, the Board also failed to consider the unique burden that would result from granting presumptive access rights to individuals against property owners who are not their employers. Unlike an employer-owner, a *nonemployer*-owner would typically not be able to try to regain the full use its property rights by bargaining with those who are exercising their presumptive access rights to the owner's detriment. For example, when employees are exercising their *Republic Aviation* rights against their own employer, the employer can consider the value of its property rights in determining whether and how to reach a resolution with its employees to purchase labor peace. The nonemployer property owner, on the other hand, will more likely be a neutral third-party on the sidelines of any em-

ployment dispute between its contractors or lessees and *their* employees. The non-employer's property rights – no matter how valuable they may be to the property owner in operating its business – will be a hostage to others' employment disputes and beyond the owner's ability to ransom.

For all of these reasons, the Board should have given far greater weight in its accommodation analysis to the interests of property owners like NYNY.

B. The Board accorded too much weight to nonemployees' § 7 interests.

As the same time, in assessing the interests of employees, the Board treated Ark employees' interests in handbilling on NYNY's property as far too substantial.

First, the Ark employees' § 7 interest in hand-billing customers to convey an "area standards" message is among the less significant of their § 7 interests, particularly in contrast to NYNY's interests in its property rights. *See United Food and Commercial Workers v. NLRB*, 74 F.3d 292, 298 (1996) ("Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees.") Furthermore, employees as a general matter would appear to possess even less of an interest in exercising their § 7 right to hand-bill regarding area standards on property that belongs to, is used by, and is managed by a business other than their employer. *See, e.g.*, *MBI Acquisition Corp. d/b/a Gayfers Dep't Store*, 324 NLRB 1246, 1252 (1997)

(Member Higgins, dissenting) ("I am not prepared to say that an employer must open up its property to allow persons to inflict economic injury on its enterprise (through a consumer boycott) particularly where . . . the employer is a neutral to the underlying area-standards dispute"). In such circumstances, the employees' message is far more likely to miss its target, to end up directed at consumers who are not customers of his or her own employer, and to cause confusion among the property owner's own customers and perhaps inadvertently lead to consumer boycotts against the wrong employer.

In light of the weakness of the Ark employees' interests in contrast to property owners' significant countervailing property interests, it is difficult to understand how that Board concluded its new standard should impose a strong presumption in favor of the nonemployees' access rights. This presumption makes no sense, and lacks any "detailed and reasoned" explanation of its foundation.

If the Board is authorized to craft an access standard that departs from *Babcock* for nonemployees who work regularly on the property of another, this Court should nevertheless refuse to enforce the Board's Decision and should remand this matter to the Board ordering it to undertake a detailed, comprehensive, and reasonable assessment and balancing of the property interests and § 7 interests at stake.

CONCLUSION

Public policy and sound labor policy must continue to recognize the right of a property owner to control the use of its premises and to manage its business without undue interference. Privileging nonemployees to violate the lawful and consistently maintained no-solicitation policies of property owners absent an employment relationship would invite disruption of the property owner's business, confusion among the property owner's customers, and the expansion of labor disputes to neutral employers with no relationship to the affected employees or control over their terms and conditions of employment. An important component of national labor policy is to reduce labor disputes that have the effect of disrupting commerce. The effect of the Board's decision in the instant cases is contrary to that purpose.

For the foregoing reasons, the Chamber urges this Court to decline to enforce the Board's Decision & Order.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 5,579 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 26th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2011, I caused to be sent via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing **AMICUS BRIEF** properly addressed to the following:

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