EXHIBIT A

G. Roger King

Roger King represents employers in employment relations matters, concentrating on matters arising under the National Labor Relations Act, state and federal equal employment statutes, the Americans with Disabilities Act, and the Family and Medical Leave Act. In addition, Roger's practice consists of representing employers in collective bargaining negotiations, grievance and arbitration matters, and litigation in state and federal trial and appellate courts regarding a broad spectrum of labor-related matters.

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Related Services

- Labor & Employment
- Trial Practice
- Health Care
- Collective Bargaining, Contract Enforcement & Union Organizing
- Employment Aspects of Corporate Transactions
- Health Care
- Health Care Compliance Counseling & Regulatory Advice
- Labor & Employment Health Care Law
- NLRB Proceedings & Appeals
- Single & Multiple Plaintiff Employment Litigation

Roger's experience also includes non-competition, tortious interference with business, substance abuse testing, issues under the Fair Labor Standards Act, Office of Federal Contract Compliance Programs matters, wrongful discharge claims, and the development and review of employee policies and procedures.

Clients and organizations that Roger has recently worked with include: Appalachian Regional Healthcare (ARH), American Society for Healthcare and Human Resources Administration (ASHHRA), Bellevue Hospital, Benefis Healthcare, Bon Secours Health System, California Hospital Association, Carilion Health, Catholic Healthcare Partners, Cedars-Sinai Medical Center, Columbus Symphony Orchestra, Community Health Partners, Community Health System, Delphi Automotive, Firelands Regional Medical Center, First American Title Insurance Company, Fisher Titus Medical Center, Forum Health, General Motors Corporation, HCA, Hospital Association of Southern California, HR Policy Association, Humility of Mary Health Partners, Kaleida Health System, Kettering Health Network, Kindred Health Care, Lakeland Regional Medical Center, Laurel Health Care Company, Lourdes Health System, Mary Rutan Hospital, MedStar Health System, National Beef Packing Company, Northwestern Memorial Healthcare, Norton Healthcare, Ohio Bankers Association, Ohio Grocers Association, Ohio Hospital Association, Premier Health, PETsMART, ProMedica Health System, RCA/Thomson multimedia, St. Luke's Health System, St. Peter's Hospital, Sisters of Charity of Leavenworth Health System, TALX, Texas Health Resources, Trinity Health, United Church Homes, University Hospitals Health System, Yale-New Haven Health System, and Verizon.

Roger is a Fellow of The College of Labor and Employment Lawyers and a member of the following bar associations, including the labor relations section of each: American, District of Columbia, Ohio State, and Columbus; a member of the Ohio Chamber of Commerce Labor Advisory Committee, the Society for Human Resource Management (SHRM), the American Health Lawyers Association, and the American Society for Healthcare Human Resources Administration (ASHHRA).

In 2003 he was appointed to Miami University's Richard T. Farmer School of Business Advisory Council. Roger has served as a board

JONES DAY

member of the American Health Lawyers Association, a member of the National Employment Relations Committee of SHRM, is presently serving on the Advocacy Committee of ASHHRA, and is a member of the Ohio State Bar Association Labor and Employment Council. Roger has testified before U.S. Congressional committees, is frequently quoted on labor issues in publications, and has been an active speaker and author for various groups throughout the U.S. on labor and employment relations matters.

Honors and Distinctions

Repeatedly recognized by: *Chambers USA: America's Leading Lawyers for Business*, the *NLJ*'s "Who's Who of Employment/Labor Lawyers," *Ohio Super Lawyers*, *The Legal 500*, and for the past 20 years, *The Best Lawyers in America*

Admitted

Ohio and District of Columbia

Education

Cornell University (J.D. 1971); Miami University (B.S. 1968)

Government/Military Service

Professional Staff Counsel, U.S. Senate Committee on Labor (1973-1975); Captain, U.S. Air Force, Judge Advocates General Division (1972-1973); Labor Relations Counsel to U.S. Senator Robert Taft Jr. (1971-1973)

JONES DAY

EXHIBIT B

CHRONOLOGY OF THE BOARD'S UNSUCCESSFUL RULEMAKING INITIATIVE

- June 2, 1994

  The Board published Advance Notice of Proposed Rulemaking in Federal Register on Appropriateness of Requested Single Location Bargaining Units in Representation Cases. 59 Fed. Reg. 28,501 (June 2, 1994).

- September 28, 1995

  The Board published Notice of Proposed Rulemaking in Federal Register on Appropriateness of Requested Single Location Bargaining Units in Representation Cases. 60 Fed. Reg. 50,146 (Sep. 28, 1995).

- March 7, 1996

  House subcommittee held hearings on the proposed rule. 38 Republican Senators and 67 Republican House members signed separate letters stating their opposition to the proposed rule. The letters argued that the Board should not make fundamental changes in such an important area of the law when it was operating with only four members, one of whom was serving as a recess appointee.

- September 12, 1996

  The federal budget bill passed and it included a rider prohibiting the NLRB from spending any of its funds on the proposed rule. The rider stated that "none of the funds made available by this Act shall be used in any way to promulgate a final rule . . . regarding single location bargaining units in representation cases." H.R. 3755 [Report No. 104-368], 104th Congress, Second Session (Sep. 12, 1996). The rider remained in the following two years' budgets.

- February 23, 1998

  The Board published Withdrawal of Proposed Rulemaking in Federal Register on Appropriateness of Requested Single Location Bargaining Units in Representation Cases. 63 Fed. Reg. 8,890 (Feb. 23, 1998). The Board stated that "[a] Congressional rider attached to each of the NLRB's 1996, 1997, and 1998 appropriations bills has prohibited the Agency from expending any funds to promulgate a rule regarding the appropriateness of single location bargaining units in representation cases." *Id.* at 8,891 n.2.

NATIONAL COUNCIL ON DISABILITY

SALARIES AND EXPENSES

For expenses necessary for the National Council on Disability as authorized by title IV of the Rehabilitation Act of 1973, as amended, ~~$1,757,000~~ *$1,793,000.*

NATIONAL EDUCATION GOALS PANEL

For expenses necessary for the National Education Goals Panel, as authorized by title II, part A of the Goals 2000: Educate America Act, ~~$974,000~~ *$1,500,000.*

NATIONAL LABOR RELATIONS BOARD

SALARIES AND EXPENSES

For expenses necessary for the National Labor Relations Board to carry out the functions vested in it by the Labor-Management Relations Act, 1947, as amended (29 U.S.C. 141–167), and other laws, ~~$144,692,000~~ *$170,266,000*: *Provided,* That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (29 U.S.C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203), and including in said definition employees engaged in the maintenance and oper-

ation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 per centum of the water stored or supplied thereby is used for farming purposes: *Provided further,* That none of the funds made available by this Act shall be used in any way to promulgate a final rule (altering 29 CFR part 103) regarding single location bargaining units in representation cases.

NATIONAL MEDIATION BOARD

SALARIES AND EXPENSES

For expenses necessary to carry out the provisions of the Railway Labor Act, as amended (45 U.S.C. 151–188), including emergency boards appointed by the President, ~~$7,656,000~~ *$8,300,000: Provided, That unobligated balances at the end of fiscal year 1997 not needed for emergency boards or any other purposes in fiscal year 1997 shall remain available until expended.*

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SALARIES AND EXPENSES

For expenses necessary for the Occupational Safety and Health Review Commission (29 U.S.C. 661), $7,753,000.

EXHIBIT C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S INC.,	)	
and	)	CASE 30-CA-17185
MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO	)	

BRIEF OF *AMICI CURIAE* HR POLICY ASSOCIATION AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT EMPLOYER

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Counsel for *Amici Curiae*

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STATUTES

The HR Policy Association and The Society for Human Resource Management (together, "*Amici*") respectfully submit this brief *amici curiae* to address, among other things, the permissible contours of employer rules restricting nonemployee access to employer private property for non-organizational purposes. *Amici* urge the Board to disavow the standard adopted by its decision in *Sandusky Mall*, 329 N.L.R.B. 618 (1999) and instead hold—consistent with the United States Supreme Court's decisions in *NLRB v. Babock & Wilcox Co.*, 351 U.S. 105 (1956) and *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992) and various decisions of the Federal Courts of Appeal—that employers may restrict nonemployee access to employer property unless the union establishes that (1) no reasonable alternative means of access to the employees exist or (2) the employer's rules discriminate *against the union* by allowing other distribution. *Amici* further urge the Board to adopt a discrimination standard for nonemployee access cases that is at least as accommodating of employer property rights as the standard the Board recently adopted in *Register Guard*, 351 N.L.R.B. 1110 (2007), *enf. denied in part*, 571 F.3d 53 (D.C. Cir. 2009) for *employee* access cases, namely, so long as the employer does not treat union-related communications differently from substantially similar non-union communications, the employer should not be held to have discriminated in violation of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151 *et seq.* This minimum threshold for establishing employer discrimination in nonemployee access cases is mandated by the Supreme Court's recognition that the trespassory rights of nonemployees to employer property are only derivative of the rights of that employer's employees under the Act.

STATEMENT OF INTEREST

HR Policy Association represents the chief human resource officers of over 300 of the largest employers doing business in the United States. Representing every major industrial sector, HR Policy's members employ more than 18 million people worldwide. Since its

founding, one of HR Policy's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

With the exception of those subject to the Railway Labor Act, all of the member companies of HR Policy are employers subject to the NLRA. These members have a considerable stake in how the Act is interpreted. HR Policy's members, moreover, own or lease property for business purposes in which they have an exclusionary property interest.

The Society for Human Resource Management is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of human resource professionals and advances the interests of the human resource profession. Founded in 1948, the Society has more than 575 affiliated chapters within the Unites States and subsidiary offices in China and India. Most of the Society's members own or lease property for business purposes, and also all have a significant stake in how the Act is interpreted.

As property owners for business purposes, *Amici*'s members have a compelling business and societal interest in affording reasonable access to their properties by charitable organizations and commercial ventures that do not conflict with the members' legitimate business purposes. Conversely, these members have an equally compelling interest in barring from their private property solicitors, protestors, picketers, and other third parties that cause workplace disruption and discourage would-be patrons from purchasing the members' products and services.

These and other goals for member companies cannot be achieved without restrictions and guidelines on nonemployee access to company property. *Amici*'s members thus have a strong interest in the resolution of this case, which presents fundamental issues regarding employers' rights to control private property that they maintain for business purposes. Accordingly, the

development of clear, predictable, and workable legal standards governing nonemployee access to that property is of great importance to *Amici*'s members. In addition, the HR Policy Association participated as *amicus curiae* before the Board in the *Register Guard* case, about which the Board has specifically sought briefing in this case, and its familiarity with those issues further supports its participation here. Finally, *Amici* themselves have an interest, consistent with their respective missions, in ensuring that the Board's analysis takes account of the needs and imperatives of their member companies, and that the Board decisions are consistent with those of the federal courts. *Amici* thus respectfully submit this brief as *amici curiae*.

STATEMENT OF THE CASE

As the parties' briefs and the Administrative Law Judge's ("ALJ") decision describe in greater detail, this case involves allegations that Respondent, a Wisconsin grocery store operator, violated section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by prohibiting nonemployee agents of the Milwaukee Building and Construction Council ("Union") from engaging in informational activities on property that Respondent owned or leased, while permitting dissimilar nonunion solicitations and distributions on such property. *See* Decision of Administrative Law Judge Robert A. Giannasi, No. 30-CA-17185, slip op. at 1 (Feb. 8, 2006) ("ALJ Decision"). In this brief, *Amici* will address the Union's charge and the three questions the Board posed in its November 12, 2010 Notice of Oral Argument and Invitation to File Briefs ("Invitation") at 1-2.

This dispute arises from the attempts of nonemployee agents of the Union to access private property underlying twenty six of Respondent's stores to urge store patrons to boycott Respondent's businesses because it used nonunion contractors for various remodeling projects. ALJ Decision at 2-3. After Respondent took steps to expel the nonemployee Union agents from its properties, the Union filed the underlying unfair labor practice charge. *Id.* The ALJ held that the Respondent's actions constituted discrimination under the Act. *Id.* at 8. While the ALJ

concluded that the Respondent did not act with an "anti-union motive," it nonetheless found its holding compelled by the Board's decision in *Sandusky Mall*, because Respondent stipulated that it permitted solicitation by other groups, such as the Girl Scouts, on its properties. *Id.* at 4-5.

Respondent appealed the ALJ's decision to the Board in 2006. The Board, however, opted not to reach the merits of the access and discrimination issues and instead remanded the case to the ALJ to consider whether Respondent had established an exclusionary property interest in the twenty six properties. *See* Supplemental Decision of Administrative Law Judge Robert A. Giannasi, No. 30-CA-17185R, slip op. at 1 (March 28, 2007) ("ALJ Supplemental Decision"). On November 12, 2010, the Board, relying on the ALJ's supplemental factual findings, issued a Supplemental Decision and Order holding that the Respondent failed to establish an exclusionary property interest in twenty three of the twenty six properties at issue and, accordingly, violated section 8(a)(1) of the Act by prohibiting nonemployee agents of the Union from accessing those properties. The ALJ's original access and discrimination analysis, therefore, remains viable with respect to two of Respondent's properties.[1]

The Board has severed the allegations concerning these remaining properties and retained them for further consideration. Invitation at 1. It is undisputed that Respondent has established an exclusionary property interest in these properties. The remaining question, therefore, is what standard for establishing unlawful employer discrimination should apply where the employer has an exclusionary interest in property, and nonemployees wish to access that property solely for informational purposes. Respondent has filed exceptions to the ALJ's original ruling that this issue is controlled by the Board's decision in *Sandusky Mall*. The Board, in inviting parties to

[1] In his supplemental order, the ALJ found that Respondent did not violate the Act at the "East Pointe" property, even under the ALJ's original access and discrimination analysis. Supplemental ALJ Decision at 13. The Union and General Counsel have not filed exceptions to the ALJ's dismissal of the allegations related to this property. Invitation at 1.

file briefs, has posed three questions directly related to this issue, including whether the Board should continue to adhere to the majority holding of *Sandusky Mall*.

Amici appreciate the interest the Board has shown in issues impacting employer property rights by identifying specific questions for briefing, inviting participation by parties as *amicus curiae*, and considering the views of all impacted parties before reaching any final decision.

SUMMARY OF ARGUMENT

This case provides an opportunity for the Board to depart from its *Sandusky Mall* decision and adopt a standard of discrimination in nonemployee access cases that comports with established principles from the Supreme Court and various Courts of Appeal regarding the limited access rights of nonemployees under the NLRA. The Supreme Court's decisions in *Babcock*, *Lechmere*, and Federal Court of Appeals cases construing those holdings, require a narrow standard for discrimination in nonemployee access cases that gives considerable weight to the fundamental exclusionary rights that employers hold in their private property. The Board's *Sandusky Mall* standard cannot be squared with these decisions.

The case also directly implicates the Board's recent decision in *Register Guard*, but not as a vehicle for revisiting that decision's central holdings regarding the exclusionary rights that employers hold in their email systems and the appropriate standard for discrimination in *employee* access cases. Rather, because the Supreme Court has consistently held that the access rights of nonemployees to employer property derive only from the organizational rights of that employer's employees, *Register Guard* establishes the minimum threshold for a finding of discrimination in nonemployee access cases. Indeed, the Board cannot logically or reasonably adopt a standard of discrimination in this nonemployee access case that is any more exacting than, or that is in conflict with, the standard the Board recently established with respect to employees in *Register Guard*. Under that standard, whenever an employer can show that

differently treated trespassory activities are distinguishable according to neutral criteria, discrimination charges against that employer must fail.

Finally, this case provides the Board with an opportunity to clarify the ambiguous and logically inconsistent nature of its current discrimination standard in nonemployee access cases. Under that standard, which permits employers to engage in "isolated beneficent solicitation" while still posting their private property against union-related activities of nonemployees, employers are left to guess at exactly how many charitable activities go too far. Such ambiguities and inconsistencies have the pernicious effect of discouraging employers from permitting laudable charitable activities for fear that doing so will open the door to solicitations that undermine their legitimate business purposes. The ambiguity also runs afoul of the Board's obligation as an administrative body to provide all interested parties with fair and reasonable warnings of what conduct is prohibited.

ARGUMENT

I. *Babcock*, *Lechmere*, And Federal Court Of Appeals Cases Interpreting These Supreme Court Decisions Dictate That A Narrow Standard Of Discrimination Is Appropriate In Nonemployee Access Cases

The rights of nonemployees to access employer private property for informational purposes are severely circumscribed by the Supreme Court's pronouncements in *Babcock* and *Lechmere* as well as by court of appeal precedent construing these decisions. These decisions recognize the paramount importance of employer property rights, which give employers broad authority to exclude nonemployees from their property. The decisions also recognize that nonemployees' access rights constitute a narrow exception to employers' overriding right to exclude outsiders from their private property and are governed by fundamentally different considerations than the access rights of the employers' employees under Act. These principles—which are binding on the Board—require the Board to establish a very narrow and exacting

standard of proof to support a finding of discrimination in nonemployee access cases that permits employers to regulate communications on their properties according to any neutral criteria.

A. *Babcock* And Its Progeny Mandate A Narrow Standard Of Discrimination In The Nonemployee Context

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) is the Supreme Court's seminal decision regarding the access rights of nonemployees to private property. In that case, the Supreme Court rejected the Board's holding that an employer unlawfully prohibited nonemployee union organizers from distributing union literature on the parking lot and walkway of the employer's private property. *Id.* at 113. The Court held that nonemployees can override the broad exclusionary right that employers hold in their private property only if (1) reasonable efforts by the union through "other available channels of communication" do not enable it to reach the employer's employees with its message; or (2) the employee discriminates "*against the union* by allowing other distribution." *Id.* at 112 (emphasis added). In reaching this conclusion, the Court rejected the Board's reliance on its prior precedent from the employee access context, which called for a balancing of the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees, with the employer's right to control the use of its private property. *Id.* at 110-11 (discussing *LeTourneau Co. of Ga.*, 54 N.L.R.B. 1253 (1944)). According the Court, the distinction between the access rights of employees and nonemployees is "one of substance." *Id.* at 113. While, with limited exceptions, "no restriction may be placed on the employees' right to discuss self-organization among themselves," the access rights of nonemployees are "governed by a different consideration" and exist only to the extent that the location of the employer's employees place them beyond reasonable union efforts to communicate. *Id*; *see also Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 206 n. 42 (1978) (holding that trespassory area standards

handbilling of nonemployees is protected only as "derivative of the right of that employer's employees to exercise their organization rights effectively.").

In *Lechmere Inc. v. NLRB*, the Supreme Court reaffirmed and extended its holding in *Babcock*. 502 U.S. 527 (1992). There, the employer excluded nonemployee union organizers from the parking lot of its retail store pursuant to its uniformly enforced rule against solicitation and distribution on those premises. *Id.* at 529-30. Rejecting the Board's contrary analysis, the Court ruled that the test of nonemployee access announced in *Babcock* with respect to an employee parking lot at a factory was equally applicable to a customer parking lot at a retail store. *See generally id.* Indeed, the Court went so far as to state that "[a]s a rule, . . . an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property." *Id.* at 533. While the Court expressly reaffirmed the exception to this rule recognized by *Babcock*, it emphasized that this exception is "a narrow one": the exception applies only where "'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.'" *Id.* at 533-34 (quoting *Babcock*, 351 U.S. at 113 (emphasis in *Lechmere* removed)). The Court explained that this exception, "does not apply whenever nontresspassory access to employees may be cumbersome or less-than-ideally effective," but only where employees, "by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society." *Id.* at 539-40. The burden of establishing such isolation, according the Court, is a "'heavy one,' and one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication." *Id.*[2]

The Court in *Lechmere* also reaffirmed *Babcock*'s central rationale: that nonemployees, standing alone, have no rights under the Act. *See id.* at 532. Returning to the text of the Act, the

[2] Neither the Union nor the General Counsel has alleged that *Babcock*'s and *Lechmere*'s limited exception for situations in which employees are isolated is implicated here.

Court recognized that its plain terms confer rights only on employees, not unions or their nonemployee representatives. *Id.* Thus, the rights of nonemployees to access employer property are derivative rights, if they exist at all, and are only available in certain limited circumstances, that is, only "insofar as the employees' right of self-organization depends in some measure on their ability . . . to learn the advantages of self-organization from others." *Id.* (citation omitted).

While neither *Babcock* nor *Lechmere* expressly addressed the appropriate standard for discrimination in the context of nonemployee access, it is clear that any such standard must conform to the principles of nonemployee access established by those cases. Indeed, the possibility of access discrimination by employers in the nonemployee context arose only with the Supreme Court's decision in *Babcock*; neither section 7 nor 8 of the Act explicitly provides for a cause of action for such discrimination. *See* 29 U.S.C. §§ 157, 158. It is important for the Board to keep in mind what this case does and does not involve. The allegations in this case involve only the attempts by nonemployee union agents to access the Respondent's property to inform the Respondent's patrons of the union practices of the Respondent's third-party contractors (and to urge the patrons to boycott the Respondent's businesses based on its disagreement with those practices). The case does not involve the organizational rights of the Respondent's employees—indeed, they are already unionized—nor does it even involve attempts by the Union to access the employer's employees for informational purposes. The Supreme Court's repeated holdings that the rights of nonemployees to access an employer's private property derive only from the organizational rights of the employer's employees, and logic, dictate that any employer policy banning nonemployee distributions for purely informational purposes does not violate the Act. This conclusion is compelled regardless of what other types of distributions the employer permits on its property. *See Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997) ("[W]e

seriously doubt, as do our colleagues in other circuits, that the *Babcock & Wilcox* disparate treatment exception, post *Lechmere*, applies to nonemployees who do not propose to engage in organizational activities."); *see also Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 691 (6th Cir. 2001) (noting that the Board itself has acknowledged "that nonemployee area-standards picketing warrants even less protection than nonemployee organizational activity under section 7 because it is a right even more peripheral." (internal quotations omitted)).

Regardless, it is clear that any standard of discrimination adopted by the Board in the context of nonemployee access must conform to the rationales of *Babcock* and *Lechmere*. These rationales dictate a narrow and exceedingly exacting standard be satisfied before a finding of discrimination may be made. Further, the standard must give considerable weight to fundamental exclusionary rights that employers hold in their private property. *See Metro. Dist. Council of Phila. & Vicinity United Bhd. of Carpenters & Joiners of Am. v. NLRB*, 68 F.3d 71, 75 (3d Cir. 1995) ("[T]he primary thrust of *Lechmere* was to reemphasize the protection of employers' private property rights against unwarranted intrusions by nonemployees."). This is even more true today than it was when *Babcock* and *Lechmere* were decided, given the increasingly pervasive availability of various means of electronic communication. The "available channels of communication" have grown exponentially since the Supreme Court used the phrase in *Babcock* in 1956—the internet, email, Twitter, and social networking websites have expanded avenues for communication to such a degree that almost no one is unreachable. *Cf. J. Picini Flooring*, 356 N.L.R.B. No. 9 (2010) (recognizing the "increasing prevalence of electronic communication at and away from the workplace"); *Register Guard*, 351 N.L.R.B. at 1121 (noting that "[n]ational labor policy must be responsive to the enormous technological changes that are taking place in our society" and that "[o]nly a Board that has been asleep for the past 20

years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace.") (Liebman and Walsh, dissenting). The Board cannot ignore these ever-expanding means of communication, which clearly establish that physical access to employer private property is even less necessary today, and thus correspondingly less interference with employer property rights is warranted.

B. Federal Court Of Appeals Decisions Applying *Babcock* And *Lechmere* Have Consistently Held That Employers May Permit Various Types Of Solicitation While Lawfully Excluding Union-Related Solicitations

The Federal Courts of Appeals have consistently applied the rationales underlying *Babcock* and *Lechmere* to hold that employers may post their private property against nonemployees' solicitation unless the nonemployees establish that the employers have selectively disadvantaged a specific union or otherwise discriminated among comparable groups engaged in comparable activities. These cases give significant deference to the legitimate business justifications that the owners of private commercial premises have in distinguishing among the types of communications they permit on their properties. Indeed, these decisions have found lawful employer policies that, despite barring union-related solicitations, permitted a host of other solicitors, including the Salvation Army, other businesses, political candidates, the Girl Scouts, and those engaged in civic distributions.

In *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996), *overruled on other grounds by NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 & n.2 (6th Cir. 1997), the Sixth Circuit rejected the Board's position that permitting occasional distributions by groups such as the Jehovah's Witnesses or the Lions Club demonstrates discriminatory enforcement of a non-solicitation rule when an employer has denied access to nonemployee representatives of a union. *Id.* at 464-65. In reaching this conclusion, the court found significant fault with the Board's suggestion that *Babcock*'s discrimination principle could be construed apart from that

decision's narrow access analysis. *Id.* Rather, according to the court, "*Babcock* and its progeny, which weigh heavily in favor of private property rights, indicate that the [Supreme] Court could not have meant to give the word 'discrimination' the import the Board has chosen to give to it." *Id.* at 465. Given the sharp distinctions that the Supreme Court drew in *Babcock* between the rights of nonemployees and employees, the Sixth Circuit concluded that discrimination in the context of nonemployees is limited to situations where the employer "favor[s] one union over another, or allow[s] employer-related information while barring similar union-related information." *Id.* at 463, 465. The court also found its definition of nonemployee discrimination supported by the purposes of the Act, because no relevant labor policies are advanced by requiring employers to prohibit charitable solicitations merely to preserve their right to post their private property against nonemployee distributions of union-related materials. *Id.* at 465.

In *Sandusky Mall*, 242 F.3d 682, the Sixth Circuit reaffirmed its holding in *Cleveland Real Estate* that a finding of discriminatory conduct in the nonemployee context must consist of "discrimination [] among comparable groups or activities and that the activities themselves under consideration must be comparable." *Id.* at 690 (emphasis and internal quotations omitted). As it did in *Cleveland Real Estate*, the Sixth Circuit found its construction of *Babcock*'s discrimination principle mandated by *Babcock* and its progeny. *Id.* at 689-90. The court distinguished the cases relied upon by the Board, because those cases involved either *employer* distributions or allegations of discrimination with respect to *comparable* activities. *Id.* at 691-92 ("The union's activity in the instant case relates to a peripheral right only and deserves less protection under the Act."). The court also emphasized that, as here, the nonemployee activity at issue involved area-standard picketing, as opposed to nonemployee organizational activity, and thus was "a right even more 'peripheral'" to the purposes of the Act. *Id.* at 691 (citing *NLRB v.*

Great Scot, Inc., 39 F.3d 678, 684 (6th Cir. 1994)). Finally, the court gave special credence to the practical business needs of owners of private commercial premises: according to the court, "employers must be able to make distinctions based on the time, place, and means of solicitation to the extent that [ ] business may be negatively affected by one and not another." *Id.*

The Second Circuit reached a similar conclusion in *Salmon Run Shopping Center LLC v. NLRB*, 534 F.3d 108, 116-17 (2d Cir. 2008). Relying on *Lechmere*, the court held that "[t]o amount to *Babcock*-type discrimination, the private property owner must treat a nonemployee who seeks to communicate on a subject protected by section 7 less favorably than another person communicating on the same subject" because "[t]he focus of the discrimination analysis [] must be upon disparate treatment of two like persons or groups." *Id.* Thus, "[t]he standard for assessing discrimination must take account of the general rule that a private property owner need not provide a forum for expression on its property and may be arbitrary and inconsistent in its selection of speakers." *Id.* Just as only the "'rare case' satisfies *Babcock*'s inaccessibility exception, . . . it may be that the same holds true under" its discrimination exception. *Id.*

Finally, the Seventh Circuit—a court of appeal to which this case may be appealed—has held that even in situations involving *employee* access to employer property, a similarly narrow standard for discrimination is appropriate. *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995). *Guardian* involved an employer's refusal to permit the union to post meeting notices on a bulletin board, even though it allowed employees to post notices of items for sale. *Id.* at 318. The Court rejected the Board's rule that "once a bulletin board is open to any notices from employees, it is 'discrimination' not to accept meeting announcements," noting that this "understanding of 'discrimination' [] has been considered, and found wanting, in every other part of the law that employs that word." *Id.* at 320. Rather, the Court held, to prove discrimination,

the Board must show "that the cases among which the employer has distinguished are indeed 'similar' in all respects relevant to labor policy," which it had failed to do. *Id.* at 321.

It appears that the United States Court of Appeals for the Fourth Circuit would go even further than *Cleveland Real Estate*, *Sandusky Mall*, or *Salmon* and hold that the Supreme Court's decisions in *Babcock* and *Lechmere* constitute a *per se* bar to any discrimination claim brought by nonemployees who were excluded from engaging in informational activities on employer private property. "Because nonemployees' claims to access to an employer's private property are at their nadir when the nonemployees wish to engage in protest or economic activities, as opposed to organizational activities," the Fourth Circuit has expressed "serious[ ] doubt" "that the *Babcock & Wilcox* disparate treatment exception, post *Lechmere*, applies to nonemployees who do not propose to engage in organizational activities." *Be-Lo Stores*, 126 F.3d at 284 (noting that other courts of appeals have expressed similar doubts). Although the Fourth Circuit in *Be-Lo* did not expressly reach the issue, its statements regarding the nonexistence of nonemployee discrimination claims with respect to informational activities are consistent with the Supreme Court's recognition that nonemployee access rights derive only from the *self-organization* rights of the employer's employees, which are not at issue here. *See Babcock*, 351 U.S. at 113; *see also Riesbeck Food Markets, Inc. v. NLRB*, 91 F.3d 132, 1996 WL 405224, at *3 (4th Cir. July 19, 1996) (per curiam) (refusing to enforce Board finding of discrimination because there are "legally significant differences between [] charitable solicitation" and the union's activities); *id.* at *4 (concurrence noting that Section 7 of the NLRA "does not protect the union's picketing of Riesbeck and its handbilling of Riesbeck's customers").

Accordingly the Board could, consistent with the principles announced by the Supreme Court in *Babcock* and *Lechmere*, hold that *Babcock*'s discrimination rationale simply has no

application to the facts of this case. That conclusion is soundly grounded on the undisputed fact that this case does not involve organizing activities, either by employees or nonemployees, and thus does not implicate—either directly or derivatively—the organizational rights of employees under section 7 of the Act. *See* 29 U.S.C. § 157; ALJ Decision at 4. But at a minimum, the Board should adopt the discrimination standard articulated by the court of appeals decisions in *Cleveland Real Estate*, *Sandusky Mall*, *Salmon*, and *Guardian*: that is, that an employer discriminates against the union-related communications of nonemployees if it favors one union over another, or treats comparable groups engaged in comparable activities differently from each other. This approach is consistent with the Supreme Court's statement in *Babcock* that the discrimination must be "against the union" to run afoul of the Act. *See Babcock*, 351 U.S. at 112. Importantly, it would also give proper weight to the significant limitations that the Supreme Court has placed on the access rights of nonemployees while, at the same time, accounting for the broad exclusionary rights enjoyed by owners of private property.[3]

It is important to note in this context that the question of what standard governs claims of discrimination in the nonemployee context does not fall under the Board's broad rule-making authority as an administrative body. *See Sandusky Mall*, 242 F.3d at 691. Rather, because the proper scope of *Babcock*'s discrimination principle is, by definition, a question of interpreting Supreme Court precedent, the Board, in adjudicating a discrimination claim in the nonemployee context, is constrained by the principles announced by *Babcock* and its progeny in the Supreme Court. *See Maislin Inds., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990) (refusing to follow agency's new interpretation of statute which conflicts with century-old Supreme Court

[3] By adopting such a standard, the Board may avoid confronting the serious constitutional issues under the First and Fourteenth Amendments that may be present if an exacting standard for employer discrimination is not applied. *See, e.g., Hurley v. Irish-Am. Gay Group*, 515 U.S. 557, 566 (1995) (requiring private parade organizer to include group whose message parade organizer disagreed with violates First and Fourteenth Amendments); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986). The Board should, of course, construe the statute so as to avoid "serious constitutional problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-77 (1988).

precedent); *cf. Webcor Packaging, Inc.*, 118 F.3d at 1123 n.8 (distinguishing between interpretation of the NLRA and decisional precedent, saying "[t]his is also not an instance in which the Board has departed from the Supreme Court's interpretation of the statute.")

C. Application of the Correct Discrimination Standard Requires that the Remaining Complaint Allegations Here Be Dismissed

The appropriate discrimination standard clearly dictates that the Board rule in favor of Respondent with respect to the remaining allegations in this case. The evidence shows that Respondent, while permitting various civic, political, and charitable solicitations on its property, never specifically targeted nonemployee Union agents based on their union affiliation. *See* ALJ at 4-5. Neither did the Respondent exclude nonemployee Union agents while permitting other unions to engage in substantially similar activities. Rather, the Respondent simply excluded from its private property—consistent with its legitimate business purposes—individuals protesting and urging Respondent's customers to boycott its business. *Id.* at 5. Notably, the facts of both *Cleveland Real Estate* and *Sandusky Mall* are essentially indistinguishable from those currently before the Board. *See Cleveland Real Estate*, 95 F.3d at 459 (noting that the nonemployee handbilling at issue urged customers not to patronize respondent's stores); *Sandusky Mall*, 242 F.3d at 685 ("The specific issue before this court is whether Sandusky may be compelled to permit non-employee union members to trespass on the mall's property for the purpose of distributing handbills urging mall customers not to patronize non-union employers.").

II. The Board Should No Longer Apply Its *Sandusky Mall* Standard To Cases Alleging Discrimination In The Context Of Nonemployee Access

A. The Board's *Sandusky Mall* Standard Is Inconsistent With The Supreme Court's Holdings In *Babcock* And *Lechmere*

Even if the Board is not inclined to adopt the *Cleveland Real Estate* discrimination standard in nonemployee cases (or go further and eliminate the concept of discrimination in the

context of nonemployee informational activities), the Board should not continue to apply its discredited *Sandusky Mall* standard, which is unsupported by settled law. Indeed, the Board's decision to overturn *Sandusky Mall* would not disturb the expectations of employers, employees, or unions, because the principles established by that decision have consistently been rejected by reviewing courts (and thus the parties are not bound by that standard so long as employers have the resources and determination to challenge the Board's ruling).

The decisions of these reviewing courts were discussed extensively above. In short, those decisions fundamentally reject *Sandusky Mall*'s central premise, namely, that *Babcock* and *Lechmere*'s narrow view of nonemployee access rights can be squared with a standard for discrimination that forbids employers from denying union access if they permit anything more than "isolated beneficient solicitation" on their private property. *Sandusky Mall*, 329 N.L.R.B. 618, 621 (1999). In *Cleveland Real Estate*, for example, the Sixth Circuit rejected the Board's argument that occasional distributions by charitable and civic groups demonstrates discriminatory enforcement of a non-solicitation rule when an employer has denied access to nonemployee representatives of a union. *Cleveland Real Estate*, 95 F.3d at 464-65. Rather, according to the court, "*Babcock* and its progeny, which weigh heavily in favor of private property rights, indicate that the [Supreme] Court could not have meant to give the word 'discrimination' the import the Board has chosen to give it." *Id.* at 465. Likewise, in *Sandusky Mall*, the Sixth Circuit—in denying enforcement of the Board's decision in *Sandusky Mall*—adopted the dissenting Board members' views that *Babcock* and *Lechmere*'s narrow exception to the rule prohibiting nonemployee access also mandates a narrow construction of *Babcock*'s discrimination exception. *Sandusky Mall*, 242 F.3d at 690; *see also See Be-Lo Stores*, 126 F.3d at 284 (holding that solicitations were "isolated and sporadic" and therefore did not establish

disparate enforcement of non-solicitation policy, but also expressing "doubt" that, post *Lechmere*, the discrimination treatment exception applies to non-employees not engaged in organizational activities, and that employer approval of charitable distribution while excluding unions constitutes discrimination).

These courts' decisions to reject the Board's *Sandusky Mall* standard flow naturally from the Supreme Court's observations in *Lechmere* that "trespasses of nonemployee union organizers are far more likely to be unprotected than protected," and that the burden imposed on a union to justify access to an employer's private property is "a heavy one" that requires proof of "unique obstacles." *Lechmere*, 502 U.S. at 541. It is only in this context that *Babock*'s discrimination principle can be construed. Yet, instead of adhering to *Babcock* and *Lechmere*'s narrow exception for nonemployee access, the Board's *Sandusky Mall* standard interprets *Babock*'s discrimination exception in a way that effectively eviscerates that exception. As the Second Circuit has observed in rejecting the Board's reliance on its *Sandusky Mall* rationale, "[t]he Board cites no reason why the burden in the discrimination context ought to be any less 'heavy' than under the inaccessibility exception." *Salmon Run*, 534 F.3d at 116. Rather, just as "[o]nly the 'rare case' satisfies *Babcock*'s inaccessibility exception," and "it may be that the same holds true" under the appropriate construction of *Babcock*'s discrimination exception. *Id.* at 117.

B. As A Policy Matter, the Board's Sandusky Mall Standard Is Inappropriate

The Board's *Sandusky Mall* standard provides employers, employees, and unions with little guidance regarding the likely application of *Babcock*'s discrimination principle. Indeed, while *Sandusky Mall* expressed a narrow "tolerance of isolated beneficent solicitation," *see Hammary Mfg. Corp.*, 265 NLRB 57 n.4 (1982), the Board has provided no clear guidance regarding how many charitable activities are permitted before an employer will run afoul of *Babcock*'s discrimination exception. Employers attempting to structure nonsolicitation policies

to further their legitimate business interests should not be left to guess whether two, or five, or nine charitable activities over an undefined period of time are sufficient to place them at risk under the Act. As the Sixth Circuit explained in reiterating the views of the dissenting Board members in *Sandusky Mall*, "[t]he parameters of the Board's application of the so-called 'discrimination exception' first articulated in *NLRB v. Babcock & Wilcox* are so vague that the Board too must resort to subjective, 'I know it when I see it' criteria to decide whether its requirements have been met, thus leaving employers without fair notice of what they may lawfully do." *Sandusky Mall*, 242 F.3d at 689 (quoting 329 N.L.R.B. at 624 (Brame, dissenting)).[4] This ambiguity in the *Sandusky Mall* standard is particularly problematic because the Board, as an administrative body, has an obligation to enact guidelines that "provide a fair and reasonable warning of what is prohibited." *Ga. Pac. Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004 (11th Cir. 1994) (per curiam).

At bottom, the principal effect of the Board's current beneficent solicitation exception is to discourage employers from permitting laudable charitable activities for fear that doing so will open the door to all types of solicitation, including those (such as union organizing and informational solicitation) that cause workplace disruption and detract from employer's legitimate business purposes. Employer property rights encompass both the right to invite people in, and to keep people out. Forcing employers to choose between excluding everyone or excluding no one thus violates *Babcock*'s and *Lechmere*'s fundamental protection of property

[4] The opinions of the Board's General Counsel's office reflect this confusion. Following the September 11, 2001 terrorist attacks on the United States, the General Counsel issued a memorandum designed to clarify the appropriate standard for the beneficent acts exception in light of the employer community's outpouring of charitable activity in response to the attacks. This Memorandum indicated that three incidents of charitable solicitation would not give rise to a finding of discrimination. *See* Memorandum GC 01-06 (Sept. 28, 2001). Other Division of Advice decisions have also noted the confusion in this area, and at times reached differing conclusions. *See, e.g.*, *Walmart Stores, Inc.*, 2001 WL 1155418 at *8 (N.L.R.B. G.C. Apr. 23, 2001) ("[t]he Board has not defined exactly how many incidents would be enough to overcome the isolated beneficent acts exception," but noting that generally such acts must be frequent, regular, routine, or extensive); *NSAL Inc.*, 1993 WL 726785 (N.L.R.B. G.C. Jan. 27, 1993) (permitting one or two solicitations per year sufficient to overcome isolated beneficent acts exception).

rights just as surely as requiring employers to admit everyone, and does so in a way that harms not only employers, but society as a whole, by discouraging philanthropic activities. This is a result that a proper construction of *Babcock*'s discrimination exception does not require and one the Board should not countenance.

III. *Register Guard*'s Application To Nonemployee Access Cases

A. *Register Guard* Mandates A Discrimination Standard In Nonemployee Access Cases That Permits Employers To Draw Distinctions Based On Neutral Criteria

In requesting briefing, the Board has specifically asked the parties and amici to address the question of what impact its decision in *Register Guard*, 351 N.L.R.B. 1110, which established the standard for unlawful discrimination in employee access cases, has on the appropriate standard for finding unlawful discrimination in nonemployee access cases. Invitation at 2. The answer to that question is plain: Because the rights of nonemployees to access employer property are solely derivative of that employer's employees' rights under the Act, the Board must adopt a standard for discrimination in the nonemployee context that is at least as accommodating of employer property rights as the discrimination standard applicable to an employer's own employees under *Register Guard*.

Register Guard involved the propriety of an employer policy that prohibited employees from using the employer's email system for any "nonjob-related solicitations." 351 N.L.R.B. at 1110. Pursuant to this policy, the employer sent warning letters to one of its employees, a union president, after she sent union-related emails to employees at their work email addresses. *Id.* at 1111-12. In reviewing the ALJ's decision that the employer's enforcement of its policy against the union president constituted unlawful discrimination, the Board reached two central holdings. First, the Board held that employees do not have a specific right under the Act to use an employer's email system for section 7 purposes. *Id.* at 1116. Rather, the Board concluded that

employer email systems are no different than any other employer property and, as a consequence, employers have the right to bar employees' nonwork-related use of their email systems so long as employers do not discriminate against section 7 activity. *Id.*

In its second holding—which is implicated by the questions presently before the Board—the Board held that the concept of discrimination in the context of *employees* involves only an employer's "unequal treatment of equals." *Id.* at 1117. An employer thus unlawfully discriminates against its employees' union related-activities only if it engages in "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Id.* at 1119. Conversely, "nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis." *Id.* at 1118. In establishing this discrimination standard under the Act, the Board expressly and correctly overruled prior Board decisions that were inconsistent with this standard. *Id.* at 1119 n.21. The Board also sought to provide employers, employees, and unions with clear guidance going forward by informing them that the Board would apply the section 7 standard of discrimination "in future cases." *Id.* at 1119.

Babcock and its progeny establish two important principles that require the Board to apply in this, and similar future cases, a standard of discrimination that is at least as accommodating of employer property rights as the standard announced by *Register Guard.* First, the Supreme Court and others have consistently recognized that nonemployee access rights are limited precisely because "any right they may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively." *Sears, Roebuck & Co.*, 436 U.S. at 206 n.42 ("*Babcock* makes clear that the interests being protected by according limited-access rights to nonemployee, union organizers are not those of the organizers but of the employees located on the employer's property."); *ITT*

Indus., Inc. v. NLRB, 413 F.3d 64, 67 (D.C. Cir. 2005) (same); *see also Lechmere*, 502 U.S. at 532 (The employee/non-employee distinction for purposes of determining organizational access rights is significant because "[b]y its plain terms, [ ] the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers."); *United Food & Commercial Workers, AFL-CIO, Local No. 880 v. NLRB*, 74 F.3d 292, 298 (D.C. Cir. 1996) (Nonemployee access rights, the Supreme Court has held, stem entirely from on-site employees' § 7 organizational right to receive union-related information.).

The second principle, which is compelled by the first, recognizes that section 7 rights are at their scantest where, as here, nonemployee union agents seek to access employer property for informational, as opposed to organizational, purposes. The District of Columbia Court of Appeals aptly explained this principal in its *United Food* decision: "A long history of cases manifests a hierarchy among section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interest of nonemployees in organizing an employer's employees being somewhat weaker, and the interest of uninvited visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still." *United Food*, 74 F.3d at 298; *see also Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972) ("[T]he principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal."); *Sears*, 436 U.S. at 206 n.42 ("[S]everal factors make the argument for protection of trespassory area-standards picketing as a category of conduct less compelling than that for trespassory organizational solicitation . . . . [T]he right to organize is at the very core of the purpose for which the NLRA was enacted . . . . [whereas] [a]rea-standards picketing . . . has only recently been recognized as a § 7 right.").

Thus, while *Register Guard* presented the Board with a claim at the very core of section 7, the purported trespassory right of nonemployees to engage in area-standards picketing at issue in this matter implicates section 7, if at all, only in the most derivative and peripheral manner. Under these circumstances, the Board cannot logically or reasonably apply a standard of discrimination in this case that is any less deferential to employer property rights than the *Register Guard* standard. More broadly, *Register Guard* mandates that whenever an employer can show that differently treated nonemployee trespassory activities are distinguishable based upon neutral criteria, discrimination charges against that employer must fail. As explained above, while *Babcock* and its progeny certainly permit (and arguably compel) the Board to adopt a principle here that is even more accommodating of employer property rights, neither those decisions nor the Board's own precedent in *Register Guard* permit any lesser standard.

B. There Is No Basis For Using This Case As A Vehicle For Overturning *Register Guard*

Equally important to what *Register Guard* means for this case is what this case does not mean for *Register Guard*. As mentioned, *Register Guard* reached two central holdings. The first—that employer email systems should be treated as employer property for section 7 purposes—is not even arguably implicated here, and the Board should not disturb it.

Nor does the Board need to disturb *Register Guard*'s second holding—that the Act's non-discrimination rule prohibits only the unequal treatment of equals—to decide the matter before it. Indeed, the discrimination principles established by *Register Guard* are well supported and should be affirmed.

First, the *Register Guard* discrimination standard is supported by a settled body of law in the courts of appeals. *See, e.g.*, *Restaurant Corp. of Am. v. NLRB*, 827 F.2d 799, 807-08 (D.C. Cir. 1987) (explaining that the "essence of discrimination" is "treating like cases differently,"

and holding no discrimination where employer permitted social collections but prohibited systemic union solicitation); *Guardian Indus.*, 49 F.3d at 319 ("A person making a claim of discrimination must identify another case that has been treated differently and explain why that case is 'the same' in the respects the law deems relevant or permissible as grounds of action."); *Fleming Cos. v. NLRB*, 349 F.3d 968, 975 (7th Cir. 2003) (practice of permitting personal postings, but not organizational ones, not discriminatory); *6 West Ltd. v. NLRB*, 237 F.3d 767, 780 (7th Cir. 2001) ("[S]olicitations for [G]irl [S]cout cookies, Christmas ornaments, hand-painted bottles, and the other examples listed by the ALJ certainly cannot, under any circumstances, be compared to union solicitation as support for the ALJ's determination that the [employer] engaged in a discriminatory application of its non-solicitation policy").

Second, the *Register Guard* standard is a practical one that provides employers with relative predictability and certainty in the way in which the Board will examine alleged discrimination claims. Notably, it does not depend on the number of United Way or Girl Scout cookie drives an employer may permit, but rather focuses on whether actual discrimination against unions has been proven. In this way, employers are not left with the difficult choice of opening their doors to all solicitations, no matter how disruptive, if they choose to allow charitable activities on employer property. *See Cleveland Real Estate*, 95 F.3d at 465 ("To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so.").

Finally, a decision to overrule *Register Guard* now would unwisely disrupt the settled expectations of employers, employees, unions, and lower adjudicative bodies that have already begun to rely on the standards it sets forth. *See Starbucks Corp. & Local 660, Indus. Workers Of*

The World, Case No: 2-CA-37548, 2008 WL 5351366 (NLRB Div. of Judges (NY) Dec. 19, 2008) (relying on *Register Guard*'s discrimination standard). Such a decision, coming so soon after *Register Guard* was decided by the Board, may increase the skepticism with which the courts of appeals already view the Board standards in this important area. *See supra* at 11-18.

CONCLUSION

For the reasons discussed above, *Amici* respectfully request that the Board hold that: (1) employers may restrict nonemployee access to employer property unless charging parties establish that (i) no reasonable alternative means of access to the employer's employees exist or (ii) the employer's rules discriminate against union-related activities; and (2) restrictions on nonemployee access to private property violate the Act's non-discrimination rule only if the employer applies non-neutral criteria that result is dissimilar treatment for substantially similar nonemployee activities. As to the specific charges at issue, *Amici* respectfully request that the Board reverse the ALJ's finding of discrimination and render judgment in favor of Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2011, an electronic copy of the Brief of *Amici Curiae* HR Policy Association and The Society for Human Resource Management In Support of the Respondent Employer was filed and true and correct copies of the brief were e-mailed and served by overnight delivery, addressed as follows:

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EXHIBIT D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S INC.,	)	
and	)	CASE 30-CA-17185
MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO	)	

BRIEF OF *AMICI CURIAE* AMERICAN HOSPITAL ASSOCIATION AND AMERICAN SOCIETY FOR HEALTHCARE HUMAN RESOURCES ADMINISTRATION IN SUPPORT OF THE RESPONDENT EMPLOYER

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In response to the Board's Notice and Invitation to File Briefs dated November 12, 2010, the American Hospital Association ("AHA") and the American Society for Healthcare Human Resources Administration respectfully submit this brief as *amici curiae* in support of Respondent.

STATEMENT OF INTEREST

The AHA is a national not-for-profit association that represents the interests of approximately 5,000 hospitals, health care systems, networks, and other health care providers, as well as 37,000 individual members. It is the largest organization representing the interests of the Nation's hospitals. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed.

The American Society for Healthcare Human Resources Administration ("ASHHRA") of the AHA is the Nation's only membership organization exclusively dedicated to meeting the professional needs of human resources leaders in health care. Founded in 1964, ASHHRA represents more than 3,400 human resources professionals across the nation. ASHHRA is governed by a 13-member board of directors, four standing committees, and more than 45 affiliated chapters who are all committed to enhancing the profession and moving forward toward one common goal – excellence in health care human resources.

Most of the hospitals that belong to the AHA are employers subject to the National Labor Relations Act (the "Act").[1] Many member hospitals interact frequently with organized labor, in circumstances that range from long-standing collective bargaining relationships to initial organizing campaigns. In addition, third-party work at hospital campuses (such as construction)

[1] Approximately 22 percent of the AHA's member hospitals are government-owned and are therefore covered by separate labor relations laws.

sometimes attracts union secondary activity, which can include boycott appeals and derogatory statements about the care delivered in the targeted hospital.

The AHA, ASHHRA and their members share the same general interest that all employers have in protecting their property rights, but hospitals also have a special concern with legal developments that permit nonemployee trespassing. Hospitals attempt to maintain a tranquil environment that promotes healing by patients. Disruptions to that tranquility affect patients and may upset the patients' families and visitors. They may even interrupt the delivery of care. Thus, America's hospitals are especially interested in the potential impact that the Board's interpretation of the Act may have on employers' ability to limit access to their premises by nonemployee union representatives.

Hospitals also have expanded their roles beyond traditional delivery of care to patients to encompass broader initiatives that, consistent with their mission, promote health and wellness and other important benefits in their communities. Hospitals frequently provide space for activities – either under their own initiative or in partnership with community groups – that promote health and wellness, including hosting support groups and raising funds for health-related causes. Naturally *amici* and their members are concerned about any interpretation of the Act that could discourage these activities, such as by equating them with nonemployee union trespassing.

SUMMARY OF ARGUMENT

The AHA and ASHHRA oppose as unworkable the broad definition of property access "discrimination" stated in *Sandusky Mall Co.*, 329 NLRB 618, 623 (1999), *enf. denied*, 242 F.3d 682 (6th Cir. 2001). Instead, the more appropriate standard is that articulated in *Register Guard*, 351 NLRB 1110 (2007), *enf. den'd on other grounds*, 571 F.3d 53 (D.C. Cir. 2009).

In addition to general concerns about the *Sandusky Mall* standard applicable to all employers, it is uniquely impracticable for hospitals, for at least two reasons.

First, hospitals have long been recognized by both the Board and the courts to have a special patient-care mission that can be harmed by unchecked solicitation and distribution. Most notably, the Supreme Court has affirmed the importance of a tranquil environment in a hospital and the need to avoid unnecessary disruptions caused by organizational activities. To that end, the Court has upheld restrictions on solicitations and distribution – *even among hospital employees* – and has further stated that rules restricting appeals to patients and visitors would be justified by patient care concerns. To the extent that *Sandusky Mall* requires hospitals to "open the door" to trespassory union activities without regard to its impact on patient care, it conflicts with binding precedent.

Second, the *Sandusky Mall* analysis assumes that an employer is free to permit or prohibit any and all solicitation and distribution by outsiders and, therefore, must assume the risk of opening the door to organizational activities if it permits any third-party solicitation or distribution. Whatever the truth of this view as applied to other business sectors, it has no bearing on healthcare institutions. Hospitals' mission of providing health care long ago expanded beyond direct patient service to a variety of activities that promote health and well-being in the community. Unfortunately, the *Sandusky Mall* test would appear to give little to no attention to the *criteria* an employer (such as a hospital) applies in permitting third-party groups to solicit and distribute on its premises, and whether those criteria – rather than a blanket assumption of arbitrariness or anti-union animus – might explain why a hospital would choose to open its doors to those activities. And, if permitting charitable solicitations for health causes or allowing support groups to meet on campus is viewed as "opening the door" to union canvassing,

then hospitals are faced with a dilemma: either close their doors to important activities that benefit their communities, or permit unfettered union access to their campuses. By contrast, a *Register Guard* analysis would allow hospitals to distinguish between the activities, and, accordingly, is much more appropriate in analyzing claims relating to nonemployee union access.

Finally, we urge the Board, regardless of its holding in the instant case, to reaffirm its prior precedent recognizing that certain healthcare-related activities at hospitals do not open the door to union organizational activities.

ARGUMENT

I. THE DISCRIMINATION TEST OUTLINED IN THE *REGISTER GUARD* DECISION IS THE APPROPRIATE TEST TO APPLY IN THIS CASE

The AHA and ASHHRA urge that the Board adopt, for nonemployee property access discrimination claims, the same analysis as it adopted in *Register Guard* for claims of unlawful discrimination in accessing employer property. Under that analysis, an employer is permitted to exclude nonemployee union trespassers unless the employer engages in "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Id.* at 1119. Thus, an employer would not be prohibited "from drawing lines on a non-Section 7 basis" that regulate access by nonemployees. *Id.*

We fully concur with the legal analysis provided by the HR Policy Association ("HRPA") and the Society for Human Resources Manamagent ("SHRM") in support of this standard, and therefore will not repeat that analysis here. Instead, we will now turn to the reasons why adherence to the *Sandusky Mall* standard is especially harmful to hospitals, and why the *Register Guard* standard would better fit the special needs of hospitals.

II. SPECIAL CONSIDERATIONS APPLY TO ORGANIZATIONAL ACTIVITY IN HOSPITALS

As the U.S. Supreme Court, other federal courts, and the Board itself have long recognized, hospitals have a compelling interest in providing patients, their families, and friends with an environment conducive to the highest quality of medical care. Because of hospitals' patient-care mission, the law is clear that even organizational activity among employees themselves is presumptively harmful and may be completely banned in areas of a hospital where patients are most likely to witness such activities. It necessarily follows that solicitation conducted by nonemployees – particularly solicitation directed at hospital patients – should enjoy even less protection under the Act.

A. Protection Of Patient Care Has Long Served To Justify Special Restrictions On Organizational Activity In A Hospital Setting

Twenty-five years ago, the Supreme Court recognized that "'the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function.'" *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 495 (1978) (quoting *St. John's Hosp. and School of Nursing, Inc.*, 222 NLRB 1150, 1150 (1976)). That is so because:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activities, and where the patient and his family – irrespective of whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783 n.12 (1979) (quoting *Beth Israel*, 437 U.S. at 509 (Blackmun, J., concurring in judgment)).

In *Beth Israel*, the Court concluded that hospitals' focus on patient care justified the adoption of a unique set of rules to govern employee solicitation and distribution policies in

healthcare settings. Under these rules, a hospital may ban all solicitation in "strictly patient care areas" – even employee-to-employee communications – because any solicitation or distribution in those areas is presumptively unsettling to patients. In all other areas the hospital must show that the solicitation or distribution is likely to disrupt patient care or disturb patients. *Beth Israel*, 437 U.S. at 495. In reversing the Board in the later *Baptist Hospital* case, the Supreme Court held that "immediate patient care areas" must be deemed to include not only patient rooms and treatment or procedure areas, but also corridors and sitting rooms on patient floors. 442 U.S. at 789-90.

The Court advised in *Beth Israel* – and repeated verbatim in *Baptist Hospital* – that still other restrictions on "organizational activities" also might be appropriate: "Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar." *Beth Israel*, 437 U.S. at 508, *quoted in Baptist Hospital*, 442 U.S. at 790. To that end, the Court urged the Board to consider the needs of patients when assessing other restrictions on organizational activity. *Id.*

Indeed, in *Beth Israel*, the Court noted two types of additional rules that could survive scrutiny under the Act, since they would be narrowly tailored to avoid disturbance of patients. First, a policy forbidding employee solicitation of and distribution to *nonemployees* could be permissible, regardless of where those activities occur on a hospital's premises. *See id.* at 503 & n.23 (stating that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients" and suggesting such a rule might be permitted even in areas where employees could not be restricted from soliciting each other for purposes of union organizing). Similarly, a rule prohibiting leaving organizational

literature on a table could be justified, since it would accommodate a hospital's "legitimate desire to avoid having potentially upsetting literature read by patients." *Id.*[2]

B. The Risk That Union Activities May Disturb Patients Justifies Restrictions On Solicitation And Distribution, Particularly Solicitation And Distribution Conducted By And Directed At Nonemployees

It is because of hospitals' patient-care mission that the NLRB's rules governing hospital solicitation and distribution policies are already different from those governing other employers. The Board has determined – with the Supreme Court's approval – that hospitals can forbid employees from soliciting or distributing to other employees in patient-care areas because of the likelihood that merely witnessing such activity "'might be upsetting to the patients.'" *Beth Israel*, 437 U.S. at 495 (quoting *St. John's Hosp.*, 222 NLRB at 1150). It necessarily follows from this reasoning that hospitals should also be able to prohibit solicitation or distribution of materials to patients and their families and visitors – by definition a far more intrusive experience than witnessing employee-to-employee solicitation. This is clearly why the *Beth Israel* Court endorsed "a rule forbidding any distribution to or solicitation of nonemployees" as a "less restrictive" means of balancing patients' privacy and employees' speech interests in a nonpatient-care setting, where all solicitation and distribution activities are not automatically prohibited. Id. at 503 n.23; *see also Brockton Hosp. v. NLRB*, 294 F.3d 100, 104 (D.C. Cir. 2002) (citing footnote 23 with approval); *A.W Schlesinger Geriatric Ctr., Inc.*, 263 NLRB 1337, 1341 (1982) (same).

[2] The passage of time has also brought increased attention to other reasons why hospitals must control access to their premises. To take one example, Congress has, since *Beth Israel*, passed the Health Insurance Portability and Accountability Act (HIPAA), which directed the implementation of the HIPAA Privacy Rule. Under the Privacy Rule, hospitals are require to adopt and implement policies and procedures to protect patient protected health information from any intentional or unintentional use or disclosure. 45 C.F.R. § 164.530(i)(1). Specifically, they must implement "appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information." 45 C.F.R. § 164.530(c)(1). With respect to electronic health records, the HIPAA Security regulations require covered hospitals to "implement policies and procedures to safeguard the facility and the equipment therein from unauthorized physical access, tampering, and theft." 45 C.F.R. § 164.310(a)(2)(ii).

Prohibiting nonemployee solicitation and distribution – particularly activities directed at patients, families and other visitors while they are in a hospital – interferes only minimally with employees' Section 7 rights. Those same patients, families and visitors can be reached through alternative means when they are outside the hospital setting, making solicitation on a hospital campus unnecessary. For example, unions can publicize their causes through the Internet, news media publicity, and demonstrations on public property. Given these alternative avenues of communication, a prohibition on organizational activities by nonemployees in a hospital setting is not an unreasonable restriction on employees' Section 7 rights. *See Beth Israel*, 437 U.S. at 505 ("availability of alternative means of communication" may be important factor in hospital solicitation cases).

Accordingly, to apply the ALJ's holding below (concerning a grocery-store setting) to a hospital, and thereby permit nonemployees to solicit hospital patients and their loved ones while on hospital property, permits an outcome that the Supreme Court found unacceptable in *Beth Israel*.

The Board also should consider the types of messages that trespassing nonemployees are likely to disseminate. While "area standards" picketing and other types of communications directed at business patrons might sound innocuous enough, as if they raise only pedestrian concerns about prevailing wages or project labor agreements, the reality is much different, especially when directed at hospitals. Even without enhanced property access rights, unions targeting hospitals have not hesitated to play directly to the fears of patients. *See Sheet Metal Workers' Local 15 v. NLRB*, 491 F.3d 429, 438 (D.C. Cir. 2007) (union conducted "mock funeral" procession at neutral hospital, complete with "grim reaper" costumes, advising public that patronizing hospital would be "grave" mistake; union also distributed handbills alleging

medical malpractice by hospital); *St. Luke's Episcopal Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575, 578, 580-581 (8th Cir. 2001) (false and unprotected statements that hospital was "jeopardizing the health of mothers and babies" by delivering inadequate maternity care); *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir.1997) (bannering outside of hospital directed at construction contractor maliciously and falsely communicated that hospital was infested with rats); *Sutter Health v. UNITE HERE*, 113 Cal. Rptr. 3d 132 (Cal. Ct. App. 2010) (as part of secondary dispute, union distributed communications alleging that neutral hospitals used linens contaminated with "blood, feces, and harmful pathogens;" state court of appeals found sufficient evidence to justify claim for libel against union, even under demanding "actual malice" standard).[3] The *Sandusky Mall* test does not appear to give hospitals a meaningful ability to prevent such disturbing messages from being delivered on their own property.

No employer should be required to permit such disparagement of its products and services on its own property – even if it has previously allowed the sale of Girl Scout cookies or permitted fundraising to benefit the homeless or fight disease.[4] Hospitals, however, are uniquely

[3] Although these cases did not involve trespassing on an employer's property, there is no reason to believe that nonemployee union representatives, if permitted access to a hospital's property, would communicate any different message. Nor is there limiting language in *Sandusky Mall* that would permit an employer to make content-based decisions when deciding whether to permit trespassory union activities. In any event, there could be significant practical difficulties in enforcing such restrictions against trespassers, particularly if local law enforcement believes (correctly or not) that Board law would generally permit the trespassers to access the property and distribute literature.

[4] A rule compelling a property owner to provide a forum for such speech raises serious constitutional concerns. *See, e.g., Hurley v. Irish-American Gay Group*, 515 U.S. 557, 566 (1995) (holding that requiring a private parade organizer to include a group with whose message the parade organizer disagreed violated the First and Fourteenth Amendments); *Carey v. Brown*, 447 U.S. 455 (1980) (holding that a picketing law that selectively permitted labor picketing near a public school violated both the First and Fourteenth Amendments); *see also Ralph's Grocery Co. v. UFCW Local* 8, 113 Cal. Rptr. 3d 88 (Cal. 2010) (granting review to and depublishing lower-court decision regarding First Amendment bar to statute limiting remedies against union trespassing). When faced with such substantial constitutional questions, the Board should adopt a construction of the Act that avoids them. *See Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (Aug. 27, 2010) (reaffirming Board's adherence to canon of avoiding serious constitutional questions).

vulnerable to such disparagement because they risk disturbing patient care. *See Beth Israel*, 437 U.S. at n.23 (recognizing that a hospital might lawfully prohibit even the leaving of union literature on a table because visitors might see it). And it would be especially inappropriate to read into the Act an expansive right to trespass and engage in such activities, considering that nonemployee union organizers do not, on their own behalf, have any Section 7 rights at all. *See Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 206 n. 42 (1978) ("*Babcock* makes clear that the interests being protected by according limited-access rights to nonemployee, union organizers are not those of the organizers but of the employees located on the employer's property."). Accordingly, the Board should adopt a *Register Guard* analysis for claims of nonemployee access discrimination, which better respects the legitimate interests of hospitals and other employers.

C. Hospitals Should Not Be Discouraged By Board Law From Opening Their Doors To Third-Party Community Groups When Public Policy Favors The Provision Of Health And Wellness Benefits To The Communities That Hospitals Serve

The *Sandusky Mall* test is also ill-suited to the healthcare setting because it appears to assume that an employer (presumably including a hospital) would permit outside groups to access its facilities purely as a matter of grace or ideological preference. Under this view, an employer's subsequent decision to deny access to nonemployee union organizers would never be viewed as a legitimate restriction on union activity.

In the case of hospitals, however, there are significant and legitimate business reasons for permitting certain third-party groups or individuals access to their property. Most notably, the Nation's hospitals offer health and wellness benefits to the communities they serve. These programs frequently include offering space to host the meetings of various health-related organizations, and other activities on behalf of community groups. Representative examples include:

- Providing space for meetings of "12-step" groups such as Narcotics Anonymous and Alcoholics Anonymous;
- Hosting blood drives by the American Red Cross and other organizations;
- Providing space for CPR and Emergency Cardiovascular Care trainings conducted by the American Heart Association;
- Providing space for American Cancer Society "Look Good . . . Feel Better" workshops to cope with appearance-related side effects from chemotherapy and radiation treatments;
- Providing space for smoking cessation workshops sponsored by the American Cancer Society and other organizations;
- Providing space for Alzheimer's Association support groups;
- Hosting fundraisers for health-related causes ranging from disease prevention groups to summer camps for sick children; and
- Hosting community groups holding cultural heritage months, to facilitate health messaging to disadvantaged and medically underserved groups.

These are just examples of activities that take place at our Nation's hospitals every day, and which directly and legitimately support hospitals' missions to promote health and wellness. Not-for profit and investor-owned hospitals alike provide such benefits to their communities. *See* AHA, *AHA Guidance on Reporting of Community Benefit* 1 (2006), *available at* <http://www.aha.org/aha/content/2006/pdf/061113cbreporting.pdf>; Fed'n Am. Hospitals, Letters to the Honorable Charles E. Grassley, Chairman, dated July 20, 2006 and August 31, 2006, *available at* <http://finance.senate.gov/newsroom/chairman/download/?id=04512e3e-6883-45e0-9b34-298b781b1b75> *and* <http://finance.senate.gov/newsroom/chairman/download/

?id=14c70403-6b15-4d4c-a950-165e9cd82afc>.[5] And the need for such programs increases as obesity and other unhealthy lifestyle factors continue to threaten both individual health and overall community wellness. *See* AHA & Community Connections, *CEO Insight Series—The Importance of Community Partnerships* 16 (Dec. 2010).[6]

The *Sandusky Mall* standard, as applied to hospitals, would theoretically afford no deference to a hospital's decision to open their facilities to community service and health activities. Instead, it threatens to subsume all such activities into the category of "solicitation" or "distribution" activities that are indistinguishable from union organizational activities. As recognized in *Register Guard*, though, such an analysis ignores the many legitimate, non-Section 7 related reasons why organizational activities are analytically distinct from many other activities that might be permitted in the workplace. And such reasons should be given particular deference when the nonemployee union trespassers have no independent Section 7 interests at all.

Hospitals should not be required to choose between engaging third-party community groups or restricting access to nonemployee union representatives. The *Register Guard* test avoids this result and instead focuses – correctly and narrowly – on whether the employee has in fact discriminated along Section 7 lines.

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[5] Indeed, for non-profit hospitals, engaging with community groups can assist the hospital in supporting its tax-exempt status. *See* Rev. Rul. 69-545, 1969-2 C.B. 117 (requiring non-profit hospitals to provide community benefit). Providing funds and facility space to non-profit and community groups is a recognized form of community benefit. *See* United States Government Accountability Office, *Nonprofit Hospitals-Variation in Standards and Guidance Limits Comparison of How Hospitals Meet Community Benefit Requirements* (hereafter "*How Hospitals Meet Community Benefit Requirements*"), GAO-08-880, at App. II (2008).

[6] <http://www.caringforcommunities.org/caringforcommunities/content/10commconn-partnerships.pdf>.

III. IN NO EVENT SHOULD THE BOARD UNDERMINE ITS EXISTING PRECEDENT PERMITTING CERTAIN TYPES OF MISSION-RELATED SOLICITATION AND DISTRIBUTION ACTIVITIES WITHIN HOSPITALS

As argued above, the Board should adopt a conceptual framework for property-access "discrimination" claims that permits genuine "apples-to-apples" comparisons of the solicitation and distribution activities permitted by employers and the activities in which trespassing nonemployees seek to engage. In the view of the AHA and ASHHRA, the *Register Guard* test provides such a framework.

But even if the Board declines to adopt *Register Guard* as the deciding test in the instant case, we urge the Board not to overrule (through inadvertence or otherwise) its many prior decisions recognizing special considerations for solicitation and distribution in hospitals. As discussed above, the Supreme Court's *Beth Israel* and *Baptist Hospital* cases laid out significantly different rules for solicitation and distribution in hospitals than are permitted in virtually any other workplace.

In addition, and long before the adoption of *Register Guard*, the Board recognized that various types of health-related solicitations and distributions do not require hospitals to provide a forum for nonemployee union solicitation and distribution. In those cases, the Board found that health-related solicitations and distributions comprised an "integral part" of a hospital's necessary functions. *See Lucile Packard Children's Hosp.*, 318 NLRB 433, 433 (1995) (medical textbook sales), *enf'd*, 97 F.3d 583, 587–588 (D.C. Cir. 1996); *Cent. Solano County Hosp. Fdn., Inc.*, 255 NLRB 468 (1981) (solicitations by hospital guilds and philanthropies to solicit for the hospital's benefit); *Rochester Gen. Hosp.*, 234 NLRB 253, 259 (1978) ("Red Cross postering and blood collection in the hospital for the blood bank, postering of sales by a volunteer group which donates all the proceeds to the hospital, displaying of pharmaceutical products that doctors might prescribe and the hospital pharmacy might therefore purchase, and displaying of medical books

of interest to the doctors"); *George Washington Univ. Hosp.*, 227 NLRB 1362, 1374 n.39 (1977) ("white elephant" and Women's Board sales for the benefit of the hospital).

These cases demonstrate that the Board has previously shown special sensitivity to the unique mission and setting of a hospital. We urge the Board to ensure that any test that it adopts in the instant case will not undermine this precedent.

CONCLUSION AND SUMMARY OF RESPONSES TO QUESTIONS

For the reasons discussed above, the AHA and ASHHRA respectfully respond as follows to the questions posed by the Board in its Notice and Invitation to File Briefs:

1. *In cases alleging unlawful employer discrimination in nonemployee access, should the Board continue to apply the standard articulated by the Board majority in* Sandusky Mall Co., *above?*

The AHA and ASHHRA submit that the answer is no.

2. If not, what standard should the Board adopt to define discrimination in this context?

-and-

3. What bearing, if any, does Register Guard, *351 NLRB 1110 (2007), enf. denied in part 571 F.3d 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in nonemployee access cases?*

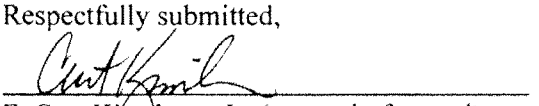
The Board should adopt the test of *Register Guard* in nonemployee access cases alleging "discrimination." As such: (1) employers could lawfully restrict nonemployee access to employer property unless it were established that (i) no reasonable alternative means of access to the employer's employees exist or (ii) the employer's rules discriminate against union-related activities; and (2) restrictions on nonemployee access to private property would violate the Act's non-discrimination rule only if the employer applied non-neutral criteria that resulted in dissimilar treatment for substantially similar nonemployee activities.

As applied to the instant case, the AHA and ASHHRA submit that adoption of the *Register Guard* test would compel dismissal of the complaint as to the remaining charges.

More generally, the AHA and ASHHRA urge the Board to consider the unique needs of healthcare institutions in evaluating claims of nonemployee access discrimination. It is difficult to conceive how the *Sandusky Mall* case can be applied consistent with those unique needs, and the Board should instead adopt a test better suited to the concerns of the Nation's hospitals.

Dated: January 7, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2011, a copy of the Brief of *Amici Curiae* American Hospital Association and American Society for Healthcare Human Resources Administration was filed electronically.

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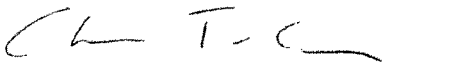

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