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**Bexar County Performing Arts Center Foundation
d/b/a Tobin Center for the Performing Arts and
Local 23, American Federation of Musicians.**
Case 16–CA–193636

August 23, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN,
KAPLAN, AND EMANUEL

The issue in this case is whether and when a property owner must grant access to the off-duty employees of an onsite contractor to engage in Section 7 activity. Specifically, we address whether the Respondent, the Tobin Center for the Performing Arts, had the right to prohibit off-duty employees of one of its licensees, the San Antonio Symphony, from accessing a sidewalk located on Tobin Center private property to engage in informational leafletting to the general public.¹ Contrary to the judge, we find the Respondent’s conduct lawful, and we dismiss the complaint.

I. INTRODUCTION

The Respondent, as the property owner, enjoys certain fundamental property rights derived from the common law and protected by the Fifth and Fourteenth Amendments to the United States Constitution. Except as limited by any covenants set forth in its deed, the Respondent generally has the right to control access to its property. It has the right to restrict the hours during which it grants that access. It has the right, even while otherwise granting access, to prohibit certain activities on its property, such as those that are disruptive to its patrons and guests. And most fundamentally, it has the right to utilize what the Supreme Court has characterized as “one of the essential

sticks in the bundle of property rights,” the right to exclude.²

The Board has recognized that “[a]ny rule derived from Federal labor law that requires a property owner to permit unwanted access to his property for a nonconsensual purpose necessarily impinges on the right to exclude.”³ For the property owner’s own employees, the Board has balanced, with Supreme Court approval, the interests of employees to engage in Section 7 activity on the property with the employer’s right to control the use of its property.⁴ Specifically, where the property owner’s own employees are already rightfully on the owner-employer’s real property, the balance to be struck is that between the employees’ Section 7 rights and the owner-employer’s managerial interests, rather than its property rights.⁵ However, with respect to nonemployees, the Supreme Court has stated that “the [National Labor Relations] Act drew a distinction ‘of substance’ between the union activities of employees and nonemployees.”⁶ Except in certain rare cases, Section 7 does not grant nonemployees the right to access private property to engage in union activities.⁷

This case, however, involves a different category of workers: off-duty employees of a licensee employer who are neither employees of the property owner nor, like nonemployees, utter strangers to the owner’s property. For purposes of an analysis under the Act, a licensee is indistinguishable from an onsite contractor. In *New York New York Hotel & Casino*, the Board held that off-duty employees of an onsite contractor who worked regularly and exclusively in a restaurant on the hotel and casino’s property had the right to access the owner’s property to engage in Section 7 activity unless the property owner could show that such activity would significantly interfere with the use of its property or could be restricted for another legitimate business reason, “including, but not limited to, the need to maintain production or discipline.”⁸ The Board majority reasoned that the contractor

¹ On December 5, 2017, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

² *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980). See also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (“[T]he right to exclude others [is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)); Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 730 (1998) (“[T]he right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the *sine qua non*. . . . Deny someone the exclusion right and they do not have property.”).

³ *New York New York Hotel & Casino*, 356 NLRB 907, 916 (2011), *enfd.* 676 F.3d 193 (D.C. Cir. 2012), *cert. denied* 133 S.Ct. 1580 (2013).

⁴ *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992).

⁵ *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976).

⁶ *Lechmere*, 502 U.S. at 537 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)).

⁷ *Id.* Those rare cases are when “the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels,” *id.* (quoting *Babcock & Wilcox*, 351 U.S. at 112), and when a property owner’s access rule discriminates against union solicitation. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978). Here, there is no allegation that the Respondent discriminated against union solicitation.

⁸ 356 NLRB at 918–919. The contractor employees at issue in *New York New York* worked regularly and exclusively on the property owner’s premises. The *New York New York* majority, however, omitted exclusivity from the standard it announced.

employees “worked on the property every day for a party that had both a contractual and a close working relationship with [the property owner].”⁹ In *Simon DeBartolo Group*, however, the Board expanded its holding in *New York New York* to require access by off-duty contractor employees even though they did not work exclusively on the owner’s property.¹⁰ The judge in this case relied on both decisions in finding a violation.

The majority in *New York New York* acknowledged that the contractor employees were neither equivalent to the property owner’s own employees nor to nonemployee union organizers.¹¹ They declared that they must, and did, give weight to property owners’ right to exclude.¹² And they claimed to be “mindful of the Supreme Court’s admonition that the ‘distinction between rules of law applicable to employees and those applicable to nonemployees’ is ‘one of substance.’”¹³ And yet, they arrived at a standard that contravened several guiding principles articulated in *Lechmere* as to the Section 7 rights of nonemployees of the property owner—i.e., off-duty employees of an onsite contractor. They granted these nonemployees of the property owner the same Section 7 access rights as the property owner’s own employees, subject to an exception that has never been found to apply and predictably never would be found to apply.¹⁴ This decision was followed by *Simon DeBartolo*, in which the Board greatly expanded the class of contractor employees entitled to Section 7 access rights by applying the *New York New York* standard to contractor employees who worked regularly but not exclusively on

the owner’s property. For the reasons explained below, we overrule both *New York New York* and *Simon DeBartolo*, which failed to properly accommodate the property owner’s property rights, including its right to exclude.

We hold that contractor employees are not generally entitled to the same Section 7 access rights as the property owner’s own employees. In so holding, we are being faithful to the teachings of the Supreme Court, which has repeatedly drawn a critical distinction “of substance” between the property owner’s own employees and nonemployees of the property owner.¹⁵ To state the obvious, employees of an onsite contractor are not employees of the property owner. The contractor employees’ right to access the property is derivative of their employer’s right of access to conduct business there. Off-duty employees of a contractor are trespassers and are entitled to access for Section 7 purposes only if the property owner cannot show that they have one or more reasonable alternative nontrespassory channels of communicating with their target audience. If there is at least one such channel, the Board will not compel the property owner to permit the contractor employees to infringe upon its property rights. Instead, the property owner will be free to assert its fundamental property right to exclude without conflicting with Federal labor law.¹⁶

In light of these principles, we hold that a property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless (i) those employees work both

⁹ Id. at 912 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978), and *Hudgens*, 424 U.S. at 522).

¹⁰ 357 NLRB 1887, 1888 & fn. 8 (2011). Although the Board in *New York New York* omitted exclusivity from its articulation of the test, the facts of that case would have permitted the Board to limit its scope to contractor employees who work both regularly and exclusively on the property owner’s premises. The Board rejected that option in *Simon DeBartolo*, making explicit that exclusivity is not required.

¹¹ 356 NLRB at 913 (“Just as we see differences between the [contractor] employees and the union organizers in *Lechmere*, so also do we recognize the distinction between persons employed by a contractor and the employees of the property owner itself.”).

¹² Id. at 916.

¹³ Id. (quoting *Babcock & Wilcox*, 351 U.S. at 113).

¹⁴ As stated above, with regard to the property owner’s own employees, the balance to be struck is one between the employees’ Sec. 7 rights and the property owner’s *managerial interests* rather than its property rights. *Hudgens*, 424 U.S. at 521 fn. 10. And it was the property owner’s managerial interests, not its property rights, that the *New York New York* majority placed in the balance against the Sec. 7 rights of contractor employees (who, to state the obvious, are nonemployees in relation to the property owner). This was most apparent where the Board majority balanced the contractor employees’ Sec. 7 access rights against the property owner’s “need to maintain production or discipline.” 356 NLRB at 918–919. But it was also clear from the fact that the majority balanced the contractor employees’ Sec. 7 access rights, not against the property owner’s *right to exclude*, and not even against its *right to control the use* of its property, but against the property owner’s *interest* in being free

from *significant interference* in the use of its property. Moreover, if it were not sufficiently clear from the foregoing that the *New York New York* majority was merely paying lip service to the distinction of substance that the Supreme Court requires be drawn between the access rights of employees and those of nonemployees, any possible uncertainty on this score was dispelled by the majority’s *acknowledgment* that it was granting contractor employees the same rights of access as the property owner’s own employees, subject to an abstract, theoretical exception that has never been and will predictably never be found to exist in fact. See *New York New York*, 356 NLRB at 919 (“We leave open the possibility that in some instances property owners will be able to demonstrate that they have a legitimate interest in imposing reasonable, non-discriminatory, narrowly-tailored restrictions on the access of contractors’ off-duty employees, *greater than those lawfully imposed on its own employees.*”) (emphasis added).

¹⁵ *Lechmere*, 502 U.S. at 537; *Babcock & Wilcox*, 351 U.S. at 113.

¹⁶ In *Nova Southeastern University*, the Board applied *New York New York* to find that a property owner unlawfully denied access to a contractor employee who had worked on the owner’s property on a “continuous, exclusive, and regular basis for years.” 357 NLRB 760, 761, 774 (2011). To the extent the Board did not consider reasonable alternative nontrespassory channels of communication, we overrule this decision as well. The D.C. Circuit enforced the Board’s Order in *Nova Southeastern University*. See 807 F.3d 308 (D.C. Cir. 2015). However, the court did so based on deference to the Board’s exercise of discretion to decide how to treat onsite contractor employees under the court’s decision in *New York New York, LLC v. NLRB*, 676 F.3d 193, 197 (D.C. Cir. 2012). Id. at 313. We exercise that same discretion here.

regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message. Further, we will consider contractor employees to work “regularly” on the owner’s property only if the contractor regularly conducts business or performs services there. In addition, we will consider contractor employees to work “exclusively” on the owner’s property if they perform all of their work for that contractor on the property, even if they also work a second job elsewhere for another employer.

Under this standard, which we apply retroactively to all pending cases, the off-duty Symphony employees were not entitled to access the Respondent’s property to engage in Section 7 activity. The Symphony employees indisputably did not work exclusively on the Respondent’s property, and their employer, the Symphony, did not regularly conduct business or perform services there because it only used the property for performances and rehearsals 22 weeks of the year. Moreover, the Symphony employees had a reasonable alternative nontrespassory channel of communicating their concerns to the theater-going public by leafleting on public property directly across the street from the Tobin Center, where they distributed several hundred leaflets. They also had access to their target audience through mass and social media. Accordingly, the Respondent lawfully denied the Symphony employees access to its property, and we will dismiss the complaint.

II. FACTS

The Respondent owns and operates the Tobin Center, which was built with public and private funding at the former site of the San Antonio Municipal Auditorium. The Respondent is responsible for creating a world-class experience for its patrons and guests while ensuring their utmost safety at all times. The Tobin Center is set off from the street by the Valera Plaza, which includes eight gradually rising steps leading up to the front entrance. At the edge of the Respondent’s private property are sidewalks used by pedestrians to traverse the grounds of the Tobin Center. Upon opening the center in 2014, the City of San Antonio conveyed to the Respondent the deed to the Tobin Center property, including the surrounding sidewalks. The deed provides that the property is to be used

“primarily for the [p]ublic [p]urpose.”¹⁷ The Respondent maintains a general rule prohibiting all solicitation on its private property, including the sidewalks. On occasions where a local bar or club has sought to hand out flyers on the Center’s private sidewalk, the Respondent has consistently removed those individuals from its property.

The Tobin Center houses three principal resident companies: the Symphony, Ballet San Antonio, and Opera San Antonio. Under the terms of use agreements, each of these companies has a licensor-licensee relationship with the Respondent. The Symphony’s Use Agreement with the Respondent provides that it is entitled to use the Tobin Center for performances and rehearsals 22 weeks of the year. The Symphony is a party to a collective-bargaining agreement with the American Federation of Musicians Local 23 (Union). Under that agreement, the Symphony employees work 30 weeks within a 39-week performance season from September to June.¹⁸ During the 2014–2015 season, 88 percent of Symphony employees’ rehearsals and performances were at the Tobin Center. The percentage decreased to 83 percent for the 2015–2016 season and even further to 79 percent for the 2016–2017 season.¹⁹ During the 2016–2017 season, the Symphony employees also performed at the Majestic Theater and other venues throughout San Antonio, such as churches and high schools. During the performance season, the Symphony employees also used the Tobin Center’s break room for breaks and union meetings. Some Symphony employees also stored large instruments there.

Although Ballet San Antonio occasionally uses live music performed by the Symphony at its ballets, it chose to use recorded music, as it had done on past occasions, for its February 17 through 19, 2017 production of Tchaikovsky’s *Sleeping Beauty*. The use of recorded music denied the Symphony’s employees the opportunity to perform the work. To raise awareness among Ballet San Antonio’s patrons about the use of recorded music, the Union decided to leaflet before the four weekend performances of *Sleeping Beauty*. The leaflet stated, “You will not hear a live orchestra performing with the professional dancers of Ballet San Antonio. Instead, Ballet San Antonio will waste the world class acoustics of the Tobin Center by playing a recording of Tchaikovsky’s score over loudspeakers.

¹⁷ The deed defines “primarily for the [p]ublic [p]urpose” as “use of the Performing Arts Center for performing and visual arts activities in San Antonio, Texas, including but not limited to musical, dance, and theatrical performances, rehearsals, art exhibitions, arts education, and similar activities, that are open to the general public.” Furthermore, it defines “open to the general public” as “accessible by the general public on a paid or unpaid basis, from time to time.”

¹⁸ During the 2016–2017 season, the Symphony furloughed its employees for 3 weeks because of financial difficulties.

¹⁹ In the judge’s decision, where he stated the percentages of rehearsals and performances that the Symphony employees had at the Tobin Center each performance season, the judge did not provide the total number of rehearsals and performances held at the Tobin Center out of the total number of rehearsals and performances across all venues. Instead, the judge’s percentages were based on the number of weeks in which at least one rehearsal or performance was held at the Tobin Center out of the total number of weeks that the Symphony held at least one rehearsal or performance at any venue.

You've paid full price for half of the product. San Antonio deserves better! DEMAND LIVE MUSIC!"

The Respondent's president, Michael Fresher, learned of the Union's plan to leaflet beforehand. At a February 14 meeting, he instructed his staff not to permit anyone to hand out leaflets, promote, or solicit on the Respondent's property. On the evening of February 17, some Symphony employees, prior to performing at the Majestic Theater a few blocks away, and several sympathizers crossed the street onto the sidewalk in front of the Tobin Center's main entrance at the edge of the Valera Plaza to start passing out their leaflets. There were about 12 to 15 leafleteers in total. The Respondent's event staff and San Antonio police officers, at the Respondent's direction, immediately informed both the Symphony employees and the sympathizers that they could not pass out the leaflets anywhere on the Respondent's property, including the sidewalks, and had to relocate across the street off the Tobin Center grounds. The Symphony employees and their sympathizers moved to public sidewalks across the street from the main entrance to the Tobin Center, where they distributed several hundred leaflets.

III. THE BOARD'S DECISIONS IN *NEW YORK NEW YORK* AND *SIMON DEBARTOLO*

In *New York New York*, off-duty employees of an onsite contractor who regularly and exclusively worked on the premises of the hotel and casino property owner sought access to distribute handbills, in support of their organizing effort, to members of the general public. The Board majority found that the contractor employees were neither employees of the property owner entitled to the full Section 7 access rights of the property owner's own employees nor nonemployees entitled to only the restrictive access rights for nonemployee union organizers under *Lechmere*.²⁰ Yet the majority accorded the contractor employees access rights to the property that were virtually identical to those enjoyed by the hotel and casino's own employees, as described above.²¹ The majority concluded that it would be inappropriate to afford such employees diminished access rights merely because of the location of

their workplace.²² The contractor's employees were neither "strangers" nor "outsiders" on the property owner's property because that was their regular workplace.²³ As to their protected activity, the majority found inconsequential that the contractor employees' intended audience was the general public, not their coworkers, because their effort to gain customer support in organizing rests at the core of what Congress sought to protect under Section 7.²⁴ As a result, the majority found that the Section 7 interests of the contractor's employees were "much more closely aligned" with those of the property owner's own employees than with those of nonemployee union organizers, and thus their access rights should be similarly aligned.²⁵

Notwithstanding this finding, the majority acknowledged that the off-duty contractor employees were trespassers, and they recognized the property owner's legitimate interest in preventing interference with the use of its property.²⁶ In balancing what it determined were the contractor employees' Section 7 rights against the property owner's private property rights and managerial interests, the Board majority concluded that the property owner must accommodate the contractor employees' Section 7 rights because it "generally has the legal right and practical ability to fully protect its interests through its contractual and working relationship with the contractor."²⁷ The only exceptions would be if the property owner showed that employees' Section 7 activity significantly interfered with its use of its property or where an exclusion from the property was justified by another legitimate business reason, namely, the need to maintain production or discipline.²⁸

In dissent, Member Hayes asserted that the Board majority's purported accommodation failed to adequately consider the owner's property rights.²⁹ He reiterated the Supreme Court's pronouncement of the critical distinction "of substance" between a property owner's employees, with whom it has a contractual relationship, and nonemployees, with whom it does not.³⁰ Contractor employees cannot be entitled to the same access rights as the property owner's own employees if that distinction is of any legal

²⁰ 356 NLRB at 911–912.

²¹ See *supra* fn. 14.

²² *Id.* at 912.

²³ *Id.* (quoting *Eastex, Inc.*, 437 U.S. at 571, and *Hudgens*, 424 U.S. at 522).

²⁴ *Id.* at 915.

²⁵ *Id.*

²⁶ *Id.* at 916.

²⁷ *Id.* at 918. Although the *New York New York* majority referred to accommodating the hotel and casino's "property rights and managerial interests," *id.* at 914, and they acknowledged the property owner's right to exclude, *id.* at 916, property rights disappear from sight at key points in the majority's analysis, as in the above-quoted passage that speaks of

the owner's ability to "fully protect its interests" (emphasis added); and most importantly, property rights do not figure in the standard the majority formulated, see *id.* at 918–919 (balancing contractor employees' Sec. 7 access rights against the property owner's managerial interests); see also *fn.* 14, *supra*.

²⁸ *Id.* at 918–919. The majority left open the possibility that a property owner may be able to demonstrate a "legitimate interest," other than preventing significant interference with the use of the property or maintaining production or discipline, for restricting access by off-duty contractor employees. *Id.* at 919. Again, however, the majority refers to the property owner's "interest," not its property rights.

²⁹ *Id.* at 921.

³⁰ *Id.* at 922.

significance.³¹ Moreover, Member Hayes recognized that, in appealing to the public, the contractor employees exercised a weaker Section 7 right than if they were communicating with their coworkers.³² He also pointed out that the majority disregarded its earlier precedent finding that contractor employees have Section 7 access rights only when they work exclusively on the property owner’s property and that, by doing so, the Board majority had dramatically expanded the class of contractor employees entitled to access a property owner’s property.³³ Lastly, Member Hayes criticized the majority for failing to consider whether the contractor employees had a reasonable alternative means of communicating their message, which is essential to determining the degree of access necessary to properly accommodate the contractor employees’ Section 7 rights and the property owner’s property rights, without requiring the former to consistently outweigh the latter.³⁴

In light of the Board’s discretion on the issue, the D.C. Circuit enforced the Board’s Order.³⁵ The court had previously noted that no Supreme Court case had decided whether the term “employee” extended to the relationship between an employer and an onsite contractor’s employees.³⁶ In the absence of contrary precedent, the court held that the Board was within its discretion to determine whether, and under what circumstances, off-duty employees of onsite contractors are entitled to access a third-party property owner’s property to engage in Section 7 activity.³⁷

Soon after issuing *New York New York*, the Board in *Simon DeBartolo* applied its *New York New York* holding to off-duty contractor employees who worked regularly but not exclusively on the property owner’s property.³⁸ The Board noted that under *New York New York*, the property owner could not prohibit off-duty contractor employees from engaging in protected conduct on its property that it could not lawfully restrict its own employees from engaging in unless it could show that the greater restrictions were justified by a heightened risk of disruption or interference with its use of its property.³⁹ The Board determined that the contractor employees’ regular workplace was the property owner’s property, even though they may

have worked at a different location on weekends, because their work at the property owner’s property was “more likely than not” greater than “fleeting or occasional.”⁴⁰ Because the property owner failed to show a heightened risk of disruption to the use of its property by the off-duty contractor employees’ leafleting, the property owner could not exclude them.⁴¹

Member Hayes dissented. He again noted that the Board majority failed to observe the critical distinction between the access rights of a property owner’s own employees and nonemployees, such as the contractor employees.⁴² Indeed, the Board majority was vesting contractor employees with the same broad access rights enjoyed by the property owner’s own employees.⁴³ The Board majority gave no significance to the property owner’s lack of any employment relationship with the contractor employees so long as they were employed by someone and had a “regular” presence on the property.⁴⁴

In addition, as he foreshadowed in his *New York New York* dissent, Member Hayes called out the Board majority for repudiating the Board’s prior precedent holding that off-duty contractor employees must work “regularly” and “exclusively” on a property owner’s property to enjoy greater Section 7 access rights than nonemployees.⁴⁵ He noted that merely requiring a contractor employee to “regularly work” on the property is “far too imprecise and ambiguous to serve as a reliable indicator of where to draw the line on access rights” and would grant access to contractor employees with “only a fleeting working relationship” with the property.⁴⁶ Member Hayes also argued that the contractor employees’ Section 7 right to access the property was entitled to less weight because they were leafleting the general public who patronize the property owner and its tenants, not the contractor that employed them.⁴⁷ In addition, he asserted that the Board majority had failed to accommodate the property owner’s property rights by not assessing whether the contractor employees had reasonable alternative nontrespassory means of communicating their message.⁴⁸

³¹ Id.

³² Id.

³³ Id. at 923. Again, the facts of *New York New York* would have permitted the Board, in a subsequent decision, to limit the scope of that decision to contractor employees who work both regularly and exclusively on another’s property, but Member Hayes correctly pointed out that the standard announced in *New York New York* omitted the requirement of exclusivity.

³⁴ Id. at 923–924.

³⁵ *New York-New York, LLC v. NLRB*, 676 F.3d 193, 197 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013).

³⁶ Id. at 196 (quoting *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002)).

³⁷ Id.

³⁸ 357 NLRB at 1888 & fn. 8.

³⁹ Id. at 1888.

⁴⁰ Id. at 1888 fn. 8.

⁴¹ Id. at 1889.

⁴² Id. at 1891.

⁴³ Id.

⁴⁴ Id.

⁴⁵ The majority found that requiring exclusivity “is too strict a standard.” Id. at 1888 fn. 8.

⁴⁶ Id.

⁴⁷ Id. at 1893.

⁴⁸ Id.

IV. THE JUDGE'S DECISION

The judge, relying on *New York New York* and *Simon DeBartolo*, found that the Respondent violated Section 8(a)(1). The judge found immaterial the factual distinctions between this case and *New York New York*, including that the Symphony employees were not engaging in organizational leafleting but sought to appeal to the patrons of another one of the Respondent's licensees. In addition, the judge rejected the Respondent's assertion that, under *New York New York*, it had legitimate business reasons for prohibiting the Symphony employees from distributing the leaflets on the Respondent's property—specifically, to maintain world-class ambiance and decorum for its patrons and guests and to avert any potential security issues.

V. POSITIONS OF THE PARTIES

On exception, the Respondent asserts that *New York New York* was wrongly decided. It claims that the decision failed to account for a property owner's right to protect its business interests when individuals attempt to involve the property owner's patrons and guests in a dispute with a separate entity. The Respondent notes that the Supreme Court has long recognized the importance of protecting private property rights by causing as little destruction to them as possible, even when balanced against employees' Section 7 rights. The Respondent stresses that the Supreme Court drew a categorical distinction in *Babcock & Wilcox* that it reiterated in *Lechmere* between the union activities of employees and nonemployees and that no balancing of Section 7 rights is required where the union activity at issue is by nonemployees. The Respondent argues that the Supreme Court has consistently repudiated the Board's attempts to broaden nonemployee access to private property in furtherance of Section 7 rights at the expense of a property owner's right to exclude and to defend its property from intrusion by trespassers. The Respondent hypothesizes that the Board's continued adherence to *New York New York* would prevent it and similarly situated employers from ever being able to exclude nonemployees from their private properties.

The General Counsel contends in its answering brief that there is no basis to overturn *New York New York* because it is not contrary to Supreme Court precedent. The General Counsel asserts that *Lechmere* concerned individuals with no relationship to the property owner, whereas *New York New York* concerned employees who seek to exercise their own Section 7 rights at their regular worksite, even if the property is not owned by their employer. The General Counsel disputes the Respondent's characterization of *New York New York* as preventing a property owner

from barring all nonemployees from its property, as *New York New York* applies only to those who regularly work there. The Charging Party also asserts that *New York New York* should not be overruled and notes the Supreme Court's denial of certiorari when presented with the opportunity to consider the Board's decision in that case.

VI. DISCUSSION

The Supreme Court in *Lechmere* articulated three guiding principles regarding access to private property to engage in Section 7 activity that we rely upon here. First, employees' Section 7 rights are not absolute. When Section 7 rights conflict with a property owner's property rights, an accommodation between the two "must be obtained with as little destruction of one as is consistent with the maintenance of the other."⁴⁹ Second, in reaching an accommodation, the Board must balance the "nature and strength" of the respective Section 7 rights against the private property rights of the property owner.⁵⁰ Third, and most importantly to this case, when Section 7 rights infringe on private property rights, the Court has labeled the distinction between the union activities of employees versus those of nonemployees as one "of substance."⁵¹ This distinction between employees and nonemployees necessitates that, although employees of an onsite contractor enjoy some Section 7 access rights, they are weaker than those of the property owner's own employees. Because the "nature and strength" of the contractor employees' Section 7 rights are diminished, the extent to which the contractor employees must be permitted to infringe upon private property rights is inherently more restricted.

The D.C. Circuit has held that whether and when a property owner must grant access to the off-duty employees of an onsite contractor for Section 7 activity is left to the Board's discretion.⁵² We disagree with the choices made by the Board in exercising that discretion in *New York New York* and *Simon DeBartolo*. We therefore take this opportunity to overrule those cases and to announce a new standard that we find is more consistent with the Supreme Court precedent described above regarding access to private property by contractor employees to engage in Section 7 activity. We believe our new standard properly accommodates the competing rights at issue here: off-duty, onsite contractor employees may access a property owner's property to engage in Section 7 activity where they have a sufficient connection to the property owner by working regularly and exclusively on the property, and the contractor employees do not have access to reasonable alternative nontrespassory means of communicating their message.

⁴⁹ *Lechmere*, 502 U.S. at 534 (quoting *Babcock*, 351 U.S. at 112).

⁵⁰ Id. at 538 (quoting *Hudgens*, 424 U.S. at 522).

⁵¹ Id. at 537 (quoting *Babcock*, 351 U.S. at 113).

⁵² *New York-New York, LLC*, 676 F.3d at 196.

The Board majority in *New York New York* claimed that it was mindful of the Supreme Court’s critical distinction “of substance” between employees and nonemployees with regard to Section 7 access rights.⁵³ The *New York New York* majority even recognized the Court’s repeated instruction to the Board to accommodate Section 7 rights and private property rights so as to cause as little destruction to one as is consistent with the maintenance of the other.⁵⁴ But the majority’s words ring hollow in light of its holding, which drew only the faintest of distinctions between the access rights of a property owner’s own employees and those of contractor employees who work on the property.⁵⁵ *New York New York* and *Simon DeBartolo* permit off-duty contractor employees to disregard the owner’s private property rights and its fundamental right to exclude. And they completely ignore whether off-duty contractor employees have an alternative nontrespassory means of communication to accomplish their objective without infringing on the owner’s private property rights.

We therefore conclude that the Board majorities in *New York New York* and *Simon DeBartolo* failed to arrive at an accommodation that causes as little destruction to private property rights as is consistent with maintaining employees’ Section 7 rights. The Section 7 access rights of those who have an employment relationship with a property owner are substantively different from those who do not, including contractor employees whose only connection with the owner is that they work on its property. Even if contractor employees work “regularly” on the property owner’s property, they lack an employment relationship with the property owner. And some “regular” employees may be little more than “strangers” to or “outsiders” on the property.⁵⁶ This is equally true where the contractor that the employees work for does not itself regularly conduct business or perform services on the property owner’s property.

We recognize that contractor employees with a significant work connection to the property owner’s property—those who regularly and *exclusively* work on a property owner’s property for a contractor that regularly conducts business or performs services for the property owner—may have some Section 7 access rights, albeit less than those of a property owner’s own employees. But even

then, a property owner’s property rights should only have to yield to a contractor employees’ Section 7 rights if the contractor employees have no other reasonable alternative nontrespassory means of communicating their message. If there is an option that allows off-duty contractor employees to communicate their Section 7 message without infringing on the property owner’s property rights, the Board should embrace that accommodation—not disregard it. Under those circumstances, it is simply not necessary to invade private property rights in order to make room for the exercise of Section 7 rights by off-duty contractor employees. Requiring the property owner to cede its right to exclude would cause greater destruction of property rights than is necessary to the maintenance of Section 7 rights, contrary to the Supreme Court’s authoritative teaching.

The new standard we announce today ensures a proper weighing of both rights the Board is responsible for accommodating. It acknowledges the Section 7 access rights of off-duty contractor employees with a sufficient connection to the property at which they regularly and exclusively work. And it ensures that, where the contractor employees have alternative nontrespassory means to communicate their message, the Board will not require an unwarranted infringement of a property owner’s property rights.

A. *The Critical Distinction “of Substance” Between Contractor Employees and a Property Owner’s Own Employees*

We begin our analysis by recognizing, as the Supreme Court has repeatedly done, the critical distinction “of substance” between employees and nonemployees in the context of Section 7 access rights to a property owner’s property.⁵⁷ It is self-evident that contractor employees are not employees of the property owner. When a property owner itself employs employees covered under the Act, the owner-employer relinquishes, to a certain degree, its control over its real property to accommodate its employees’ right, under Section 7 of the Act, to engage in union or other protected concerted activity, subject to the owner-employer’s managerial interests in maintaining production and discipline.⁵⁸ The same is not true where

⁵³ 356 NLRB at 913.

⁵⁴ *Id.*

⁵⁵ See fn. 14, *supra*.

⁵⁶ For example, a contractor employee who stocks vending machines once a week at the property owner’s facility works “regularly” on the property, particularly under the *Simon DeBartolo* definition of “regularly” as “more likely than not” greater than “fleeting or occasional,” 357 NLRB at 1888 fn. 8; but he is essentially a stranger to the property for purposes of off-duty access.

⁵⁷ *Babcock & Wilcox*, 351 U.S. at 112–113 (“The Board failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees. The distinction is one of substance.”) (internal footnote omitted); see also *Lechmere*, 502 U.S. at 537 (“In *Babcock*, as explained above, we held that the Act drew a distinction ‘of substance’ between the union activities of employees and nonemployees.”) (internal citation omitted).

⁵⁸ See *Hudgens v. NLRB*, 424 U.S. at 521 fn. 10 (recognizing that the employer’s managerial interests, rather than its property interests, are

contractor employees seek to engage in Section 7 activity on the property owner's property while off duty. The property owner has neither hired nor vetted the contractor employees. The owner may not have the same confidence in the integrity and self-discipline of contractor employees that it has in its own employees, and it may reasonably be concerned about the security of its property and the safety of persons rightfully thereon when contractor employees are off duty and not being supervised by the onsite contractor. Indeed, the property owner may have little, if any, idea who the contractor employees are. Although contractor employees, unlike nonemployees, are not complete strangers to the property, their diminished contact with the owner and its property should reasonably correspond to lesser rights of access to the property when off duty than the property owner's own employees enjoy.

B. Working Regularly and Exclusively on the Property Owner's Property

Prior to *New York New York*, the Board had granted Section 7 access rights to contractor employees only if they worked both regularly and exclusively on a property owner's property.⁵⁹ Because of their recurrent presence on the property owner's property, the contractor employees who worked there regularly and exclusively were not "strangers" to or "outsiders" on the property owner's property.⁶⁰ In *Postal Service*, the Board noted that "[w]hen employees work regularly and exclusively on the premises of another employer, there is no other place at which they can exercise their Section 7 rights."⁶¹

Even though the contractor employees in *New York New York* worked regularly and exclusively on the property owner's property, the Board majority omitted the exclusivity requirement from its access test.⁶² In *Simon DeBartolo*, the Board applied its expanded *New York New York* access standard to nonemployees of the property owner

involved when employees already rightfully on the employer's property seek to engage in organizational activity).

⁵⁹ See *Postal Service*, 339 NLRB 1175, 1177–1178 (2003); *Gayfers Department Store*, 324 NLRB 1246, 1250 (1997); *Southern Services*, 300 NLRB 1154, 1155 (1990), enf. 954 F.2d 700 (11th Cir. 1992). Notably, the contractor employees in *Gayfers* and *Southern Services* were not trespassing on the property owner's property because they were leafleting during their lunchbreak or immediately preceding work, respectively, times during which the contractor employees were already rightfully on the property owner's property pursuant to their employment relationship. The Board in *New York New York* overruled the rationales in *Gayfers* and *Southern Services* because those cases failed to distinguish between a contractor's employees and a property owner's own employees. 356 NLRB at 913 fn. 27. Nonetheless, the Board in *New York New York* disregarded how both *Gayfers* and *Southern Services*, despite the flaws in their analyses, provided that contractor employees have a Sec. 7 access right only when they work exclusively on the property owner's property. Moreover, as discussed above, although the *New York New York* majority paid lip service to the difference between a property owner's own employees and those of a contractor doing business on the

who worked regularly, but not exclusively, on the property owner's property.⁶³

We agree with the holding of the Board's decisions prior to *New York New York* that only contractor employees who regularly and exclusively work for a contractor on a property owner's property have some Section 7 access rights. The removal of the exclusivity requirement in *New York New York* made off-duty access to the owner's property possible for a myriad of contractor employees, some of whom spend only a small fraction of their workweek on the property owner's property. As Member Hayes observed in his *Simon DeBartolo* dissent, regularity in working on the property "alone is far too imprecise and ambiguous to serve as a reliable indicator of where to draw the line on access rights."⁶⁴

As to working regularly on the owner's property, it is axiomatic that contractor employees can only work regularly on the property if the contractor they work for regularly conducts business or performs services there. Where a contractor conducts business or performs services only occasionally, sporadically, or on an ad hoc basis, it is simply impossible to find that the contractor's employees work regularly on the property owner's property.

C. Reasonable Alternative Nontrespassory Means of Communication

Having determined which off-duty contractor employees have a sufficient connection to a property owner's property to have some access rights to engage in Section 7 activity there, the Board must still consider if those contractor employees have a reasonable alternative means of communicating their Section 7 message without causing

property, the access standard the majority adopted for the latter was all but identical to the standard that applies to the former.

⁶⁰ See *Southern Services*, 300 NLRB at 1155 (contractor employee who regularly and exclusively worked on property owner's property was not a "stranger" to the property or to her fellow contractor employees on the property whom she was soliciting).

⁶¹ 339 NLRB at 1178. However, in that case, the Board found that a contractor employee who worked regularly—but not exclusively—on the property owner's property was governed by the same access rights as nonemployees under *Lechmere*.

⁶² 356 NLRB at 923 (Member Hayes dissenting). In response to Member Hayes' dissent, the Board majority in *New York New York* stated only that *Postal Service* was "clearly distinguishable on its facts" without addressing the omission of the exclusivity requirement from its rationale. Id. at 913 fn. 27. This is particularly notable because the contractor employees in *New York New York* worked exclusively on the property owner's property. Id. at 908.

⁶³ *Simon DeBartolo*, 357 NLRB at 1888 fn. 8 (finding exclusivity standard too strict).

⁶⁴ 357 NLRB at 1892.

any destruction to the property owner’s property rights.⁶⁵ In *Babcock & Wilcox*, the Supreme Court concluded that, as to nonemployees, Section 7 “does not require that the employer permit the use of its facilities for organization when other means are readily available.”⁶⁶ The Supreme Court reiterated this point in *Lechmere*, where it held that Section 7 does not authorize trespass by nonemployees where “reasonable alternative means of access exist.”⁶⁷ If the property owner can prove that the contractor employees have reasonable alternative means for communicating their message, there is no reason for the Board to require the property owner to cede its fundamental right to exclude by compelling the property owner to grant access to contractor employees with whom it has no employment or other contractual relationship.⁶⁸

The Supreme Court has also recognized that the Section 7 right to access private property to communicate with the general public is weaker than if access is sought to communicate with the employees who work on the property. In *Sears, Roebuck & Co.*, the Supreme Court stated that access to private property to engage in area-standards picketing is “a category of conduct less compelling than that for trespassory organizational solicitation.”⁶⁹ The Supreme Court specified that appeals to the general public are not an attempt to engage in the organizational right “at the very core” of Section 7.⁷⁰ A message intended for the general public may have nothing to do with the working

conditions of the employees working at that time on the property owner’s property. In the context of off-duty contractor employees in particular, their message may not even be aimed at influencing their own employer but may target a third party, such as the property owner or another contractor of the property owner. In such circumstances, the contractor employees’ Section 7 access rights are even more attenuated and are entitled to even less weight.

In *Lechmere*, the Supreme Court ruled that infringement of a property owner’s property rights is only permissible where nontrespassory means of communication would be unavailable because the target audience is “isolated from the ordinary flow of information that characterizes our society.”⁷¹ In light of the Supreme Court’s holding, the Board in *Oakland Mall II* found that, where the Section 7 right involves informational leafleting of the general public, the use of mass media, including newspapers, radio, and television, could be a reasonable alternative nontrespassory means of communication.⁷²

Applying that same analysis here, when off-duty contractor employees seek to access a property owner’s property to communicate to the general public, the property owner may exclude the contractor employees if they can effectively communicate their message through nontrespassory means, which may include newspapers, radio, television, billboards, and other media through which is transmitted “the ordinary flow of information that

⁶⁵ See *Lechmere*, 502 U.S. at 534 (noting that the Supreme Court had previously held that “nonemployee organizers cannot claim even a limited right of access to a nonconsenting employer’s property until [a]fter the requisite need for access to the employer’s property has been shown”) (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972)).

⁶⁶ 351 U.S. at 114.

⁶⁷ 502 U.S. at 537.

⁶⁸ We agree with Member Hayes’ dissent in *New York New York* that the burden is appropriately placed on the property owner to show that reasonable alternative means of communication exist. 356 NLRB at 924. Because the contractor employees who work regularly and exclusively on the property owner’s property have some Sec. 7 access rights and are not utter “strangers” to the property like nonemployee union organizers, it is reasonable to place the burden on the property owner to show that reasonable alternative means of communication exist, not on the General Counsel to show that they do not. Doing so gives greater weight to the Sec. 7 access rights of contractor employees who work regularly and exclusively on a property owner’s property than to the access rights of a nonemployee union organizer. See *Lechmere*, 502 U.S. at 540–541 (placing burden on union to prove the existence of obstacles to communicating its organizational message to employees). At the same time, the weight given to the contractor employees’ Sec. 7 access right is less than that accorded the Sec. 7 access right of the property owner’s own employees, where alternative means of communication are not considered.

⁶⁹ 436 U.S. at 207 fn. 42. This is in accordance with the Supreme Court’s acknowledgment in *Hudgens* that certain Sec. 7 rights are not as strong as others and that some are more likely than others to require yielding to a property owner’s private property rights. 424 U.S. at 522 (“The locus of that accommodation [between § 7 rights and private

property rights] may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.”).

⁷⁰ 436 U.S. at 207 fn. 42; see also *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994) (“The targeted audience was not [the property owner’s] employees but its customers. Under the § 7 hierarchy of protected activity imposed by the Supreme Court, non-employee area-standards picketing warrants even less protection than non-employee organizational activity.”) (emphasis in original).

⁷¹ 502 U.S. at 540. The Supreme Court stated that “direct contact, of course, is not a necessary element of ‘reasonably effective’ communication; signs or advertising also may suffice.” *Id.*; see also *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (recognizing that alternative nontrespassory means of communicating to the general public existed through advertisements, mailings, and billboards).

⁷² 316 NLRB at 1163–1164. The D.C. Circuit stated that, in the context of reasonable alternative nontrespassory means of communication, it was proper for the Board to require a “‘show[ing] that the use of the mass media . . . would not be a reasonable alternative means for the Union to communicate its message.’” *Food & Commercial Workers, Local 880 v. NLRB*, 74 F.3d 292, 300 (D.C. Cir. 1996) (quoting *Oakland Mall II*, 316 NLRB at 1163). In accordance with the Supreme Court’s decision in *Lechmere*, the Board in *Oakland Mall*, a case that involved nonemployee access, placed the burden on the General Counsel to demonstrate the absence of alternative nontrespassory means of communication. *Id.* In cases involving contractor employees who work regularly and exclusively on the property, we place the burden on the property owner to demonstrate the availability of such means for the reasons stated in fn. 68, *supra*.

characterizes our society.” Here, off-duty contractor employees were able to reasonably communicate their message by leafleting on public property adjacent to the property owner’s property. In certain instances, such alternative means could include social media, blogs, and websites, which are increasingly used by employees to spread information of interest within a community.⁷³ On the other hand, where off-duty contractor employees would not have a reasonable alternative nontrespassory means for reaching their audience, the property owner must afford them only the least intrusive means of access to its property.⁷⁴

D. Retroactive Application of the New Standard

When the Board announces a new standard, a threshold question is whether the new standard may appropriately be applied retroactively, or whether it should be applied only in future cases. In this regard, “[t]he Board’s usual practice is to apply new policies and standards retroactively ‘to all pending cases in whatever stage.’”⁷⁵ Only when it would create a “manifest injustice” would the Board not apply a new rule retroactively.⁷⁶ The Supreme Court has indicated that “the propriety of retroactive application is determined by balancing any ill effects of retroactivity against ‘the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.’”⁷⁷

We do not envision that any ill effects will result from applying the standard we announce here to this case and to all pending cases. No party that has acted in reliance on the *New York New York* standard will be found to have violated the Act as a result of our decision today. On the other hand, because the Board’s standard in *New York New York* failed to properly accommodate Section 7 rights and private property rights, failing to apply our new standard retroactively would “produc[e] a result which is contrary to a statutory design or to legal and equitable principles.”⁷⁸ It would be imprudent and inequitable, for example, to require a property owner that violated the *New York New York* standard to post a notice stating that it will cease and desist from denying contractor employees access to its property when it may never have had a legal obligation to grant them access in the first place. Accordingly, we find

no “manifest injustice” in applying this new standard to this case and all pending cases.

E. Application of the New Standard to the Symphony Employees

The Respondent is responsible for providing patrons and guests visiting or attending a performance at the Tobin Center with a world-class experience in a safe and secure setting. In furtherance of that purpose, the Respondent maintains a general rule prohibiting solicitation on its private property. Even though the Respondent keeps the sidewalk open for use by the general public, the Respondent does not permit members of the general public to solicit or distribute there. By enforcing its generally applicable prohibition against the Symphony employees, even though they occasionally worked on the Respondent’s property, we find that the Respondent lawfully denied access to the off-duty Symphony employees who sought access for the purpose of distributing leaflets to the public.

There is no question that the Symphony employees in this case are not employees of the Respondent. Their sole employer is one of the Respondent’s licensees, a completely separate entity from the property owner. Therefore, our first inquiry is whether the Symphony employees worked on the Respondent’s property regularly and exclusively. The record clearly shows they did not.

First, the Symphony employees did not work on the Respondent’s property exclusively. They also performed at the Majestic Theater and other venues throughout San Antonio, such as churches and high schools. During the 2016–2017 performance season, only 79 percent of the Symphony employees’ performances and rehearsals were held on the Respondent’s property. In fact, the Symphony employees who sought to leaflet on the Respondent’s property on February 17 had a performance that very night at the Majestic Theater.

In addition, the Symphony employees did not “regularly” work on the Respondent’s property because the Symphony itself did not regularly conduct business or perform services there. The Symphony’s performance season lasted only 39 weeks of the year. The Symphony employees typically worked for 30 of those weeks—27 weeks in the 2016–2017 performance season because of a furlough. And the Symphony itself, which would include the

⁷³ See Christine Neylon O’Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 *Charleston L. Rev.* 411, 412–413 (2014) (recognizing that employees’ use of technology, including “Facebook, tweeting, texting, blogging, uploading videos on YouTube, using Instagram, Snapchat, Pinterest, LinkedIn, Wikis, and more,” has changed the work world over the past thirty years).

⁷⁴ The Board has long held that off-duty employees of the property owner have a right of access to the exterior, nonworking areas of the employer’s property. *Tri-County Medical Center*, 222 NLRB 1089

(1976). As noted above, contractor employees who have no employment relationship with the property owner should be afforded less access than the owner’s employees.

⁷⁵ *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)).

⁷⁶ *Id.*

⁷⁷ *Id.* (quoting *Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

⁷⁸ *Chenery Corp.*, *supra*.

Symphony employees, was entitled to use the Respondent's property for only 22 weeks of the year. For well over half the year, the Symphony is not present on the Respondent's property. Thus, there is no basis to find that the Symphony employees worked regularly on the Respondent's property. Moreover, the Symphony was not conducting business or performing services on the day when the Symphony employees sought to leaflet.

We could end the inquiry here, having determined that the Symphony employees did not work regularly and exclusively on the Respondent's property. But even assuming arguendo that they did, it is clear that they had other alternative nontrespassory channels of communication to reach the general public. The Symphony employees were able to leaflet on a public sidewalk across the street from the Respondent's property—and they did, distributing several hundred leaflets. Because they sought to communicate with the general public, the Symphony employees also had other channels they could have used to convey their message, including newspapers, radio, television, and social media, such as Facebook, Twitter, YouTube, blogs, and websites. The Symphony employees did not have to infringe on the Respondent's private property rights, including its fundamental right to exclude, for their message to be communicated.

Accordingly, because the Respondent lawfully informed the off-duty Symphony employees whom it did not employ that they could not engage in informational leafleting on its private property, we find that the Respondent did not violate Section 8(a)(1).

⁷⁹ As a preliminary matter, we again reject our colleague's oft-repeated charge that we wrongfully overrule precedent here without public notice and an invitation to file briefs. Nothing in the Act, the Board's Rules, the Administrative Procedures Act, or procedural due process principles requires the Board to invite amicus briefing before reconsidering precedent, and the Board has frequently overruled or modified precedent without supplemental briefing. See, e.g., *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing). Our colleague offers

VII. RESPONSE TO DISSENT

Much is made by our dissenting colleague about our reliance on the Supreme Court's decision in *Lechmere*.⁷⁹ We recognize that *Lechmere* does not directly control this case. But our decision today is rightly informed by the principles articulated by the Court decades ago, and reiterated in *Lechmere*, for determining when a property owner's property rights have to yield to the Section 7 rights of individuals that it does not employ. The D.C. Circuit has also said that, in the absence of controlling Court precedent, the issue as to the status of onsite contractor employees is "committed primarily to the Board's discretion under the Act."⁸⁰ Today, we also properly exercise our discretion, relying on fundamental labor law principles articulated in the Court's decisions, in reevaluating the accommodation reached by the *New York New York* Board. We have concluded that there is an accommodation of rights that is more faithful to the Court's guiding principles than was made by the *New York New York* Board.⁸¹

The dissent asserts that there is no basis for limiting Section 7 access rights only to employees who work exclusively on the property owner's property. As noted above, however, the dissent fails to acknowledge that exclusivity was a traditional consideration in cases involving the access rights of contractor employees until the majority in *New York New York* deleted it. We agree with the Board's traditional conclusion, and for the reasons it has traditionally articulated, that only those contractor employees with a sufficient connection to the property owner's property—a connection established by regular and exclusive work there—should have access rights to the owner's property.⁸²

post hoc justification in each of the cited cases for not inviting briefing, but that is beside the point. As stated above, the Board had no legal obligation to justify the failure to invite briefing in those or any of the many other cases over the decades in which it has overruled precedent without amicus briefing.

⁸⁰ *New York-New York, LLC*, 676 F.3d at 196.

⁸¹ The dissent criticizes us for holding that "contractor employees' rights are 'inherently more restricted'"—i.e., more restricted than those of a property owner's own employees—"without actually analyzing the unique interests at stake." But she defends *New York New York*, and the Board in that case also recognized that the Sec. 7 access rights of those two groups are not identical. The difference between our position and our colleague's is that we treat the distinction as one of substance, in keeping with the principles of *Lechmere*: because employees of a contractor are nonemployees in relation to the property owner, their Sec. 7 access rights are more restricted than those of the owner's own employees. In criticizing us for so holding, our colleague tacitly confirms the accuracy of our understanding of *New York New York* as a decision that acknowledged the employee/nonemployee distinction with one hand and all but erased it with the other.

⁸² Regarding employees who, like the Symphony employees at issue here, work for one employer at multiple locations, whatever access rights

The dissent also takes issue with our decision to consider, when balancing the respective rights of property owners and off-duty contractor employees, whether even contractor employees who regularly and exclusively work on a property owner's property have access to reasonable alternative nontrespassory means of communicating their message. Despite numerous pronouncements by the Supreme Court supporting the consideration of alternative means of communication in achieving an appropriate accommodation of competing rights, the dissent claims that such consideration is without "reasonable justification," and she predicts "drastic outcome[s]." We do not anticipate such catastrophe. In this case, for instance, the intended audience for the Symphony employees consisted of the public attending a ballet performance on the owner's property. Although we find that the off-duty Symphony employees have no rights greater than those of other nonemployee strangers under *Lechmere* and *Babcock & Wilcox* to access that property, we note that when the Symphony leafleteers were moved from the owner's private sidewalk to the public sidewalk across the street, they distributed hundreds of leaflets to the public. This is not, in our view, a drastic restriction on the ability to exercise Section 7 rights. The dissent also dismisses the possibility that, by using print and online media that focus on cultural events in San Antonio, the Symphony employees might be able to communicate not only with those who happen to be attending one ballet performance but also with prospective patrons and benefactors who may generally be interested in the operations of the San Antonio Ballet and the Symphony. We do not dismiss that possibility. Indeed, such communication may be more effective than a single day of leafleting. Finally, we emphasize that where contractor employees work regularly and exclusively on the owner's property, and thus have potentially greater rights of trespassory access than nonemployee strangers, we place the burden on the property owner to show that the alternative means of communication is reasonable. Thus, we find the dissent's complaints unpersuasive.

We make a few additional observations. First, the dissent claims that, because the Respondent has already opened its property to the public, we are doing "far more

such off-duty contractor employees may have, we do not believe those rights should extend to leafleting at a facility where the contractor is not even present.

⁸³ Contrary to the dissent, we do not suggest that the access rights of off-duty employees of an onsite contractor are the same as those of a commercial business with no connection to the property. If the Respondent granted a commercial business access to distribute leaflets on its property, then surely the employees of the Symphony would have a stronger claim of access. But the Respondent reasonably decided to exclude both, as was its right.

damage" to the Symphony employees' Section 7 rights than necessary. It is true that the public has access to the property, as do the Symphony employees. However, the Respondent has never allowed members of the public to distribute literature on its property. Whether this distribution is by a local bar or club (which the Respondent has prohibited) or by the Symphony employees, the Respondent has reasonably decided that such conduct detracts from the patron experience and cannot be permitted. After all, the Respondent is in a much better position than we are to ascertain the extent to which distribution of literature detracts from its operations and those of its licensees.⁸³

Second, the dissent asserts that the onsite contractor employees' right to access the property owner's property is somehow not derivative of their employer's right of access to conduct business there. But if the contractor did not have access, it is axiomatic that neither would the contractor's employees. The contractor employees were not hired by the property owner. Their only claim to access the property derives from the owner's contract with a third-party contractor that employs them, independent of any decision made by the property owner.

Third, the dissent cites *NLRB v. Stowe Spinning Co.*, a case involving access to a meeting hall in a company town, to assert that "some dislocation of property rights may be necessary in order to safeguard" statutory rights.⁸⁴ This is correct, as far as it goes, but 7 years later the Court emphasized in *Babcock & Wilcox* the narrowness of circumstances in which property rights must yield to nonemployee strangers, even when they seek access in order to further onsite employees' core Section 7 organizational rights. Further, as the Court recognized in *Lechmere*, although it is true that there are cases where protecting the exercise of Section 7 rights may require the dislocation of property rights, it is equally true that there are cases where such dislocation of property rights is simply not necessary. This is such a case. The dislocation of the Respondent's property rights is unnecessary because the Symphony employees do not have a sufficient connection to the property owner's property and they have reasonable alternative *nontrespassory* means of communicating their message to the public.⁸⁵

⁸⁴ 336 U.S. 226 (1949).

⁸⁵ We see no need to speculate as to what will, in future cases, be a sufficient reasonable alternative nontrespassory means for off-duty contractor employees to communicate their message. Instead, we have merely provided examples of what may serve that purpose, whether that may be relocating to adjacent public property or utilizing websites and billboards. Nonetheless, we agree with the dissent that "employees and their unions should be free to choose whatever peaceful means of reaching out to customers they wish," provided that those means do not infringe on a property owner's property rights. In those instances, the

Lastly, the dissent notes that, under our new standard, the property owner is not required to prove that permitting access by off-duty employees of an onsite contractor to engage in Section 7 activity would interfere with the use of its property. This overlooks a fundamental tenet of property law: the right to exclude. A property owner can remove a trespasser regardless of whether it can show that the trespasser’s presence interferes with use of the property.⁸⁶ Here, on the other hand, the dissent suggests that the property owner should be entitled to enforce its property rights only if it is unable to protect its property and operational interests by some means other than removing the trespassers. In other words, the dissent makes the property owner’s right to exclude subservient to the trespassers’ demand to access the property to assert Section 7 rights. This is anything but a balancing. And it is also unnecessary where the contractor employees’ connection with the property is tenuous because they do not work there regularly and exclusively, or they have reasonable alternative nontrespassory means of communicating their message. The dissent’s discomfort with private property rights does not change the Supreme Court’s recognition that they must be respected, even when the Section 7 access rights of contractor employees are on the other side of the balance.

For these reasons, we overrule *New York New York* and *Simon DeBartolo* and hold that a property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message. Under this standard, which we apply retroactively, the Respondent did not violate Section 8(a)(1) by prohibiting the off-duty Symphony employees from leafleting on its private property.

Supreme Court has repeatedly instructed us to conduct a balancing to accommodate the conflicting rights at issue, which we have done here.

⁸⁶ Restatement (Second) of Torts § 163 (1965) (“One who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest.”). The dissent appears to take issue with our labeling of the off-duty employees of an onsite contractor as “trespassers.” However, this nomenclature is not new. The *New York New York* Board made the exact same determination about the contractor employees’ legal right of access: “[I]t also seems clear that, purely from the perspective of state property law, the [onsite contractor] employees were trespassers at the moment they began to distribute handbills.” *New York New York*, 356 NLRB at 916 (emphasis added).

Of course, we do not suggest that state trespass law is dispositive here, but neither can we disregard it. Nor are we moved by the dissent’s

ORDER

The complaint is dismissed.
 Dated, Washington, D.C. August 23, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

One day in 2017 about a dozen employees of the San Antonio Symphony tried to peacefully leaflet on the sidewalks outside the Tobin Performing Arts Center. The musicians had been distressed to learn that the Ballet (which also performed at the Tobin) had opted to use recorded music, rather than live music, for its performances. That step would result in less work for the Symphony and its employees. The musicians’ leaflets urged patrons who were about to attend a performance of the Ballet to demand live music for future performances.

There is no real question that, during the 39-week Symphony performance season, the Tobin Center is the musicians’ place of work. Seventy-nine percent of their rehearsals and performances during their approximately 30 weeks of work during the season are at the Center, and many musicians store their instruments there as well. Meanwhile, the sidewalks where they sought to leaflet, though the property of the Center, were open to the public

hypothetical example of an employer inviting an employee onto its property to work only on the condition that he or she not engage in protected concerted activity. First, imposing such a condition would be unlawful under the Act, thereby preempting any state trespass law claim against an employee who failed to abide by the restrictive invitation. Second, even accepting the premise of the hypothetical, we agree with the dissent that an employee who accepted such a restrictive invitation and then engaged in protected concerted activity would still be protected from adverse action under the Act, even if he or she technically became a trespasser under state common law. But this ignores a critical distinction. In the dissent’s example, the noncompliant employee had been invited by the employer onto its property, notwithstanding the restriction. Here, because the Respondent did not invite the Symphony or its employees onto its property at the time they sought to leaflet, the Respondent could lawfully assert its right to exclude.

at all times, including at the time of the performance. According to the judge here, the area where the musicians sought to leaflet encompassed a “broad expanse of sidewalk,” leaving ample room for Ballet patrons and other members of the public to walk by or around the musicians. There is no plausible claim, and no evidence, that the musicians were or would have been in any way disruptive or harassing to patrons. Nonetheless, the Center’s staff called the police, intercepted the leafleters, and instructed them that they could not leaflet on Center property. So, the musicians moved to a public sidewalk across the street where there were fewer patrons.

The musicians did nothing that the average person would think should subject them to police removal from an area open to the general public. And, in fact, under federal labor law—at least until today—the musicians had

¹ *New York New York*, supra, involved employees of the property owner’s contractor. Here, the musicians were employees of the Center’s licensee, the Symphony. I agree with the majority that for purposes of the analysis in this case, there is no difference between contractor employees and licensee employees.

² To take one jarring example, in *PCC Structural*s, the majority reversed a Board decision that had been upheld by eight federal courts of appeals. 365 NLRB No. 160 (2017). The majority’s practice of making sweeping changes to the law without commensurate public input has, unfortunately, become commonplace. See *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 17 & fn. 25 (2019) (Member McFerran, dissenting); *UPMC*, 368 NLRB No. 2, slip op. at 18 & fn. 56 (2019) (Member McFerran, dissenting); *SuperShuttle DFW, Inc.*, 367 NLRB No. 75, slip op. at 15 & fn. 2 (2019) (Member McFerran, dissenting); *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 12 & fn. 18 (2019) (Member McFerran, dissenting); *E.I. Du Pont de Nemours, Louisville Works*, 367 NLRB No. 12, slip op. at 3–4 (2018) (Member McFerran, dissenting); *Boeing Co.*, 366 NLRB No. 128, slip op. at 9–10 (2018) (Members Pearce and McFerran, dissenting); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 22 (2017) (Members Pearce and McFerran, dissenting); *PCC Structural*s, Inc., supra, slip op. at 14, 16 (Members Pearce and McFerran, dissenting); *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156, slip op. at 36, 38 (2017) (Members Pearce and McFerran, dissenting), vacated 366 NLRB No. 26 (2018); *Boeing Co.*, 365 NLRB No. 154, slip op. at 30–31 (2017) (Member McFerran, dissenting); *UPMC*, 365 NLRB No. 153, slip op. at 17–19 (2017) (Member McFerran, dissenting).

Rather than offer a rationale for rejecting public participation here (and elsewhere), the majority simply asserts that the Board “has frequently overruled or modified precedent without supplemental briefing.” But the six cases the majority cites are all distinguishable from this one, not least because in none of the cases did the Board refuse to request briefing over the objection of one or more Board members.

See *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (considering whether unilateral changes made after expiration of a collective-bargaining agreement violate the Act); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (considering, inter alia, whether the Board is precluded from considering an unalleged failure to timely disclose that requested information does not exist when the unalleged issue is closely connected to the subject matter of the complaint and has been fully litigated); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (considering whether an employer, having voluntarily recognized a “mixed-guard union” as the representative of its security guards, lawfully may withdraw recognition

every right to do what they were doing, free of the Center’s interference. With judicial approval, the Board has found that statutory employees like the musicians generally have the right to engage in non-disruptive customer leafleting in public areas of a property where they regularly work, even if they are not employed by the property owner. *New York New York Hotel & Casino*, 356 NLRB 907, 908 (2011), enf.d. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013).¹ The activities of the musicians here seeking better job security and work opportunities by engaging in peaceful leafleting are at the core of what the National Labor Relations Act protects.

In what has become an unfortunate pattern, the majority again reverses court-approved precedent without seeking public input.² There can be no suggestion that the reversal of *New York New York* is somehow compelled by Supreme

if no collective-bargaining agreement is in place, even without an actual loss of majority support for the union); *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (considering whether an employer’s obligation to check off union dues from employees’ wages terminates upon expiration of a collective-bargaining agreement); *Pressroom Cleaners*, 361 NLRB 643 (2014) (considering, inter alia, whether an employer can limit its backpay liability in compliance through an evidentiary showing or whether the predecessor employer’s terms and conditions of employment should continue until the parties bargain to agreement or impasse); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (considering, inter alia, whether an employee was engaged in “concerted activity” for the purpose of “mutual aid or protection” when she sought assistance from her coworkers in raising a sexual harassment complaint to her employer).

In two cited cases, *Loomis* and *Lincoln Lutheran*, amicus briefs were actually filed. See *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (amicus brief filed by SEIU urging the Board to overrule *Wells Fargo Corp.*, 270 NLRB 787 (1984)); *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (amicus brief filed by National Right to Work Legal Defense Foundation urging the Board not to overrule *Bethlehem Steel*, 136 NLRB 1500 (1962)).

Both *Du Pont* and *Lincoln Lutheran*, meanwhile, were the culmination of long-running discussions of the precedent they ultimately overruled. In *Du Pont*, the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit for the express purpose of deciding between two conflicting branches of precedent. See *E.I. Du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). *Lincoln Lutheran*, in turn, was the culmination of a 15-year dialogue with the United States Court of Appeals for the Ninth Circuit about *Bethlehem Steel*. See *WKYC-TV, Inc.*, 359 NLRB 286, 286 (2012) (discussing history).

The other three cases were substantively far better disposed to resolution without briefing. *Graymont* presented a purely procedural question concerning pleading standards; *Pressroom* involved reversal of an anomalous holding concerning remedies that was in conflict with long-standing Board law; *Fresh & Easy* similarly reversed a Board decision because the decision could not be harmonized with long-standing precedent.

It should be obvious that public participation would be helpful to the Board’s decision-making here. This case involves an important issue of Sec. 7 rights, as reflected in multiple court decisions and lengthy Board decisions. To the extent the Respondent calls for reversal of precedent, its brief completely ignores the District of Columbia Circuit’s analysis and offers no new factual or policy considerations.

Court authority. The District of Columbia Circuit has already rejected that argument in *affirming* the Board’s decision, unanimously.

As in other recent decisions, the result here is, again, to dramatically scale back labor-law rights for a large segment of American workers—this time, employees who work regularly on property that does not belong to their employer.³ The new test articulated by the majority would allow the peaceful leafleting here only if the musicians worked *exclusively* on the Center’s property (and nowhere else for the same employer) and only if they lacked *any* other means, no matter how impractical, for communicating with the public. Even if it had not been imposed improperly (by treating the judicially-approved framework of *New York New York* as impermissible), this test would still be arbitrary. That a statutory employee who is regularly employed on the property owner’s property *also works elsewhere* is irrelevant with respect to both protecting the owner’s property rights and preserving the employee’s rights under the National Labor Relations Act. Similarly, the exclusion of a statutory employee from property open to the public, where he is regularly employed, cannot reasonably be justified by citing the employee’s other means of communicating with the public at large and without requiring any showing that the Section 7 activity interferes with the owner’s use of the property or some legitimate business interest.

I.

As the Supreme Court pointed out 70 years ago, “[i]nconvenience or even some dislocation of property rights may be necessary in order to safeguard the right to

collective bargaining.”⁴ No later decision of the Court has cast doubt on this proposition. The property rights of employers do not automatically trump the rights of employees under Section 7 of the National Labor Relations Act, including the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.”⁵ Instead, the Supreme Court has explained, when “conflicts between [Section] 7 rights and private property rights” arise, the Board must “seek a proper accommodation between the two.”⁶ Such an “[a]ccommodation between employees’ [Section] 7 rights and employers’ property rights . . . must be obtained with as little destruction of one as is consistent with the maintenance of the other.”⁷ “The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and the strength of the respective [Section] 7 rights and private property rights asserted in any given context.”⁸ In the context presented here, as I will explain, the majority has failed to reasonably accommodate employees’ Section 7 rights and employer private property rights. The majority offers no good justification for scrapping the accommodation reached by the Board in *New York New York*—and then upheld by the District of Columbia Circuit. In its place, the majority adopts a standard that does far more damage to the Section 7 rights of employees like the musicians here than is necessary to protect the property rights of an employer that has already opened its property to the public.⁹

The statutory right of employees to engage in non-disruptive Section 7 activity at work, on property owned by their employer, has long been recognized by the Supreme Court, as illustrated by its 1945 decision in *Republic*

³ In *Alstate*, for example, that majority held that the Act does not protect tipped workers who protest poor tips to their employer. *Alstate Maintenance*, 367 NLRB No. 68 (2019). In *SuperShuttle*, the majority made it easier for employers to classify workers as independent contractors, who are not covered by the Act. *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). And in *Hy-Brand*, the majority tried—but failed—to narrow the Board’s standard for determining joint-employer status, which would have frustrated the ability of many employees to engage in collective bargaining with the company that controls their employment. *Hy-Brand Indust. Contractors*, 365 NLRB No. 156 (2017), recon. granted and decision vacated at 366 NLRB No. 26 (2018). The majority apparently is contemplating further restrictions to the Act’s coverage by reversing precedent through rulemaking. See NLRB, *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681 (Sept. 14, 2018) (notice of proposed rulemaking). NLRB, *Regulatory Flexibility Agenda*, 84 Fed. Reg. 29776 (June 24, 2019) (Board “will be engaging in rulemaking to establish the standard for determining whether students who perform services at a private college or university in connection with their studies are “employees” within the meaning of Section 2(3) of the National Labor Relations Act” and “to establish the standards under the National Labor Relations Act for access to an employer’s private property”).

Notably, by the forthcoming “access” rulemaking, along with today’s decision and the 2019 *UPMC* decision, the majority appears to have

undertaken a multi-prong initiative to weaken longstanding principles protecting Sec. 7 access rights.

⁴ *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 232 (1949) (quotations omitted) (addressing access rights of union organizers to employer-owned meeting hall opened to other persons and organizations).

⁵ 29 U.S.C. §157. “[N]othing in the [National Labor Relations Act] expressly protects” an employer’s right to exclude persons from its property, which “emanates from state common law.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 fn. 21 (1994).

⁶ *Hudgens v. NLRB*, 424 U.S. 507, 521–522 (1976) (quotations omitted).

⁷ *Id.* (quotations omitted).

⁸ *Id.*

⁹ Contrary to the majority’s suggestion, the fact that the Respondent has not allowed commercial distribution by persons with no connection to the property is not evidence that distribution interferes with its use of the property. Certainly, the Respondent has made no such showing with respect to distribution by the Symphony musicians. In any case, as the *New York New York* Board explained, the control that a property owner possesses over contractor employees allows it to protect its property interests in ways that do not apply to outside parties, and the proper accommodation of their right of access should accordingly be different.

Aviation.¹⁰ In contrast, per the Supreme Court’s *Lechmere* decision,¹¹ the property-access rights of nonemployees, such as union organizers, are much more limited, requiring a showing either that the property owner discriminated against the union organizers or that they employees that the organizers sought to reach were otherwise inaccessible.

The question in cases like this one is whether and to what extent the “locus of accommodation” changes when statutory employees want to engage in Section 7 activity at their workplace, but the workplace is owned not by their own employer, but rather by *another* employer that has a contractual or licensing arrangement with their own. The Board answered that question—informed by amicus briefing, oral argument, and court guidance—in *New York New York*, decided in 2011 on remand from the District of Columbia Circuit.¹² In that case, the Board considered whether off-duty food service employees had the right to engage in organizational leafleting of customers outside their employer’s place of business—not on their employer’s own property, but in the public areas of a hotel-casino that they and their employer provided integral services for.¹³

Accepting the guidance of the District of Columbia Circuit, the *New York New York* Board acknowledged that the case could not be decided by rote application of *Republic Aviation* and proceeded to evaluate the issue presented in light of principles set by the Supreme Court. The Board noted the Court’s observation that “the Act ‘confers rights only on *employees*, not on unions or their nonemployee organizers,’ whose rights are derived from the right of employees to learn about the advantages of self-organization from others” and thus are given limited accommodation.¹⁴ But, the Board concluded, the contractor employees plainly fell into a different category than union organizers because “[i]n distributing handbills to support their own

organizing efforts [the employees] were exercising their own Section 7 rights.”¹⁵

Further, unlike union organizers, the contractor employees were not strangers to the property, because they worked there regularly.¹⁶ The Board thus concluded “that the statutorily-recognized interests of the [contractor] employees . . . are much more closely aligned to those of [the property owner’s] own employees . . . than they are to the interests of . . . union organizers. . . .”¹⁷

Nonetheless, the Board recognized that the lack of a direct employment relationship with the property owner could result in a different accommodation.¹⁸ The Board noted that the property owner had the right to control access to and use of its property. But it found that the employees’ “handbilling did *not* interfere with operations or discipline [nor] adversely affect the ability of customers to enter, leave, or fully use the facility. . . .”¹⁹ The Board then considered whether there were any ways in which the “*absence* of an employment relationship” affected the “*evaluati[on] [of] [the property owner’s] interests.*” It found that “the property owner generally has the legal right and practical ability to fully protect its interests through its contractual and working relationship with the contractor,” and would have “anticipated” the possibility that regularly-present contractor employees might choose the property as a venue for Section 7 activity; “but the contractors’ employees have no parallel ability to protect their statutory rights and legitimate interests in and around their workplace without [the Board’s] intervention.”²⁰

The *New York New York* Board “address[ed] only the situation where . . . a property owner seeks to exclude, from nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner’s business, who seek to engage in organizational handbilling directed at

¹⁰ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

¹¹ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

¹² In its original 2001 decision, the Board had followed its own precedent, which treated the employees of a contractor working on the property owner’s property as identical to the owner’s own employees for purposes of Section 7. *New York New York Hotel, LLC*, 334 NLRB 762 (2001), remanded by 313 F.3d 585 (D.C. Cir. 2002). The District of Columbia Circuit rejected that position and remanded the case for further consideration by the Board. The court pointed out that the issue was not controlled by Supreme Court precedent:

No Supreme Court case decides whether the term ‘employee’ extends to the relationship between an employer and the employees of a contractor working on its property. No Supreme Court case decides whether a contractor’s employees have rights equivalent to the property owner’s employees—that is, *Republic Aviation* rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property owner—

because their work site, although on the premises of another employer, is their sole place of employment.

313 F.3d at 590. The court held that “[i]t is up to the Board to [decide the nature and scope of Section 7 rights of these employees] not only by applying whatever principles it can derive from the Supreme Court’s decisions, but also by considering the policy implications of any accommodation between the § 7 rights of [the contractor’s] employees and the rights of [property owner] [New York-New York] to control the use of its premises, and to manage its business and property.” *Id.*

¹³ *New York New York*, 356 NLRB at 908.

¹⁴ 356 NLRB at 914 (quoting *Lechmere*, supra, 502 U.S. at 532).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 915.

¹⁸ *Id.* at 916.

¹⁹ *Id.*

²⁰ *Id.* at 917–918.

potential customers of the employer and the property owner.”²¹ It concluded that:

[T]he property owner may lawfully exclude employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board’s case law).²²

The District of Columbia Circuit enforced the Board’s decision, noting that “the governing statute and Supreme Court precedent grant the Board discretion over how to treat employees of onsite contractors for [Section 7] purposes.”²³ The court found that the *New York New York* Board had “adequately considered and weighed the respective interests based on the principles from the Supreme Court’s decisions” as well as “the policy implications of any accommodation between the [Section] 7 rights of [the contractor’s] employees and the rights of [the property owner] to control the use of its premises, and to manage its business and property.”²⁴ Notably, the court specifically agreed with the Board that for purposes of Section 7, employee communications aimed at the employer’s customers were indistinguishable from communications aimed at fellow employees.²⁵

The Board has consistently followed its *New York New York* precedent.²⁶ No intervening decision of the District of Columbia Circuit has cast doubt on its decision upholding the Board,²⁷ nor has any other federal appellate court rejected the Board’s view.

II.

The majority acknowledges that the standard adopted by the Board in *New York New York*—and endorsed by the District of Columbia Circuit—controls this case. But instead of applying precedent, the majority overrules it, announcing a new standard to govern access for Section 7 purposes to public areas on private property by contractor and licensee-employees employed there. The majority concludes—contrary to the District of Columbia—that the *New York New York* Board impermissibly gave too little

weight to employer property rights and too much weight to the Section 7 rights of employees. According to the majority, this

contravened several guiding principles articulated in *Lechmere* as to the Section 7 rights of nonemployees of the property owner—i.e., off-duty employees of an on-site contractor. They granted these nonemployees of the property owner the same Section 7 access rights as the property owner’s own employees, subject to an exception that has never been found to apply and predictably never would be found to apply.

This sentence alone illustrates several of the flaws in the majority’s reasoning. In remanding the Board’s original decision in *New York New York*, of course, the District of Columbia Circuit made clear that *Lechmere* does *not* decide the question presented in cases like this one.²⁸ And in enforcing the Board’s subsequent decision, the same court made equally clear that the *New York New York* Board did not—as the majority now claims—“fail[] to properly accommodate the property owner’s property rights, including its right to exclude.” The majority also does not explain how the “exception” in *New York New York* can be so readily dismissed as “an abstract, theoretical exception,” when it permits exclusion to protect the property owner’s “use of the property” and to further “legitimate business reason[s],” such as the “need to maintain production and discipline.”²⁹

The majority accuses the *New York New York* Board of “merely paying lip service” to the judicially-required distinction “between the access rights of employees and those of nonemployees.” According to the majority, the “contractor employees’ right to access the property is derivative of their employer’s right of access to conduct business there.” But that claim is obviously wrong with respect to employees’ statutory rights under the National Labor Relations Act. Those employee rights do not depend on the private contractual rights of their employers: the musicians here, for example, are invoking Section 7, not the

²¹ Id. at 918.

²² Id. at 918–919.

²³ 676 F.3d at 196.

²⁴ Id. at 196 fn. 2 (quotations omitted).

²⁵ Id. at 196–197.

²⁶ See *Simon DeBartolo Group*, 357 NLRB 1887 (2011) (finding protected, under *New York New York*, organizational handbilling by employees of shopping mall maintenance contractor); *Nova*

Southeastern Univ., 357 NLRB 760 (2011) (same, with respect to employees of university maintenance contractor), enf. 807 F.3d 308 (D.C. Cir. 2015).

²⁷ See *Nova Southeastern Univ. v. NLRB*, 807 F.3d 308, 312–313 (D.C. Cir. 2015).

²⁸ *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) (“No Supreme Court case decides whether the term ‘employee’ extends to the relationship between an employer and the employees of a contractor working on its property. No Supreme Court case decides whether a contractor’s employees have rights equivalent to the property owner’s employees....”).

²⁹ *New York New York*, supra, 356 NLRB at 918–919 (quotations omitted).

license agreement between the Symphony and the Center.³⁰

From this premise, the majority reaches two conclusions: (1) that “[o]ff-duty employees of a contractor are trespassers;” and (2) therefore, they “are entitled to access for Section 7 purposes only if the property owner cannot show that they have one or more reasonable alternative nontrespassory channels of communicating with their target audience.” As explained, however, federal labor law routinely requires employers to yield their state-law property rights to some degree.³¹

“In light of these principles,”—which are based on the flawed premise that the National Labor Relations Act authorizes employees to “trespass” only as a last resort—the majority adopts its new test to replace the standard applied in *New York New York* and endorsed by the District of Columbia Circuit:

[A] property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message.

It should be obvious that the majority’s new test places a property owner’s right to exclude undesired persons above the labor-law rights of employees in all but the rarest circumstances. First, under the majority’s new test, only those employees who work both “regularly” and “exclusively” on the property can ever be entitled to access for Section 7 purposes. Thus, an employee who regularly works on the property will *never* be entitled to access if she does not work there *exclusively*—that is, if she also works somewhere else for the same employer who employs her on that property. As I will explain, this “exclusivity” requirement is arbitrary. It serves no purpose except to frustrate the exercise of Section 7 rights.

Second, even with respect to employees who work both regularly and exclusively on the property, the property owner is free to exclude them—even from areas open to

the public—if the owner can show “that they have one or more reasonable nontrespassory alternative means to communicate their message.” That showing, as the majority interprets it, is easy to make. It clearly does *not* require showing that an “alternative means” is even substantially equivalent to the means denied to employees, as measured by cost (in time and money) to employees and by effectiveness (the likelihood of reaching the actual target audience, in a meaningful way, at a meaningful time). And, of course, the property owner is not required to prove that *permitting* employees to engage in Section 7 activity on the property would interfere, in any way, with the employer’s use of the property or that *excluding* employees is justified by a legitimate business reason, such as the need to maintain production and discipline.

The majority’s application of this standard to the case of the Symphony employees illustrates how wildly restrictive it is. First, the majority notes that the Symphony musicians—despite having close to 80 percent of their rehearsals and performances at the Performing Arts—did not work “exclusively” on the Respondent’s property. My colleagues also conclude that the musicians did not work “regularly” on the property because the Symphony was only guaranteed the use of the Center for 22 weeks of a 39-week performance season. Under the new test, either of these findings would be enough to extinguish the Section 7 rights of the musicians here. But the majority does not stop there. It goes on to note that, even if the musicians did work regularly and exclusively at the Center, there were reasonable alternative means of communicating their message including, for example, “social media” or “billboards.” That finding—in the majority’s view—independently justifies preventing the musicians from passing out leaflets to Symphony patrons on sidewalks open to the public.

Thus, under the majority’s new test, because the Symphony occasionally performs in venues other than the Center, because the Symphony does not (like most symphonies in this era of declining arts funding) work all year-round, and because employees presumably have access to the internet or the ability to scrape together funds for a

³⁰ The majority’s claim is an attempt to echo *Lechmere*, where the Supreme Court explained that the *statutory* rights of union organizers are derivative of the *statutory* rights of the employees they seek to reach.

³¹ Addressing the access rights of union organizers (not employees or contractor-employees), the Supreme Court made clear that access rights and property rights have different legal foundations:

The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the [National Labor Relations Act], nothing in the [Act] expressly protects it. To the contrary, this Court consistently has maintained that the [Act] may entitle union employees to obtain access to an employer’s property under limited circumstances.

Thunder Basin Coal Co., supra, 510 U.S. at 217 fn. 21, citing *Lechmere* and *Babcock & Wilcox*, supra. To be sure, statutory employees seeking access to an employer’s property may be deemed “trespassers” as a matter of state common law. But this does not answer the question posed in cases like this one, which involve access rights under a federal statute. The distinction should be obvious. For example, an employer might invite employees onto its property to work only on the condition that they not engage in protected concerted activity. Engaging in Sec. 7 activity, then, would make the employees trespassers under state common law. But that would not mean that the employer’s restrictive invitation was lawful under the National Labor Relations Act, as *Republic Aviation* demonstrates.

highway sign, the musicians of the San Antonio Symphony may lawfully be treated as strangers to a property that the Symphony describes as its “home”³² and that prominently advertises the Symphony as its “resident.”³³

There is no possible statutory or policy justification for this subjugation of the musicians’ Section 7 rights to the property right of the Center to exclude anyone it wishes, for any reason or no reason—particularly when the employees in question sought only to engage in peaceful, nondisruptive leafleting at their workplace on a sidewalk that was otherwise open to the public.

III.

The Supreme Court has observed that “[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”³⁴ The majority has failed to satisfy that basic requirement today. Its decision cannot be sustained as a reasonable exercise of the Board’s discretion to interpret the National Labor Relations Act. The majority’s errors fall into two categories. First, by deeming the standard adopted by the *New York New York* Board and endorsed by the District of Columbia Circuit to be in tension with Supreme Court precedent, the majority proceeds from an interpretation of governing law that is not only incorrect, but that also has been rejected by the Circuit.³⁵ Reasoned decision-making requires the majority to give a legally-acceptable explanation for why it is rejecting the *New York New York* standard. It has failed to do so.

Second, even assuming that majority had succeeded in wiping the slate clean, the standard it adopts today is arbitrary. The majority’s new test fails to satisfy the Supreme Court’s test that an “[a]ccommodation between employees’ [Section] 7 rights and employers’ property rights . . . must be obtained with as little destruction of one as is consistent with the maintenance of the other.”³⁶ Under the new test, for employees to have any claim to access at all, they must work not just regularly, but also “exclusively” on the owner’s property. This requirement serves no legitimate statutory purpose. In turn, the new test is arbitrary in denying employees access based entirely on whether they have supposed alternative means of communication, regardless of whether the activity interferes with

the owner’s use of the property or with some legitimate business interest.

A.

As the District of Columbia Circuit has made clear, when the Board reaches a decision “pursuant to an erroneous view of law and, as a consequence, fails to exercise the discretion delegated to it by Congress,” it is not entitled to judicial deference.³⁷ Where the Board mistakenly believes that a particular interpretation of the Act is mandated—whether by the statute itself or by Supreme Court decisions—it has “misconstrued the bounds of the law,” and “its opinion stands on a faulty legal premise and without adequate rationale.”³⁸ The same principle applies where the Board has misinterpreted Supreme Court decisions as supporting a reversal of Board precedent.³⁹ This case implicates that well-established principle. The majority errs in concluding that the Supreme Court’s decision in *Lechmere* somehow undercuts *New York New York* or supports today’s holding. The District of Columbia Circuit has already held that *New York New York* was consistent with *Lechmere*.

As to each point on which the majority criticizes it, the Board’s decision in *New York New York* permissibly interpreted the Act, Supreme Court precedent, and relevant legal principles—and to hold otherwise would be to find that the District of Columbia Circuit, which enforced the decision, also got the law wrong.

1.

The majority first argues that the *New York New York* Board wrongly focused on weighing the employees’ Section 7 interests against the property owner’s managerial interests rather than against the owner’s property rights. According to the majority, the Board improperly “permit[ted] off-duty contractor employees to disregard the owner’s private property rights” and “overlooks a fundamental tenet of property law: the right to exclude.” In the majority’s view, weighing an employer’s managerial interests and the impact of granting access on the employer’s use of the property “is anything but a balancing,” and “makes the property owner’s right to exclude subservient to the trespassers’ demand to access the property to assert Section 7 rights.” As I now explain, the majority’s contention is baseless.

³² See <https://sasymphony.org/about/plan-your-visit/#1486490632580-87f64ce5-87fe>.

³³ See <https://www.tobincenter.org/>.

³⁴ *Encino Motorcars, LLC v. Navarro*, -- U.S. --, 136 S.Ct. 2117, 2125–2126 (2016).

³⁵ The District of Columbia Circuit “conclude[d] that the Board adequately considered and weighed the respective interests based on the principles from the Supreme Court’s decisions. . . .” 676 F.3d at 196 fn. 2.

³⁶ *Hudgens*, supra, 424 U.S. at 522 (quotations omitted).

³⁷ *Prill v. NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985). See also *International Bhd. of Electrical Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 707–708 (D.C. Cir. 1987) (following *Prill*, supra).

³⁸ *Id.*

³⁹ See, e.g., *Jacoby v. NLRB*, 233 F.3d 611, 617 (D.C. Cir. 2000) (remand in light of Board’s “mistaken analysis” of Supreme Court’s duty-of-fair-representation decisions as supporting reversal of Board precedent).

Whenever the Board (or the Supreme Court, for that matter) holds that the National Labor Relations Act requires a property owner to grant employees access to its property (under whatever defined conditions), it might be said that the owner's right to exclude has been infringed. But, of course, it is far too late to deny that, as the Supreme Court has observed, "some dislocation of property rights may be necessary in order to safeguard" statutory rights.⁴⁰ "This is not a problem of always open or always closed doors for [Section 7 activity] on company property," the Court has explained, but rather a question of "accommodation."⁴¹

The *New York New York* Board was fully cognizant of the property owner's right to exclude. It thus "g[a]ve weight to [the] fact" that "[a]ny rule derived from Federal labor law that requires a property owner to permit unwanted access to his property for a nonconsensual purpose necessarily impinges on the right to exclude."⁴² The Board did not hold that a property owner may *never* exclude employees who seek to engage in Section 7 activity on the property. Rather, it placed conditions on *when* exclusion would be permitted, requiring that the property owner demonstrate that the employees' activity would significantly interfere with its use of the property *or* that excluding the employees was justified by a legitimate business reason, such as the need to maintain production or discipline.⁴³ As the Board explained:

[A]ny justification for exclusion that would be available to an employer of the employees who sought to engage in Section 7 activity on the employer's property would also potentially be available to the nonemployer property owner, as would any justification derived from the property owner's interests in the efficient and productive use of the property.

356 NLRB at 919 (emphasis added). In other words, property owners seeking to exclude employees may invoke *both* the managerial interests implicated when an employer seeks to restrict the workplace activity of its own employees *and* the property interests implicated when statutory employees

are not already lawfully on the property.⁴⁴ If the balancing test favors the property owner in *either* respect, it will be free to exclude employees from the property.

Of course, the District of Columbia Circuit held the Board acted properly when it struck a balance between the Section 7 right of employees and the "rights of [the property owner] to control the use of its premises, and to manage its business and property."⁴⁵ Unless one assumes that the Court of Appeals got this question wrong, the majority's contention that *New York New York* gave impermissibly little weight to the property owner's bare right to exclude is untenable.

The majority is also demonstrably wrong in claiming that the *New York New York* Board improperly failed to give effect to the "distinction of substance" between the rights of employees and nonemployees emphasized by the Supreme Court's *Lechmere* decision. *Lechmere* does not control cases like this one. The District of Columbia Circuit made that clear, first in remanding the Board's initial decision in *New York New York*⁴⁶ and then in enforcing the Board's subsequent decision, when it rejected the property owner's argument that the Board was required to treat contractor employees as the equivalent of nonemployees.⁴⁷

As any fair reading of its decision demonstrates, the *New York New York* Board carefully considered the significance of the fact that the on-site contractor's employees were *not* employees of the property owner. It sought to "establish an access standard that reflect[ed] the specific status of the [contractor] employees as protected employees who are *not employees of the property owner*, but who are regularly employed on the property."⁴⁸ The Board explained the "important distinctions, as a matter of both law and policy, between the [on-site contractor] employees and the nonemployee union organizers involved in *Lechmere*."⁴⁹ The employees were exercising their own Section 7 rights, treating the employees as the equivalent of union organizers would "create serious obstacles to the effective exercise of" those rights particularly where their employer had no leasehold interest of its own in the workplace, and the employees were not "'strangers' to or

⁴⁰ *Stowe Spinning*, supra, 336 U.S. at 232.

⁴¹ *Babcock & Wilcox*, supra, 351 U.S. at 112.

⁴² 356 NLRB at 916.

⁴³ 356 NLRB at 918–919.

⁴⁴ See *Hudgens*, supra, 424 U.S. at 522 fn. 10 (distinguishing *Republic Aviation* from *Babcock & Wilcox* by observing that "when the organizational activity was carried on by employees already rightfully on the employer's property," the "employer's management interests, rather than his property interests" were involved). The *New York New York* Board explained that "[a]part from its state law property right to exclude, [the property owner] also has a legitimate interest in preventing interference." 356 NLRB at 916.

⁴⁵ 676 F.3d at 196 fn. 2. See also *Nova Southeastern University v. NLRB*, 807 F.3d 308, 312–313 (D.C. Cir. 2015) (approving Board's

application of *New York New York* test "balanc[ing] the employee's rights under section 7 and the employer's rights to control the use of its premises and manage its business and property," and finding right to handbill "unless the property owner can demonstrate that the handbilling significantly interferes with its use of the property or justifies its prohibition by other legitimate business reasons").

⁴⁶ *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002).

⁴⁷ *New York New York, LLC v. NLRB*, 676 F.3d 193, 196 (D.C. Cir. 2012).

⁴⁸ 356 NLRB at 912 (emphasis added).

⁴⁹ *Id.*

‘outsiders’ on the property,” but rather “worked on the property . . . for a party that had both a contractual and a close working relationship with” the property owner.⁵⁰ At the same time, however, the Board “recognize[d] the distinction between persons employed by a contractor and the employees of the property owner itself” and took that distinction into account.⁵¹ It noted that the absence of an employment relationship with the property owner meant that the owner lacked that measure of control over contractor employees, but—citing many illustrative Board cases—observed that this “deficit [was] mitigated” by the contractual and working relationship between the owner and the contractor employer.⁵² The Board thus concluded that “property owners ordinarily are able to protect their property and operational interests, in relation to employees of contractors working on their premises, without resort to state trespass law.”⁵³

In upholding the approach taken in *New York New York*, the District of Columbia Circuit necessarily endorsed this last conclusion—but the majority takes issue with it. Remarkably, the majority cites no factual or legal support at all for its contrary view: that the property owner is effectively powerless to protect its property and operational interests by any means other than excluding contractor employees from its property. The majority fails to address the Board decisions cited in *New York New York*,⁵⁴ and it fails to point to any evidence in the record of this case demonstrating that the Center, through its relationship with the Symphony, could not effectively protect its interests here without ejecting the musicians. In simply ignoring the Board’s relevant administrative experience, as reflected in the decisions cited in *New York New York*, the majority fails to engage in reasoned decision-making, as the Supreme Court has defined it. The Supreme Court has explained that under the Administrative Procedure Act—which applies to Board adjudications, see *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 364 (1998)—an administrative agency must provide a reasoned explanation for changing its position on an issue.⁵⁵ Such an explanation must address the agency’s “disregarding facts

and circumstances that underlay . . . the prior policy.”⁵⁶ And with respect to this case in particular, the majority’s decision is not “supported by substantial evidence on the record”—a sufficient basis alone for reversal under the Act.⁵⁷

B.

As demonstrated, then, the majority has failed adequately to justify its reversal of *New York New York*, relying on criticisms of the Board’s earlier decision that are refuted by any fair reading of the decision and that in any case are precluded by the District of Columbia Circuit’s endorsement of the *New York New York* standard. While the Board has the discretion to adopt a different standard, it may only do so through the exercise of reasoned decision-making. The majority’s failure to meet that requirement is apparent not only in its unjustified reversal of precedent, but also in the new access standard that it adopts. That standard is arbitrary in two important respects. First, the majority denies access rights to contractor employee who are not employed *exclusively* on the property owner’s property, even if the employees *regularly* work there.⁵⁸ Second, the majority denies access rights whenever the property owner can make the easy showing that contractor employees have other means of communicating with the public, without requiring any showing that the employees’ Section 7 activity interferes with the owner’s use of the property or some legitimate business interest. In these respects, the majority’s test impairs employees’ statutory rights far more than necessary to reasonably accommodate the property rights of employers—and so fails the test established by the Supreme Court in cases like *Babcock & Wilcox* and *Lechmere*.

1.

There is simply no rational, much less statutory, basis for limiting Section 7 access rights to only those employees who are employed exclusively on the property owner’s property—and categorically denying access to all employees who also work somewhere else, even if they are regularly employed on the owner’s property.⁵⁹ So long as

regularly because of the Symphony’s partial-year performance season. This interpretation of regularity is arbitrary, because the musicians’ work is clearly regular during the Symphony season. The majority’s position would seem to exclude access rights for seasonal contractor-employees of any sort—no matter how long the season is—but that view is untenable. So long as employees work regularly during the relevant season, the property owner reasonably must expect that they may wish to engage in Sec. 7 activity on its property during the season.

⁵⁹ The majority points to the Board’s pre-*New York New York* decisions in *Gayfers Department Store*, 324 NLRB 1246 (1997); *Southern Services*, 300 NLRB 1154 (1990), *enfd.* 954 F.2d 700 (11th Cir. 1992); and *Postal Service*, 339 NLRB 1175 (2003), as support for the exclusivity requirement imposed today. Those decisions, however, fail to justify such a requirement. Of the three cases, *Postal Service* was the only one

⁵⁰ *Id.*

⁵¹ *Id.* at 913.

⁵² *Id.* at 916–917.

⁵³ *Id.* at 918 (footnote omitted.)

⁵⁴ See *New York New York*, 356 NLRB at 917–918, fn. 41–44 (summarizing numerous Board cases showing how businesses exert authority over contractor’s employees).

⁵⁵ See, e.g., *Encino Motorcars, LLC v. Navarro*, -- U.S. --, 136 S.Ct. 2117, 2125–2126 (2016).

⁵⁶ *Id.* at 2126, quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–516 (2009).

⁵⁷ Act, Sec. 10(f), 29 U.S.C. §160(f).

⁵⁸ The majority finds that not only that the Symphony musicians did not work *exclusively* at the Center, but also that they did not work there

employees are regularly employed on the property (as *New York New York* held), their *workplace* is obviously a natural and uniquely appropriate site of Section 7 activity.⁶⁰ The Supreme Court has recognized as much, observing that the workplace is the “one place where employees clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.”⁶¹ The unique nature of the workplace as the site of Section 7 activity is no less true where, as here, employees seek to communicate with patrons of their employer who are present at the workplace. *That* is precisely where employees and patrons intersect.

The position of the property owner, meanwhile, is no different with respect to employees who are employed regularly (but not exclusively) on his property, the employees who can *always* be excluded under the majority’s test. The owner’s rights and interests—and his ability to protect those rights and interests—are the same, regardless of whether contractor employees also work somewhere else. The owner reasonably can expect that employees regularly employed on his property will seek to engage in Section 7 activity in areas open to the public and can provisions for that conduct. Because the employment is regular, in turn, the employer’s contractual and operational relationship with the employees’ employer—which necessarily encompasses day-to-day matters—provides a reasonable means to regulate employees’ conduct, as may be necessary and appropriate. Employees regularly employed on site by a contractor are not strangers to the workplace whose appearance on the property poses some unusual threat to the owner’s rights and interests. In accommodating the Section 7 rights of contractor employees and the property rights of employers, exclusive employment on the property is entirely irrelevant.

It should be clear, then, that the exclusivity requirement introduced by the majority serves no purpose other than to

arbitrarily curtail who can exercise Section 7 rights. That a contractor employee may have *another* place of employment has no bearing at all on his Section 7 interests, so long as he is *also* regularly employed on the property to which he seeks access.

Under the majority’s approach, a contractor employee who works only for the contractor, and who spends most of his work time on the site of the property owner, will have no access rights to that site, if he spends even a small amount of time at *another* of the contractor’s service locations. Indeed, because they are exclusively employed *nowhere*, contractor employees who work at two service locations of the same contractor—on different sites belonging to others—will have *no* workplace where they can exercise their Section 7 rights to engage in leafleting or other off-duty activities, despite having only one employer. That result cannot be justified.

In short, even if the majority had succeeded in wiping the slate clean of the *New York New York* standard, it is not free to adopt a new standard that includes this arbitrary obstacle to the exercise of Section 7 rights.

2.

The majority’s threshold requirement of exclusive employment on the property is not the only arbitrary aspect of its new standard. Under that standard, even employees who are both regularly and exclusively employed on the property may be prevented from communicating with members of the public about Section 7 concerns, if the property owner can show that employees “can effectively communicate their message through . . . newspapers, radio, television, billboards, and other media,” such as “social media, blogs, and websites” (in the majority’s words). As this case illustrates, property owners will virtually always be able to make that nominal showing—and so contractor employees will virtually *never* be able to engage in Section 7 activity on the owner’s property where their message is aimed at members of the public. The showing

to offer an ostensible rationale for the exclusivity requirement. There, the Board considered contractor employees’ distribution of authorization cards to fellow employees. The Board reasoned that, “[w]hen employees [are not exclusively on the property owner’s property and instead] have a work situs provided by their own employer, . . . there is no need [to give them Section 7 rights elsewhere].” 339 NLRB 1175, 1178 (2003). In other words, it was the availability of another workplace, owned by the employer, that diminished the employees’ need to exercise Section 7 rights elsewhere.

As the *New York New York* Board correctly recognized, 356 NLRB at 913 fn. 27, the *Postal Service* decision involved facts quite different from those presented in cases like this one, where employees may never work on their own employer’s property and/or where they seek to reach customers rather than coworkers.

For that reason, the *New York New York* Board linked access rights to *regularity* of employment on the property owner’s property—but not to *exclusivity*. Following *New York New York*, application of an exclusivity

requirement was even more firmly renounced in *DeBartolo Group*, 357 NLRB 1887, 1888 fn. 8 (2011). There, the Board observed that it would make little sense to deny access rights simply because contractor employees happened to spend their weekends working at another site. In such cases, of course, the employees would have an overwhelming interest in engaging in Sec. 7 activity at the worksite where they spent the great majority of their time. And, in *DeBartolo* as well, the contractor employee sought to reach customers (unlike the *Postal Service* employees), and so plainly no other location would have been an adequate substitute for their primary jobsite, even though they did not work there exclusively. Thus, even if exclusivity were a “traditional” consideration, as the majority contends, there is no persuasive rationale for its broad and strict application today.

⁶⁰ 356 NLRB at 914.

⁶¹ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (quotation marks omitted).

required of property owners, of course, does not require them to prove that the employees' Section 7 activity interfered with their use of the property in any way or that excluding the employees was justified by a legitimate business interest of any sort. To the majority, rather, the owner's mere objection to the employees' presence is enough to warrant their exclusion. In this crucial respect, the majority's new standard allows employees' rights under the Act to be trumped by the owner's bare property right to exclude unwanted persons. The majority offers no reasonable justification for this drastic outcome.⁶² The majority does not attempt to disguise where this part of its new standard comes from: the "inaccessibility" requirement applied by the Supreme Court in *Babcock* and *Lechmere*. Indeed, my colleagues expressly "find that the off-duty Symphony employees have no rights greater than those of other nonemployee strangers under *Lechmere* and *Babcock*," and they point to *Babcock*'s articulation of "the narrowness of circumstances in which property rights must yield to nonemployee strangers" as a basis for giving contractor employees minimal access rights. In *Lechmere* and *Babcock*, however, access to the property was sought not by statutory employees who worked there regularly and who were exercising their own Section 7 rights, but rather by union organizers, who were strangers to the workplace and who had only derivative Section 7 rights.⁶³ It was this critical distinction that led the District of Columbia Circuit to affirm *New York New York*. The majority nonetheless fails to adequately address the unique situation of contractor-employees or to persuasively explain why employees like the musicians in this case should be treated as if they were union organizers.⁶⁴ *New York New York*, in contrast, demonstrated in great detail why the two groups were *not* equivalent—and, as already

demonstrated, the majority's attack on *New York New York* is baseless.

But even if it were appropriate to consider whether contractor employees had "reasonable alternative nontrespassory means of communication," the majority's approach would still be arbitrary in its failure adequately to consider the facts presented here and in other cases where employees seek to communicate not with the *general* public, but rather with a small, specific subset of the public: the patrons or customers of their employer, who might have special influence with the employer. The majority disregards a patently obvious fact: the far-and-away superior means to reach patrons of one's employer is by engaging in activity at the place of business. Advertising or social media is not a substitute. Even with the broadest outreach, bolstered with unlimited resources, attempting to reach the narrow band of the public who patronizes an establishment—a virtually unknowable subset of the population until they set foot in the employer's business—will be impossible. This case provides a clear example. It is difficult to discern a medium available to the Symphony's musicians that could target Ballet patrons effectively other than talking to people arriving for a Ballet performance. A random highway billboard advertisement or posting on a worker's social media pages is hardly an effective substitute—even leafleting on a sidewalk across the street, where Ballet patrons are less likely to traverse, is not really comparable. The Supreme Court has held that agency action is arbitrary if the agency has "entirely failed to consider an important aspect of the problem."⁶⁵ The majority's failure here is clear. But the majority's ultimate failure to engage in reasoned decision-making is much more glaring. The majority cannot credibly deny the consequences of adopting its new access standard here: the destruction of Section 7 rights in almost all cases where on-

⁶² The majority relies on Supreme Court precedent that considers alternate means of access where access is sought by union organizers without any non-derivative Sec. 7 rights. But, as explained, the Symphony musicians and other contractor-employees fall into a different category. Meanwhile, the fact that the Symphony musicians were only made to cross the street hardly saves the majority's broad approach to alternative means of access. There can be no doubt that the majority will find that contractor-employees may be denied access when websites and billboards will serve as substitutes (in the majority's view), whether or not there is a nearby sidewalk. The majority's assertion that print and online media "may be more effective than a single day of leafleting" is utterly misplaced. Under the Act, employees and their unions should be free to choose whatever peaceful means of reaching out to customers they wish. Obviously, not all means of communication will be available to all employees at all times, given their varying resources and sophistication.

⁶³ To be sure, under *Babcock* and *Lechmere*, the burden of proof is on union organizers to show that employees are inaccessible and cannot be reached except by permitting access to the owner's property. See, e.g., *Lechmere*, supra, 502 U.S. at 539–540. The Supreme Court described this burden as "a heavy one." *Id.* at 540. But if the burden of proving

inaccessibility is heavy, of course, then the burden of proving *accessibility*—the nominal burden placed on property owners here by the majority—is correspondingly light.

⁶⁴ The majority professes not to apply *Lechmere* as controlling precedent in this case, but instead to be exercising the Board's discretion while "being faithful to the teachings of the Supreme Court." My colleagues purport only to apply *Lechmere*'s "distinction 'of substance' between the property owner's own employees and nonemployees of the property owner." But *Lechmere* only contemplated this "distinction of substance" with respect to nonemployee union organizers who were strangers to the property and had no Sec. 7 rights of their own. And, as the District of Columbia Circuit held, the access rights of contractor employees are not determined by prior Supreme Court decisions. See *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002). The majority has reflexively applied *Lechmere* to mean that contractor employees' rights are "inherently more restricted," without actually analyzing the unique interests at stake.

⁶⁵ *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983).

site contractor employees seek access to the property to communicate with members of the public. But the majority does not seem to recognize these consequences as something harmful to the goals of the National Labor Relations Act, the statute that the Board administers. The Board's statutory mission is not the enforcement of private property rights on behalf of property owners, against employees who are protected by the Act.

In upholding the Board's decision in *New York New York*, the District of Columbia Circuit observed that the Board had "adequately considered . . . 'the policy implications'" of the accommodation between Section 7 rights and property rights that the Board had reached.⁶⁶ The *New York New York* Board pointed out that its accommodation generally promoted the exercise of Section 7 rights by employees acting on their own behalf—that are the cornerstone of the Act's system of labor peace—and that to deny employees access rights as the decision provided would seriously undermine the Act's purposes.⁶⁷ Similarly, the Board expressed concern that denying rights would create a perverse incentive for statutory employers to structure work relationships to defeat employees' ability to exercise their statutory rights.⁶⁸ Here, by contrast, the majority seems to disregard the impact of its decision on the Act's policies.

Consider two examples: Custodial or housekeeping employees who work at multiple buildings, none of which are owned by the firm that employs them, will now have no right to communicate with the public about their working conditions on any of the building properties. Employees of a food service contractor who work exclusively on the property of a business will now be unable to leaflet the public to complain about unfair working conditions at their workplace, because they can theoretically use Facebook or billboard ads to (somehow) reach the business patrons. Today's decision takes away important Section 7 rights for a segment of the workforce that may need them the most, but it utterly fails to explain how that outcome serves the purposes of the National Labor Relations Act and why the Board should abandon an approach, endorsed by the District of Columbia Circuit, that avoided such a result.

IV.

In short, the majority makes little effort to grapple with the legal and policy considerations that the *New York New York* Board—with the approval of the District of Columbia Circuit—took pains to analyze, or to find a bona fide accommodation of employees' Section 7 rights and employers' property rights, as the Supreme Court requires.

My colleagues claim to have simply made different "choices" than did the *New York New York* Board, but their explanation for those choices cannot withstand scrutiny. The majority's policy choices, in other words, are arbitrary—and the inevitable result of their new standard will be to ensure that employer property rights will almost invariably prevail, stripping important labor-law rights from a significant segment of American workers who work on property owned by someone other than their employer. Because the majority's holding falls far outside the Board's discretion in interpreting the National Labor Relations Act, I dissent.

Dated, Washington, D.C. August 23, 2019

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

Eva Shih, Esq., for the General Counsel.

Donna K. McElroy and Hannah L. Hembree, Esqs. (Dykema Cox Smith), of San Antonio, Texas, for the Respondent.

David Van Os, Esq., of San Antonio, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in San Antonio, Texas, on October 10 and 11, 2017. Local 23 of the American Federation of Musicians filed the initial charge on February 21, 2017. The General Counsel issued the complaint on June 30, 2017.

The General Counsel alleges that Respondent, Bexar County Performing Arts Center Foundation (hereinafter the Tobin Center), violated Section 8(a)(1) of the Act by prohibiting musicians employed by the San Antonio Symphony from handing out leaflets in front of the Tobin Center on February 17–19, 2017. The musicians, members of Local 23, were protesting the use of recorded, instead of live, music, by the San Antonio Ballet in the performances of Tchaikovsky's *Sleeping Beauty*.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a non-profit corporation which operates the Tobin Performing Arts Center in San Antonio, Texas. In the year prior to the filing of the charge, Respondent derived gross

⁶⁶ 676 F.3d at 199 fn. 2.

⁶⁷ 356 NLRB at 912.

⁶⁸ *Id.*

revenues in excess of \$1 million. It also purchased and received goods and materials during that year valued in excess of \$5000 directly from points outside of Texas. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.¹

II. ALLEGED UNFAIR LABOR PRACTICES

The Tobin Center

The Tobin Center, which opened in 2014, was built with city, county and private funding on the former site of the San Antonio Municipal Building. Upon the opening of the Tobin Center, the City of San Antonio conveyed the deed to the Tobin Center to the Bexar County Performing Arts Center Foundation. The Tobin Center and the sidewalks surrounding it are private property.

The Tobin Center has 3 performing arts venues; the H-E-B Performance hall, which seats 1750 patrons; the Caesar Alvarez Studio Theater, which seats 300 and the Will Smith Plaza Outdoor theater, which seats 1000.

Respondent has use agreements with 3 principal resident companies and several associate resident companies. The principal resident companies are the San Antonio Symphony, the San Antonio Ballet and the San Antonio Opera. The relationship between the Tobin Center and the resident companies is that of lessor and lessee.

Leafletting of The Tobin Center by Symphony Musicians and Sympathizers

The San Antonio Ballet uses live music, performed by San Antonio Symphony musicians in some productions, but not others. It has used such live music at holiday performances of *The Nutcracker*, but generally has used recorded music at its spring performances, including the February 2017 production of Tchaikovsky's *Sleeping Beauty*.

The use of recorded music by the Ballet has an adverse economic impact on the Symphony musicians. For that reason, Local 23 decided to pass out leaflets before the 4 performances of *Sleeping Beauty* on February 17 through February 19 (Friday and Saturday nights; Saturday and Sunday matinees). Sympathizers, who did not work at the Tobin Center, including some members of the International Brotherhood of Electrical Workers, agreed to assist in passing out these handbills.

Management of the Tobin Center became aware of the Union's plan to leaflet the performances beforehand. At a meeting on February 14, Michael Fresher, the President of the Tobin Center, instructed his staff not to permit anyone to hand out leaflets, promote or solicit on the Tobin Center grounds. On the evening of September 17, 12–15 Symphony musicians and their sympathizers gathered in front of a building across the street from the Tobin Center. Several individuals crossed the street onto the sidewalk in front of the main entrance to the Tobin Center with their flyers. They were immediately met by Tobin Center management and agents and told they could not distribute flyers

¹ However, Respondent is not the employer of the symphony musicians.

² Of course, the leafletting may have been even more effective had the leafletters been able to distribute the handbills closer to the entrance of

anywhere on Tobin Center property, including the sidewalks in front of the facility. At this hearing, Respondent stated that it would also prohibit such distribution and solicitation in the parking lots which belong to the Tobin Center.

The musicians and their sympathizers were thus required to distribute their leaflets at places off the Tobin Center property, such as the sidewalks across the street from the main entrance. At these locations the leafletters were able to distribute a number of handbills, possibly several hundred.²

The leaflet read as follows:

A Live Orchestra for Live Dancers.

You will not hear a live orchestra performing with the professional dancers of Ballet San Antonio. Instead, Ballet San Antonio will waste the world class acoustics of the Tobin Center by playing a recording of Tchaikovsky's score over loudspeakers. You've paid full price for half of the product. San Antonio deserves better! DEMAND LIVE MUSIC!

The Tobin Center employs security personnel at all performances. During at least some of the performances of *Sleeping Beauty*, the Tobin Center employed extra security personnel for reasons unrelated to the union handbilling.

The relationship of the San Antonio Symphony Musicians with the Tobin Center

Symphony musicians are employed by the San Antonio Symphony, a lessee of the Tobin Center. The relationship between the Tobin Center and the Symphony is governed by a Use Agreement (GC Exh. 4.) The Symphony is entitled to use the Tobin Center for performances and rehearsals 22 weeks of the year. Local 23 has a collective-bargaining agreement with the Symphony, not with the Tobin Center.³ That agreement provides for 30 work weeks within a 39-week period between September and June. In 2016–2017, the musicians worked 27 weeks for the Symphony and were furloughed for 3 weeks.

Symphony musicians perform most, by not 100 percent, of their services; i.e., performances and rehearsals, for the Symphony inside the Tobin Center. In 2014–2015, 97 percent of the services rendered by symphony musicians to the Symphony, Opera or Ballet occurred at the Tobin Center (GC Exh. 13); 84 percent in 2015–2016 (GC Exh. 15) and 93 percent in 2016–2017 (GC Exh. 17), Tr. 243–46.

While the Symphony is leasing space from the Tobin Center (generally the entire year except for the summer months) symphony musicians use the Tobin Center breakroom for breaks and for union meetings. Some store their instruments (e.g., large instruments such as the Harp) at the Center. The Symphony also maintains a library at the Tobin Center staffed by a Local 23 bargaining unit member.

Legal Analysis

Respondent relies principally on the U.S. Supreme Court decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in which the Court held that property owners may bar nonemployee union

the Tobin Center, where the density of patrons would have likely been greater than across the street.

³ The Union has a separate collective-bargaining agreement with the San Antonio Opera.

organizers from their premises except in limited circumstances. There is a limited exception where the Union does not have reasonable access to the target employees. The General Counsel and the Union rely on the Board's decision in *New York New York Hotel and Casino*, 356 NLRB 907 (2011), enfd. 676 F. 3d 193 (D.C. Cir. 2012), cert den. 133 S.Ct. 1580 (U.S. 2013).

In *New York New York* the Board held that the hotel violated Section 8(a)(1) by prohibiting employees of Ark, a food service contractor, to distribute union literature on the sidewalks and a driveway in front of the hotel, which was hotel property. These employees worked at restaurants inside the hotel. The Board held that a property owner may lawfully exclude from non-work areas, off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason. In *New York New York*, the Board specifically stated that *Lechmere* did not apply to the situation presented, 356 NLRB at 913.

In *Simon DeBartolo Group*, 357 NLRB 1887, 1888 fn. 8 (2011), the Board rejected the employer's argument that its holding in *New York, New York* applied only in situations in which the contractor's employees worked exclusively on the owner's property. As in that case, it is clear that symphony musicians worked regularly at the Tobin Center. I find that this case is governed by *New York New York* and *Simon DeBartolo*, rather than by *Lechmere*. I therefore find that by prohibiting the hand-billing in this case, Respondent violated Section 8(a)(1) of the Act.

Unlike the employees in *New York, New York*, the musicians in this case were not engaged in organizational handbilling as were the restaurant employees in *New York New York*. Another distinction is that the musicians did not have a dispute with their employer; their dispute was with another licensee, the San Antonio Ballet.⁴ I find that neither distinction is material for the reasons stated in the following paragraph.

The musicians had a dispute that effected their wages, hours and working conditions. They are entitled to appeal to the public for help in such matters. Although, the Tobin Center could not rectify their loss of work, the public might be able to do so by lobbying for increased funding for the Ballet. In this regard, it is well settled that employees are protected under the "mutual aid or protection" clause of Section 7 when they seek to improve their lot as employees through channels outside the immediate employee-employer relationship, *Eastex Inc. v NLRB*, 437 U.S. 556 (1978); *Five Star Transportation, Inc.*, 349 NLRB 42, 47 (2007) enfd. 522 F. 3d 46 (1st Cir. 2008) [an appeal by school

bus drivers to a school board, asking that it not award a contract to the Respondent, which was not their employer].

Although Respondent argues that it had no control over Symphony employees, the Use Agreement (GC Exh. 4), gives it powers similar to those of New York, New York vis-à-vis Ark employees. Section 4(1) of that agreement requires the User (the Symphony) to cause its servants, agents, employees, etc. to abide by all rules and regulations as may from time to time be adopted by the Operator (Tobin). Section 4(5) allows Tobin to refuse admission to or cause to be removed from the Premises or the Theater any disorderly or undesirable person as determined by the Operator (Tobin) in its reasonable discretion. There is no reason to conclude that "person" in Section 4(5) does not include employees of the Symphony.

Section 11(2) of the Use Agreement warrants that the User (the Symphony) has under its direct control all performers, staff, personnel and other participants in the Event and shall hold harmless and indemnify the Operator for the actions or omissions of any such staff employed or engaged by the User.⁵

Respondent also points out that pursuant to its deed, the Tobin Center is not open to the public at all times. While that may be true for the interior of the Tobin Center, the sidewalks surrounding the Tobin Center, where the Union desired to leaflet, is open to the public at all times. Even if that were not the case, those sidewalks were open to the public in the hour before the Ballet's performance of *Sleeping Beauty*, at which time the symphony musicians and their supporters attempted to distribute their leaflets to the public.

Tobin also contends that it had a legitimate business reason for prohibiting symphony musicians from distributing handbills to the public on its property. I find that it failed to establish that this is so. First of all the leafleters were not advocating a boycott of the Tobin Center on in any way trying to influence anybody to reduce their patronage of the Tobin Center or the San Antonio Ballet. Their objective was solely to increase their employment opportunities in conjunction with the performances of the Ballet.

Respondent suggests that it needed to prevent patrons of the ballet from having to "wade through" the leafleters. Given the broad expanse of the sidewalk in front of the Tobin Center and limited number of leafleters, there is no evidence that these individuals did, or would have, impeded access to the Tobin Center. While that might be true if there were many more handbillers or if they stationed themselves right in front of the doors to the auditorium, those are hypothetical situations not present in this case.

Respondent also raises hypothetical security concerns since it is a "soft target" for terrorists. However, there is has been no showing that it had any legitimate security concern with regard

⁴ The General Counsel and Charging Party rely in part on the fact that Respondent allowed a car dealership to display two automobiles at the entrance of the Tobin Center-without advertising. Thus, they argue that Respondent should be found to have violated the Act because its no solicitation policy was disparately applied. I decline to decide this case on that basis. In a somewhat different context the Board has held that an employer does not violate the Act by a small number of "beneficent acts" as narrow exceptions to its no-solicitation rule, *Hammary Manufacturing Corp.*, 265 NLRB 57 fn. 4 (1982); *Serv-Air, Inc.*, 175 NLRB 801 (1969). While the car dealership is not a charity, as were the beneficiaries of the

"beneficent acts" in the cited cases, it was allowed to display its vehicles in exchange for sponsorship of the Tobin Center. Regardless, of whether the "beneficent acts" exception applies to this case, the display of the automobiles should not be determinative of this case.

⁵ Respondent also states that the Symphony provides no services or supplies to the Tobin Center, similar to those provided by Ark to the New York New York hotel. However, the Symphony pays the Tobin Center for the use of its venues, which I deem to be functionally the equivalent to the services provided by Ark.

to the union's handbilling. Respondent knew in advance who was going to handbill and the reason for the leafletting. It had no reason to suspect violence on the part of those doing the leafletting. There is no evidence that any of the leafletters were going to be wearing backpacks (a concern at any public gathering since the Boston Marathon bombing). Moreover, whatever danger of terrorism existed on the sidewalk in front of the Tobin Center existed across the street—almost to the same extent.

Finally, the possibility of accumulation of discarded leaflets on the ground presents no rationale for denying symphony musicians the opportunity to exercise their Section 7 rights on the sidewalk in front of the Tobin Center. First of all, leaflets distributed on the other side of the street were just as likely to be discarded on Tobin Center property as those handed out adjacent to it. Moreover, ballet performances generally distribute programs which are also likely to end up on the grounds of the Tobin Center. There is no evidence that the handbilling created an actual litter problem.

CONCLUSION OF LAW

In sum there is nothing to materially distinguish this case from the Board's decision in *New York New York*. Therefore, I find that Respondent violated Section 8(a)(1) in preventing symphony employees from distributing flyers on the sidewalk in front of the Tobin Center between February 17 and 19, 2017. This conclusion does not apply to sympathizers of those employees who were not symphony employees.⁶

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Bexar County Performing Arts Center Foundation (doing business as the Tobin Center), its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting and/or preventing off-duty employees who are regularly employed at the Tobin Center, including employees of the San Antonio Symphony, from engaging in handbilling in nonworking areas of the Tobin Center property when that handbilling relates to wages, hours or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed

⁶ This case was tried by the General Counsel on the theory that pursuant to *New York New York* Respondent could not prohibit leafletting by employees who regularly work at the Tobin Center. Due to this, I did not address the issue of whether Respondent could prohibit employees who did not regularly work at the Tobin Center from distributing flyers on its property. However, since the sidewalks in front of the Tobin Center were open to the public at the times material to this case, it is not clear that Respondent could have legally prevented these individuals from leafletting on the Tobin Center sidewalk, *Baptist Medical System*, 288 NLRB 882 (1988); *Montgomery Ward & Co.*, 265 NLRB 60 (1982).

them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Within 14 days after service by the Region, post at its San Antonio, Texas facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and employees of its lessees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and/or employees of its lessees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent or its lessees at any time since February 17, 2017.

Dated, Washington, D.C. December 5, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT prohibit and/or prevent off-duty employees who are regularly employed at the Tobin Center, including employees of the San Antonio Symphony and other lessees, from engaging in handbilling relating to wages, hours or other terms and

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conditions of employment in nonworking areas of the Tobin Center property.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

BEXAR COUNTY PERFORMING ARTS CENTER
FOUNDATION D/B/A TOBIN CENTER FOR THE
PERFORMING ARTS

The Administrative Law Judge's decision can be found at www.nlr.gov/case/16-CA-193636 or by using the QR code below. Alternatively, you can obtain a copy of the decision from

the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

