

Nos. 12-1021, 12-1076

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

VENETIAN CASINO RESORT, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

(A) Parties and Amici: Venetian Casino Resort, LLC, petitioner/cross-respondent here, was a respondent in the case before the National Labor Relations Board. The Board is the respondent/cross-petitioner here, and the Board's General Counsel was a party in the case before the Board. The Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165 (both affiliated with the Hotel Employees and Restaurants Employees International Union) was the charging party before the Board.

(B) Rulings Under Review: This case involves a consolidated petition for review and cross-application for enforcement of the Board's Second Supplemental Decision and Order: *Venetian Casino Resort, LLC*, 357 NLRB No. 147 (December 21, 2011).

(C) Related Cases: This case was previously before this Court. In September 2005, the Board issued a Decision and Order (*Venetian Casino Resort, LLC*, 345 NLRB 1061 (2005)) finding that Venetian interfered with a lawful labor demonstration in violation of Section 8(a)(1) of the Act by: playing, over a loudspeaker, a message telling demonstrators that they were subject to arrest for trespass on private property; informing a union business agent that he was being

placed under citizen's arrest and then contacting the Las Vegas Metropolitan Police to report the citizen's arrest; and summoning the police and requesting that the demonstrators be issued trespass citations and removed from the sidewalk in front of the Venetian. The Board found that these actions were not protected by the First Amendment as petitioning incidental to a lawsuit. On a petition for review filed by Venetian (case no. 05-1396), this Court upheld the Board's findings that Venetian's actions were not incidental petitioning. But the Court remanded the case to the Board to determine whether Venetian's summoning of police constituted direct petitioning under the First Amendment. *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601 (D.C. Cir. 2007). The Board's decision on remand is the case now before the Court.

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues	2
Relevant statutory and regulatory provisions	3
Statement of the case.....	3
I. Statement of facts	5
A. Venetian builds a replacement sidewalk and promises to keep the sidewalk open for public use	5
B. The District attorney and police officials refuse Venetian’s attempts to secure their agreement that the police will arrest the demonstrators for trespass; the Union obtains a permit and holds the demonstration.....	6
C. The Ninth Circuit concludes that the sidewalk fronting Venetian’s resort is a public forum and holds that Venetian possesses no right to exclude demonstrators from it	9
II. The Board’s initial decision	10
III. The Court’s opinion and remand	11
IV. The Board’s decisions and orders on remand.....	13
Summary of argument.....	15
Standard of review	16

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
Argument.....	17
I. The Board reasonably found that Venetian violated Section 8(a)(1) of the Act by summoning police to issue trespass citations and evict peaceful union demonstrators, and reasonably rejected its First Amendment defense.....	17
A. Venetian’s summoning of the police interfered with the Union’s protected Section 7 demonstration and violated Section 8(a)(1) of the Act.....	17
B. Venetian’s summoning of the police to evict peaceful union protesters was not petitioning activity	19
1. <i>Noerr-Pennington</i> does not shield every contact with government employees.....	19
2. <i>Noerr-Pennington</i> does not apply in this case because Venetian did not engage in direct petitioning of government ..	23
II. The Court does not have jurisdiction to consider Venetian’s challenges to the Board’s remedial order	32
A. The Court lacks jurisdiction to consider Venetian’s challenges to the Board’s remedial order because it failed to file a motion for reconsideration and because Venetian’s challenge to the remedy is not yet ripe for review.....	32
B. In any event, the Board properly exercised its broad remedial authority in directing electronic posting of notices	36
C. Even if reached, Venetian’s challenges to the remedy are meritless and must be rejected.....	41
Conclusion	46

TABLE OF AUTHORITIES

Cases	Page(s)
* <i>Allied Tube & Conduit Corp. v. Indian Head, Inc.</i> , 486 U.S. 492 (1988).....	20,21,30
<i>BE&K Constr. Co. v. NLRB</i> , 537 U.S. 516 (2002).....	12,22,28
<i>Bill Johnson's Rests., Inc. v. NLRB</i> , 461 U.S. 731 (1983).....	12,22,24,27
<i>Borough of Duryea, PA v. Guarnieri</i> , __ U.S. __, 131 S. Ct. 2488 (2011).....	21
<i>California Motor Transp. Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972).....	20,21
* <i>Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers, Local Union No. 419 v. NLRB</i> , 467 F.2d 392 (D.C. Cir. 1972).....	44
<i>Chet Monez Ford</i> , 241 NLRB 349 (1979).....	37
<i>Chicago Casket Co.</i> , 21 NLRB 235 (1940).....	18
* <i>Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961).....	4,20,26,31
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978).....	18
* <i>FCC v. Pottsville Broad. Co.</i> , 309 U.S. 134 (1940).....	44

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Federal Prescription Service, Inc. v. American Pharmaceutical Association</i> 663 F.2d 253 (D.C. Cir. 1981)	30,31
<i>Fibreboard Paper Prods. Corp. v. NLRB</i> , 379 U.S. 203 (1964).....	36
<i>Ford Motor Co.</i> , 31 NLRB 994 (1941)	18
* <i>Forro Precision, Inc. v. IBM</i> , 673 F.2d 1045 (9th Cir. 1984)	25,26
* <i>George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.</i> , 424 F.2d 25 (1st Cir. 1970).....	22,28,29,31
* <i>Hilton v. City of Wheeling</i> , 209 F.3d 1005 (7th Cir. 2000)	21,25,27,29-30
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 353 U.S. 137, 152 (2002).....	38
<i>Indio Grocery Outlet</i> , 323 NLRB 1138 (1997), <i>enforced sub nom.</i> <i>NLRB v. Calkins</i> , 187 F.3d 1080 (9th Cir. 1999)	19
* <i>J. Picini Flooring, Inc.</i> , 356 NLRB No. 9 (2010)	15,16,32,34,37,38,39,40,41,42,43,45
<i>J.J. Cassone Bakery, Inc. v. NLRB</i> , 554 F.3d 1041 (D.C. Cir. 2009).....	16
<i>Montgomery Ward & Co., Inc. v. NLRB</i> , 692 F.2d 1115 (7th Cir. 1982)	19

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>New Process Steel, L.P., v. NLRB</i> , 560 U.S. ____, 130 S. Ct. 2635 (2010).....	13-14
* <i>New York & Presbyterian Hosp. v. NLRB</i> , 649 F.3d 723 (D.C. Cir. 2011).....	33
<i>NLRB v. Cheney California Lumber Co.</i> , 327 U.S. 385 (1946).....	17
<i>NLRB v. Falk Corp.</i> , 308 U.S. 453 (1940).....	38
<i>NLRB v. J. Weingarten</i> , 420 U.S. 251 (1975).....	41
<i>O’Dovero v. NLRB</i> , 193 F.3d 532 (D.C. Cir. 1999).....	37
<i>Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Maryland</i> , 756 F.2d 986 (4th Cir. 1985)	26
<i>Pennsylvania Greyhound Lines Inc.</i> , 1 NLRB 1 (1935), <i>enforced</i> , 303 U.S. 261 (1938).....	37
<i>Petrochem Insulation, Inc. v. NLRB</i> , 240 F.3d 26 (D.C. Cir. 2001).....	17,18
<i>Revlon Prods. Corp.</i> , 48 NLRB 1202 (1943), <i>enforced</i> , 144 F.2d 88 (2d Cir. 1944).....	19

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Sanford Fork & Tool Co.</i> , 160 U.S. 247 (1895).....	44
* <i>Sheet Metal Workers Int’l Ass’n v. NLRB</i> , 561 F.3d 497 (D.C. Cir. 2009).....	34,36
<i>Sprain Brook Manor Nursing Home, LLC</i> , 351 NLRB 1190 (2007).....	19
<i>Sosa v. DIRECTV, Inc.</i> , 437 F.3d 923 (9th Cir. 2006).....	28
* <i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	17,24,27,34
<i>Tasty Baking Co. v. NLRB</i> , 254 F.3d 114 (D.C. Cir. 2001).....	12
<i>Teamsters Local 171 v. NLRB</i> , 863 F.2d 946 (D.C. Cir. 1988).....	37
* <i>United Mine Workers of Am. v. Pennington</i> , 381 U.S. 657 (1965).....	4,20,31
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	16
<i>Venetian Casino Resort v. Local Joint Executive Bd., Las Vegas</i> , 45 F.Supp.2d 1027 (D. Nev. 1999).....	9
<i>Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas</i> , 257 F.3d 937 (9th Cir. 2001), <i>cert. denied</i> , 535 U.S. 905 (2002).....	9-10,11

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
* <i>Venetian Casino Resort, LLC v. NLRB</i> , 484 F.3d 601 (D.C. Cir. 2007)	3,4,5,6,7,8,9,11,12,13,16,18,19,22,27,28,43
<i>Vico Prods. Co., Inc. v. NLRB</i> , 333 F.3d 198 (D.C. Cir. 2003)	37
<i>Virginia Elec. & Power Co. v. NLRB</i> , 319 U.S. 533 (1943)	17,37
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)	33
* <i>Woods Exploration & Producing Co. v. Aluminum Co. of Am.</i> , 438 F.2d 1286 (5th Cir. 1971)	21,22,24,28,29
 Statutes:	 Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 3(b) (29 U.S.C. § 153(b))	14
*Section 7 (29 U.S.C. § 157)	11,12,13,14,17,18,19,26,27
*Section 8(a)(1) (29 U.S.C. § 158(a)(1))	2,3,4,10,11,13,14,15,17,18,22,31
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(c) (29 U.S.C. § 160(c))	36
*Section 10(e) (29 U.S.C. § 160(e))	2,16,33
Section 10(f) (29 U.S.C. § 160(f))	2,34

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Regulations:

29 C.F.R. § 102.48(d)(1)-(2).....33

Miscellaneous:

NLRB Casehandling Manual, Part III (Compliance), § 10518.238

Companies Embrace Telecommuting as a Retention Tool,
<http://www.cnbc.com/id/44612830> (Sep. 30, 2011).....40

The State of Telework in the U.S.,
<http://www.workshifting.com/downloads/downloads/Telework-Trends-US.pdf>
(June 2011).....40

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Venetian Casino Resort, LLC, to review, and the cross-application of the National Labor Relations Board to enforce, the Board's Second Supplemental Decision and Order issued against

Venetian on December 21, 2011, which is reported at 357 NLRB No. 147.¹ (A 441-45.) The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of National Labor Relations Act, which authorizes the Board to prevent unfair labor practices affecting commerce. 29 U.S.C. §§ 151, 160(a). The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f).

The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement. Venetian filed its petition for review on January 12, 2012. (A 446.) The Board filed its cross-application for enforcement on February 7, 2012. (A 447.) Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUES

1. Did the Board reasonably find that Venetian violated Section 8(a)(1) of the Act by summoning the police to issue trespass citations and eject peaceful union demonstrators from the sidewalk in front of its premises, and in doing so, did the Board reasonably reject Venetian's defense that its summoning of police under

¹ Citations are to the Appendix filed with Venetian's brief. When a record citation contains a semicolon, references preceding it are to the Board's findings, and references following it are to the supporting evidence.

the facts of this case constituted direct petitioning protected by the First Amendment?

2. Does the Court have jurisdiction to consider Venetian's challenges to the Board's remedial Order?

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act and the Board's Rules and Regulations can be found in the Addendum to this brief.

STATEMENT OF THE CASE

The Second Supplemental Decision and Order currently under review results from the Board's acceptance of this Court's remand in *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601 (D.C. Cir. 2007). In that opinion, the Court upheld the Board's findings that Venetian violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by its conduct during a sidewalk demonstration organized by the Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165. Specifically, the Court upheld the Board's findings that, during the demonstration, Venetian unlawfully interfered with the peaceful union demonstrators by repeatedly playing a recorded message over a loudspeaker telling demonstrators that they were trespassing, and by attempting to place a union representative under citizen's arrest. *See Venetian*, 484 F.3d at 605, 610. In doing so, the Court rejected Venetian's defense that those actions were protected by the

First Amendment under the *Noerr-Pennington* doctrine.² Specifically, the Court found that Venetian's actions were not pre-litigation activities incidental to its later lawsuit in which it sought an injunction against the Union and a declaratory judgment that the sidewalk was its private property. *Id.* at 612.

The Court, however, remanded the third Board finding, that Venetian's summoning of police violated Section 8(a)(1) of the Act, because the Board had not addressed Venetian's additional constitutional defense that its summoning of police constituted direct petitioning of the government under the First Amendment. *Id.* at 610, 614. On remand, the Board rejected that defense under the circumstances of this case and settled First Amendment principles. (A 441.)

The facts relevant to the Board's decision are detailed below, followed by summaries of the Board's initial decision, the Court's opinion, and the Board's Supplemental Decisions and Orders on remand.

² As explained more fully at pp. 19-22, the *Noerr-Pennington* doctrine, which the Supreme Court developed in a series of antitrust cases, may immunize from liability certain conduct that could otherwise violate a federal statute when necessary to ensure that the statute does not abridge the First Amendment right to petition the government. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 137-38 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669-72 (1965).

I. STATEMENT OF FACTS

A. Venetian Builds a Replacement Sidewalk and Promises To Keep the Sidewalk Open for Public Use

Venetian operates a hotel-casino in Las Vegas, Nevada. *Venetian*, 484 F.3d at 603. In 1999, Venetian built its new resort after demolishing a smaller, unionized hotel, the Sands, which once stood on the same property. *Id.* at 603-04. Earlier, in 1997, when Venetian attempted to secure approval of its development plan, the Clark County Council determined that widening Las Vegas Boulevard (“the Strip”) in front of the resort would be necessary to accommodate additional traffic. *Id.* at 604. Widening the Strip required demolishing the existing state-owned sidewalk. *Id.* Venetian agreed to build a replacement sidewalk parallel to the new traffic lane. *Id.*

To secure the Council’s approval of its development plan, Venetian entered into an agreement with the Nevada Department of Transportation. Under the terms of that agreement, Venetian agreed to construct and maintain on its property a replacement sidewalk that connected the public sidewalks on either end of its property and gave the public access to an uninterrupted sidewalk. Venetian also agreed to allow public access and use of that sidewalk without restriction. (A 285-86.)

B. The District Attorney and Police Officials Refuse Venetian's Attempts To Secure Their Agreement that the Police Will Arrest the Demonstrators for Trespass; the Union Obtains a Permit and Holds the Demonstration

In February 1999, local media reported that the Union intended to hold a demonstration on the sidewalk in front of the resort to protest the fact that Venetian was about to hire its new workforce without a union contract in place. *Venetian*, 484 F.3d at 604. As reported, the Union saw the battle over the sidewalk as the “opening salvo in the union’s stepped-up campaign against the \$1.2 billion Venetian as it prepares to open doors without a union contract.” (A 334.) The articles also reported that Venetian’s owner claimed the right to exclude the Union from the sidewalk and had refused the Union’s request that he remain neutral in the Union’s campaign to organize the resort’s employees. (A 334-35.)

The Nevada Department of Transportation issued the Union a permit to hold a rally on March 1 on the sidewalk in front of Venetian’s resort. (A 305-06.) The permit stated that approximately 1,000 people were expected and granted the Union permission to demonstrate on the sidewalk and in the lane of the Strip adjacent to the sidewalk. (A 305.) In addition, the permit specified that “police [were] required” to be on the scene to administer the terms of the permit. (A 306.)

On more than one occasion before the March 1 demonstration, Venetian attorney David Friedman spoke with County District Attorney Stewart Bell and argued that the demonstration should not be permitted on the sidewalk because

Venetian considered it to be private property. *Venetian*, 484 F.3d at 604. (A 150-52.) Bell made it clear to Friedman that his office would not enforce the Nevada trespass statute against the demonstrators. *Venetian*, 484 F.3d at 604. (A 153.) Friedman then met with high-ranking officials in the Las Vegas Police Department, who confirmed that the police would be present at the demonstration “just . . . [to] make sure that nobody got hurt,” and that they “weren’t going to be arresting anybody.” (A 153-54.)

On the morning of the demonstration, which was scheduled for 5:00 p.m., Venetian met with District Attorney Bell and police officials to give them a tour of the sidewalk area. (A 292.) At about 4:00 p.m., union representative Glen Arnodo arrived, and the police officers assigned to administer the permit arrived shortly thereafter. (A 40, 43, 47.) About that time, a Venetian security guard approached Arnodo and read the criminal trespass statute to him. (A 43.)

Once the demonstration got underway, about 1,000 individuals, many displaying T-shirts or pins identifying themselves as affiliated with various unions, marched and carried picket signs. *Venetian*, 484 F.3d at 604. Many of the picket signs included a photograph of Venetian’s owner and the words “Private Sidewalk” written under the photo, with the words “Union Rights/Civil Rights/One and the Same” framing the top and bottom of the sign. *Id.*

The demonstrators repeatedly chanted “Who owns the sidewalk? Union sidewalk,” “Venetian no, Union yes,” and “Hey, hey, ho, ho, union busting’s got to go.” *Id.* Towards the end of the demonstration, there were a number of speeches touching on themes mentioned in the newspaper reports: the Union’s organizing campaign and Venetian not hiring union employees or having a union contract in place when it opened. For example, one speaker remarked that Venetian should be operating “one hundred percent union.” Another said that Venetian should have given all former Sands employees hiring priority over members of the general public and that despite the “new name,” a hotel on the same property as the unionized Sands “should still be union.” *Id.* at 604-05.

Throughout the demonstration, Venetian repeatedly played a recorded message over loudspeakers asserting that the demonstrators were trespassing on private property and were subject to arrest under Nevada’s criminal trespass statute. *Id.* at 605. At one point, Venetian also asked the police officers who were on the scene to administer the terms of the Union’s demonstration permit to issue criminal trespass citations to the demonstrators and to force their removal from the sidewalk as trespassers on private property. *Id.* The police officers refused. In addition, a Venetian security guard sought to effect a citizen’s arrest of union representative Arnodo by telling Arnodo that he was being arrested and, the next

day, reporting that “arrest” to police. *Id.* (A 180-81.) The police refused to take any action. (A 56-57.)

C. The Ninth Circuit Concludes that the Sidewalk Fronting Venetian’s Resort Is a Public Forum and Holds that Venetian Possesses No Right To Exclude Demonstrators From It

Three days after the demonstration, Venetian filed an action in U.S. District Court seeking a declaratory judgment and preliminary injunction against county officials, the Las Vegas Metropolitan Police Department, and the Union. *Venetian*, 484 F.3d at 605. In its suit, Venetian claimed that the sidewalk was private property, that it had the right to exclude the union demonstrators from its property as criminal trespassers, and that the actions of county and city officials in granting the Union a permit for the demonstration and in refusing to enforce the Nevada criminal trespass statute against them constituted an unconstitutional “taking” under the Fifth Amendment. *Id.* The district court rejected those arguments. *Venetian Casino Resort v. Local Joint Executive Bd., Las Vegas*, 45 F.Supp.2d 1027 (D. Nev. 1999) (A 249-58). It found instead that the sidewalk performed an essential public function, and therefore, that Venetian had no right to restrict the demonstrators’ exercise of their First Amendment rights. *Id.* at 1036 (A 258). On review, the Ninth Circuit affirmed, and the Supreme Court denied Venetian’s subsequent petition for a writ of certiorari. *Venetian Casino Resort, LLC v. Local*

Joint Executive Board of Las Vegas, 257 F.3d 937 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002) (A 259-80).

II. THE BOARD'S INITIAL DECISION

Based on unfair labor practice charges filed by the Union after the March 1, 1999 demonstration, the Board's General Counsel issued a complaint against Venetian, alleging that Venetian's actions on the day of the demonstration violated Section 8(a)(1) of the Act. (A 385.) Venetian filed an answer denying that it committed any unfair labor practices. (A 385.) Following a hearing, an administrative law judge issued his decision, finding that Venetian violated Section 8(a)(1) of the Act by repeatedly playing the recorded trespass message over a loudspeaker, telling union representative Arnodo that he was being placed under citizen's arrest, and summoning police to have the demonstrators ejected. (A 389.) The judge rejected Venetian's defense that its conduct was protected by the First Amendment as pre-litigation activity incidental to its later federal lawsuit (in which it sought a declaratory judgment and an injunction against union demonstrators). (A 391.)

The Board (Chairman Battista and Members Liebman and Schaumber) affirmed the administrative law judge's rulings, findings, and conclusions, and agreed with the judge that Venetian violated Section 8(a)(1) of the Act as alleged and rejected its defense that its conduct was incidental to the lawsuit. (A 383.)

Neither the judge nor the Board addressed Venetian's additional claim that its summoning of the police constituted direct petitioning under the First Amendment.

III. THE COURT'S OPINION AND REMAND

On review, the Court upheld the Board's findings that by broadcasting the trespass message and attempting a citizen's arrest, Venetian violated Section 8(a)(1) of the Act. In upholding those findings, the Court agreed with the Board that the Union's demonstration "was an effort to communicate its 'labor dispute' to the public" and, therefore, that the demonstration was protected by Section 7 of the Act, 29 U.S.C. § 157. *Venetian*, 484 F.3d at 607-08. The Court rejected Venetian's argument that, by attempting to deny the demonstrators access to the sidewalk, it was merely exercising a permissible property right. *Id.* at 609. The Court cited the Ninth Circuit's determination that Venetian "has no property right to the sidewalk that permits it to prevent people, like the demonstrators here, from exercising their First Amendment rights." *Id.* See also *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001) (A 270). Based on these two findings—that the demonstration was protected by Section 7 and Venetian had no right to exclude the demonstrators from the sidewalk—the Court held that Venetian unlawfully interfered with the demonstrators' Section 7 rights because those actions "had a reasonable tendency to . . . interfere" with the demonstration in violation of Section 8(a)(1) of the Act.

Venetian, 484 F.3d at 610 (quoting *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001)).

The Court then addressed *Venetian*'s contention that it should be immunized from unfair labor practice liability under the Supreme Court's *Noerr-Pennington* doctrine because its actions were pre-litigation activities incidental to its subsequent, unsuccessful lawsuit. The Court, recognizing the limited reach of that doctrine, noted that the Supreme Court had extended the *Noerr-Pennington* doctrine in the labor law context only to protect "direct petitioning, i.e., employer lawsuits" and had yet to apply the doctrine to any form of incidental conduct.

Venetian, 484 F.3d at 612 (discussing *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983), and *BE&K Constr. Co. v. NLRB*, 537 U.S. 516 (2002)). The Court, however, did not reach that question because it held that *Venetian*, in any event, had failed to show "that its conduct was in fact 'incidental' to its lawsuit."

Venetian, 484 F.3d at 612. The Court noted that there is "no evidence" that *Venetian*'s conduct was "customary 'pre-litigation' activity," while this type of conduct has "long been held to be governed by the NLRA." *Id.*

Recognizing that "context matters," the Court cautioned that "expanding First Amendment protection in labor law for an employer's arguably expressive conduct may result in constricting the scope of employees' expressive activity protected by Section 7." *Id.* at 613. By "interpret[ing] *Noerr-Pennington* to

protect an employer's conduct that has as little connection to actual petitioning activity as the Venetian's, we would effectively eviscerate the fundamental protection Section 7 seeks to provide for expressive activities by labor unions." *Id.*

Accordingly, the Court granted the Board's cross-application for enforcement as to its findings that playing the recorded trespass message and attempting a citizen's arrest were Section 8(a)(1) violations that were not immunized from liability under the First Amendment. *Id.* at 614. Regarding the Board's third finding, however, the Court remanded the issue for the Board to consider whether Venetian's summoning the police was direct petitioning within the meaning of the First Amendment because the Board had previously not reached that defense. *Id.*

IV. THE BOARD'S DECISIONS AND ORDERS ON REMAND

Following the Court's remand, the Board invited the parties to submit supplemental statements of position. (A 395-434.) In April 2009, a two-member panel of the Board issued a Supplemental Decision and Order in which it withdrew the finding that Venetian violated Section 8(a)(1) by summoning police. The Board explained that it would not "be a good use of the Board's limited resources" while operating with only two sitting members to decide this issue when the employees' Section 7 rights had already been vindicated. (A 435.) In June 2010, the Supreme Court issued its decision in *New Process Steel, L.P., v. NLRB*, 560

U.S. ___, 130 S. Ct. 2635 (2010), holding that under Section 3(b) of the Act, 29 U.S.C. § 153(b), a delegee group of at least three members had to be maintained in order to exercise the delegated authority of the Board. The Board, after subsequently being reconstituted with additional sitting members, then issued an order setting aside the 2009 Supplemental Decision and Order. (A 437-38.) On August 27, 2010, a three-member panel of the Board issued an order severing the remanded finding for further consideration. (A 439-40.)

On December 21, 2011, the Board (Chairman Pearce and Members Becker and Hayes) issued the Second Supplemental Decision and Order that is the subject of this appeal. (A 441-45.) In the decision, the Board concluded that Venetian did not engage in direct petitioning of the government within the meaning of the First Amendment by summoning the police to eject the peaceful union demonstrators from the sidewalk. The Board accordingly affirmed its earlier finding that Venetian violated Section 8(a)(1) of the Act by that conduct. (A 444.)

The Board's Order requires Venetian to cease and desist from summoning the Las Vegas Metropolitan Police and requesting that peaceful union demonstrators be issued trespass citations and excluded from the sidewalk, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. (A 444.) Affirmatively, the Board's Order

requires Venetian to post a remedial notice at the resort and in a manner consistent with *J. Picini Flooring, Inc.*, 356 NLRB No. 9 (2010). (A 444.)

SUMMARY OF ARGUMENT

1. The Court's remand required the Board to decide whether Venetian, by summoning police to eject lawful union demonstrators from the sidewalk in front of its resort, engaged in direct petitioning of government protected by the First Amendment under the Supreme Court's *Noerr-Pennington* doctrine. The Board, applying the settled principles of Section 8(a)(1) and the *Noerr-Pennington* doctrine to "the factual context presented," concluded that Venetian did not engage in direct petitioning. (A 441).

The Board found that Venetian's request to the police at the demonstration was simply an attempt to eject the demonstrators and interfere with the lawful union demonstration. Unlike the defendants' actions in *Noerr*, Venetian's summoning of police was not an attempt to influence government policymakers. Nor did Venetian report any criminal conduct or provide any information to the police. Rather, Venetian sought to undermine the prior decisions of the district attorney and the police department that the demonstration could go forward. Thus, the Board reasonably determined that Venetian's interference with the demonstration violated Section 8(a)(1) of the Act.

2. The Court has no jurisdiction to consider Venetian's claim that the Board overstepped its authority on remand by requiring notice-posting in accordance with *J. Picini Flooring, Inc.* First, Venetian failed to raise that argument to the Board in a motion for reconsideration, as required by Section 10(e) of the Act. Second, Venetian has no standing to challenge that remedy, and such a challenge is not yet ripe for review, because Venetian's specific posting obligations will only be determined at the later compliance stage of the case. In any event, the Board did not abuse its broad discretion in fashioning that remedy and ordering it in this case, and Venetian's arguments to the contrary are meritless.

STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference; this Court will uphold them if they are "reasonable and consistent with applicable precedent."³ The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole.⁴ The Court, however, does not defer to the Board's resolution of a constitutional question.⁵

³ *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007) (quotation omitted).

⁴ 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Venetian*, 484 F.3d at 606.

⁵ *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009).

Courts afford the Board broad discretion to interpret the Act and to issue remedies that effectuate national labor policy.⁶ Board orders are subject to limited judicial review and typically receive special respect and deference in the courts.⁷ Indeed, the Board’s choice of remedy “should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.”⁸

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT VENETIAN VIOLATED SECTION 8(a)(1) OF THE ACT BY SUMMONING POLICE TO ISSUE TRESPASS CITATIONS AND EVICT PEACEFUL UNION DEMONSTRATORS, AND REASONABLY REJECTED ITS FIRST AMENDMENT DEFENSE

A. Venetian’s Summoning of the Police Interfered with the Union’s Protected Section 7 Demonstration and Violated Section 8(a)(1) of the Act

Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

⁶ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984).

⁷ *Id.*; *NLRB v. Cheney California Lumber Co.*, 327 U.S. 385, 388 (1946).

⁸ *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 34-35 (D.C. Cir. 2001).

for the purpose of collective bargaining or other mutual aid or protection”⁹

Section 7’s protections extend “to the broader purpose of ‘mutual aid or protection’ as well as for the narrower purposes of ‘self-organization’ and ‘collective bargaining.’”¹⁰

As this Court explained in its decision remanding, the Union’s demonstration was protected by Section 7 because the demonstrators attempted to communicate their labor dispute with Venetian to the public and “to enlist the support of prospective employees in accomplishing its goal of getting the Venetian to ‘operate[] on a union basis.’”¹¹ In addition, the Court noted that the demonstration was protected by Section 7 even though the demonstrators were not Venetian’s own employees.¹²

The Board and courts have found calling the police to remove lawful union demonstrators or otherwise interfere with protected Section 7 activity to be unlawful since the beginning of the Act.¹³ This Court has already recognized that

⁹ 29 U.S.C. § 157. *Accord Venetian*, 484 F.3d at 606.

¹⁰ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). *Accord Venetian*, 484 F.3d at 606.

¹¹ *Venetian*, 484 F.3d at 608 (citation omitted).

¹² *Id.* See also *Petrochem Insulation*, 240 F.3d at 29-30.

¹³ See, e.g., *Chicago Casket Co.*, 21 NLRB 235 (1940) (enlisting police in efforts to break strike violated the Act); *Ford Motor Co.*, 31 NLRB 994, 1061-62 (1941) (causing police to interfere with strike, including arresting strikers,

Venetian's efforts to disrupt the demonstration interfered with the demonstrators' Section 7 rights.¹⁴ Indeed, Venetian no longer disputes that its summoning of the police tended to interfere with Section 7 activity, nor could it plausibly do so in a manner consistent with the Court's earlier opinion. Rather, its remaining defense is that it engaged in "direct petitioning" under the First Amendment, which relieved it of its unfair labor practice liability. Therefore, if the Court agrees with the Board's rejection of Venetian's First Amendment defense, then the Board's Section 8(a)(1) unfair labor practice finding is entitled to enforcement.

B. Venetian's Summoning of the Police To Evict Peaceful Union Protesters Was Not Petitioning Activity

1. *Noerr-Pennington* does not shield every contact with government employees

Conduct that might otherwise violate a federal statute may, in limited contexts, be immunized from liability when necessary to ensure that the statute does not abridge the First Amendment right to petition the government. For

violated the Act); *Revlon Prods. Corp.*, 48 NLRB 1202, 1203 (1943), *enforced* 144 F.2d 88 (2d Cir. 1944) (calling police to prevent the Union from organizing employees interfered with Section 7 rights); *Montgomery Ward & Co., Inc. v. NLRB*, 692 F.2d 1115, 1128 (7th Cir. 1982) (threatening police action interfered with Section 7 rights); *Indio Grocery Outlet*, 323 NLRB 1138, 1142-43 (1997), *enforced sub nom. NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999) (asking police to arrest union picketers violated the Act); *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191-92 (2007) (calling police in response to union meeting with employees in the parking lot violated the Act).

¹⁴ *Venetian*, 484 F.3d at 610.

example, activities that could be deemed to violate the antitrust laws—the context in which the *Noerr-Pennington* doctrine developed—are immune from liability if they constitute, or are sufficiently related to, genuine efforts to petition the government.¹⁵ As the Supreme Court has explained, however, the *Noerr-Pennington* doctrine does not provide immunity for every concerted effort to influence government action that would otherwise violate the antitrust laws.¹⁶ Rather, whether activity is immune depends on “the context and nature of the activity.”¹⁷

More specifically, *Noerr-Pennington* can shield certain efforts “to influence public officials,”¹⁸ as well as “genuine effort[s] to influence legislation and law enforcement practices.”¹⁹ For example, conduct that has been held to be direct petitioning of government, and therefore immune under *Noerr-Pennington*,

¹⁵ See *Noerr*, 365 U.S. at 137-38; *Pennington*, 381 U.S. at 669-72. See also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (recognizing that the right to petition includes a right of access to the courts).

¹⁶ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988).

¹⁷ *Id.* at 504.

¹⁸ *Pennington*, 381 U.S. at 670.

¹⁹ *Noerr*, 365 U.S. at 144. In *Noerr*, the railroads conducted a publicity campaign “to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks, and to encourage a more rigid enforcement of state laws penalizing trucks for overweight loads and other traffic violations.” *Id.* at 131.

includes attempts to “influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement,” as well as petitions to administrative agencies and courts.²⁰ The Supreme Court, however, has found that doctrine inapplicable in circumstances where the activity did not “take place in the open political arena” and was not a genuine “effort[] to persuade an independent decisionmaker.”²¹

Accordingly, not every contact with a government official qualifies as petitioning activity immune under *Noerr-Pennington*, and not every government employee may be a receiver of those petitions within the meaning of the First Amendment.²² Rather, courts generally limit *Noerr-Pennington* immunity to efforts to influence the passage or enforcement of laws or a significant policy decision. For example, in *Woods Exploration & Producing Co. v. Aluminum Co. of America*, the Fifth Circuit held that *Noerr-Pennington* is “inapplicable” to the alleged filing of false reports with a government agency because that conduct “was

²⁰ *California Motor Transp.*, 404 U.S. at 611-12. *But see Borough of Duryea, PA v. Guarnieri*, ___ U.S. ___, 131 S. Ct. 2488 (2011) (Thomas, J. concurring, and Scalia, J. concurring in part and dissenting in part) (questioning whether lawsuits are petitions within the original meaning of the First Amendment).

²¹ *Allied Tube*, 486 U.S. at 506-07.

²² *See Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000) (holding that police officers, accused by plaintiff of “enforc[ing] the law one-

not action designed to influence policy.”²³ And in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, the First Circuit explained that *Noerr-Pennington* does not apply to efforts to influence government officials acting under statutes requiring competitive bidding because “*Noerr* stressed the importance of free access to public officials vested with significant policymaking discretion.”²⁴

The reach of the *Noerr-Pennington* doctrine into the federal labor laws has been very circumscribed. As this Court noted,²⁵ the Supreme Court cases applying *Noerr-Pennington* immunity as a defense to NLRA violations each involved direct petitioning. Both such cases arose in the context of filing lawsuits. Thus, most recently, in *BE&K Construction Co. v. NLRB*,²⁶ the Supreme Court held that Section 8(a)(1) does not authorize the Board to declare unlawful a completed lawsuit that was reasonably based but unsuccessful merely because it was filed with a retaliatory purpose.²⁷

sidedly,” did not violate plaintiff’s right to petition for redress of grievances or equal protection of the law).

²³ 438 F.2d 1286, 1297-98 (5th Cir. 1971).

²⁴ 424 F.2d 25, 32-33 (1st Cir. 1970).

²⁵ *Venetian*, 484 F.3d at 612.

²⁶ 536 U.S. 516, 536 (2002).

²⁷ Previously, in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983), the Court held that, because of First Amendment concerns, Section 8(a)(1) of the Act does not authorize the Board to enjoin as an unfair labor practice

2. *Noerr-Pennington* does not apply in this case because Venetian did not engage in direct petitioning of government

Applying these principles to the question remanded by this Court, the Board reasonably determined that Venetian’s summoning of police was not a direct petition of government. As the Board explained, Venetian’s summoning of the police involved “[n]o effort to influence the passage of any law,” nor did it involve “any interaction with any official with policymaking authority” or any “significant policy determination in the application of a statute.” (A 443-44.) Thus, it was not the type of political activity designed to “influence public officials” that is typically found immune under *Noerr-Pennington*.

Although several times prior to the demonstration Venetian officials met with the District Attorney and officials in the police department, both informed Venetian that the police at the demonstration would not force demonstrators to leave or cite them for trespassing. At the time of the demonstration, then, Venetian had received a determination from the officials with authority that no trespass citations would be issued to the demonstrators. Therefore, as the Board explained, by seeking action from the police officers on the scene, who had no policy making authority, Venetian “was effectively attempting to undermine the prior rulings of

the filing and prosecution of a well-founded lawsuit, even if the suit were motivated by the employer’s desire to retaliate against the defendant for exercising rights protected by the Act.

the district attorney and the police department that it had no legal right to exclude the demonstrators from the temporary sidewalk.” (A 444.) Such an action is not entitled to constitutional protection. As the *Woods* court explained in the antitrust context, once a ruling has been promulgated by the appropriate decisionmaker, “defendants may not plead immunity in their attempt to undermine its efficacy for anti-competitive purposes.”²⁸

The result here is consistent with Supreme Court law establishing that not all reports to law enforcement agencies are necessarily petitioning activity protected by the First Amendment. In *Sure-Tan, Inc. v. NLRB*, for example, the Supreme Court, while emphasizing that the “reporting of any violation of the criminal laws is conduct which ordinarily should be encouraged, not penalized,” found that an employer’s reporting of its undocumented workers to the INS in the case before it was not protected petitioning.²⁹ Similarly, in a non-*Noerr-Pennington* case explaining that “the right [to petition] is merely a right to petition the appropriate government entity,” the Seventh Circuit found that the proper authority with whom

²⁸ *Woods*, 438 F.2d at 1297.

²⁹ 467 U.S. 883, 897-98 (1984) (discussing *Bill Johnson’s*, 461 U.S. at 741-42). There, the Court concluded the employer “did not invoke the INS administrative process in order to seek the redress of any wrongs committed against them.” *Id.* at 897.

to exercise the right to petition was “the local prosecutor rather than the police on the beat.”³⁰

As the Board found (A 444), Venetian’s summoning of the police was solely an attempt to evict the demonstrators from the sidewalk in the midst of this ongoing labor dispute, not an attempt to report a crime or convey any new information to the police that would assist the police in their law enforcement duties. Rather, Venetian asked the police, who were already on-site, to eject the demonstrators as part of Venetian’s continued attempts to stop the Union from demonstrating on the sidewalk in front of its resort.

In this regard, the Board reasonably contrasted Venetian’s conduct with that at issue in *Forro Precision, Inc. v. IBM*.³¹ In *Forro Precision*, the Ninth Circuit held that IBM’s reporting a suspected crime to police was protected petitioning activity. But the court noted that reporting a crime to the police is not like other petitioning activity—it “does not generally promote the free exchange of ideas, nor does it provide citizens with the opportunity to influence policy decisions.”³² Instead, the court found that California has a policy of encouraging citizens to report suspected wrongdoing, which “ensur[es] the free flow of information to the

³⁰ *Hilton*, 209 F.3d at 1007.

³¹ 673 F.2d 1045 (9th Cir. 1984).

³² *Id.* at 1060.

police.”³³ In contrast, as the Board explained (A 444 n.13), the facts here present no such policy concern. Thus, for all of the above reasons, the Board reasonably found on the facts of this case that Venetian was not engaged in a “genuine effort to influence . . . law enforcement practices” within the meaning of *Noerr-Pennington*.³⁴

In addition, Venetian had—and used—other avenues to press its view to policymakers, law enforcement officials, and the courts that the sidewalk was private property and that it had the right to exclude protesters from that property. (A 444.) A Venetian official met with both the District Attorney and the police department prior to, and again on the morning of, the demonstration. And after the demonstration, Venetian filed suit against the Union, the County, the District Attorney, and the Las Vegas Police Department seeking an injunction against further demonstrations by the Union on the sidewalk. (A 249-51.) As the Board explained, Venetian’s “ability to present its position to local and Federal authorities through those means demonstrates . . . that application of the Act’s protection of employee Section 7 rights can be achieved—and was achieved

³³ *Id.* at 1053, 1060. *See also Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Maryland*, 756 F.2d 986, 992-94 (4th Cir. 1985) (citing *Forro* favorably and finding telephone company’s report to police of suspected wrongdoing was protected petitioning).

³⁴ *See Noerr*, 365 U.S. at 144.

here—without any infringement of the First Amendment right to petition.” (A 444.) Thus, Venetian was not “totally deprived” of a forum in which to petition the government.³⁵

Venetian raises a handful of challenges to the Board’s determination, none of which has any merit. Throughout its brief, Venetian appears to claim on the basis of little more than a presumptive leap, without supporting precedent or reasoned analysis, that summoning the police should automatically be held to constitute direct petitioning. Importantly, no court has held that calling the police on peaceful union demonstrators is protected petitioning exempt from the Act’s prohibitions on interference with protected Section 7 activity. Indeed, as this Court recognized, an expansive view of petitioning in the labor context “may result in constricting the scope of employees’ expressive activity protected by Section 7.”³⁶ Nevertheless, Venetian appears to ask this Court to adopt its inferential leap without question, a result that must be rejected.

Based on its unwarranted and unsupported premise that its statements to police on the scene constituted petitioning, Venetian similarly asks the Court to engage in an unreasoned expansion of First Amendment principles in the labor law

³⁵ See *Sure-Tan*, 467 U.S. at 897 (quoting *Bill Johnson’s*, 461 U.S. at 742). See also *Hilton*, 209 F.3d at 1007.

³⁶ *Venetian*, 484 F.3d at 613.

context by asserting (Br. 17) that “undoubtedly” the sham test from *BE&K* “applies to other petitioning activities by employers,” not just lawsuits, and complains (Br. 19-23) that the Board here improperly failed to engage in such an analysis. To the contrary, the Board’s finding that Venetian’s activity was not direct petitioning ended the inquiry.

Moreover, Venetian’s reliance (Br. 18) on the Ninth Circuit’s decision in *Sosa v. DIRECTV, Inc.*³⁷ a case that did not involve a claim of direct petitioning such as that before the Court here, is misplaced. As this Court explained, even in the arguably more applicable context of a claim that conduct was protected as incidental to petitioning, the *Sosa* decision was “of no help to the Venetian,” because its holding “was limited to a narrow category of ‘incidental’ activity: ‘[p]relitigation communication [] demanding settlement,’ that the Ninth Circuit found had a ‘sufficiently close’ connection” to litigation.³⁸

Venetian’s attempts (Br. 26-28) to distinguish *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*³⁹ and *Woods Exploration & Producing Co. v. Aluminum Co. of America*⁴⁰ fail to take into account the full breadth of those

³⁷ 437 F.3d 923 (9th Cir. 2006).

³⁸ *Venetian*, 484 F.3d at 613 (quoting *Sosa*, 437 F.3d at 936).

³⁹ 424 F.2d 25 (1st Cir. 1970).

⁴⁰ 438 F.2d 1286 (5th Cir. 1971).

decisions. In neither case did the court find that the activity at issue was a sham petition because of fraud or misrepresentation, as Venetian asserts. Rather, in each case, the court found that no petitioning occurred, and both courts emphasized that the claimed petitioning activity had not been intended to influence the political process, whether passage or enforcement of a law or a “significant policy determination in the application of a statute.”⁴¹ As the First Circuit in *Whitten* explained, the “entire thrust of *Noerr* is aimed at insuring uninhibited access to government policy makers.”⁴² Moreover, in *Woods*, the Fifth Circuit found “*Noerr-Pennington* inapplicable to the alleged filing of false nominations by defendants because this conduct was not action designed to influence policy, which is all the *Noerr-Pennington* rule seeks to protect.”⁴³

Moreover, both cases stand for the unremarkable proposition that not all efforts to “influence any public official are exempt” under *Noerr*, and that *Noerr* “stressed the importance of free access to public officials vested with significant policymaking discretion.”⁴⁴ Indeed, as noted above at p. 21, the Seventh Circuit

⁴¹ *Whitten*, 424 F.2d at 32. *See also Woods*, 438 F.2d at 1297 (finding that “there has been no attempt by defendants to influence the policies of the Railroad Commission”).

⁴² *Whitten*, 424 F.2d at 32.

⁴³ *Woods*, 438 F.2d at 1298.

⁴⁴ *Whitten*, 424 F.2d at 33.

had a similar message in *Hilton*, explaining that not “every government employee [is] a petition receiver” and that petitioners must “petition the appropriate government entity.”⁴⁵ Likewise, and contrary to Venetian’s erroneous contention (Br. 24-26), the Board was warranted in relying on *Allied Tube* as part of its analysis. The Board correctly relied on that case in support of the general proposition that the *Noerr-Pennington* doctrine applies only where the ultimate purpose of the activities in question—be they direct or indirect—is to influence independent decisionmakers, not for any proposition particular to indirect petitioning. (A 443.) Moreover, *Noerr* itself involved activity incidental to direct petitioning but nevertheless forms the basis of the eponymous doctrine applied to direct and indirect petitioning alike because the ultimate purpose there was to affect policy.

This Court’s decision in *Federal Prescription Service, Inc. v. American Pharmaceutical Association*,⁴⁶ on which Venetian relies (Br. 26-28), does not mandate a different result. In that case, the Court found that certain lobbying activity “was a genuine attempt to secure governmental action” and, therefore, was protected under the *Noerr-Pennington* doctrine.⁴⁷ The Court did not analyze

⁴⁵ *Hilton*, 209 F.3d at 1007.

⁴⁶ 663 F.2d 253 (D.C. Cir. 1981).

⁴⁷ *Id.* at 262.

Woods and *Whitten*, but merely distinguished them via footnote in rejecting the plaintiff's "peculiar" view of the law regarding sham petitions.⁴⁸ Indeed, the Court recognized that *Noerr-Pennington* protects "political activity" intended to "influence government action."⁴⁹ Nothing in *Federal Prescription Service* contradicts the Board's statement that "courts generally have limited *Noerr-Pennington* immunity to petitions that seek the passage of a law or rule, or a significant policy decision regarding enforcement." (A 443.) The Board here found that Venetian was not engaged in political activity designed to influence government action: Venetian made "[n]o effort to influence the passage of any law," nor did it "interact[] with any official with policymaking authority." (A 443-44.) Instead, Venetian "simply sought the ejection of the protesters." (A 444.) Thus, the Board reasonably rejected Venetian's defense that its summoning of police was direct petitioning activity and found that Venetian's interference with the demonstration violated Section 8(a)(1) of the Act.

⁴⁸ *Id.* at 263 & n.7.

⁴⁹ *Id.* at 261 (citing *Noerr*, 365 U.S. at 137, 143). *See also Pennington*, 381 U.S. at 670 (holding that [j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition").

II. THE COURT DOES NOT HAVE JURISDICTION TO CONSIDER VENETIAN'S CHALLENGES TO THE BOARD'S REMEDIAL ORDER

A. The Court Lacks Jurisdiction To Hear Venetian's Challenges to the Board's Remedial Order Because It Failed To File a Motion for Reconsideration and Because Venetian's Challenge to the Remedy Is not yet Ripe for Review

In 2010, after the Court's remand in this case, the Board issued *J. Picini Flooring, Inc.*,⁵⁰ in which the Board updated its standard remedy directing violators of the Act to post remedial notices. Specifically, the Board held that orders to post remedial notices could include new communication formats, such as electronic dissemination, posting on a respondent's intranet, or posting on the internet.⁵¹ Prior to its decision in *Picini*, the Board's standard notice-posting remedy required respondents to post a remedial notice "in conspicuous places including all places where notices to employees are customarily posted." (A 392.)

In *Picini*, the Board modified this standard notice-posting remedy to add the following requirement:

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees [or members] by such means.⁵²

⁵⁰ *Picini*, 356 NLRB No. 9, 2010 WL 4318372 (2010).

⁵¹ *Id.* at *4.

⁵² *Id.*

Accordingly, when the Board issued its Second Supplemental Decision and Order in December 2011, it ordered that the remedial notice be distributed electronically, if appropriate. (A 444-45.)

As an initial matter, the Court lacks jurisdiction to consider Venetian’s challenge to the Board’s electronic posting remedy because Venetian never raised the issue before the Board. Specifically, Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”⁵³ The Supreme Court has made clear that where, as here, a party seeks to challenge aspects of the case that arose for the first time in a Board decision, the proper time to make that challenge is in a timely motion for reconsideration before the Board.⁵⁴ Venetian failed to file a motion for reconsideration and, in its brief to this Court, cites no reason, much less “extraordinary circumstances,” for its failure to do so. Therefore, its challenge cannot be heard by this Court.⁵⁵

⁵³ 29 U.S.C. § 160(e).

⁵⁴ *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). *See also* Board’s Rules and Regulations, 29 C.F.R. § 102.48(d)(1)-(2).

⁵⁵ *See Woelke*, 456 U.S. at 665-66; *New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011).

Moreover, Venetian has no standing to challenge the Board's Order that it post a notice pursuant to *Picini*, and its challenges are not appropriate for review, because it has not suffered any present injury resulting from the requirement, and therefore it is not "aggrieved" by that portion of the Board's Order within the meaning of Section 10(f) of the Act.⁵⁶ In *Picini*, the Board expressly determined that factual resolution of how a respondent customarily communicates with its employees will be addressed in the first instance at the compliance stage.⁵⁷ Accordingly, the Board reasoned, respondents will have the opportunity to "present evidence about any peculiarities in their email, intranet, internet, or other electronic communication systems that would affect their ability to post remedial notices by those means."⁵⁸ As this Court explained in an analogous context, "at this stage, with the compliance proceedings still ahead, the challenge is unripe."⁵⁹

⁵⁶ 29 U.S.C. § 160(f).

⁵⁷ *Picini*, 2010 WL 4318372, at *4; accord *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (explaining bifurcated Board proceedings in which general remedy is ordered in liability stage and remedy is "tailor[ed] . . . to suit the individual circumstances in subsequent compliance proceeding).

⁵⁸ *Picini*, 2010 WL 4318372, at *4.

⁵⁹ *Sheet Metal Workers Int'l Ass'n v. NLRB*, 561 F.3d 497, 500, 501-02 (D.C. Cir. 2009) (holding that, because the Board's new evidentiary rule for determining backpay and reinstatement liability in cases of unfair labor practices committed against union salts was to be applied during the compliance stage, challenges to the rule were not ripe for review until after compliance proceedings were held and an actual injury was present).

On review, Venetian has not identified any present or immediate injury from the Board's posting remedy, nor could it. Presently, it is pure conjecture whether Venetian's obligation to post a remedial notice will encompass a requirement to disseminate such notice electronically. To date, the Board has merely ordered Venetian to post a remedial notice in accord with *Picini*. (A 444-45.) At a later compliance proceeding, Venetian will be permitted to present evidence about all factual circumstances and "peculiarities" of its electronic communication systems that bear on whether electronic notice is appropriate in this case. The extent of Venetian's remedial obligations to post electronically therefore will depend on evidence adduced at a future compliance hearing. Accordingly, any claim of adverse effect is purely hypothetical, and the Court lacks jurisdiction to entertain Venetian's challenge at this time.

It may be that Venetian will demonstrate in the compliance proceeding that it does not, in fact, customarily communicate by electronic means with its employees. In that case, its obligation to post a remedial notice may be limited to posting a traditional paper notice. On the other hand, if and when the compliance proceeding results in an actual aggrievement to Venetian on this issue, its challenge will then come up for review "in a concrete factual context, shedding

light on how the [new remedial notice posting standard] operates in practice.”⁶⁰

Currently, Venetian’s claim is unfit for judicial decision.⁶¹

Finally, a determination by the Court to withhold review at this time does not impose any hardship on Venetian. Under *Picini*, a Board order to distribute the remedial notice electronically is reviewable after an evidentiary compliance hearing. The Board’s Order regarding the exact requirements of notice distribution would then be ripe for review by the Court.⁶²

B. In Any Event, the Board Properly Exercised Its Broad Remedial Authority In Directing Electronic Posting of Notices

In any event, the Board enjoys broad discretion in crafting appropriate remedies for violations of the Act.⁶³ Section 10(c) of the Act expressly authorizes the Board to order a violator of the Act, not only to cease and desist from the unlawful conduct, but also “to take such affirmative action . . . as will effectuate the policies of th[e] Act.”⁶⁴ This Court has long recognized that the Board enjoys broad discretion in fashioning remedies to unfair labor practices, and “will decline

⁶⁰ *Sheet Metal Workers*, 561 F.3d at 497.

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

⁶⁴ 29 U.S.C. § 160(c).

to enforce the Board's remedial order only if the order represents 'a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'"⁶⁵

In *Picini*, the Board weighed several policy considerations in reaching the decision to update the manner in which remedial notices may be posted under the Act. The Board underscored the essential goals served by its cornerstone remedy to order a respondent to post a remedial notice.⁶⁶ As the Board explained, notices inform employees of their rights, violations found by the Board, the respondent's commitment to cease and desist from the unlawful conduct, and the affirmative action to be taken by the respondent to redress the violations.⁶⁷ The Board thus orders respondents to post notices both to "dispel[] and dissipat[e] the unwholesome effects" of unfair labor practices⁶⁸ and to reassure employees that the Board will protect their statutory rights and that employees should exercise those

⁶⁵ *O'Dovero v. NLRB*, 193 F.3d 532, 537-38 (D.C. Cir. 1999) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943), and *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 957 (D.C. Cir. 1988)); accord *Vico Prods. Co., Inc. v. NLRB*, 333 F.3d 198, 212 (D.C. Cir. 2003) (quoting *O'Dovero*).

⁶⁶ See *Picini*, 2010 WL 4318372, at *2 (citing *Pennsylvania Greyhound Lines Inc.*, 1 NLRB 1, 52 (1935), *enforced*, 303 U.S. 261 (1938)).

⁶⁷ See *id.* (citing cases).

⁶⁸ *Chet Monez Ford*, 241 NLRB 349, 351 (1979).

rights freely.⁶⁹ By requiring violators to post remedial notices, the Board also seeks to deter future violations.⁷⁰ The Supreme Court has characterized such notices as a “significant” part of the Board’s remedial scheme.⁷¹

Given the importance of remedial notices, the Board strives to maximize the target audience by requiring “conspicuous” postings, including customary posting locations.⁷² Appropriate locations have traditionally included bulletin boards, time clocks, department entrances, meeting hall entrances, and dues payment windows.⁷³ But as the Board reasonably noted, the posting of a remedial notice serves little purpose if the notice fails to reach its targeted audience.⁷⁴ Accordingly, it undertook a considered examination of current trends in workplace communication and function to determine whether postings at traditionally appropriate locations are losing their effectiveness.⁷⁵

⁶⁹ *See NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940).

⁷⁰ *Hoffman Plastic Compounds, Inc. v. NLRB*, 353 U.S. 137, 152 (2002).

⁷¹ *Id.*

⁷² *Picini*, 2010 WL 4318372, at *2.

⁷³ *Id.*; NLRB Casehandling Manual, Part III (Compliance), § 10518.2.

⁷⁴ *Picini*, 2010 WL 4318372, at *2-3.

⁷⁵ *Id.* at *3.

To that end, the Board acknowledged the increasing reliance on electronic communication in contemporary workplaces and the strong likelihood that such reliance will continue to increase.⁷⁶ A recent study on which the Board relied found that 900 employers, across a wide range of industries, identified email (83 percent of respondents) and intranet (75 percent of respondents) as the most frequently used communication methods for engaging employees.⁷⁷ Only 28 percent of the respondents frequently used poster or flyers.⁷⁸ Another survey cited by the Board indicated that 75 percent of the professional employer organizations surveyed used either electronic distribution entirely to transmit human resources and benefits information or such distribution at least 50 percent of the time.⁷⁹ Further, the Board explained that it and “most other government agencies routinely and sometimes exclusively rely on electronic posting or email to communicate information to their employees.”⁸⁰

Additionally, the Board recognized that “the growth of telecommuting and the decentralization of workspaces permitted by new technology” have similarly

⁷⁶ *Id.*

⁷⁷ *Id.* at *3 n.7.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at *3 (internal citations omitted).

jeopardized the efficacy of the Board's remedial notices.⁸¹ In support of this observation, the Board relied on studies showing that the internet and the economy were driving up the number of telecommuters.⁸² The Board properly reasoned that traditional paper notices were not necessarily adequate to reach the maximum number of affected employees.

The Board thus soundly concluded that "in addition to physical posting, notices should be posted electronically, on a respondent's intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members. Similarly, notices should be distributed by email if the respondent customarily uses email to communicate with its employees or members."⁸³ The Board reasoned that "[t]his approach constitutes an appropriate balancing of the parties' legitimate interests in light of technological change, and enables the Board to continue to protect and effectively enforce employees' rights under the Act."⁸⁴ The Board's conclusion falls squarely within its broad discretion

⁸¹ *Id.*

⁸² *Id.* at *3 n.10. Additional studies clearly document this rise. *See, e.g., Companies Embrace Telecommuting as a Retention Tool*, <http://www.cnbc.com/id/44612830> (Sep. 30, 2011) (study predicting dramatic increase in telecommuters by 2016); *The State of Telework in the U.S.*, <http://www.workshifting.com/downloads/downloads/Telework-Trends-US.pdf> (June 2011) (telecommuting grew by 61% between 2005 and 2009).

⁸³ *Id.*

⁸⁴ *Id.* at *4.

to fashion appropriate remedies and furthers its “responsibility to adapt the Act to the changing patterns of industrial life.”⁸⁵

C. Even If Reached, Venetian’s Challenges To the Remedy Are Meritless and Must Be Rejected

Contrary to Venetian’s argument (Br. 33-34), the Board’s decision to allow the possibility that an employer must transmit a remedial notice through electronic means is not an “extraordinary” remedy going “far beyond” the Board’s traditional remedies. The Board carefully considered that concern and rejected the analogy to the Board’s extraordinary remedies, finding instead that electronic distribution, if limited to where such means of communication is customary, closely resembles a traditional paper posting.⁸⁶ As the Board explained, “[b]y definition, in a company or union for which some form of electronic communication is customary, communication of a notice by that electronic means would be customary, not extraordinary.”⁸⁷ Moreover, the Board concluded that electronic dissemination under these circumstances imposed no burden on respondents.⁸⁸ In sum, Venetian does not, and cannot, demonstrate that the conditional electronic distribution requirement is an extraordinary remedy.

⁸⁵ *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975).

⁸⁶ *See Picini*, 2010 WL 4318372, at *5.

⁸⁷ *Id.*

⁸⁸ *Id.*

For the most part, Venetian (Br. 36-38) simply restates arguments made by Member Hayes in his *Picini* dissent, which the Board fully addressed in the *Picini* majority decision. For example, Venetian restates the concerns that electronic posting would require individual communications with employees or attachments to email, that it might result in disparate remedies because not all employers use email to communicate with employees, that electronic notices might be altered or too broadly distributed because electronic notice posting is akin to publishing a notice in a newspaper, and that deferring determination to compliance could increase litigation.

In responding to these concerns, the Board in *Picini* observed that “[m]ost electronic communication systems will permit respondents to post or upload a single file” accessible to limited users, and “most email systems will permit respondents to send a single message to the employees or members affected by the unfair labor practices found, and to limit the scope of distribution to that group of individuals.”⁸⁹ Regarding Venetian’s claim (Br. 37) that an employer would “surrender ‘physical control’” over an electronic posting, the Board observed that respondents have, “[i]n reality, [] never had dominion over Board-ordered remedial notices” and unsigned hard copies are available in the Board’s bound volumes and

⁸⁹ *Id.* at *4.

unsigned electronic copies are available on the Board’s website.⁹⁰ And, as the Board noted, the electronic posting remedy is “also consistent with the Board’s current practice of resolving at the compliance stage issues regarding the location and number of paper postings.”⁹¹

Contrary to Venetian’s claim (Br. 31), the Board’s electronic posting remedy ordered in this case does not “improperly exceed[]” the scope of the Court’s remand. In the first place, as explained above at p. 33, Venetian should have raised this argument to the Board in a motion for reconsideration to give the Board an opportunity to explain why it appropriately imposed its updated remedy here.

In any event, Venetian’s argument, like its other challenges to the Board’s remedy, is without merit. The Court’s remand decision required the Board to consider Venetian’s First Amendment defense regarding summoning the police; it enforced all other aspects of the Board’s order.⁹² The Board on remand found that Venetian violated the Act, and it issued a new Order which rightly included the Board’s posting remedy, as updated in *Picini*. Nothing in the Court’s remand decision addressed the issue of the appropriate remedy should the Board find an

⁹⁰ *Id.* at *6.

⁹¹ *Id.* at *4.

⁹² *Venetian*, 484 F.3d at 614.

unfair labor practice, and therefore did not foreclose the Board from issuing a new order that included the updated posting remedy.⁹³

Venetian (Br. 31-32) misreads *In re Sanford Fork & Tool Co.*,⁹⁴ which does not support its assertion that the Board was barred from modifying its posting remedy on remand. Rather, in that case the Supreme Court determined that the remedial measure taken by the lower court post-remand did not exceed the lower court's authority since the issue had been "left open by the opinion and mandate" by the Supreme Court's decision.⁹⁵ Similarly, here, where the Court in its remand decision left open the issue of whether Venetian had committed a violation of the Act, the Board, once finding an unfair labor practice, was free to order the appropriate remedy.

⁹³ See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 145 (1940) (holding that FCC, upon remand, was not foreclosed from "enforcing the legislative policy committed to its charge" by consolidating remanded proceeding with two others for decision); *Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers, Local Union No. 419 v. NLRB*, 467 F.2d 392, 403-04 (D.C. Cir. 1972) (on remand for consideration of company's secondary status, Board foreclosed only from "placing controlling reliance" on workers' independent contractor status but retained "broad adjudicatory discretion" which Court "recognized the Labor Board would have a statutory obligation to exercise on remand").

⁹⁴ 160 U.S. 247 (1895).

⁹⁵ *Id.* at 259.

In sum, the Court has no jurisdiction to address Venetian's challenges to the Board's Order, and Venetian otherwise has no standing to assert its challenges at this time because its obligations under *Picini* have not yet been determined in the compliance stage of the case. In any event, the Board properly decided *Picini*, and Venetian's challenges, even if reached, would be meritless.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny Venetian's petition for review and enforce the Board's Order in full.

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June 2012

ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

NATIONAL LABOR RELATIONS ACT

Section 3(b) of the Act (29 U.S.C. § 153(b)).....i
Section 7 of the Act (29 U.S.C. § 157).....i
Section 8(a) of the Act (29 U.S.C. § 158(a))i
Section 10 of the Act (29 U.S.C. § 160).....i,ii

THE BOARD’S RULES AND REGULATIONS

Section 102.48(d)(1)-(2)ii
NLRB Casehandling Manual, Part III,
Compliance Proceedings, § 10518.2iii

STATUTORY AND REGULATORY ADDENDUM
NATIONAL LABOR RELATIONS ACT

Section 3(b) of the Act (29 U.S.C. § 153(b)) provides in relevant part:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . [T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(c) . . . the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act

* * *

(e) The Board shall have power to petition . . . for the enforcement of such order No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

THE BOARD'S RULES AND REGULATIONS

Section 102.48(d)(1)-(2) of the Board's Rules and Regulations

(d) (1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

NLRB Casehandling Manual, Part III, Compliance Proceedings

§ 10518.2 Location and Number of Notices

General posting provisions require that notices be posted wherever employee or member notices are customarily posted. When Board agents are negotiating the terms of settlement agreements, they should resolve potential posting issues and identify specific posting locations as part of the settlement process. Examples of posting locations include employee bulletin boards, timeclocks, department entrances, meeting hall entrances, and dues-payment windows. Small facilities may require only one notice; large facilities may require a great number.

In Board order cases or when specific posting locations have not been identified as part of a settlement, appropriate posting locations will depend on the circumstances of the case, and must be determined by the Compliance Officer.

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

VENETIAN CASINO RESORT, LLC)	
)	
Petitioner/Cross-Respondent)	Nos. 12-1021, 12-1076
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	21-CA-16000

CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,792 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 27th day of June, 2012

**UNITED STATES COURT OF APPEALS
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)	

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2012, I electronically filed the Board’s brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I served the brief on the following counsel through the CM/ECF system:

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