UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

BRIEF OF *AMICUS CURIAE*
COUNCIL ON LABOR LAW EQUALITY

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The Council on Labor Law Equality ("COLLE") submits this *amicus curiae* brief in response to the National Labor Relations Board's notice and invitation dated November 12, 2010. Specifically, the Board asked (1) whether the Board should continue to apply the standard articulated in *Sandusky Mall Co.*, 329 NLRB 618 (1999), in cases alleging unlawful employer discrimination in nonemployee access; (2) if not, what standard should the Board apply in such cases; and (3) whether the Board's decision in *Register-Guard*, 351 NLRB 1110 (2007), has any bearing on the standard for finding unlawful discrimination in nonemployee access cases.

COLLE respectfully submits that the Board should abandon the *Sandusky Mall* standard because it is inconsistent with Supreme Court precedent and has been rejected in every circuit that has considered it in cases involving consumer boycott activities of the type at issue here. Instead, COLLE urges the Board to apply the discrimination standard adopted by the Board in *Register-Guard*, which holds that discrimination must be determined by comparison to activities or communications of a "similar character" allowed on an employer's property (in that case, the employer's email system). The *Register-Guard* standard is consistent with Supreme Court precedent and the standard applied by the Seventh Circuit and other federal courts of appeal in cases involving nonemployee access to an employer's property.

STATEMENT OF COLLE'S MEMBERSHIP AND INTEREST

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act ("NLRA" or the "Act"). COLLE's single purpose is to follow the activities of the NLRB and the courts as they relate to the NLRA. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a

broad cross-section of industry. COLLE has participated as *amicus curiae* in numerous cases before the NLRB.

SUMMARY OF THE CASE AT ISSUE

In *Roundy's Inc.*, the General Counsel has alleged that a supermarket in the Milwaukee, Wisconsin area, operating stores under the name "Pick N Save," unlawfully discriminated against nonemployee agents of the Milwaukee Building and Construction Trades Council ("Council") by denying the Council permission to engage in a consumer boycott on store property while allowing other individuals, groups, and organizations to solicit on store property. *Roundy's, Inc.*, 356 NLRB No. 27, slip op. at 3-6 (2010). The Council's boycott campaign included consumer handbills protesting Pick N Save's use of nonunion contractors to build or remodel its stores because those contractors did not pay their employees prevailing wages and benefits. The handbills called for a total boycott of Pick N Save, encouraging customers not to patronize Pick N Save stores and to shop for groceries elsewhere. The Council's campaign did not involve an attempt to organize Pick N Save employees, as Pick N Save employees were already represented by another labor organization.

On February 8, 2006, Administrative Law Judge Robert A. Giannasi found that Roundy's violated Section 8(a)(1) of the Act by prohibiting Council officials from engaging in the boycott campaign in front of Pick N Save stores. The ALJ based his finding on Pick N Save's "discriminatory" treatment of the Council's consumer boycott activity. Although the supermarket sought to restrict the consumer boycott campaign on its property, Pick N Save had previously allowed charitable and political solicitation in front of its stores, including by the Salvation Army, Boy and Girl Scouts, a local environmental group, and a candidate for judicial office. Under the standard of *Sandusky Mall*, a consumer boycott directed against an employer's

own business interests is viewed as conduct identical to charitable or other types of solicitation that, if permitted by an employer, requires the employer to allow nonemployee union access under pain of violating Section 8(a)(1) for "discriminatory" treatment of union activity. The ALJ's decision, now awaiting resolution by the Board, involves the larger issues of nonemployee access rights to private property and the Board's framework for defining "discriminatory" restrictions on nonemployee use of an employer's private property.

ARGUMENT

Sandusky Mall is inconsistent with the Supreme Court's admonitions, for over half a century, that nonemployee union agents have no statutory right to trespass on an employer's private property. Federal courts of appeal have rejected the *Sandusky Mall* standard in cases where, as here, the union is not seeking to organize the employer's employees. Adhering to *Sandusky Mall* would perpetuate the ongoing conflict with the federal courts of appeal and would encourage protracted litigation in cases involving nonemployee access to an employer's property.

The Board's decision in *Register-Guard*, 351 NLRB 1110 (2007), adopts a more sensible discrimination standard that is in line with the standard applied by the federal courts of appeal. While *Register-Guard* involved *employee* access to an employer's e-mail and computer system, this case presents an opportunity for the Board to adopt this same approach in a case of *nonemployee* access to an employer's property. COLLE urges the Board to adopt the *Register-Guard* standard in this case.

I. *Sandusky Mall* Is Inconsistent with Supreme Court Precedent and Has Been Rejected by the Federal Courts of Appeal.

A. *Sandusky Mall* Fails to Acknowledge the Strict Limitations on Nonemployee Access Rights Under the Act.

Sandusky Mall holds that an employer must permit nonemployee union agents to handbill, picket, and demonstrate on its property if the employer "allow[s] substantial civic, charitable, and promotional activities" on its property. *Sandusky Mall*, 329 NLRB at 622. This standard is an expansive interpretation of the so-called "discrimination exception" articulated by the Supreme Court in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956). In *Babcock*, nonemployee union agents sought to organize a group of employees and, in doing so, the nonemployee agents sought to distribute union literature to employees in company-owned parking lots. *Id.* at 106. The Court first held that the nonemployee union agents had *no statutory right of access* to the employer's private property, and emphasized that "the Board failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees" and that "[t]he distinction is one of substance." *Id.* at 112-13.

The Court next determined that nonemployee union agents only gain the right to trespass under two limited exceptions: (1) "inaccessibility" to the intended employee audience or (2) "discriminatory" treatment of nonemployee union activity by allowing "other distribution" on employer property. *Id.* at 112. The limited exceptions for nonemployee union agents to access private property represent *derivative rights* to support the Section 7 rights of the employer's own employees. *Id.* at 113. Those derivative rights flow not from any rights bestowed on labor organizations, but from the employees' own employment relationship and the purposes underlying Section 7. *Id.*

The Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), reaffirmed that "the NLRA confers rights only on employees, not on unions or their

nonemployee organizers." *Id.* at 532. This language is oft-quoted, but perhaps not fully appreciated. Above all, an employer's right to exclude nonemployee union agents "remains the general rule" and "the burden imposed on the union [to overcome the rule] is a heavy one." *Id.* at 535 (citing *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)). The presumption is that nonemployees do *not* have the right to engage in handbilling, picketing, or other demonstrations on an employer's private property.

Sandusky Mall flips this presumption by interpreting the *Babcock* "discrimination exception" so broadly as to make it virtually impossible for an employer to avoid a finding of discrimination. To satisfy the *Sandusky Mall* test, an employer must prohibit all nonemployee solicitation and distribution on its property, except for perhaps a few "isolated beneficent" acts of charitable solicitation. *Sandusky Mall*, 329 NLRB at 621. An employer that generously allows more than a few isolated acts of charitable solicitation is deemed automatically to have waived its property rights under the *Sandusky Mall* standard. This arbitrary rule is inconsistent with the limited and derivative nature of the Section 7 rights applicable to nonemployees, and it discourages businesses from supporting legitimate charitable activity. *See Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996) ("No relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature."); *NLRB v. Pay Less Drug Stores Northwest, Inc.*, 57 F.3d 1077, 1995 WL 323832, at *1 (9th Cir. 1995) (unpublished disposition) ("A business should be free to allow local charitable and community organizations to use its premises, whether for purely altruistic reasons or as a means of cultivating good will, without thereby being compelled to allow the use of those same premises by an organization that seeks to harm that business.").

B. *Sandusky Mall* Fails to Distinguish Between Organizing Activity and Union Activity That Is Designed to Harm an Employer's Business.

Sandusky Mall is also flawed because it treats *all* nonemployee union activity – no matter the objective – as the same for purposes of *Babcock's* discrimination exception. The federal courts of appeal have consistently criticized the Board's failure to distinguish between nonemployees who seek access to an employer's property for purposes of organizing the employees on that property, and nonemployees who have no interest in organizing the employer's employees but, instead, seek access in order to engage in a consumer boycott or other activities designed to harm the employer's business.

As noted previously, access rights for nonemployee union agents are merely derivative of employees' Section 7 rights. *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1177 (D.C. Cir. 1993) ("*Babcock* suggested that when the NLRA requires an employer to grant access to his property to nonemployee organizers, *it does so only to protect the rights of his employees.*") (emphasis added). Derivative Section 7 rights for nonemployees should vary based on the conduct at issue. The Supreme Court, in analyzing *Babcock*, has held that "[t]he locus of [access] accommodation [] may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights . . . ." *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). And citing to *Hudgens*, the Board has acknowledged that it is "not free to assume that every Section 7 right is of equal weight when intrusions on private property are concerned." *Jean Country*, 291 NLRB 11, 13 (1988).[1]

Sandusky Mall makes the improper assumption that all nonemployee activities are created equal under Section 7. The majority's decision does not distinguish between

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[1] The *Lechmere* Court's rejection of *Jean Country's* balancing test approach in all access cases did not disturb the Court's long-standing position that Section 7 rights vary in strength depending on the context.

"organizing" activities directed at the employer's employees, which are afforded greater protection on the Section 7 spectrum, and "nonorganizational" activities that are designed to harm the employer's business. Whatever derivative Section 7 rights flow to nonemployee union agents seeking to organize employees under *Babcock* and *Lechmere*, that flow slows or stops when nonorganizational activities are involved. The federal courts of appeal have questioned whether the *Babcock* framework – and its limited inaccessibility and discrimination exceptions to the general rule of no access rights – even extends at all to the "nonorganizational" objectives of union agents on private property, such as consumer boycott or handbilling activity. *See Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997) ("[W]e seriously doubt, as do our colleagues in other circuits, that the *Babcock & Wilcox* disparate treatment exception, post *Lechmere*, applies to nonemployees who do not propose to engage in organizational activities.").

The federal courts of appeal have rejected the Board's broad interpretation of *Babcock's* "discrimination exception" in cases involving boycott and handbilling activities by nonemployee union agents on private property. *See, e.g.*, *Salmon Run Shopping Ctr. LLC v. NLRB*, 534 F.3d 108 (2d Cir. 2008) (denying enforcement of Board's order allowing nonemployees to distribute literature to customers/public at private mall); *Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001) (denying enforcement of Board's order allowing nonemployees to distribute handbills asking consumers not to patronize a mall store); *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997) (denying enforcement of Board's order protecting the right of nonemployee union picketers to enter private property); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996) (denying enforcement of Board's order where nonemployee union agents distributed information to customers at a private mall); *NLRB v. Great Scot, Inc.*, 39 F.3d 678 (6th Cir. 1994) (denying enforcement of Board's order to allow nonemployee area standards picketing on

grocer employer's private property); *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 911 (9th Cir. 1992) (denying enforcement of Board's order that authorized nonemployee union agents to distribute literature to customers).

The overriding theme of these cases is that nonorganizational union activity on private property – particularly activity that is designed to harm the business of the property owner – should not be viewed as akin to organizing activity under Section 7. *See, e.g.*, *Great Scot*, 39 F.3d at 682 ("Non-employee area standards picketing is even farther removed from the core concerns of Section 7 . . . their picketing was not even ostensibly aimed at organization . . . [which] warrants even *less* protection than non-employee organizational activity."). *See also United Food & Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292, 294 (D.C. Cir. 1996) ("*Babcock* and its progeny indicate that . . . the interest of nonemployees in organizing an employer's employees is stronger than the interest of nonemployees engaged in protest or boycotting activities directed at an employer's customers.").

Indeed, in order to find discrimination within the *Babcock* exception, the courts have required that nonemployee union activity be directed at *organizing employees*, as was the case in *Babcock*. For example, in *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583 (D.C. Cir. 1996), the court enforced the Board's decision finding that the employer discriminated against solicitation of the employer's employees by nonemployee union organizers. The employer had allowed other outside groups, including commercial and charitable organizations, to solicit employees near the cafeteria. *Id.* at 589. Finding that union solicitation in this context was similar to the other solicitation that the employer had allowed on its property, the D.C. Circuit agreed that the employer had unlawfully discriminated against the union solicitation. *Id.* at 589-91. *See also Four B Corp. v. NLRB*, 163 F.3d 1177, 1184 (10th Cir. 1998) (upholding

Board's order finding discrimination against nonemployee *organizational activity* directed at employees because employer had allowed regular charitable solicitation of employees and customers).

Thus, a union's objective in seeking access to an employer's property – *i.e.*, an organizing objective vs. an objective of carrying out a boycott or other activity designed to harm the employer's business – must be considered when finding unlawful "discrimination" within the meaning of the *Babcock*. *Sandusky Mall* improperly treats organizational and nonorganizational activity as one in the same. The Board should acknowledge this important distinction when applying the *Babcock* "discrimination exception" in cases involving derivative Section 7 rights for nonemployee union agents.

II. The Board Should Adopt a Discrimination Test That Is Consistent with *Register-Guard.*

A. The *Register-Guard* Discrimination Standard Should Be Applied to Organizing Activity by Nonemployees.

In cases involving organizing activity by nonemployee union agents, COLLE urges the Board to apply the discrimination standard adopted by the Board in *Register-Guard*. The *Register-Guard* standard defines unlawful discrimination as "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Register-Guard*, 351 NLRB at 1118.[2] Although *Register-Guard* involved charges of discrimination with respect to an employee's use of the employer's email system to engage in

[2] The D.C. Circuit declined to enforce part of the Board's *Register-Guard* decision due to the conflict between the employer's written solicitation policy and its actual practices, but the court noted that it was not reviewing the Board's adoption of the "in-kind" discrimination test. *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 58-60 (D.C. Cir. 2009).

union-related speech, the standard can be appropriately applied in cases involving nonemployee access to an employer's property for the purpose of engaging in organizing activity.[3]

The dissenting opinion in *Register-Guard* warned that the discrimination standard adopted by the majority would be "a license [for employers] to permit almost anything but union communications, so long as the employer does not expressly say so." *Register-Guard*, 351 NLRB at 1130. The *Sandusky Mall* standard is premised on similar concerns that, in the absence of an expansive interpretation of the *Babcock* "discrimination exception," an employer could be selective in allowing solicitation it liked while banning solicitation it disliked, including union-solicitation. *Sandusky Mall*, 329 NLRB at 622. COLLE submits that these concerns are exaggerated.

For instance, in *Lucile Salter Packard Children's Hospital*, the D.C. Circuit agreed with the Board's conclusion that an employer could not ban solicitation by nonemployee union agents for purposes of organizing when the employer had permitted solicitation by other organizations for "purely commercial purposes" that were not related to the employer's "legitimate business purposes and functions." *Lucile Salter Packard Children's Hospital*, 97 F.3d at 589-90. The D.C. Circuit found that this conclusion was consistent with the Seventh Circuit's decision in *Guardian Industries*, upon which the *Register-Guard* standard is based. *Id.* at 591-92 (citing *Guardian Industries*, 49 F.3d at 320-22). The union's attempted organizational solicitation was "like" conduct when compared with the commercial solicitation of employees that the employer allowed.

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[3] Applying the *Register-Guard* standard is particularly appropriate in this case because the standard is based on the law of the Seventh Circuit, the circuit that would have jurisdiction to hear a petition for review or enforcement in this case. *See Register-Guard*, 351 NLRB at 1117-19 (citing *Fleming Companies, Inc. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), and *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995)).

Thus, the standard adopted by the Board in *Register-Guard* does not give an employer license to "permit almost anything but union communications." *Register-Guard*, 351 NLRB at 1130 (dissenting opinion). It prohibits an employer from engaging in disparate treatment of solicitation "of a similar character" to union solicitation. *Id.* at 1118.

B. The *Register-Guard* Standard As Applied to Consumer Boycotts and Related Activities by Nonemployee Union Agents.

In applying the *Register-Guard* discrimination standard, the Board should take heed of the difference between union speech directed at employees for purposes of union organizing, and union speech that is directed at customers for purposes of a boycott or other efforts to harm the employer's business. *See Be-Lo Stores*, 126 F.3d at 284 ("nonemployees' claims to access to an employer's private property are at their nadir when the nonemployees wish to engage in protest or economic activities, as opposed to organizational activities"); *United Food & Commercial Workers, Local No. 880*, 74 F.3d at 298 ("Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees.").

In this case, the union's conduct had nothing to do with organizing the employer's employees. The Council engaged in consumer boycott and area standards activity in order to discourage customers from shopping at the employer's stores because a non-union contractor had been hired to perform construction and remodeling work in the employer's stores. *See Roundy's*, 356 NLRB No. 27, slip op. at 3-4. The Council had no interest in organizing the employer's employees; those employees were represented by another labor organization. Indeed, the Administrative Law Judge noted that the Council's activity "might well have adversely affected those employees by jeopardizing their jobs through the consequent loss of business due to the boycott of their employer." *Id.*, slip op. at 6 n.7.

The definition of "discrimination" must reflect the nature of the union activity at issue. Under *Register-Guard*, an employer discriminates against union activity only if the employer permits other activities "of a similar character." *Register-Guard*, 351 NLRB at 1118. An employer does not discriminate against union activity if it permits charitable organizations to solicit on its property but seeks to exclude nonemployee union agents who seek to promote a consumer boycott against the employer. An employer discriminates against nonemployee union agents in these circumstances only if the employer has allowed other organizations to engage in similar types of protests on its property. *See Sandusky Mall*, 242 F.3d at 690 ("Certainly, employers must be able to make distinctions based on the time, place, and means of solicitation to the extent that mall business may be negatively affected by one and not another."); *Riesbeck Food Markets, Inc. v. NLRB*, 91 F.3d 132, 1996 WL 405224, at *4 (4th Cir. 1996) (unpublished decision) ("Riesbeck did not discriminate against union distributions by prohibiting the union's do-not-patronize solicitations while allowing various other civic and charitable groups to solicit its customers.").[4]

C. The *Register-Guard* Discrimination Test Is Also Consistent with An Employer's Right to Engage in Noncoercive Speech and to Permit Business-Related Solicitation.

The *Register-Guard* discrimination standard also is consistent with the longstanding principle, articulated by the Supreme Court in *NLRB v. United Steelworkers of Am. (Nutone)*, 357 U.S. 357 (1958), that an employer need not permit a union to utilize a particular channel of

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[4] COLLE is advocating that the Board apply the *Register-Guard* discrimination standard, which focuses on activities "of a similar character" in determining whether an employer is discriminating against nonemployee union agents. This standard can be applied flexibly in a variety of situations. COLLE is not advocating that the Board adopt the Sixth Circuit's definition of discrimination, for purposes of the *Babcock* exception, as "favoring one union over another, or allowing employer-related information while barring similar union-related information." *Sandusky Mall*, 242 F.3d at 686.

communication simply because the employer has used it to engage in noncoercive anti-union speech. *See Register-Guard*, 351 NLRB at 1118 n.17 (citing *Nutone*). Similarly, an employer need not grant a union access to solicit or distribute on the employer's property even though the employer permits solicitation by organizations that are related to the employer's business functions or purposes, such as organizations that provide benefits under the employer's fringe benefit programs. *See id.* at 1118 (stating that employer may lawfully draw a line between "business-related use and non-business-related use"). *See also Lucile Salter Packard Children's Hosp.*, 97 F.3d at 588-89; *Rochester General Hosp.*, 234 NLRB 253 (1978); *George Washington Univ. Hosp.*, 227 NLRB 1362 (1977).

In sum, the *Register-Guard* discrimination standard appropriately harmonizes the well-established law regarding employer speech and business-related solicitation, as well as the prevailing interpretation of the *Babcock* "discrimination exception" in the federal courts of appeal.

CONCLUSION

For all of the foregoing reasons, COLLE urges the Board to abandon the discrimination standard articulated in *Sandusky Mall* and to apply instead the *Register-Guard* standard in cases involving nonemployee union access.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 7, 2011, a true and accurate copy of the foregoing Brief of *Amicus Curiae* Council on Labor Law Equality was served by e-mail on the following:

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I further certify that on January 7, 2011, I contacted the following representatives by phone and caused a true and accurate copy of the foregoing Brief of *Amicus Curiae* Council on Labor Law Equality to be served by overnight mail:

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