

UNITED STATE OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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ROUNDY'S INC., :  
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 - and - :  
 :  
MILWAUKEE BUILDING AND :  
CONSTRUCTION TRADES COUNCIL, AFL-CIO :  
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Case No. 30-CA-17185

**BRIEF OF THE AMICUS CURIAE**

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## **I. INTEREST OF THE AMICUS CURIAE**

Epstein Becker & Green, P.C. (the "Firm") is one of the nation's leading labor and employment law firms representing management in a wide variety of industries across the United States. The Firm regularly represents employers in the fields of health care, retail and hospitality in connection with matters under the National Labor Relations Act ("NLRA" or "Act"). The Firm has a significant interest in the issues before the National Labor Relations Board (the "NLRB" or the "Board") in Roundy's Inc. ("Roundy's") because the Board's decision will directly impact the ability of employers to ensure high quality care and services for their patients and customers.<sup>1</sup>

## **II. PRELIMINARY STATEMENT**

The issues here are: (i) whether the Board will seek to force open the doors to an employer's private property to allow access to nonemployee union organizers and representatives virtually any time that an employer permits access to its property to any other organizations and individuals who are not its employees, regardless of circumstance and reason, and (ii) to the extent that the Board recognizes that the Act permits an employer to restrict such access to nonemployee union representatives where the employer has allowed only limited access to other nonemployee groups and individuals, under what circumstances, e.g., at what times, at what locations, and for how long will the Board allow nonemployee union representatives access notwithstanding an employer's private property rights.

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<sup>1</sup> We wish to inform the Board that in addition to this Brief, which we submit on our own behalf, our Firm is also submitting a separate brief on behalf of a client that is a national trade association and may, should the Board invite further briefing on the issues herein, make further submissions on behalf of additional clients.

These issues must be considered in light of the following facts. First, while the Act protects *the right of employees to engage in protected, concerted activity*, including on an employer's premises generally during non-working times and in non-working areas, the Act does not afford any such right to nonemployees. Second, the Supreme Court has long recognized that the Act does not negate the right of an employer or other property owner to prohibit or otherwise limit access to and entry upon its private property. Finally, denying nonemployee union representatives the right to engage in such activities on an employer's property will not impede employees in exercising their rights under the Act.

### **III. ISSUES REPRESENTED AND SUMMARY OF ARGUMENT**

By notice dated November 12, 2010, the Board invited interested parties to file briefs addressing the following three issues:

(i) Whether the Board should, in cases alleging unlawful employer discrimination in the context of nonemployee access to private property, continue to apply the standard articulated by the majority in Sandusky Mall Co., 329 NLRB 618, 623 (1999), enforcement denied sub nom., Sandusky Mall Co., v. NLRB, 242 F.3d 682 (6<sup>th</sup> Cir. 2001) ("Sandusky Mall");

(ii) If it should not, what standard should the Board adopt to define discrimination in this context?; and

(iii) What bearing, if any, does the Board's decision in Register-Guard, 351 NLRB 1110 (2007), enforcement granted in part sub nom., Guard Pub'g Co. v. NLRB, 571 F.3d 53 (D.C. Cir. 2009) ("Register-Guard"), have on the Board's standard

for deciding cases alleging violation of the Act by virtue of an employer's denial of access to its private property in cases involving nonemployee union representatives?

*Amicus* respectfully submits:

(i) The Board should abandon the standard with respect to nonemployee access set forth in Sandusky Mall because it:

(a) ignores Supreme Court and circuit court precedent that expressly recognizes an employer's right to deny nonemployee union representatives access to its private property other than in the rare instance where such employer's employees are literally unable to leave the employer's premises and have no other opportunity for access to information necessary for them to exercise their rights under Section 7 of the Act or where similar solicitation on private property by outsiders is permitted other than by charitable or civic organizations;

(b) usurps an employer's right to exercise its judgment as to whether activities by third-parties on its private property are likely to help or harm its business;

(c) fails to provide any reasoned or meaningful guidance as to the number and/or frequency of so called "beneficent acts" that the Board has held will make an exclusion of union organizers a violation of the Act; and

(d) fosters poor public and social policy because it encourages employers to exclude all third party civic and charitable activities from their property in order to safeguard private property rights.

(ii) In place of the judicially disfavored standard set forth in Sandusky Mall, the Board should adopt a much more limited and definite standard for determining whether discrimination has occurred, one which is based upon the following factors:

(a) Section 7 of the Act affords rights to employees. Nonemployee union agents are not granted the right either under Section 7 or any other provision of the Act to trespass on an employer's property except under rare and very narrow circumstances;

(b) nonemployee union representatives should never have a greater right of access to use of and activity on an employer's premises than employees with Section 7 rights;

(c) an employer should be permitted to exercise its business judgment to allow third-parties and vendors whose activities are related to the employer's business on its property without forfeiting the right to exclude nonemployee union representatives whose activities are detrimental to or at best unrelated to the property owner's interests;

(d) denying nonemployee union representatives access to private property should be unlawful only if nonemployees, other than charitable or civic organizations, have been permitted access to an employer's property to solicit employees to join or support those organizations; and

(e) employer or employee conducted solicitation or distribution on an employer's private property for charitable or other purposes unrelated to employees'

terms and conditions of employment should not force open the door for nonemployee union solicitations or distributions.

If, however, the Board were to retain the Sandusky Mall standard, by eliminating the NLRB's long recognized albeit vaguely delineated charitable and civic organization exception, the Board should hold that nonemployee union access only be allowed for the same frequency and duration and limited to the same number of persons and in the same areas of the employer's property as the employer allowed the charitable, civic or other solicitation.

(iii) The Board's decision in Register-Guard generally has no application to determining when an employer must allow *nonemployee* union agents to solicit or distribute handbills on its property because that case addressed issues relating solely to whether an employer's policy *restricting its employees' use* of the employer's e-mail system was lawful, and did not involve access to email or other systems by nonemployees. The Board and the courts have developed separate rules accommodating *employees' Section 7* rights to employers' property rights and their rights to conduct business, generally allowing solicitation by employees only on non-working times in non-working areas. Only to the extent Register-Guard analyzes what types of conduct are considered comparable for evaluating whether facially lawful policies have been enforced in a non-discriminatory fashion under the Act, could such analysis provide useful guidance as to what might constitute discrimination between like or similar entities.

#### IV. ANALYSIS

##### A. The Board Should Apply United States Supreme Court Precedent to Bar Nonemployee Union Representatives

In the seminal case of NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) ("Babcock"), the United States Supreme Court set forth the general rule that an employer retains the right under the Act to protect its property from access by nonemployee union representatives:

It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit.

Id. at 112. The two exceptions to the general rule recognizing the right of employers to bar nonemployee union organizers from their property have come to be known as the "inaccessibility" exception and the "discrimination" exception. Only where the facts establish one of these two exceptions must the Board next consider the extent to which the property rights of an employer must yield *to the organizational activities of the nonemployees.*" See id. (emphasis added).

More than twenty years later, in Sears Roebuck and Co. v. San Diego Cty. Dist. Council of Carpenters, 436 U.S. 180 (1978), the Supreme Court reaffirmed that the application of the Babcock exceptions rarely tip in favor of trespassory organizational activity.

While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, *the*

*union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the Babcock accommodation principle has rarely been in favor of trespassory organizational activity.*

436 U. S., at 205 (emphasis added; footnotes omitted).

Lechmere Inc. v. NLRB, 502 U.S. 527 (1992) ("Lechmere"), is the latest Supreme Court decision affirming the right of an employer to exclude nonemployee union agents from its property. The Lechmere Court premised its holding on two basic principles. First, Section 7 of the Act "[b]y its plain terms ... confers rights only on *employees*, not on unions or their nonemployee organizers." 502 U.S. at 523. Second, under Babcock, an employer's right to bar nonemployee union organizers from its property remains the general rule subject to the two limited exceptions the Court identified therein. Id. at 535.

Read together, these cases make clear that in all but the most limited of circumstances an employer has the right, notwithstanding the provisions of the Act, to bar nonemployee union agents from solicitation and other activity on its private property. The Court has never held that an employer must provide a forum for labor unions. To the contrary, the Court has recognized that a private property owner need not provide a forum for expression on its property and in fact may be arbitrary and inconsistent in its selection of speakers. See Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) ("Hudgens").

**B. The Board Should Abandon the Standard of Discrimination Articulated in Sandusky Mall**

In Sandusky Mall, the Board held that the owner of a shopping mall that permitted *any* form of solicitation or distribution on the mall's property and then sought to prohibit nonemployee union representatives from distributing handbills publicizing the union's dispute with a nonunion contractor working in a store at the mall was in violation of the Act unless mall owner could establish that the other unrelated solicitations it had permitted fell within the Board's "isolated beneficent incident" exception.<sup>2</sup> The Board rejected the mall owner's contention that under Lechmere nonemployee union hand billers did not have a protected right of access to private property under the Act. Instead, relying on the discrimination exception articulated in Babcock (even though the mall did not retain the contractor who was the subject of the union's dispute), the Board held that "an employer violate[s] Section 8(a)(1) of the Act by denying union access to property while permitting other individuals, groups, and organizations to use its premises for various activities." Sandusky Mall, 329 NLRB at 620 (footnote omitted). The Board found that allowing charitable solicitation on nine occasions over an unspecified time period was sufficient to find the charitable solicitations outside the isolated charitable solicitation exception.

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<sup>2</sup> See NLRB, Office of the General Counsel, Gen. Counsel Mem. No. 01-06 Fundraising Following Recent Tragedy (Sept. 28, 2001) (available on the Board's website) ("Although the Board has not defined the exact number of incidents necessary to find unlawful discrimination, it has found that three incidents of employer condonation of charitable solicitation was permitted. On the other hand, the Board has found discriminatory enforcement of otherwise valid no-solicitation/no-distribution rules where the incidents of charitable solicitation occurred frequently and/or for an extended duration of time.") (footnotes omitted); see also KMart Corp., 313 NLRB 50, 58 (1993) (concluding that three incidents of solicitation by nonemployees on behalf of beneficent organizations [*i.e.*, the Salvation Army, the promoter of a ballot initiative, and someone seeking donations for a religious organization], *were* sufficient to find discrimination when they all occurred on the same day that the nonemployee union solicitors were denied access).

Board Members Hurtgen and Brame both dissented. Member Hurtgen wrote that the Respondent mall operator had not discriminated against the union in violation of the Act because its decision to deny the union access was based on its judgment as to whether the persons seeking access to its property would benefit or hurt the mall and its tenants' business interests, not on their union identity or status.

Member Brame wrote a separate dissent and concluded that the correct standard for assessing whether the mall operator violated the Act would be one that examined whether the Respondent had discriminated among comparable groups or activities. "On its face, comparability has at least two obvious components: the nature of the persons or organizations being excluded and the nature of the activities which the property owner would prohibit. Discrimination must be established by the General Counsel on both grounds." *Id.* at 626.

The Sixth Circuit Court of Appeals denied enforcement of the Board's order in Sandusky Mall concluding that the "conduct of the nonemployee union handbillers is not similar conduct to that of civic and charitable organizations...." Sandusky Mall, 242 F.3d at 692-93. The Court held that "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 when access to the target audience is otherwise available. *Id.*

The Board should now abandon the standard adopted by the three-member majority in Sandusky Mall for determining whether a denial of access to nonemployee union representatives violates Section 8(a)(1) for several reasons. First,

that test ignores the Supreme Court's holdings in Babcock and Lechmere, in which the Court recognized the primacy of employers' private property rights. In placing nonemployee union access rights above an employer's private property rights, the Board disregarded the instructions and soundness of Babcock, Lechmere and their progeny. Second, the standard articulated by the Board in Sandusky Mall usurps an employer's rights to make legitimate business decisions as to whether allowing a third party on its property will help or harm its business. The Board should not intrude upon such business considerations. Third, the vague and ill-defined standard articulated in Sandusky Mall, which fails to offer meaningful guidance as to what constitutes an acceptably limited number of instances of access to charitable entities on an employer's property to avoid a finding of a violation of the Act, violates fundamental due process rights. The absence of clear and understandable standards will lead a prudent employer to exclude all charitable and civic organizations from its property for fear of unintentionally opening the floodgates to nonemployee union representatives who may seek unlimited access to its property. As a matter of public policy, the Board should not discourage employers from supporting charitable and civic activities. To the contrary, the Board should encourage employers to literally open its doors to charitable and civic activities without causing them to fear findings made in hindsight that granting such access has stripped them of the right to otherwise exercise their property rights. For each of these reasons, the Board should discard the standard articulated in Sandusky Mall for determining whether an employer has discriminatorily denied access to nonemployee union representatives.

**C. The Board Should Adopt a Standard for Determining Whether it is an Unfair Labor Practice to Deny Nonemployee Union Representatives Access to Private Property That is in Accord with Babcock & Wilcox and Lechmere**

Several Circuit Courts of Appeals have rejected the Board's standards for finding discrimination announced in Sandusky Mall. Like the Sixth Circuit, these courts have concluded that a finding of discrimination requires an examination of those entities that seek to communicate on the same subject. These courts have rejected a standard that provides that any time an employer allows a party on its property it must allow nonemployee union representatives access to the property as well. We set forth the approaches of the Second, Fourth and Seventh Circuit Courts of Appeals below.

**1. The Second Circuit**

In Salmon Run Shopping Ctr. LLC, 534 F.3d 108 (2d Cir. 2008), the Second Circuit Court of Appeals denied enforcement of a Board order rejecting the Board's test for discrimination and holding that "the Board's articulation of the standard by which to assess whether 'discrimination' – as defined in *Babcock* – occurred was not reasonable.... Because we conclude that the facts do not amount to discrimination under a properly framed standard, we deny enforcement of the Board's order." Id. at 114. The Court held that:

To amount to *Babcock*-type discrimination, the private property owner must treat a nonemployee who seeks to communicate on a subject protected by section 7 less favorably than another person communicating on the same subject. The disparate treatment must be shown between or among those who have chosen to enter the fray by communicating messages on the subject, whether employers or employees.... The solicitation of Muscular Dystrophy donations by firefighters or the distribution of educational promotional materials on Higher Ed Night do not serve as valid comparisons to the Carpenters' Union distribution of

literature touting the benefits of its apprenticeship programs or decrying the failure of a mall tenant to pay area standard wages. Only the “rare case” satisfies Babcock’s inaccessibility exception, Lechmere, 502 U.S. at 537, 112 S.Ct. 841, and it may be that the same holds true under our interpretation of the discrimination exception.

Id. at 116-17.

## 2. The Fourth Circuit

The Fourth Circuit Court of Appeals in Be-Lo Stores v. NLRB, 126 F.3d 268 (4th Cir. 1997), adopted an analysis similar to that of the Sixth Circuit. There, the Board held that the respondent had discriminatorily denied union members access to its property while allowing representatives of religious groups and charitable organizations such as the Lions Club, Jehovah’s Witnesses and an individual selling cookbooks to solicit in front of its store. The Court rejected the Board’s findings, holding that:

Because nonemployees’ claims to access to an employer’s private property are at their nadir when the nonemployees wish to engage in protest or economic activities, as opposed to organizational activities, *see U.F.C.W. v. N.L.R.B.*, 74 F.3d 292, 300 (D.C. Cir. 1996), we seriously doubt, as do our colleagues in other circuits, that the *Babcock & Wilcox* disparate treatment exception, post *Lechmere*, applies to nonemployees who do not propose to engage in organizational activities. *See, e.g., Cleveland Real Estate Partners v. N.L.R.B.*, 95 F.3d 457, 465 (6th Cir. 1996). If it does, we further doubt that an employer’s approval of limited charitable or civic distribution while excluding union distribution constitutes discrimination. *See Id.* (“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 when access to the target audience is otherwise available.”).

Be-Lo Stores, 126 F.3d at 284.

The Court concluded by noting the quandary faced by employers under the Board’s standard: “[t]o affirm the Board’s contrary finding on this record would be

tantamount to a holding that if an employer ever allows the distribution of literature on any of its property, then it must open its property to paid nonemployee union picketers.” Id. at 285; see also Riesbeck Food Markets, Inc. v. NLRB, 91 F.3d 132, 1996 WL 405224, at \*3 (4th Cir. 1996) (finding that there was a legally significant difference between charitable solicitations and a union’s “do not patronize” solicitation.)

### 3. The Seventh Circuit

While the Seventh Circuit Court of Appeals has taken a somewhat different approach from those of the Fourth, Sixth and Second Courts of Appeals, in Guardian Indus. Corp. v. NLRB, 49 F.3d 317, 320 (7th Cir. 1995) (“Guardian Indus.”), it too squarely rejected the Board’s test for discrimination (“The Board treats the definition of ‘discrimination’ as something obvious. All that we find obvious is that the Board’s view is idiosyncratic.”) The Court refused to enforce the Board’s order, rejecting the Board’s contention that if an employer permits its employees *any* access to a bulletin board, it must permit the posting of union notices. Id. In so doing, the Court identified the central issue posed by the Board herein – what is discrimination under the NLRA?

Discrimination is a form of inequality, which poses the question: “equal with respect to what?” A person making a claim of discrimination must identify another case that has been treated differently and explain why that case is “the same” in the respects the law deems relevant or permissible as grounds of action. *See generally* Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of “Equality” in Moral and Legal Discourse* (1990). The event comparable to the announcement of a union meeting, according to the Board, is the index card offering a fellow employee the opportunity to buy a newly born puppy. Yet in what respects are for-sale notices and bulletins of organizational meetings “the same”? ...

The Board’s rule depends on the proposition that once a bulletin board is open to any notices from employees, it is

“discrimination” not to accept meeting announcements. The Board asks us to accept an understanding of “discrimination” that has been considered, and found wanting, in every other part of the law that employs that word.

Id. at 319-20; see also Fleming Cos. v NLRB, 349 F.3d 968 (7th Cir. 2003) (“Fleming Cos.”) (removing union literature from bulletin board not discriminatory absent a finding that the postings allowed by others were of a similar character).

#### **4. A 5-Factor Analysis Would be Appropriate**

The reasoning of these courts as well as the dissenting opinions in Sandusky Mall suggest an appropriate framework for establishing a workable standard under the Babcock discrimination exception. The Board should, in each case, conduct an analysis which focuses on the following five considerations:

(i) Section 7 of the Act protects the rights of employees. Union agents who are not employees do not have the right to trespass on an employer’s property except under very limited circumstances;

(ii) nonemployee union agents should never be afforded greater rights of access to an employer’s premises than employees who, under Section 7, generally can solicit other employees only on non-working time in non-working areas;

(iii) an employer should be permitted to exercise its business judgment and to allow third-parties and vendors on its property to engage in activities that it deems related or beneficial to its business without forfeiting the right to exclude nonemployee union agents;

(iv) discrimination should be determined by examining the treatment of comparable groups and activities (solicitation of employees and the public by charitable and civic organizations is not comparable to solicitation on private property by outside union agents); and

(v) solicitations and distributions conducted by an employer of its employees on the employer's property should not be held to give rise to a right on the part of nonemployee representatives to engage in solicitations, distributions or demonstrations on that property.

**a. Section 7 of the Act Grants Rights to Employees.  
The Act Does Not Afford Nonemployee Union Agents  
A Right To Trespass on an Employer's Property  
Except Under Very Limited Circumstances**

Under Babcock and Lechmere, the Supreme Court identified a narrow set of circumstances in which nonemployee union organizers might be permitted to have access to an employer's property for purposes of soliciting and distributing handbills to the employer's employees. The limited exceptions noted in Babcock and Lechmere were rooted in the Section 7 right of employees to gain otherwise inaccessible information regarding union representation and membership. Babcock, 351 U.S. at 112; Lechmere, 502 U.S. at 532. Neither Babcock nor Lechmere held that nonemployee union representatives have any right under the Act to access to an employer's property for the purposes of soliciting, distributing or handbilling to the public. Accordingly, the Board should evaluate the intended audience of the solicitation, distribution or other activity and not compromise an employer's right to exclude outsiders from its private property regardless of whether their conduct is directed to the public or employees.

**b. Nonemployee Union Representatives Should Never Have Greater Rights of Access on an Employer's Premises than Employees with Section 7 Rights**

In the context of employee solicitations on behalf of a union, the Board has previously noted that different standards apply in the context of specific types of employers, such as those in health care, and the retail and hospitality industries. The Courts and the Board have recognized that the Act allows such employers to impose greater restrictions on employee solicitations than employers in other industries may maintain because the presumptive effects that solicitations and distributions, even on non-working time, can be expected to affect patient care, or the delivery of service to customers and guests. Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978) (citing with approval St. John's Hosp., 222 NLRB 1150 (1976), and approving the Board's holding that under the Act a healthcare institution may lawfully prohibit employee solicitation during non-work time in immediate patient care areas and may even prohibit such activities in areas other than immediate patient care areas where such solicitations could disrupt patient care or health care operations); J.C. Penney Co., 266 NLRB 1223 (1983) (restrictions of employee solicitations even on non-working time, in aisles, corridors, escalators, and elevators interconnecting sales areas where such activity could directly affect the passage and safety of customers in such areas necessary to prevent undue interruption or disturbance of the customer-salesperson relationship and the consequent disruption of store business); Marshall Field & Co., 98 NLRB 88 (1952) (same); Dunes Hotel, 284 NLRB 871, 875 (1987); Santa Fe Hotel Inc., 331 NLRB 723, 729 (2000) (finding rationale for limiting employee solicitations in the presence of customers in retail stores applicable to employers in hospitality industry, i.e., preventing interference with services for guests).

Any standard the Board adopts must similarly permit an employer to restrict nonemployee union agent access to its property where the presence of such agents could deleteriously affect patient care provided by a healthcare employer, or interfere with customer and guest services provided by retail and hospitality industry employers. It would be illogical for the Board to afford an employer in either healthcare, retail or hospitality industries fewer rights to limit potentially disruptive or harmful solicitation and distribution on its property by nonemployees, than the Act affords it to limit the activities of employees, who actually have Section 7 rights.

**c. An Employer Should Be Permitted to Exercise Its Business Judgment To Allow Third-Parties and Vendors on Its Property Where Such Activities are Related to Its Business, Without Forfeiting the Right to Exclude Nonemployee Union Agents**

Decisions by an employer to permit those solicitations by nonemployees on its property that it determines, in its business judgment, to be in the interest of its business should not force open the door compelling access to its property to nonemployee union representatives. Indeed, the Board has historically held that the Act permits an employer to permit certain solicitations and distributions on its premises without giving rise to an obligation to allow solicitations or distributions by nonemployee union agents, where the solicitations and distributions it permits relate to the employer's business functions. See, e.g., Rochester Gen'l Hosp., 234 NLRB 253, 259 (1978) (not an unfair labor practice where the hospital permitted blood drives, display of pharmaceutical products, and display of medical books, all of which were related to the hospital's primary purpose of "carrying out its community health care functions and responsibilities."); George Washington Univ. Hosp. v. Pomerantz, 227 NLRB 1362, 1374

n.39 (1977) (nonemployee fundraising activities permitted under the Act included those which donated their proceeds to the hospital itself and which could be viewed “as virtually an integral part of the hospital’s necessary functions”); Intercommunity Hosp., 255 NLRB 468, 470 (1981) (United Fund, hospital guilds and philanthropies, Girl Scout projects for the hospital’s benefit, drug salespersons and in-service training representatives are a “recognized and permissible exemption from a valid no-solicitation rule....”); see also Ameron Auto. Ctrs., 265 NLRB 511, 512 n.10 (1982) (permitting nonemployee tool vendors to solicit sales on premises was not a basis for finding discriminatory enforcement of no-solicitation rule). The Board should continue to recognize and respect this distinction.

Moreover, the Board should recognize that an employer ought to be permitted to allow nonemployee solicitation on its property when such solicitation not only relates to, but also helps promote the employer’s business, without incurring an obligation to permit solicitations and other activities by nonemployees that the employer concludes would be counter to its business interests. See Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 564-65 (1972) (in First Amendment context, the Supreme Court held that a shopping mall, while excluding persons distributing anti-war handbills, could, lawfully permit charitable solicitations and other meetings and promotional activities to take place because the operator of the mall concluded that permitting those activities would bring potential customers, create a favorable impression of the shopping center, and generate goodwill); see also Hudgens, 424 U.S. at 520-21 (a private property owner is not required to provide a forum for expression on its property and may be arbitrary and inconsistent in its selection of speakers). It would be

incongruous with these rulings of the Supreme Court if the Board were to nonetheless hold that an employer was required, for instance, to allow a nonemployee union representative onto its property to call for or endorse a boycott of its products or services because that employer had allowed, for example, holiday gift wrapping by an outside organization to help promote sales of its products. See Sandusky Mall, 329 NLRB at 628 (Brame dissenting).

**d. Discrimination Must be Among Comparable Groups and Comparable Activities to be a Violation**

The Board should adopt a standard that evaluates whether an employer's conduct constitutes discrimination by comparing the employer's treatment of similar persons or entities. Unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or Section 7-protected status. See Guardian Indus., 49 F.3d at 319. The Girl Scouts and other civic and charitable organizations are fundamentally dissimilar to unions in their functions and purpose and the Board ought not treat them as equals when evaluating whether an employer has unlawfully discriminated in violation of Section 7 of the Act by permitting solicitations or distributions on behalf of one, but not the other, on its property.

The Seventh Circuit's Guardian Indus. analysis is consistent with that of the Supreme Court's analysis of the claims of discriminatory treatment brought against a school district by the union representing the district's teachers. In Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 47-48 (1983), the Supreme Court held that a public school was not required to grant the union representing its teachers access to its mail facilities because the district had allowed access to Cub Scouts and other

community organizations that engage in activities of interest and educational relevance to students. The Court held that “even if we assume that by granting access to the [civic organizations], the school district has created a ‘limited’ public forum, the constitutional right of access would in any event extend only to other entities of similar character.” *Id.* at 48. It concluded that the union, which was concerned with the teachers’ terms and conditions of employment was not of a similar character to the civic organizations of interest and educational relevance to students. That same test should be applied under the Act. The Board’s standard for determining discrimination should be an examination of how an employer treats requests for access by nonemployee union representatives in comparison to those made by other entities of similar character.

**e. Employer and Employee-Conducted Solicitation or Distributions Do Not Open the Door to Nonemployee Union Solicitations and Distributions**

Permitting solicitations or distributions *by an employer or its employees in the workplace or on company premises*, while not allowing them by nonemployee groups should not be found to constitute unlawful discrimination in violation of the Act. Nor should such employer or employee-conducted solicitations or distributions be included in any “quantum” calculation if the Board were to adopt a numerical standard for determining whether exceeding a particular frequency or number of charitable events opens the door to nonemployee union access.

Indeed, this conclusion has been reached by the Board’s General Counsel. Specifically, on April 23, 2001, the General Counsel issued an Advice Memorandum, which addressed the question of whether a complaint should be issued alleging that an employer had violated the Act by denying nonemployee union organizers access to the

interior of the employer's stores while the employer was hosting in-store fund-raising activities for "corporate-sponsored" charities, including the Children's Miracle Network and the sponsors of a national World War II Memorial. NLRB, Office of the Gen. Counsel, Advice Memo., Wal-Mart Stores, Inc., Case 4-CA-28666 (Apr. 23, 2001) (available on the Board's website). The General Counsel recognized that "Solicitation conducted by the employer, as opposed to other outside groups, is not included within the Board's quantum calculation. Thus, the charitable in-store solicitations conducted solely by Wal-Mart employees on behalf of the [World War II Memorial and the Children's Miracle Network] are not included in the examination of the quantum of incidents of discrimination." *Id.* (citing NLRB v. United Steelworkers of Am., CIO, 357 U.S. 357 (1958) (no-solicitation, no-distribution rules are not binding upon employers) and St. Francis Hosp., 263 NLRB 834, 835 (1982) (same); Hale Nani Rehabilitation, 326 NLRB 335 (1998) (employer lawfully could preclude employee distributions while permitting its supervisors to engage in distributions).

**D. Register-Guard Supports Replacing Sandusky Mall's Discrimination Analysis With a Standard that Compares an Employer's Treatment of Equals**

In Register-Guard, a 3-2 Board majority concluded, among other things, that: (i) employees have no statutory right under the Act to use employer e-mail systems to communicate regarding Section 7 matters; and (ii) the Board would adopt the standard enunciated by the Seventh Circuit in Guardian Indus. and Fleming Cos., that unlawful discrimination against an employee would consist of "disparate treatment of activities or communications of a similar character because of their union or Section 7 protected status." *Id.* at 1118.

The Board majority held that the employer's rule prohibiting use of the e-mail system for any "non-job-related solicitations" did not violate the Act because employees had no statutory right to use the employer's e-mail system for concerted, protected activity. Id. at 1114. The majority concluded that e-mail systems were comparable to other types of employer-owned communications equipment, such as bulletin boards, telephones, public address systems, and video systems, which it has long held an employer could lawfully restrict the use of, so long as it did so in a non-discriminatory manner. The Board observed that an employer has a basic property right to regulate and restrict employee use of all such company property. Id. (citing Mid-Mountain Foods, 332 NLRB 229, 230 (2000)) (no statutory right of employees or a union to use an employer's television), enforced, 269 F.3d 1075 (D.C. Cir. 2001); Eaton Techs. Inc., 322 NLRB 848, 853 (1997) ("no statutory right of employees or a union to use employer's bulletin board"); Champion Int'l, 303 NLRB 102, 109 (1991) (employer has "a basic right to regulate and restrict employee use of company property' such as a copy machine"); Churchill's Supermarkets, 285 NLRB 138, 155 (1987) (employer may "restrict the use of company telephones to business-related conversations ...."), enforced, 857 F.2d 1474 (6th Cir. 1988); Union Carbide Corp. – Nuclear Div., 259 NLRB 974, 980 (1981) ("employer 'could unquestionably bar its telephones to any personal use by employees'"), enforced in relevant part, 714 F.2d 657 (6th Cir. 1983); Heath Co., 196 NLRB 134 (1972) ("employer did not engage in objectionable conduct by refusing to allow prounion employees to use public address system to respond to antiunion broadcasts").

Of significance to the Board's current review of Sandusky Mall, the majority in Register-Guard the majority also adopted the United States Court of Appeals for the Seventh Circuit's standard for evaluating whether an employer has discriminatorily enforced a communication or solicitation policy. Register-Guard, at 1117, 1119 (citing Fleming Cos., and Guardian Indus.). The majority held that "*unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.*" Id. at 1118 (citation omitted, emphasis supplied). The Board majority noted that although in earlier decisions, the Board had found that an employer discriminatorily enforced a communication or solicitation policy if it permitted employees to communicate or solicit for non-work-related purposes, while prohibiting communications or solicitations about unions, id. at 1117, the Board needed to adjust its standard because nothing in the Act prohibited an employer from distinguishing between permissible and non-permissible communications and solicitations on a non-Section 7 basis. Id. at 1118.

The majority held that "an employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use." Id. at 1118. Thus an employer may ban communications or solicitations via e-mail for non-charitable, outside organizations including unions, while permitting the use of such systems for charitable solicitations, invitations of a personal nature, and

employer business-related use, so long as it implements and enforces the rules not merely to limit its employees in the exercise of their Section 7 rights.<sup>3</sup>

As noted above, Register-Guard addressed the restrictions an employer may lawfully maintain to limit its employees' use of its e-mail system. Roundy's, Inc. concerns the restrictions an employer or property owner may lawfully maintain and enforce with respect to *nonemployees* entering and using its property for solicitation, distribution and other purposes. Although arising in the context of private employer property different than the real property at issue in the instant case, the Board's ruling in Register-Guard provides valuable guidance for evaluating whether a restriction, lawful on its face, has been discriminatorily applied. In Register-Guard, the Board adopted the position of the Seventh Circuit in Guardian Indus. and Fleming Cos. that unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status, and stated that it would apply that standard in Register-Guard and in future cases. The Board did not state that it would limit its application of this analysis to allegations of unlawful discrimination specific to e-mail systems or alleged discrimination against employees. 351 NLRB at 1119. In fact, the Board noted in Register-Guard, in response to an argument by the respondent-employer that the employee who was disciplined for using the company e-mail system should be treated as a nonemployee union agent, that even if Lechmere, a case concerning an employer's right to exclude nonemployee agents of the union from its property, were used to consider the lawfulness of the policy

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<sup>3</sup> The D.C. Circuit subsequently held that the factual record did not support the Board's application of its standard for evaluating claims of discrimination under the Act which it used to determine that certain discipline imposed on an employee was not discriminatory. Guard Pub'g v. NLRB, 571 F.3d 53, 58 (D.C. Cir. 2009). The Court however, did not invalidate the Board's standard.

restricting the individual's access, the Board would reach the same conclusion because the same discrimination analysis would apply regardless of whether she was an employee or outside agent. Id. at 1119-20 and n.25.

## V. CONCLUSION

For the foregoing reasons, the Board should abandon its Sandusky Mall analysis of discrimination in favor of a more limited standard for determining unlawful discrimination as stated by various Courts of Appeals and in the Board's own Register-Guard decision and as proposed in this Brief.

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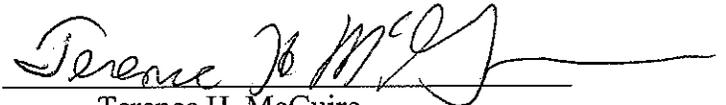
**CERTIFICATE OF SERVICE**

A copy of the foregoing Brief of Amicus Curiae Epstein Becker & Green, P.C. was filed electronically with the Executive Secretary, National Labor Relations Board and served electronically this 7<sup>th</sup> day of January, 2011, upon the following:

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