

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 20-1010

IN THE
**United States Court of Appeals
for the District of Columbia Circuit**

LOCAL 23, AMERICAN FEDERATION OF MUSICIANS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of a Decision and Order of
the National Labor Relations Board

JOINT APPENDIX—VOLUME I OF III (JA001 to JA198)

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United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570-0001

March 12, 2020

Mark J. Langer, Esquire
Clerk, United States Court of Appeals
for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue NW, Room 5423
Washington, DC 20001-2866

Re: *Local 23, American Federation of Musicians v. NLRB*
D.C. Cir. No. 20-1010
Board Case No. 16-CA-193636

Dear Mr. Langer:

I am transmitting the Certified List of the contents of the Agency Record in the above-captioned case.

/s/ David Habenstreit

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JA001

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

August 23, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN,
KAPLAN, AND EMANUEL

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹² Id. at 916.

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

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

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

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

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

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

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

II. FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁰ 356 NLRB at 911–912.

²¹ See *supra* fn. 14.

²² *Id.* at 912.

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

²⁴ *Id.* at 915.

²⁵ *Id.*

²⁶ *Id.* at 916.

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

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

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

²⁹ *Id.* at 921.

³⁰ *Id.* at 922.

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

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

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

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

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

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

³¹ Id.

³² Id.

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

³⁴ Id. at 923–924.

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

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

³⁷ Id.

³⁸ 357 NLRB at 1888 & fn. 8.

³⁹ Id. at 1888.

⁴⁰ Id. at 1888 fn. 8.

⁴¹ Id. at 1889.

⁴² Id. at 1891.

⁴³ Id.

⁴⁴ Id.

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

⁴⁶ Id.

⁴⁷ Id. at 1893.

⁴⁸ Id.

IV. THE JUDGE'S DECISION

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

V. POSITIONS OF THE PARTIES

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

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

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

VI. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

A. The Critical Distinction "of Substance" Between Contractor Employees and a Property Owner's Own Employees

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

⁵³ 356 NLRB at 913.

⁵⁴ *Id.*

⁵⁵ See fn. 14, *supra*.

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

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

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

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

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

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

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

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

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

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

who worked regularly, but not exclusively, on the property owner's property.⁶³ We agree with the holding of the Board's decisions prior to *New York New York* that only contractor employees who regularly and exclusively work for a contractor on a property owner's property have some Section 7 access rights. The removal of the exclusivity requirement in *New York New York* made off-duty access to the owner's property possible for a myriad of contractor employees, some of whom spend only a small fraction of their workweek on the property owner's property. As Member Hayes observed in his *Simon DeBartolo* dissent, regularity in working on the property "alone is far too imprecise and ambiguous to serve as a reliable indicator of where to draw the line on access rights."⁶⁴

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

C. Reasonable Alternative Nontrespassory Means of Communication

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

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

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

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

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

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

⁶⁴ 357 NLRB at 1892.

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

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

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

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

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

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

⁶⁶ 351 U.S. at 114.

⁶⁷ 502 U.S. at 537.

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

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

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

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

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

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

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

D. Retroactive Application of the New Standard

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

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

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

E. Application of the New Standard to the Symphony Employees

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

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

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

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

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

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

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

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

⁷⁶ *Id.*

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

⁷⁸ *Chenery Corp.*, *supra*.

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

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

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

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

VII. RESPONSE TO DISSENT

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁴ 336 U.S. 226 (1949).

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

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

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

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

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

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

ORDER

The complaint is dismissed.

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

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I.

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

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

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

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

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

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

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

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

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

⁷ *Id.* (quotations omitted).

⁸ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 915.

¹⁸ *Id.* at 916.

¹⁹ *Id.*

²⁰ *Id.* at 917–918.

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

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

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

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

II.

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

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

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

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

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

²¹ Id. at 918.

²² Id. at 918–919.

²³ 676 F.3d at 196.

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

²⁵ Id. at 196–197.

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

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

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

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

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

license agreement between the Symphony and the Center.³⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

A.

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

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

1.

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

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

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

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

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

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

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

³⁸ *Id.*

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

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

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

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

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

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

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

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

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

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

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

⁴² 356 NLRB at 916.

⁴³ 356 NLRB at 918–919.

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

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

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

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

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

⁴⁸ 356 NLRB at 912 (emphasis added).

⁴⁹ *Id.*

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

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

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

B.

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

1.

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

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

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

⁵⁰ *Id.*

⁵¹ *Id.* at 913.

⁵² *Id.* at 916–917.

⁵³ *Id.* at 918 (footnote omitted.)

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

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

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

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

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

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

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

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

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

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

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

2.

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

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

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

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

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

⁶⁰ 356 NLRB at 914.

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

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

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

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

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

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

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

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

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

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

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

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

IV.

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

⁶⁶ 676 F.3d at 199 fn. 2.

⁶⁷ 356 NLRB at 912.

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

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

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

Eva Shih, Esq., for the General Counsel.

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

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

DECISION

STATEMENT OF THE CASE

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

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

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

FINDINGS OF FACT

I. JURISDICTION

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

⁶⁸ *Id.*

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

II. ALLEGED UNFAIR LABOR PRACTICES

The Tobin Center

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

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

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

Leafleting of The Tobin Center by Symphony Musicians and Sympathizers

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

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

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

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

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

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

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

The leaflet read as follows:

A Live Orchestra for Live Dancers.

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

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

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

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

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

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

Legal Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION OF LAW

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

REMEDY

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

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

ORDER

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

1. Cease and desist from

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

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

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

them by Section 7 of the Act.

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

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

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

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

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

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

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

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

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



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

AND

CASE 16-CA-193636

LOCAL 23, AMERICAN FEDERATION OF MUSICIANS

ORDER DENYING MOTION FOR RECONSIDERATION

The Charging Party's Motion for Reconsideration of the Board's Decision and Order, reported at 368 NLRB No. 46 (2019), is denied.¹ The Charging Party has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(c)(1) of the Board Rules and Regulations.²

Dated, Washington, D.C., December 11, 2019

JOHN F. RING,

CHAIRMAN

MARVIN E. KAPLAN,

MEMBER

¹ The Charging Party filed a brief in support of its Motion for Reconsideration. The Respondent filed a response in opposition.

² The Charging Party asserts that the new access standard for off-duty employees of an onsite contractor announced in the Board's Decision and Order is "legally infirm" because it would bar many off-duty contractor employees from exercising their rights under *Republic Aviation Corp v. NLRB*, 324 U.S. 793 (1945). We find no merit in the Charging Party's contention. As the Charging Party acknowledges, the D.C. Circuit recognized that the Supreme Court has never decided whether contractor employees have *Republic Aviation* rights to engage in organizational activities in nonwork areas during nonwork time. *New York-New York, LLC v. NLRB*, 676 F.3d 193, 196 (D.C. Cir. 2012) (quoting *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002)), cert. denied 133 S. Ct. 1580 (2013). Moreover, in the underlying decision, we thoroughly explained our reasoning for adopting the new standard. The Charging Party and our colleague contend that we made a material error in the underlying decision, but there was no material error under Sec. 102.48(c)(1). To the contrary, they merely disagree with our conclusions. Accordingly, we deny the Charging Party's Motion for Reconsideration.

WILLIAM J. EMANUEL, MEMBER

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER McFERRAN, dissenting.

For the reasons stated in my dissent from the Board's underlying decision, I believe that the Charging Party has demonstrated "material error" in the decision. Accordingly, I would grant the motion for reconsideration.

LAUREN McFERRAN, MEMBER

NATIONAL LABOR RELATIONS BOARD

NLRB Hearing Transcript
(October 10-11, 2017) (excerpts)

Pages 32-39, 40-50, 52, 55-56, 63-90, 96-97, 102-09, 119, 128-29, 138, 146-47, 153-55, 165-70, 178-81, 187-188, 198-201, 210, 220, 228, 230-234, 249, 260-68, 270-78, 280-81, 284-88, 293-94, 304-07.

1 A Yes.

2 Q Can you briefly describe how the Tobin Center came to
3 its current status.

4 A Yes.

5 Q Go ahead. There was -- you spoke earlier -- and did
6 a nice job with it -- of the county and the city putting
7 funding and assets into the project. There is additionally
8 \$58 million raised by private funds for the construction of
9 the building, so the municipal auditorium was renovated to
10 create three performing venues where there was once only
11 one along the River Walk to create a performing arts center
12 that was designed to bring the best of the arts in the
13 world to San Antonio.

14 Q And it may sound a little bit redundant here, but
15 because my opening statement is not actually evidence, I
16 want to make sure that the correct facts get into the
17 record. So the current venue is formerly the San Antonio
18 Municipal Auditorium building.

19 A I'm not sure that was the name. It was Municipal
20 Auditorium. I don't know if it was San Antonio Municipal
21 Auditorium.

22 Q But it was owned by the City of San Antonio?

23 A I -- yes.

24 Q And that facility and its surrounding land were
25 donated to the Bexar County Performing Arts Foundation by

1 the City of San Antonio.

2 A That's correct.

3 Q Have you seen the deeds from the City of San Antonio
4 to Bexar County for that property?

5 A Not specifically. They're probably part of the grant
6 and development agreement, the GDA, but I don't have them.

7 MS. SHIH: Your Honor, I don't plan to question the
8 witness about these documents, but I would like to go ahead
9 and offer them at this time, and I do have original
10 certified copies, so if there is any concern with --

11 MS. McELROY: We don't have any objection, Judge.

12 JUDGE AMCHAN: Okay.

13 MS. McELROY: As long as I know which one --

14 MS. SHIH: Sure.

15 JUDGE AMCHAN: So just to make it clear, you don't
16 have any objection to my receiving them, and you're willing
17 to stipulate to their authenticity?

18 MS. McELROY: Yes, Judge. Once I have a look at it
19 to make sure --

20 JUDGE AMCHAN: Okay. Before you change your time --

21 MS. McELROY: Give me just --

22 MS. SHIH: And actually, since I'm not going to be
23 questioning the witness about this, I'll just go ahead and
24 take care of marking these on a break, and that way we
25 don't have to hold up that testimony.

1 Q BY MS. SHIH: The municipal auditorium and the
2 surrounding land that was donated by the City was valued at
3 approximately \$40 million. Is that right?

4 A That's my understanding.

5 Q And in addition to said, you said, approximately \$58
6 million in private donations --

7 A Uh-huh.

8 Q -- were raised.

9 A Yes.

10 Q Bexar County voters also approved a construction bond
11 at approximately \$100 million. Is that right?

12 A That's correct.

13 Q And the facility was renovated and reopened as the
14 Tobin Center in, I believe, 2014.

15 A Correct.

16 Q Were you present for the ground-breaking event that
17 took place on the grounds in 2011?

18 A I was not.

19 Q The Tobin Center identifies on its website a number
20 of resident companies. Do you know off the top of your
21 head what those are?

22 A I can try. At the time -- as of --

23 MS. McELROY: Are you talking about as of now or as
24 of February 2017?

25 Q BY MS. SHIH: As of February 2017.

1 A I'm going to have to count. The San Antonio
2 Symphony, Opera San Antonio, Ballet San Antonio, Chamber
3 Orchestra San Antonio, the Children's Fine Art Series,
4 AtticRep, Chamber Choir, Youth Orchestra San Antonio,
5 Children's Choir, and SOLI Ensemble.

6 Q And would you agree with me that the term "resident"
7 refers to an organization being housed at the facility?

8 A No.

9 Q What is your understanding of what the term "resident
10 company" is?

11 A Resident company is someone -- it's an organization
12 that performs at the Tobin Center.

13 Q And with regard to the Symphony, it also rehearses at
14 the Tobin Center. Is that right?

15 A Correct.

16 Q Do you have any idea what percentage of time the
17 Symphony musicians spend at your facility?

18 A There was weeks put out here earlier. I have as 22
19 weeks that the Symphony had performances and rehearsals.
20 Somebody said a different number, so I don't know what
21 percentage that is.

22 Q But as resident company, there's an expectation that
23 the organizations would work with one another for
24 performances. Is that right?

25 A No.

1 Q There is no expectation that there would be any
2 collaboration between the organizations.

3 A No.

4 Q Other than -- so the only common denominator among
5 the resident companies is the fact that they rehearse and
6 perform at the Tobin Center.

7 A Some rehearse and perform. Others perform.

8 Q Okay. Specifically with regard to the Symphony, it
9 rehearses and performs at the Tobin Center.

10 A For the performances at the Tobin Center it does.

11 Q The Symphony stores instruments at the Tobin Center
12 on a long-term basis. Is that right?

13 A There is -- yes.

14 Q And musicians also store their instruments there.
15 Correct?

16 A Not correct.

17 Q There are no musicians that store any of their
18 instruments at the Tobin Center on a long-term basis.

19 A There are some musicians. Other musicians bring
20 their instruments with them.

21 Q Okay. There are some instruments stored at the Tobin
22 Center that are owned by Symphony musicians.

23 A I'm uncertain on who owns them.

24 Q Symphony management has office space at the Tobin
25 Center during their season. Is that right?

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JA042

1 MS. McELROY: Counsel, we're talking about 2017?

2 Q BY MS. SHIH: I'm talking about the 2016-17 season.

3 A They have no ongoing office space at the Tobin
4 Center.

5 Q I'm talking about during the actual season. Does
6 Symphony management use office space at the Tobin Center
7 during the contracted season?

8 A No.

9 Q Do you know where Symphony management has offices?

10 A They had their administrative offices at the office
11 tower on Travis Park. I don't know the address.

12 Q Are you aware that the union holds internal meetings
13 at the Tobin Center during the season?

14 A Yes.

15 Q And you're -- are you aware that the union holds
16 meetings with Symphony management at the Tobin Center
17 during the season?

18 A Yes.

19 Q Are you aware that during breaks between rehearsals,
20 musicians use the Tobin Center's break room?

21 A No. I know that they use the Green Room.

22 Q That's a room located on the Tobin Center premises.

23 A Backstage. Correct.

24 Q And there's an entrance that musicians use to enter
25 the Tobin Center that's commonly referred to as the

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JA043

1 musicians' entrance. Is that right?

2 A As per their request.

3 MS. SHIH: I'm also going to be offering the use
4 agreement and the library agreement. Do you have any
5 objection?

6 MS. McELROY: I have no objection, assuming it's --

7 MS. SHIH: I'll hand those over at a break, because I
8 don't have any questions specifically for this witness.

9 MS. McELROY: You said the use and the library?

10 MS. SHIH: Yes. They'll be separate agreements.

11 MS. McELROY: Thank you.

12 Q BY MS. SHIH: Is it correct that the Symphony
13 maintains a library at the Tobin Center?

14 A Yes.

15 Q It's permanently housed at the Tobin Center.
16 Correct?

17 A As of the effective date of the agreement, it became
18 permanent.

19 Q Okay. So in other words, they don't remove the
20 library and its contents at the end of each of their
21 performance seasons.

22 A I don't know what they do with their -- I believe it
23 all stays there, but we don't monitor that.

24 Q The contents of the library are owned by the
25 Symphony?

1 A I believe so.

2 Q And are you aware that there is a Symphony librarian
3 that works exclusively from that space during the season?

4 A I believe that's the case. Yes.

5 Q Are you aware that there's a collective-bargaining
6 agreement between the Symphony musicians and the union?

7 A Yes.

8 Q Have you ever seen that agreement?

9 A No.

10 Q What type of security in February 2017 did the Tobin
11 Center maintain on the grounds on a regular basis, on a
12 day-to-day basis?

13 A The med staff and the SAPD and cameras and monitors
14 and things like that.

15 Q Is there -- are there any security staff members
16 employed by the Tobin Center?

17 A We have the med staff.

18 Q Are they employees of the Tobin Center?

19 A Yes.

20 Q Do they work at times other than events?

21 A Certainly.

22 Q What hours are security staff working at the Tobin
23 Center? This is as of February 2017.

24 A It's totally dependent on what the events are.

25 Q Okay. I'm talking about during non-events.

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JA045

1 A There's no such thing. We virtually have two events
2 every single night.

3 Q During the hours of a day when there are no events
4 going on at the Tobin Center, is there security staff
5 working at the facility?

6 A There is always events, either moving and moving out,
7 at the Tobin Center, so we consider that all an event, so
8 there is security. There is security that monitors the
9 loading dock from 6:00 a.m. to 11:00 p.m., I believe.

10 Q What about areas other than the loading dock? Is
11 there security staff monitoring the grounds --

12 A The entire --

13 Q -- on a 24/7 basis?

14 A The entire campus. Not 24/7.

15 Q During what hours?

16 A Either time of events, move-ins, move-outs, which
17 could go obviously till -- it could be 24 hours, if we have
18 such activity on property. The entire property is
19 monitored 24/7 by cameras.

20 Q How many cameras?

21 A I'd be guessing. Thirty.

22 Q How long has it been the practice of the Tobin Center
23 to have SAPD officers present for events?

24 A Since prior to September of 2014 when we opened.

25 Q And is that the case for all events?

1 A Yes.

2 Q How many SAPD officers do you typically request for
3 each event?

4 A Each event is different.

5 Q Okay.

6 A So different events require a different level of
7 security. We have at least one and, I believe, at least
8 two now on property at all times during events.

9 Q When did that start?

10 A September 4, 2014.

11 Q How did you learn of the union's plan to leaflet the
12 Ballet's performances of Sleeping Beauty in February 2017?

13 A I believe I was sent an email by David Gross, and I
14 was also informed by a board member, a San Antonio Symphony
15 board member.

16 Q Who was that?

17 A Alice Viroslav.

18 Q Were you aware prior to learning about the union's
19 plans to leaflet that there was a dispute between the union
20 and the Ballet over the Ballet's use of recorded music?

21 A I didn't know of a dispute between the musicians
22 union and the Ballet.

23 Q What did you know of?

24 A I knew that the Ballet, for financial purposes,
25 was -- were not going to be able to use the musicians --

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JA047

1 the San Antonio Symphony.

2 Q Were you aware prior to learning about the leafleting
3 that the musicians had raised complaints about this
4 practice or had raised any concerns about this practice?

5 A I was not aware that the musicians had raised any
6 complaints.

7 Q Were you aware of anyone raising complaints?

8 A I was aware that San Antonio Symphony had raised
9 complaints.

10 Q How did you become aware of the Symphony's
11 complaints?

12 A The Ballet is housed in our administrative building,
13 and I would see them and their board members on a regular
14 basis, and they would express concerns about the cost of
15 having the San Antonio Symphony provide live music for
16 their events.

17 Q Did anyone from the Symphony ever express any
18 concerns to you about the Ballet's use of recorded music?

19 A No.

20 Q In response to learning of the union's plan to
21 leaflet the Ballet's Sleeping Beauty performances, what did
22 you do?

23 A It was our policy not to allow any handing out or
24 soliciting -- handing out of leaflets or fliers, or
25 soliciting, selling tee shirts or anything like that on our

1 property. I convened my direct reports and explained to
2 them that this is no different than any of those
3 situations, so it was -- you know, we'd proceed as normal.

4 Q You held a meeting with these individuals?

5 A I did.

6 Q I'm handing you what's been marked as General Counsel
7 Exhibit 5.

8 **(Document marked for identification as GC-5.)**

9 MS. McELROY: Did you say 5?

10 MS. SHIH: Yes. I'm going to fill in the gaps with
11 the other documents that we --

12 Q BY MS. SHIH: Is that the meeting request that you
13 sent out when you learned of the union's plans to leaflet
14 the Ballet?

15 A I believe either LuAnn or I sent it out. I guess it
16 was me, but yes.

17 Q Did all of the individuals listed under, Required
18 attendees, attend that meeting?

19 A Yes.

20 Q Did anyone else other than those individuals attend
21 that meeting?

22 A I don't believe so.

23 Q That meeting, did it take place at the time
24 scheduled? Noon on Tuesday, February 14.

25 A Probably.

1 Q Where did that meeting take place?

2 A In my office.

3 Q At the Tobin Center.

4 A In the administrative building next to the Tobin
5 Center.

6 Q What was discussed during that meeting?

7 A As I said earlier, we just reiterated -- I reiterated
8 the fact that we don't allow leafleting or soliciting or
9 bill passing or promotion activities on our property, and
10 that the -- this would have been the first time we would
11 have had a situation with a resident company event in the
12 building where someone trying to -- a third party handing
13 out leaflets during one of our resident company events, and
14 I just wanted to reiterate to our staff that, as per
15 industry practice and as per the rest of our procedures,
16 that this would be no different.

17 Q Okay. So did you give any instructions as to what to
18 do or say when the leafleters arrived on the premises?

19 A We would not allow them to hand out leaflets, just
20 like we do anyone else. We would not then allow them to
21 hand out leaflets, promote, or solicit on our private
22 property.

23 Q Was there any kind of action plan discussed for what
24 would happen if leafleters attempted to do so?

25 A I believe that each person went back to their

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1 departments, and as to the point that their departments had
2 anything to do with property security and property event
3 staff, they went back and said, We're not allowing -- as
4 normal, we're not allowing folks on property to leaflet,
5 promote, or solicit.

6 Q Okay. So what I'm asking, though, is: You continue
7 to say you're not allowing. Was there any discussion about
8 what to do in the event that someone attempted to leaflet
9 on the property? Was there discussion that they would be
10 ejected? Was there discussion that the police would be
11 called? Was there any discussion that they would be thrown
12 off the property? What was discussed with regard to the
13 actual attempts to leaflet?

14 A The discussion I had is that we won't allow them on
15 property. How the departments were going to handle that
16 would be as normal.

17 Q So you left it up to each of your reports to
18 determine how to specifically handle any incidents.

19 A Within the scope of how industry practice is.
20 Correct.

21 Q Do you have any written guidelines that you use at
22 your facility for handling these types of events?

23 A For handling handing out leaflets? No.

24 JUDGE AMCHAN: I guess the question is: How would
25 your subordinates know what industry practice is?

1 THE WITNESS: Because they have been in the industry.
2 I've worked with some of these folks for up to 20 years.
3 They know how we've handled at other venues that we have
4 managed, and so they knew that we would not -- we just
5 don't allow people on property that are about to solicit or
6 engage or hand out leaflets.

7 Q BY MS. SHIH: How have you handled it at other
8 venues?

9 A We do not allow them on property, and that the -- our
10 event staff will ask people to leave or guide them off
11 property. And if that becomes an issue and if it becomes a
12 confrontational issue, we would engage local police to --
13 we would call local police in to handle it, which is the
14 same way we handle anyone we want removed from the property
15 for any reason.

16 Q And is it your understanding that your direct reports
17 understood that to be the case for this event as well?

18 A Correct.

19 Q Who makes arrangements to have off-duty San Antonio
20 police present for an event?

21 A Our vice president of operations.

22 Q Jack Freeman?

23 A Jack Freeman.

24 Q Did you give him any specific instructions on
25 security for this particular event that was different than

1 any other event?

2 A The event being defined as?

3 Q The event being defined as the Ballet performances of
4 Sleeping Beauty over the weekend of February 17.

5 A We had another security concern that night that we
6 did engage an alert SAPD of a situation with one of the
7 dancers that we required on that -- actually for the whole
8 weekend, that we would require them to be available to take
9 care of the situation.

10 Q How many SAPD officers were requested for the weekend
11 performances of Sleeping Beauty?

12 A Again, I don't know. Jack Freeman might know that.

13 Q Okay. Did you meet with the SAPD officers to
14 instruct them about the leafleting?

15 A No.

16 Q Do you know who did?

17 A I would believe that Jack Freeman, our VP of
18 operations, would have had conversations with them about
19 the police -- what we needed the police there that night
20 for, the ballet dancer situation.

21 Q But you did not give any instructions or meet with
22 the SAPD officers yourself.

23 A No.

24 Q Were you present for any of the Ballet performances
25 of Sleeping Beauty the weekend of February 17?

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JA053

- 1 A Yes.
- 2 Q Were you present for all of them?
- 3 A No.
- 4 Q Which ones were you present for?
- 5 A The Friday night performance.
- 6 Q And were you present for that performance because of
- 7 the union's plan to leaflet the event?
- 8 A No.
- 9 Q What did you observe in terms of the leafleters when
- 10 you were present for that event?
- 11 A They were there.
- 12 Q How many did you observe?
- 13 A Ten to 12 maybe.
- 14 Q Did you speak to any of them?
- 15 A I probably -- yes.
- 16 Q Can you describe your interactions? Any one
- 17 particular person that you recall speaking with?
- 18 A No.
- 19 Q How many of them did you speak with?
- 20 A Less than three.
- 21 Q Describe those interactions. What did you discuss?
- 22 A Please don't come on private property.
- 23 Q Did they comply with your instructions?
- 24 A No.
- 25 Q And what did you do?

1 A I would notify our event staff where these union
2 personnel, people, were fanning out to try to get on
3 property.

4 Q And do you know what they did?

5 A Which they do you mean? The event staff or the --

6 Q The event staff that you notified.

7 A They confronted them and asked them to be off -- to
8 leave the property.

9 Q And do you know whether they did comply with those
10 instructions?

11 A Over time.

12 Q Are you aware of any arrests that were made over the
13 course of that weekend?

14 A Of the musicians?

15 Q Of any of the leafleters?

16 A None of the leafleters.

17 MS. SHIH: Can I just have two minutes?

18 JUDGE AMCHAN: Sure.

19 Off the record.

20 (Off the record.)

21 MS. SHIH: No further questions from General Counsel.

22 JUDGE AMCHAN: Okay. Do you have any questions?

23 MR. VAN OS: I do, Your Honor.

24 **DIRECT EXAMINATION**

25 Q BY MR. VAN OS: Mr. Fresher, what are the

1 qualifications for an organization to be a resident company
2 in the Tobin Center?

3 A We have principal resident companies and we have
4 associate resident companies, and those qualifications are
5 different for the two different sets. They must be --
6 there's a document that demarks which -- who's who. I
7 mean, each of them have different requirements. Generally
8 they need to have their performances at the Tobin. They
9 need to be a 501(c)(3). They have to have been in
10 operation for X period of time. They -- those are kind of
11 the requirements.

12 Q So just any organization, any arts organization that
13 happens to put on a performance at the Tobin Center is not
14 necessarily a resident company. Correct?

15 A That's correct.

16 Q All right. And the San Antonio Symphony is a
17 principal resident company, is it not?

18 A One of three.

19 Q And the three principal resident companies are what?

20 A Opera San Antonio and Ballet San Antonio or San
21 Antonio Ballet.

22 Q Is there any other -- well, you mentioned Chamber
23 Orchestra of San Antonio. What's that?

24 A They're one of our resident companies.

25 Q Okay. Are they a principal resident company or an

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1 referring to Chamber Orchestra San Antonio that you've just
2 referred to.

3 A Correct. Our resident company.

4 Q What are the differences in the requirements to be a
5 principal resident company and an associate resident
6 company?

7 A We really identified the principal resident companies
8 as the big three, if you will, the Symphony, Opera, Ballet,
9 and then those that would be taking up more dates than the
10 associate resident companies. So it's really, I guess,
11 size.

12 Q All right. So the principal resident companies
13 perform more frequently in the Tobin Center than the
14 associate resident companies?

15 A They should.

16 Q Okay. Does any resident company perform as
17 frequently in the Tobin Center as the San Antonio Symphony?

18 A No.

19 Q And your understanding is the San Antonio Symphony
20 performs, I think you said, 22 weeks of the season in the
21 Tobin Center.

22 A I believe that's the number.

23 Q Is that number referenced in the use agreement or one
24 of the agreements --

25 A The actual performance dates are referenced.

- 1 A It's usually two performances per title.
- 2 Q Understood.
- 3 A And I'm not recollecting how many titles they did in
4 that particular season.
- 5 Q All right. I did ask you for an estimate.
- 6 A Yes.
- 7 Q And would you estimate how many performances Ballet
8 San Antonio performed in the Tobin during the '16-'17
9 season. Again, I know you're not -- you don't have
10 schedules in front of you. I'm asking you for an estimate.
- 11 A Twenty-five.
- 12 Q Would that be 25 different titles?
- 13 A (No audible response.)
- 14 Q How many titles --
- 15 THE REPORTER: Verbal.
- 16 THE WITNESS: I'm sorry. No. Five titles, four or
17 five titles.
- 18 Q BY MR. VAN OS: For example, Sleeping Beauty is a
19 title.
- 20 A Correct. Nutcracker is a title.
- 21 Q Is a title. Okay. Thank you. Isn't it true that
22 during the weeks that the Symphony is performing in the
23 Tobin, the Symphony personnel manager has office space
24 backstage?
- 25 A During the days and nights of performances and

1 rehearsal, they are provided the touring manager's office
2 to be used only during those times.

3 Q During the 2016-17 season, how many San Antonio
4 Police Department officers were -- did you regularly have
5 at the Tobin Center during your performance days?

6 A It would depend on the performance.

7 Q How many do you normally -- how many San Antonio
8 Police Department officers do you normally have present on
9 the grounds during a San Antonio Symphony performance?

10 A One or two.

11 Q One or two. And where are they stationed?

12 A In the front of the building, generally keeping an
13 eye on the traffic and valet operation.

14 Q And --

15 A So to the front and to the east.

16 Q During the -- do they regularly patrol the sidewalk?

17 A They regularly patrol the sidewalk and come in the
18 building.

19 Q So patrons coming to a San Antonio Symphony event at
20 the Tobin Center would regularly see a police officer
21 patrolling the sidewalk on the edge of the grounds?

22 A They would regularly see them somewhere on property.

23 Q Okay. And during the weekend of February 17, you --
24 the Tobin Center had more than the usual one or two SAPD
25 officers. Correct? The weekend of the union leafleting.

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JA059

1 JUDGE AMCHAN: Okay. They're received.

2 **(Documents marked GC-2 thru GC-4 received in evidence.)**

3 JUDGE AMCHAN: Okay. And my understanding is that
4 you also stipulated to the authenticity.

5 MS. McELROY: Yes, Judge. That is correct.

6 JUDGE AMCHAN: All right.

7 MS. SHIH: At this time, the General Counsel calls
8 Jack Freeman.

9 JUDGE AMCHAN: Good afternoon. If you'd raise your
10 right hand --

11 Whereupon,

12 **JOHN FREEMAN**

13 was called as a witness by and on behalf of the General
14 Counsel, and, after having been duly sworn, was examined
15 and testified on his oath as follows:

16 JUDGE AMCHAN: Have a seat.

17 **DIRECT EXAMINATION**

18 Q BY MS. SHIH: Would you state and spell your name for
19 the record, please.

20 A John, J-O-H-N, Freeman, F-R-E-E-M-A-N, and my
21 nickname is Jack.

22 Q Mr. Freeman, how are you currently employed?

23 A With the Tobin Center for the Performing Arts, vice
24 president of facilities and operations.

25 Q How long have you held that position?

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JA060

1 A I was promoted last year, but I arrived at the Tobin
2 Center on August 12, 2013.

3 Q What position did you start in with the Tobin Center?

4 A Director of facilities and operations.

5 Q So at the time of the leafleting event in February
6 2017, you held the position of vice president of facilities
7 and operations?

8 A That's correct.

9 Q And what are your job duties in that position?

10 A Facilities and operations for the Tobin Center for
11 the Performing Arts, which takes care of the admin
12 building, the Tobin Center, and the parking and security
13 for the center.

14 Q How many employees do you oversee?

15 A Directly, two, plus part-time, an additional, well,
16 30, I'll say, rough count.

17 Q What is the role of the two employees that you
18 directly oversee?

19 A They're my assistants in the facilities and
20 operations. They're full-time.

21 Q Do you employ any security staff?

22 A It's event staff.

23 Q Are they employees of the Tobin Center?

24 A Part-time. Yes.

25 Q How many?

1 A I think we're at 23 right now, I think, roughly.

2 Q Who do you report to?

3 A Michael Fresher.

4 MS. SHIH: Request permission to examine this witness
5 pursuant to Rule 6(11)(c).

6 JUDGE AMCHAN: Granted. All that means is she can
7 ask you leading questions, questions that suggest an
8 answer.

9 THE WITNESS: Oh, okay.

10 Q BY MS. SHIH: The part-time event staff that you
11 employ, what hours of work do they -- or what's their
12 schedule?

13 A It's flexible, depending on events, and we have an
14 event staff person assigned to the loading dock from 7:00
15 a.m. till 11:00 p.m. every day, seven days a week, 12
16 months a year. And that personnel will change, depending
17 on our needs, but there will always be someone there.

18 Q That's one individual.

19 A Right.

20 Q What about any security staff that are on the
21 premises, other than to monitor the loading dock?

22 A It depends on the event. We bring people in to -- at
23 different entrances that the groups would like to use to
24 have access to the Tobin Center. The Tobin Center's
25 completely locked down.

1 Q Other than the loading dock individual, are there
2 security staff on the premises when there are not events
3 taking place?

4 A Yes. The loading dock.

5 Q Other than the loading dock. Is that the only
6 security staff present during non-events?

7 A Yes.

8 Q Is there any security staff present on the premises
9 overnight?

10 A No.

11 Q Who makes the determination as to how many event
12 staff are needed for any particular event?

13 A Okay. So we have a point of safety and security, and
14 we will be presented with an event, and depending on the
15 magnitude and what type, we develop the security plan and
16 present that to the production staff and other groups as
17 well as the -- we have meetings and talk about what we need
18 to provide safety and security for our clients and people
19 who are using the building.

20 Q When you say, we develop the security plan, who are
21 you referring to?

22 A My staff and I. Been doing this for a long time.

23 Q How did you learn about the union's plan to leaflet
24 the Ballet's performances in February 2017?

25 A If I can remember, I think that we had a meeting with

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JA063

1 Mike Fresher. It was intimated that there may be some kind
2 of thing happening at the -- that performance, and that we
3 should be prepared for it just in case, and that's the way
4 we had that developed. Then we developed a plan as to how
5 we would deal with any kind of a leaflet passing.

6 Q What was the plan that was developed?

7 A Maintaining the integrity of the Tobin Center private
8 property.

9 Q How?

10 A We would put people on the sidewalk at certain points
11 and have the mark and just maintain the boundary lines of
12 the Tobin Center.

13 Q How many people was it determined would be needed to
14 do that?

15 A It was myself and one, two -- two others.

16 Q Event staff?

17 A Event staff. Yes.

18 Q To be present for all performances?

19 A Yes. We were there at all performances.

20 Q is it typically your practice to be present for
21 events at the Tobin Center?

22 A One of my staff is at every event in the Tobin
23 Center.

24 Q What about you personally?

25 A I do quite a few, yes, and particularly when we

1 alternate. But on this one, I was there.

2 Q What else was discussed in that meeting with Mr.
3 Fresher about the union's plans to leaflet?

4 A That's about it. Just maintain the property line,
5 and -- but we would allow them pass out their leaflets
6 without any problem whatsoever. And that's when we
7 established the -- with my staff where the boundaries were.

8 Q Was there any discussion about where or how many SAPD
9 officers would be present?

10 A No.

11 Q Who generally contacts SAPD to have officers present
12 for events at the Tobin?

13 A There's two of us. It's myself and Brian Clark, and
14 we contact one individual who's contracted, and then he
15 then provides the numbers of SAPD that we need or request.

16 Q How many SAPD officers were requested for these
17 events?

18 A Usually there's two, but because of the Ballet
19 Auditorium Circle having -- you know, being permanent, we
20 have to have police presence, because we shut down that
21 part of the street.

22 Q So were there only two SAPD officers for this
23 particular weekend's performances?

24 A No, because one more, I think, and was dealing with
25 another situation that we had to deal with. And he was the

1 lead for the SAPD.

2 Q Who met with the SAPD to discuss the union's plans to
3 leaflet?

4 A I did.

5 Q When did you have that meeting?

6 A The day of the first event, that day. We had verbal
7 conversation that it may happen. We had no strong
8 intelligence of what could happen.

9 Q And what did you tell them?

10 A Just what I said. We may have the union for the
11 musicians pass out leaflets. I don't know if that's going
12 to happen, but just be aware that we will just make them
13 being on city property to do it, and that's fine.

14 Q Did you give any instructions to SAPD or was there
15 any discussion about what would be done if the leafleters
16 attempted to leaflet on Tobin Center grounds?

17 A We would ask them to be on the city property and
18 point out those locations to pass out the leaflets.

19 Q Was there any discussion about what would be done if
20 they did not comply with those instructions?

21 A No, no. Not at all.

22 Q And you said you were present for all four of the
23 Sleeping Beauty performances?

24 A Yes.

25 Q Did you observe the leafleters before each of those

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JA066

1 performances?

2 A Yes.

3 Q Did you have any conversations or discussions with
4 any of those individuals?

5 A The very beginning, when they first came across the
6 street to the Tobin, I asked them to pass out the leaflets
7 across the street, please, and be off Tobin property.

8 Q Did they comply with those instructions?

9 A More or less. They did after conversations, and then
10 Monty McCann, police officer, came over on his own. He
11 wasn't requested but was visible and had conversations with
12 various groups, because they thought that that was not our
13 property. We had to explain that, oh, yes, it was. And
14 they wanted drawings and diagrams, and we said, That's not
15 available right now, but you're welcome to, you know, go
16 across the street, please, and pass out your pamphlets.
17 And they complied.

18 Q Were you present when one of the SAPD officers spoke
19 to a group of leafleters to announce, quote/unquote, ground
20 rules?

21 A Yes. That was Monty McCann that came over.

22 Q And it's your testimony that that was not done at the
23 direction of the Tobin Center?

24 A I'm not sure I understand that. It's part of
25 operation. He was -- and we hired him as a police officer,

1 so I'm sure on his training, that he knows what -- if we
2 tell him that this is our property and the lines that they
3 can pass things out, then he would know how to handle that
4 as far as the police procedures.

5 Q Do you know where the leafleters were standing when
6 that discussion took place?

7 A They were milling around, all on our property.

8 Q They were actually standing --

9 A Right in front of the Tobin Center on the sidewalk.

10 Q So they were standing on the sidewalk, or were they
11 standing in Auditorium Circle, on the street?

12 A Some were on the street. Others were on the
13 sidewalk. It was a pretty substantial group. I don't know
14 the numbers that came across.

15 Q How many of the leafleters did you observe on each of
16 the four performances in February?

17 A Oh, I didn't count them. They were at different
18 locations, and they moved around. We even helped them get
19 to these various points and tell them where they should go,
20 where our parkers were parking.

21 Q Did you have any discussions with any of the SAPD
22 officers about arresting any individuals who did not comply
23 with instructions?

24 A No.

25 JUDGE AMCHAN: I didn't hear that.

1 THE WITNESS: Oh, I'm sorry. No. No.

2 MS. SHIH: No further questions.

3 JUDGE AMCHAN: Do you have anything?

4 DIRECT EXAMINATION

5 Q BY MR. VAN OS: Is Marty McCann one of the SAPD
6 officers that you regularly utilize?

7 A Yes. It's Monty.

8 Q Monty.

9 A Monty McCann. Yes.

10 Q And you said a few minutes ago, he came over on his
11 own or on his own accord, something like that. What did
12 you mean?

13 A We had -- he walked over, because he really was
14 there -- we had an issue, another issue, going on, so he
15 was there on that. And he came on his own over. We didn't
16 physically call him over. He walked over, and he saw the
17 number of people that came across the street from the
18 telephone pole on the other side.

19 Q Is he the only officer who spoke to any of the
20 leafleters?

21 A That day to my knowledge, yes. Yes, because the
22 others were in traffic control.

23 Q Is he the only officer who stationed himself on the
24 front grounds of the Tobin Center during the leafleting?

25 A To my recollection, yes.

1 Q Does the Tobin Center have a written no-solicitation
2 policy?

3 A I don't remember it, but I've been told that we do
4 have it. I'd have to go and review it, but we do have that
5 policy that was enforced since the very beginning. And I
6 think it's in our manual, but I'd have to go read it. I
7 can't repeat it verbatim, but I know that's in our policy,
8 that we would not allow into our property solicitation or
9 solicitation for other events, things like that.

10 Q Do you know if it's ever been shown to any of the
11 musicians?

12 A We would have no contact with the musicians.

13 JUDGE AMCHAN: So I'm just a little confused. You
14 said that there is a written policy?

15 THE WITNESS: I believe there is. I don't know. I'm
16 not sure what you're driving at, so -- I know that the
17 policy is that we are not to permit on our property lines
18 that --

19 JUDGE AMCHAN: But you're uncertain whether it's
20 committed to writing or not.

21 THE WITNESS: No. I can't recollect. I'm sorry.
22 I'd have to pull it out.

23 Q BY MR. VAN OS: Do you know if the policy -- if you
24 know, do you know whether the policy makes any reference to
25 labor organizational activities?

1 A Absolutely not.

2 Q You don't know or --

3 A I know. Absolutely not. It does not -- it reflects
4 the general public, everyone. It doesn't clearly identify
5 a union.

6 Q Okay. During the weekend of February 17, in your --
7 did you speak personally with any of the leafleters?

8 A Oh, yes. Yes. I asked them to please go across the
9 street.

10 Q Did you tell any of the leafleters, there's a written
11 no-solicitation policy?

12 A No. I told them that we are not permitting
13 solicitation on the Tobin property, and it's our policy.

14 Q Are you aware that the union, the Symphony musicians
15 union sometimes holds union meetings in the Tobin Center
16 Green Room?

17 A Yes. I'd heard you all met there. Yes.

18 Q Okay. Do you know whether in those meetings they
19 ever solicit fellow musicians to join the union?

20 MS. McELROY: Objection. This calls for pure
21 speculation.

22 MR. VAN OS: I'm just asking if he knows.

23 MS. McELROY: Well, it is not there -- speculation.

24 JUDGE AMCHAN: Well, I mean, either he knows that or
25 he doesn't know that.

1 MR. VAN OS: Right.

2 JUDGE AMCHAN: Overruled.

3 THE WITNESS: The meeting's not mine.

4 Q BY MR. VAN OS: Okay. So Tobin Center policies do
5 permit the musicians union to hold meetings on the Tobin
6 Center property.

7 A They have -- they rent the building for rehearsals
8 and for performances. And then their interactions between
9 them and the Symphony leadership -- and they actually have
10 seclusion back there which we enforce, that that's their
11 property. What they're doing at those times is their
12 position. My position is to maintain security, integrity
13 of their rental.

14 JUDGE AMCHAN: Well, when you say, they, you're
15 referring to the Symphony as opposed to the union.

16 THE WITNESS: Right. I have no interaction with the
17 union.

18 Q BY MR. VAN OS: Are there musicians who store their
19 musical instruments --

20 A Yes.

21 Q -- on Tobin Center property on a long-term basis?

22 A Back of house. Yes.

23 Q Okay. And there doesn't have to be a performance
24 going on of the Symphony for those musicians to be storing
25 their instruments in the Tobin Center. Correct?

1 A That's correct. Some are left there.

2 MR. VAN OS: Pass the witness.

3 MS. McELROY: I'm going to reserve until our case in
4 chief.

5 JUDGE AMCHAN: Okay. You can step down.

6 (Whereupon, the witness was excused.)

7 JUDGE AMCHAN: Are you going to call another witness,
8 or are we going to break for lunch now?

9 MS. SHIH: I can do either. I don't have a
10 preference unless --

11 MR. VAN OS: May I suggest that it might be a good
12 pausing point to break for lunch.

13 MS. McELROY: Fine with me, Judge.

14 JUDGE AMCHAN: Okay. We'll go off the record.

15 (Whereupon, at 12:37 p.m., the hearing in the above-
16 entitled matter was recessed, to reconvene at 1:45 p.m.,
17 this same day, Tuesday, October 11, 2017.)

18 A F T E R N O O N S E S S I O N

19 (1:48 p.m.)

20 JUDGE AMCHAN: Raise your right hand, please.

21 Whereupon,

22 JOSEPH LEE HIPPI

23 was called as a witness by and on behalf of the General
24 Counsel, and, after having been duly sworn, was examined
25 and testified on his oath as follows:

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JA073

1 JUDGE AMCHAN: Okay. Have a seat.

2 **DIRECT EXAMINATION**

3 Q BY MS. SHIH: Could you state and spell your name for
4 the record, please.

5 A Joseph, J-O-S-E-P-H, Lee, L-E-E, Hipp, H-I-P-P.

6 Q How are you currently employed?

7 A As a musician with the San Antonio Symphony.

8 Q And how long have you been at the San Antonio
9 Symphony?

10 A Twenty-seven years.

11 Q Describe what your job entails.

12 A I am the principal tuba player, which means I carry
13 one of the heaviest instruments.

14 Q What, if any, is your relationship with Local 23 of
15 the American Federation of Musicians?

16 A I am a member, and I've been a member since I joined
17 the Symphony, so --

18 Q Twenty-seven years?

19 A Twenty-seven years. Correct.

20 Q Do you hold any other positions with the union?

21 A Not as an official of the union, but I do sit on the
22 orchestra committee of the musicians of the San Antonio
23 Symphony, which affiliates me with the local.

24 Q Can you explain what the orchestra committee is.

25 A Orchestra committee is the elected persons who

1 represent the musicians as a whole regarding the
2 collective-bargaining agreement and the management of the
3 San Antonio Symphony, and we basically -- we are the
4 representatives who will take things from the musicians to
5 management if there are issues, and we meet regularly with
6 the management of the San Antonio Symphony to exchange any
7 concerns or issues that need to be addressed between the
8 two organizations, between us.

9 Q So when you refer to musicians, are you referring
10 specifically to the San Antonio Symphony musicians?

11 A Specifically the San Antonio Symphony musicians.

12 Q Are there members of the local who are not employees
13 of the San Antonio Symphony?

14 A I think there are -- I'm sorry. Say that one more
15 time.

16 Q Are there members of the local who are not employees
17 of the San Antonio Symphony?

18 A Yes.

19 Q Approximately how many union members are there, if
20 you know?

21 A I think there's just over 200, 220, 230, somewhere in
22 that range.

23 Q And how many of those are covered by the Symphony's
24 collective-bargaining agreement?

25 A At this point, I think we're probably in the range of

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JA075

1 68 to 70, something like that.

2 Q So the other union members, who do they work for?

3 A They would be working as, for the most part,
4 independent contractors with local bands and clubs and just
5 basically gig musicians.

6 Q Do you know if the union has collective-bargaining
7 agreements with other employers?

8 A I would say, no, I don't know specifically.

9 Q Okay. Are you familiar with the collective-
10 bargaining agreement that's in place between the San
11 Antonio Symphony and the union?

12 A Yes.

13 Q I'm handing you what's being marked as General
14 Counsel Exhibit 7.

15 **(Document marked for identification as GC-7.)**

16 Q BY MS. SHIH: Can you tell me if you recognize that.

17 A Yes, I do. That's our current collective-bargaining
18 agreement, that has been extended.

19 Q I'm handing you what's being marked as General
20 Counsel Exhibit 8.

21 **(Document marked for identification as GC-8.)**

22 Q BY MS. SHIH: And what is that, if you recognize it?

23 A This is the current extension of that collective-
24 bargaining agreement that continues the collective-
25 bargaining agreement through December 2017.

1 MS. SHIH: Move for admission of General Counsel's 7
2 and 8.

3 MS. McELROY: No objection.

4 JUDGE AMCHAN: They're received.

5 **(Documents marked GC-7 and GC-8 received in evidence.)**

6 Q BY MS. SHIH: Were you involved in the union's
7 decision to leaflet the Ballet?

8 A Yes.

9 Q How were you involved in that decision?

10 A As the -- as a member of the orchestra committee,
11 there was regular communication between the orchestra
12 committee and Local 23 and the executive board of Local 23
13 regarding the potential leafleting of Ballet San Antonio,
14 San Antonio Ballet, probably for a period of months prior
15 to the actual leafleting.

16 Q When did the union first learn about the Ballet's
17 plans to use recorded music for Sleeping Beauty?

18 A Probably -- I would imagine, probably about a year
19 prior.

20 Q Prior to the performances?

21 A Prior to the performances, when their schedules came
22 out.

23 Q And you said it was months before that the orchestra
24 committee began having discussions about possible
25 leafleting?

1 A I would say specific discussions. I mean, the
2 concept of leafleting the Ballet had probably been
3 discussed even a year prior.

4 Q When did the musicians, the Symphony musicians, first
5 start raising issues about the Ballet's use of recorded
6 music?

7 A Well, that would have been probably back to 2014 when
8 the Tobin Center opened, and we did a couple of productions
9 with the Ballet with live music, but then it continued to
10 present Ballets without live music and taped.

11 Q What had the union done -- the union or the musicians
12 done in an attempt to address these concerns before the
13 February leafleting?

14 A There was always an attempt to keep a line of
15 communication open with the Ballet, and through
16 communications with the San Antonio Symphony management as
17 well, to express our concern that taped music was not what
18 we envisioned and what we were told the Tobin Center's use
19 was supposed to be, and indicating to them that we did not
20 agree that the use of tape is what the purpose of the pit
21 and the hall, the H-E-B Hall, was to serve in the Tobin
22 Center.

23 Q What was your understanding at the time the San
24 Antonio Symphony became a resident company of the Tobin
25 Center as to how the resident companies would interact with

1 one another?

2 MS. McELROY: Objection. Hearsay, no foundation.

3 MS. SHIH: I'm just asking him about his
4 understanding.

5 JUDGE AMCHAN: Yes. But I -- the question is, from
6 what. Well, I'll allow the question, and I think you can
7 cross on what the basis of his understanding was, as to
8 whether it has any probative value at all.

9 THE WITNESS: Would you repeat it one more time.

10 Q BY MS. SHIH: What was your understanding when the
11 Symphony became a resident company of the Tobin Center of
12 how the Symphony would interact with the other resident
13 companies.

14 A Our understanding and my specific understanding was
15 that the resident companies of the Tobin Center, the
16 Symphony, the Ballet and the Opera, would collaborate with
17 each other. And this collaboration was intended to
18 increase the amount of work that the musicians of the San
19 Antonio Symphony would get, thus increasing our weeks of
20 work in the Tobin Center.

21 Q And what was that understanding based on?

22 A It was based on statements by the people who were
23 involved with the Bexar County Performing Arts Association
24 developing the whole concept of the Tobin Center, back when
25 the County, Bexar County, had put together the exploratory

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JA079

1 committees and all of the other committees that went into
2 developing the concept of the Tobin Center.

3 Q When was the decision made by the union to leaflet
4 the performances of the Ballet's Sleeping Beauty?

5 A I believe that was in January 2017.

6 Q And who participated in that decision?

7 A There was a general membership meeting of Local 23
8 when the topic was on the agenda, and there was discussion
9 about specifically leafleting Sleeping Beauty, and as best
10 my memory recalls, the meeting went into an executive
11 session where the official decision was made to move
12 forward with it.

13 Prior to that union membership meeting, the orchestra
14 committee had been in close communication with Local 23 as
15 to possible language and images that might be used on the
16 leaflet itself, and definitely was decided prior to the
17 local membership meeting that the leaflet would be a simple
18 informational leaflet, just explaining that the people that
19 were going to attend the Sleeping Beauty performance would
20 not be hearing live music.

21 Q Once the union made the decision to conduct the
22 leafleting and decided on the leaflet contents, was that
23 decision announced to the membership?

24 A Yes.

25 Q Do you recall when that happened?

1 A I think that would have been an email communication.

2 Q Do you know when?

3 A I don't know the specific date. I would say it was
4 still probably the latter part of January or somewhere in
5 that range.

6 Q Was the leafleting decision announced to anyone else?

7 A I believe there was a press release that would have
8 been sent out, but I don't know the specific date that that
9 went out. Other than that, officially, no. There was no
10 other.

11 Q Did the union inform San Antonio Symphony of its
12 intentions?

13 A I think the orchestra committee itself made it clear
14 at some point in a meeting with management -- that would
15 have specifically been David Gross, president -- that some
16 kind of action would be taken to bring awareness that the
17 Ballet was continuing to not use live music. But I can't
18 say that we specifically told him, Hey, Dave, and what --
19 exactly what we would be -- what kind of action we'd be
20 taking. But he was aware, definitely aware, that we would
21 be doing something.

22 Q Did you participate personally in leafleting any of
23 the performances of Sleeping Beauty in February?

24 A Yes.

25 Q How many of those performances?

1 A All four of them.

2 Q I'm handing you what's been marked as General Counsel
3 Exhibit 9.

4 **(Document marked for identification as GC-9.)**

5 Q BY MS. SHIH: Do you recognize that?

6 A Yes.

7 Q What is it?

8 A That is the leaflet that we handed out to patrons
9 attending the Sleeping Beauty performances.

10 Q How many leaflets were prepared, if you know?

11 A I don't know specifically.

12 Q Do you know how many leaflets were handed out over
13 the course of the four performances?

14 A My best educated guess, based on --

15 MS. McELROY: I'm going to object that the statement
16 calls for speculation, unless he counts and he knows. It's
17 just pure speculation.

18 THE WITNESS: No, I don't know specifically how many
19 were passed out.

20 Q BY MS. SHIH: Approximately how many leaflets did you
21 personally distribute over the course of the four
22 performances?

23 A I would say I passed out over -- I would estimate I
24 passed out 150.

25 Q Describe what happened when you arrived at the Tobin

1 Center prior to the first performance of Sleeping Beauty on
2 the evening of February 17.

3 A We gathered in front of what's known as the Radius
4 Building, which is catty-corner from the Tobin Center, just
5 off of Auditorium Circle.

6 Q When you say, we, can you identify who?

7 A The musicians of the San Antonio Symphony who had
8 signed up to pass out leaflets, as well as other local
9 union members that had agreed to help.

10 Q About how many people in total?

11 A About 12, I think, 12 to 15.

12 Q And what time was this that you gathered?

13 A We were gathering an hour prior to the performance,
14 and we had decided that we would distribute the leaflets to
15 each person who was there to pass them out, and decide what
16 would our initial plan be and then what would our back-up
17 plan be if we were not allowed to distribute leaflets the
18 way that we were intending to.

19 So our initial cross over to the Tobin Center was
20 basically at the front entrance of the Tobin Center, and
21 we'd already observed that there was a police security and
22 Tobin Center staff presence in front of the Tobin Center
23 that normally isn't there.

24 Q How many police officers did you observe on this
25 evening?

1 A I think three in the front of the Tobin Center.
2 There's generally always a police presence at the Lexington
3 Street entrance where people come in to valet park.
4 There's usually off-duty police there as well, so that
5 that's normal. Police in front of the Tobin Center, not
6 normal.

7 Q Who else did you observe from the Tobin Center when
8 you --

9 A Jack Freeman was standing in front. So when we
10 crossed the street, we had a group of three or four
11 individuals that were going to cross the street and start
12 passing out leaflets on the sidewalk that we'd agreed we
13 would initially start on, and immediately as those
14 musicians stepped on the sidewalk, Jack Freeman and the
15 police -- at least the policeman who seemed to be in
16 charge -- at that point came over and told us to stop and
17 cease.

18 At that point, myself and a few others who were on
19 the other side of the street started walking over towards
20 them to hear what he had to say, and he proceeded to ask us
21 all to gather in that spot, so he could give us the ground
22 rules.

23 Q When you say, he, are you referring to the police --

24 A The police officer. Yes.

25 Q Did he identify himself?

1 A No.

2 Q What were ground rules that the police officer
3 announced to your group?

4 A The ground rules were that we were not step on the
5 sidewalk, on the Tobin Center side of Auditorium Circle,
6 and that he would allow us to pass fliers out on opposite
7 sides of the street from the Tobin Center. We asked if
8 that sidewalk in front of the Tobin Center was not public
9 property, accessible to the general public, and his reply
10 was, it's not his job to know; it's his job to do what he
11 was told by the Tobin Center, to keep us off of that
12 sidewalk.

13 Q Did he make any statements about what would happen if
14 you did not comply with the ground rules?

15 A I don't recall a specific statement he made at that
16 point in time. In our discussions prior to that, we had
17 already agreed that if we were confronted with an obstacle
18 like that, that we would cooperate completely with the
19 officer and not try to cause any kind of incident or
20 anything related to our fliers. So we were basically
21 trying to gather information from him, to make sure that we
22 didn't cross over any specific lines that we weren't
23 supposed to.

24 Q So what did you do after meeting with the officer to
25 go over ground rules?

1 A Well, we had already discussed the plan B prior to
2 that, and so our plan B was to go to four different
3 locations, and to keep ourselves in the positions that we
4 suspected we would be pushed towards if, in fact, the claim
5 that that was not public property would be given to us.

6 Q How long did you hand out leaflets that first
7 evening?

8 A We did them up to the performance time, which -- I'm
9 trying to recall if that's a 7:30 or eight o'clock start
10 time for them.

11 Q Did you observe police officers present outside the
12 Tobin Center the entire time you were leafleting?

13 A Yes.

14 Q What about Tobin Center management? Is there anyone
15 else that you observed during the time you were leafleting?

16 A Yes. Jack Freeman and, I assume, who probably were
17 Tobin Center security, dressed in suits, were also there
18 the entire time.

19 Q Did you have any discussion with patrons while you
20 were leafleting?

21 A Sure. Yes.

22 Q Did you have some standard statement or comment that
23 you made as you handed out leaflets?

24 A Our basic statement was, Here's something to read.
25 Some people said, Here's something to read during the

1 overture. Or some people were making reference to there
2 not being live music. So you could hand the patron the
3 flier and say, This is some information about the fact that
4 there's no live music going on with tonight's performance,
5 or like I said, Here's something to read during the
6 overture.

7 Q Did any of your interactions with patrons become
8 confrontational or aggressive?

9 A No. Not that I'm aware of. Most people were
10 surprised. I would say the vast majority of comments that
11 we got back from passing out fliers was that people weren't
12 aware that it was going to be recorded music, and they were
13 surprised by the fact that the Symphony would not be
14 performing.

15 There were people who wished to engage in a
16 conversation about why that's the case or, you know, their
17 opinion about it, but I don't -- I never observed or heard
18 of any of those becoming confrontational in any way.

19 Q Did you take any photographs during any of the
20 leafleting --

21 A Yes.

22 Q -- events? Which ones?

23 A In terms of the still photographs, probably just
24 about all of them that have been documented.

25 JUDGE AMCHAN: I don't really understand the answer.

1 MS. SHIH: Thank you.

2 Q BY MS. SHIH: What -- so we've gone through the
3 Friday evening leafleting event. Was there anything
4 different or unique that happened at any of the other
5 leafleting events that weekend?

6 A Procedurally on our side, no. There were some
7 instances of Tobin Center staff, I guess, thinking that
8 somebody might try to cross the street and yelling, Go
9 back; you don't have -- you can't come on to this side of
10 the street.

11 There was an instance at the Lexington Street-
12 Auditorium Circle intersection where we had leafleters on
13 the Lexington Street sidewalk, where Tobin security tried
14 to get them to move, and they made the stand that, no, this
15 is a public sidewalk; we're going to -- we have -- we're
16 allowed to be here. And then Tobin security staff seemed
17 to let that go.

18 Q Did you observe the same level of police presence at
19 all of the four performances?

20 A To the best of my recollection, yes.

21 Q What about Tobin Center management and security?

22 A Yes.

23 Q Did you receive the same ground rules instructions at
24 each performance, or only at the first?

25 A Only at the first.

1 Q Were there any attempts by you or anyone that you
2 observed to leaflet from the sidewalk in front of the Tobin
3 Center?

4 A Say the first part of that again. I'm sorry.

5 Q Were there any efforts, either by you or that you
6 observed by anyone trying to leaflet from that sidewalk in
7 front of the Tobin Center?

8 A No.

9 Q Let me redirect your attention to Exhibit 11.

10 JUDGE AMCHAN: Just so I understand, on Friday night,
11 you actually hadn't begun leafleting. You were gathered on
12 the sidewalk of the Tobin Center. The policeman came over,
13 told you the ground rules, and you moved.

14 THE WITNESS: Basically, yes.

15 JUDGE AMCHAN: The thing at the Lincoln Street
16 entrance, I mean, so you --

17 THE WITNESS: Lexington Street?

18 JUDGE AMCHAN: Lexington? Okay. So to your
19 knowledge, were the leafleters on Tobin property? They
20 said they were on -- you said that the staff let them stay.

21 THE WITNESS: Yes.

22 JUDGE AMCHAN: Were they on the Tobin Center's
23 property or --

24 THE WITNESS: I don't believe so.

25 JUDGE AMCHAN: You don't think so.

1 and end?

2 A As per our collective-bargaining agreement, the
3 management of the San Antonio Symphony determines the first
4 day of work, which would initiate the first week of work,
5 and then they would give us a schedule of weeks, whether --
6 depending on whether they were 27 or whether they were 30,
7 that would be scheduled within a 39-week window from the
8 beginning of that first week. And that schedule would
9 include any dark weeks, not including work.

10 Q During your work weeks, how many hours a week do you
11 work?

12 A Our services themselves are scheduled at either two-
13 and-a-half or two-hour or sometimes three-hour intervals.
14 The week itself can vary in terms of how many services it
15 has, anywhere from six to eight services per week, so each
16 week would vary slightly in terms of how many hours we've
17 been that a service is actually scheduled to perform.

18 That doesn't take into account the time prior to that
19 service beginning and the time after service has ended that
20 musicians may be at work, so I would say that that time
21 span can range anywhere from maybe 24 hours on the low end
22 to 30 hours would be on the high end.

23 JUDGE AMCHAN: When you talk about service intervals,
24 are you talking about performance plus rehearsal?

25 THE WITNESS: Yes, yes. Performances are as

1 scheduled at two-and-a-half hours. We will have generally
2 two performances a week, so an average week would have
3 seven services. That would include five other rehearsals
4 for those two performances that would happen prior to the
5 performance, so --

6 Q BY MS. SHIH: So a rehearsal is considered a service.

7 A Yes.

8 Q And a performance is considered a service.

9 A Yes.

10 Q And you said on average, a service is two-and-a-half
11 hours.

12 A Yes.

13 Q How much of your time spent working during the season
14 is physically on the Tobin Center premises?

15 A I would say definitely over 90 percent.

16 Q Are there occasions when you have multiple rehearsals
17 in a single day?

18 A Yes.

19 Q All located on the Tobin Center property.

20 A Yes.

21 Q In those situations, what do you do about breaks or
22 lunches? Where would you take those?

23 A There is a room called the Green Room behind the
24 stage where there are tables set -- tables and chairs set
25 up where musicians can gather during breaks, where if

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1 they're going to stay on the property for lunch, eat their
2 lunch in the Green Room.

3 Q Are there any other activities that musicians engage
4 in in the Green Room? Meetings?

5 A Meetings, yes. We will -- we would have mostly
6 probably bimonthly union meetings, meetings of our
7 association in the Green Room.

8 Q What about during your furlough weeks when you're not
9 performing? Do you have access to the Tobin Center
10 premises?

11 A Only if it's coordinated through our management.

12 Q Do you store any of your instruments at the Tobin
13 Center?

14 A Yes.

15 Q How do you go about getting access if you're not
16 working?

17 A If we are not actually working in the Tobin Center,
18 then a musician would have to contact our personnel manager
19 and schedule an appointment to be able to get in.

20 Q Do you store instruments there when you're not in
21 season?

22 A Yes.

23 Q How do you access the Tobin Center during work hours?

24 A There's an entrance on the north side that's adjacent
25 to the River Walk, a door on that north end of the Tobin

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JA092

1 Center that's identified as our musician entrance. It's
2 not labeled as a musician entrance, but that's what we call
3 it.

4 Q And do you have a key, or is it always open? How do
5 you actually access?

6 A No keys. From my understanding, it's generally open
7 an hour prior to the start of our services.

8 Q Does the union ever have meetings with management at
9 the Tobin Center?

10 A Yes.

11 Q During your season, does the Symphony management have
12 any presence at the Tobin Center?

13 A Yes.

14 Q Can you describe that?

15 A Next to the Green Room area, there are two offices.
16 One is generally used by our operations staff, and the
17 other one is used by our personnel manager, so we -- I
18 mean, that's where -- if we needed to find them, that's
19 where we would go to locate those individuals.

20 Q And is that true during any type of service?

21 A Yes.

22 Q Where is the Symphony library located?

23 A In the Tobin Center.

24 Q What exactly is the library? What are the contents
25 of the library?

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JA093

1 A It's all the music that the Symphony owns. I would
2 say there's thousands of titles.

3 Q And do the contents of the Symphony library stay at
4 the Tobin Center, even when you're not in season?

5 A Yes.

6 Q What does the Symphony librarian do?

7 A The librarian is obviously in charge of all of the
8 music that is stored in the library and the well-being of
9 that music, but the librarian also prepares music in
10 advance for each performance. So the librarian's contract
11 is actually a little different. The librarian is part of
12 the collective-bargaining unit. That position isn't even a
13 playing musician, but his contract backs up four weeks
14 prior to the beginning of the first week of work and then
15 is extended two weeks after the finish of our season. So
16 that basically gives him time to get music prepared before
17 the season starts and to close things, put things back.

18 Q Does the librarian work exclusively at the Tobin
19 Center during a season?

20 A Yes.

21 Q What do you do for work outside your contract season?

22 A Me personally?

23 Q Yes.

24 A Currently I -- if I'm not performing -- if I'm not
25 working a work week with the San Antonio Symphony, I do

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JA094

1 part-time work as a marketing assistant for a mortgage
2 company.

3 Q Was that also the case in the 2016-17 season?

4 A Yes.

5 JUDGE AMCHAN: You don't give tuba lessons?

6 THE WITNESS: I did for about 35 years.

7 MS. SHIH: No further questions for this witness.

8 DIRECT EXAMINATION

9 Q BY MR. VAN OS: Mr. Hipp, what is your professional
10 career?

11 A A professional symphony tuba player.

12 Q And did you receive formal education?

13 A Yes.

14 Q Why do you do some part-time work for a mortgage
15 brokerage?

16 A Well, as I mentioned earlier, for many years I
17 taught, and in 2014, I stopped teaching. I had been
18 teaching at St. Mary's University and Trinity University,
19 and it became apparent that I would be financially better
20 off if I spent time doing something else other than
21 teaching.

22 Q So there are economic reasons.

23 A Yes.

24 Q Personal economic reasons.

25 A Yes.

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JA095

1 Q How is your compensation -- how is the compensation
2 structured for San Antonio Symphony musicians? For
3 example, are you paid per performance? Per service?
4 What's your basis of compensation?

5 A Our compensation is based on weeks of work, so our
6 CBA stipulates a weekly salary that's the minimum that each
7 musician is guaranteed, and then the number of weeks
8 determine the -- what you might consider an annual -- what
9 our annual salary would be.

10 Q Is there an economic reason for your leafleting the
11 Ballet the weekend of February 17, 2017?

12 A Yes.

13 Q And what is that?

14 A To bring awareness to the fact that we were not
15 getting additional weeks of work with the ballet company as
16 the intent or purpose of resident companies collaborating
17 were supposed to.

18 Q What would additional weeks of work mean for the
19 Symphony musicians economically?

20 A Well, it -- basically that is the main way that our
21 salary increases annually is through additional weeks of
22 work.

23 Q Was there -- had there been some -- was there some
24 kind of unusual action that had occurred during the -- with
25 respect to the 2016-2017 season that affected all the

1 Symphony musicians' salaries?

2 A We took a three-way -- a three-week reduction of
3 salary.

4 Q Why did you do that?

5 A Because the Symphony Society was claiming that they
6 would not be able to meet that obligation and that they
7 needed to reduce our salaries.

8 Q And was that economically painful?

9 A Absolutely.

10 Q Losing three weeks of your salary to this three-week
11 furlough, about what percentage of an annual salary loss
12 was that for the Symphony musicians?

13 A It was -- for most people, that was a 10 percent hit.

14 Q Because your -- what was your contractually agreed
15 season length before the furlough?

16 A Thirty weeks.

17 Q I want to ask you to take a look at General Counsel
18 Exhibit 11, the first paragraph, 1392. There were two
19 automobiles parked up on the upper sidewalk or upper
20 entrance. Is that correct?

21 A Yes.

22 Q And if you'll look at the automobile that's to the
23 left, are there some signs leaning up against the front of
24 the automobile?

25 A Yes. I think those are generally signs talking about

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JA097

1 A Uh-huh.

2 Q -- to your knowledge, do they have any affiliation
3 with the Tobin whatsoever?

4 A No.

5 Q And with respect to page 2, does this gentleman have
6 any affiliation with the Tobin?

7 A No.

8 Q Next page.

9 JUDGE AMCHAN: Isn't that the IBEW guy also?

10 THE WITNESS: Correct.

11 Q BY MS. McELROY: And like similar questions: Does he
12 have any affiliation with the Tobin?

13 A No, that I know of.

14 Q San Antonio's a small town.

15 A Correct.

16 Q And page 4 of 20?

17 A Both are musicians.

18 Q And were they getting ready to go to a performance at
19 the Majestic that day? Is that why they're dressed that
20 way?

21 A Yes.

22 Q So they were coming to the Tobin prior to the
23 performance they were going to have a few blocks away at
24 Majestic Theatre. Correct?

25 A Correct.

1 Q Okay. He --

2 JUDGE AMCHAN: Well, who initiated the contact? You
3 or him?

4 THE WITNESS: Him.

5 Q BY MS. McELROY: With you?

6 A Everybody who was in the general area.

7 Q Okay. So what did he say exactly?

8 A Everybody come over here.

9 Q Okay. Was he polite?

10 A I -- okay. Yes. I guess I would say he was polite.

11 Q He didn't make any threats to you, did he?

12 A No.

13 Q Why didn't you contact the Tobin ahead of time to
14 find out where the Tobin believed its property lines were,
15 to find out where you could leaflet?

16 A It didn't seem necessary at the time.

17 Q Well, whenever you use the Green Room, you get
18 permission to use the Green Room, don't you?

19 A No.

20 Q Well, that's a fair statement. When you're not
21 performing, not rehearsing, you have to have permission to
22 use the Green Room. Right?

23 A Yes.

24 Q Okay. You don't have the ability to carte blanche
25 use the Tobin facility whenever and however you want.

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1 Correct?

2 A Correct.

3 Q You have a right to use it during the times you're
4 renting that space. Correct?

5 A Yes.

6 Q Okay. And you said you assumed that the Tobin had
7 additional security that night. Why'd you make that
8 assumption?

9 A From my observation of the number of police officers
10 and Tobin security that were present in the front entrance
11 of the Tobin.

12 Q And do you have any personal knowledge of the fact
13 that the Tobin management had been informed that there was
14 a stalker who had attempted to assault and perhaps kill one
15 of the ballet dancers?

16 A No.

17 Q So you don't have any personal knowledge of the fact
18 that the additional security could have related to that
19 event.

20 MR. VAN OS: Objection. Assumes facts not in
21 evidence.

22 MS. McELROY: I'm asking if he has personal knowledge
23 of it.

24 MR. VAN OS: But it assumes that he knows a fact.
25 That's improper.

1 musicians' entrance and you act like you belong, they let
2 you in.

3 THE WITNESS: Yes.

4 Q BY MS. McELROY: And are you saying that at no time
5 have you ever had to check in when you were going into the
6 Tobin?

7 A No. That's not what I'm saying.

8 Q Okay. Have you ever had to check in as you're going
9 into the Tobin?

10 A Yes.

11 Q Okay. And you check in when you were going through
12 the musicians' entrance?

13 A Yes.

14 Q The union does not have access to the offices you
15 referred to when the Symphony's not renting the building.
16 Correct?

17 A Correct.

18 Q And with respect to the three-week furlough you
19 talked about earlier, the Ballet wouldn't cancel any
20 performances with the Symphony that caused that to happen,
21 did they?

22 A No.

23 Q And the Tobin had nothing to do with that furlough,
24 did they?

25 A No.

1 conditionally, subject to your objection, after you have a
2 chance to read it?

3 MS. SHIH: Sure. That's fine. I'd like to reserve
4 the right to voir dire the witness if that becomes an
5 issue.

6 JUDGE AMCHAN: All right.

7 **(Document marked R-1 received in evidence.)**

8 Q BY MS. McELROY: The Tobin is not the exclusive venue
9 where all of the union musicians play, is it?

10 A No.

11 Q They play all over the city, I guess, all over the
12 state. Correct?

13 A I definitely wouldn't say all over the state.

14 Q Okay. But all over the city?

15 A We perform at the Tobin for the majority of our
16 performances.

17 Q Well, I'm not talking about the Symphony. I'm
18 talking about the union.

19 A Oh, the union.

20 MS. SHIH: Objection, Your Honor. Relevance.

21 MS. McELROY: The union's brought the charge, Judge.

22 JUDGE AMCHAN: Yes. But --

23 MS. SHIH: The individuals at issue in the charge are
24 the musicians of the San Antonio Symphony.

25 JUDGE AMCHAN: Sustained.

1 MS. McELROY: Okay. I'll rephrase it, Judge.

2 Q BY MS. McELROY: So with respect to the performance
3 in the Symphony, as we established before, you were going
4 to the Majestic -- the Symphony was playing at the Majestic
5 on the weekend in question. Correct?

6 A Correct.

7 Q And, in fact, the Symphony performed at least seven
8 performances at the Majestic during the season. Correct?

9 A I don't know specifically seven, but --

10 Q Does that sound about right?

11 A Approximately.

12 Q Okay. And the CBA, as you mentioned before, it
13 requires that the Symphony provide the union members 30
14 weeks of work. Neither the Opera, the Ballet, nor the
15 Tobin are parties to that CBA. Correct?

16 JUDGE AMCHAN: I think that's -- I can tell that from
17 the documents. It's only signed by --

18 MS. McELROY: That's fine. I'll move on.

19 JUDGE AMCHAN: -- the Symphony and the union.

20 MS. McELROY: I'm looking under tab 9 of the books
21 that I gave you, Judge, just for your ease of reference.
22 You may want to look through here as well, if you want to
23 just watch.

24 JUDGE AMCHAN: Okay.

25 MR. VAN OS: Your Honor, we object to counsel

1 San Antonio. Is that right?

2 A Yes.

3 Q And that's the agreement that expires at the end of
4 this year.

5 A Yes.

6 Q And as a member of the union, is it accurate to say
7 you can only be terminated in accordance with the
8 provisions of the collective-bargaining agreement?

9 MS. SHIH: Objection. Relevance.

10 MS. McELROY: It goes to the case law, Judge. Talk
11 about it in the case law that they cite to support their
12 position.

13 MR. VAN OS: I don't know how it would.

14 JUDGE AMCHAN: Well, is your point that the Tobin
15 can't --

16 MS. McELROY: Can't fire them.

17 MS. SHIH: We'll stipulate --

18 MR. VAN OS: Stipulate.

19 MS. SHIH: -- to that.

20 JUDGE AMCHAN: All right.

21 Q BY MS. McELROY: And nobody at the Tobin has the
22 authority to hire you for -- to be employed by the
23 Symphony. Correct?

24 JUDGE AMCHAN: Right. I think that's clear from the
25 record.

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1 MS. McELROY: Okay.

2 JUDGE AMCHAN: The Tobin can't hire or fire people
3 for the Symphony.

4 MS. McELROY: And they can't discipline them.

5 JUDGE AMCHAN: Right.

6 MS. McELROY: Okay.

7 Q BY MS. McELROY: In February of 2017, isn't it
8 accurate that the Symphony's office was at the Travis Park
9 Building here in San Antonio?

10 A Yes.

11 Q Did anyone from the Tobin tell you you could not pass
12 fliers out on public property?

13 A No.

14 Q Did the police officer ever tell you you could not
15 stand in the street to pass out fliers?

16 A Yes.

17 Q Did he tell you why?

18 A Because it's hazardous.

19 Q The patrons at the Tobin that night were coming from
20 the various parking lots around Tobin to attending that.
21 Correct?

22 A I would say it would include those. A lot of people
23 park on the street --

24 Q Okay. But they were --

25 A -- not park in a parking lot.

1 Q They were coming from around the Tobin, not from a
2 Tobin parking lot.

3 A When you say, a Tobin parking lot, are you talking
4 about the lots that the Tobin uses?

5 Q No. Any lots that the Tobin owns. Let me ask it
6 this way. Were you prevented by anybody at the Tobin from
7 going to any of the public areas where people were parking
8 to attend the event to hand out fliers?

9 A No.

10 Q And you said you were able to hand out about 150
11 leaflets. Was that about each night or for each event, I
12 guess I should say?

13 A Yes. I would say that's -- yes. That's to the best
14 of --

15 JUDGE AMCHAN: 150 each night.

16 THE WITNESS: Yes.

17 Q BY MS. McELROY: And was the experience of the other
18 people passing out the leaflets the same, as far as you
19 know?

20 A As far as I know, yes.

21 MS. McELROY: Pass the witness.

22 JUDGE AMCHAN: Anything on redirect?

23 MS. SHIH: Just a few questions, Your Honor.

24 **REDIRECT EXAMINATION**

25 Q BY MS. SHIH: If I can direct your attention back to

1 A I would think so.

2 Q And what do you mean by that?

3 A I think we've got some areas where we have some risk,
4 where our people, the way it's built, we have areas where
5 we're blind. But we have cameras all over the area to keep
6 an eye on the place. But, again, we're right on the River
7 Walk, which has our back, and then on the sides in the
8 front, we have streets that are used by the general public.

9 Q You testified earlier today that you have two direct
10 reports, and I think you said that you and your direct
11 reports handle the events at the Tobin.

12 A Yes. One --

13 Q What do you mean by that?

14 A One of us is on duty at every event, in which we're
15 responsible by radios to our event staff, back of house,
16 front of house, and respond to any issues in the building,
17 during the performance, pre- and post- as well.

18 Q And is that -- has that been the case ever since
19 you've been on board, that one of you has been at every
20 event?

21 A Yes.

22 Q Okay. And what are you charged with keeping safe?

23 A Again, the building, the priority is both the patrons
24 and performers, and back of house people.

25 Q What about the outside plazas?

1 A Outside plaza, yes. The outside plaza, we have a big
2 plaza, in the back and the little --

3 Q The loading dock?

4 A And the loading dock and the little plaza out front.

5 Q How is security handled at the Tobin?

6 A It's event staff.

7 Q Through event staff?

8 A Through event staff. And we plan in production
9 meetings -- we have a two-week-out production meeting,
10 which we'll plan our event staff, as well as parking,
11 planned valet, all the outside things we have to do, as
12 well as time frames for our rehearsals, for sound checks,
13 and for performances.

14 Q What is the Tobin's policy regarding distribution or
15 solicitation on its property?

16 A We protect the property line. We have the idea that
17 we will not allow anyone coming that's not with the
18 performance to pass out literature or pamphlets or anything
19 of that respect on our property, beyond our -- into our
20 property lines.

21 Q And based on your prior work experience, does the
22 Tobin handle it any differently than they did in any other
23 venue where you worked?

24 A Not at all. From my very first part of my career, we
25 would always maintain the security of the buildings and the

1 property lines, even to the point of in stadiums where we
2 have tee shirt sales, we'd go after that out in public
3 parking lots, where we have 40,000 people. So we maintain
4 very tough security in that respect.

5 Q If the Tobin's policy on distribution and
6 solicitation is not in writing, how do you make sure that
7 your -- the employees you're responsible for are aware of
8 that policy?

9 A We have cameras. We see everything. We make sure
10 that they know -- we have quarterly meetings with our event
11 staff, and we review our procedures and policies,
12 particularly in this day and age. And we go over
13 everything that we have to do to keep the integrity and the
14 protection of the property and the performers and patrons.

15 Q Has that been the policy since the Tobin opened?

16 A Yes, it has.

17 Q Is this consistent with Mr. Fresher's approach when
18 you've worked with him previously?

19 A Yes, it was.

20 Q There's been some testimony that you were present at
21 the weekend of February 17 when the Ballet was performing.

22 I believe you said you were there. Is that right?

23 A Yes. For every performance that weekend.

24 Q Okay. And did you see people passing out fliers?

25 A Yes, I did.

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1 Q Do you know if all -- well, strike that.

2 Who was the police officer on duty Friday night?

3 A That was -- there was actually two in the parking
4 lots -- I'm sorry -- on Auditorium Circle during the
5 Ballet, and Monty McCann was in for another issue that was
6 going on.

7 Q And is -- Monty McCann, is that what you --

8 A McCann, yes.

9 Q Is he your main contact with the police officers?

10 A Yes. He's our lead. He's the one that schedules and
11 provides the SAPD that we need to have for our events.

12 Q Did you have a meeting with Monty prior to that night
13 to discuss how you were going to handle potential
14 leafleting?

15 A No. No. Not at all.

16 Q Did --

17 A Go ahead. I'm sorry.

18 Q That's okay. Did you ask Monty to intervene with the
19 musicians?

20 A No. He came over. He was -- we were there. We
21 weren't sure what was going to happen. I was more in tune
22 to the stalker that we thought was going to come, but we
23 had no intelligence or confirmation that we would have
24 these pamphlets passed out by the union.

25 Q Did you ever overhear Monty speaking with any person

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JA110

1 who was handing out fliers?

2 A Yes. I was standing right down there on the lower
3 lobby -- I'm sorry -- the little plaza, and he was over
4 talking to a couple of individuals who had decided that
5 this is where they were going to be. And Monty knew of the
6 property lines, and then finally they both agreed that it
7 would be best if they went across the street to the city
8 property.

9 JUDGE AMCHAN: So I'm just a little -- you didn't --
10 the Friday performance, you didn't know beforehand that
11 there was going to be leafleting?

12 THE WITNESS: We weren't sure, because the
13 intelligence we had was that it might, we don't know. I
14 had no way of contacting or no one contacted us --

15 JUDGE AMCHAN: You had heard they might, but you
16 weren't sure if they would show up.

17 THE WITNESS: Exactly.

18 JUDGE AMCHAN: All right.

19 THE WITNESS: Exactly.

20 Q BY MS. McELROY: Had you previously instructed Monty
21 as to what the rules were regarding people coming onto the
22 Tobin's property to solicit or distribute materials?

23 A He -- when we have had -- yes, because we've had a
24 couple instances where we had people pass out different
25 fliers or try to, and we asked them to leave the property,

1 and then we walk down to make sure that they're out. And
2 there are casual questions. Why is he going? Because he's
3 passing these things out on the property -- he or she --
4 and we'd like to be -- make sure that we'd like to keep
5 them off our property.

6 Q From your observations that weekend, were the
7 individuals who were passing out the fliers successful in
8 terms of being able to hand them out to the patrons --

9 A Yes, they were. Very much so.

10 Q What is the basis of your conclusion?

11 A We point out places where -- a couple of places where
12 we talked to them about where our patrons would be parking
13 and where they would be coming from. As a result, they
14 moved to the various corners that they could actually
15 intercept the patrons coming in, because it was on city
16 property, and as I said to them, we park at different
17 locations. That's where you should be to hand out fliers,
18 because you're missing quite a few people.

19 Q Did you see -- did you actually witness the people
20 hand the fliers to the patrons?

21 A Yes.

22 Q And did anybody give you any of the fliers?

23 A A couple did as they walked by. They said, We don't
24 want this. So they handed them to me. I have a couple I
25 kept, but it's -- you know, the rest, they either tossed

1 MS. SHIH: That's fine.

2 Q BY MS. McELROY: And then the only other thing I was
3 curious about is: Where did you put the trash bins because
4 the fliers were on the ground and you wanted people to have
5 a place to -- mark that in a blue X.

6 A We have -- a trash bin's going up right here. But we
7 did down here, right on the walkway, just -- there's our
8 loading dock right there, so we put it right there.

9 Q And you did that so people could throw the flier --

10 A Because, yes, we learned after Friday that they would
11 just throw them -- all this is all landscaped, and we were
12 finding them in the landscaping, so we put it there. We
13 found out that they were also depositing them in the trash
14 cans here, and then just a random walk around there to pick
15 them up.

16 Q Thank you. You can take your seat now.

17 A (Complying.)

18 Q So looking at the valet -- the circle where the valet
19 street is, so are the cars coming in here, people being
20 dropped off, and the cars turning around in the back?

21 A Yes. The valet would take them and park them, and
22 you would either get the number of the VIP lot as well; we
23 park them in there, and then also on the street, between A
24 and -- all the way between Fourth Street and -- you see the
25 two white lines? Those are barriers that block the street

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1 off. The other way you can come in is right where your
2 thumb is, right there. That's the only way they can come
3 in. There's a police officer right there.

4 Q Right. But if you've got valet traffic coming up and
5 down here, would it be disruptive to have people walking up
6 and down that street?

7 A No question. In fact, we've had some near misses
8 even when people decide to walk from that VIP, because
9 they're moving the cars pretty fast, and we want to try to
10 get people in the building; they're not paying attention.

11 JUDGE AMCHAN: So the valet parking is kind of like
12 between A and B?

13 THE WITNESS: Yes. Like that whole street.

14 Q BY MS. McELROY: The -- this is where the valets go,
15 right here by A, and then right between 1 and 2 is where
16 they're closed off. Correct?

17 A That's correct. You can see the lines right across
18 there. We have little metal barriers to keep the cars --
19 by A, we shut that completely off and up by Fourth Street,
20 we make it so that you can enter, and then we also have a
21 way to get out, a second way, for emergency vehicles and
22 that kind of thing.

23 Q Did you ever take any action to prevent any members
24 of the union from communicating with patrons who were on
25 public property during that weekend?

1 A Absolutely not.

2 Q There was some testimony earlier that you may have on
3 Saturday or Sunday tried to shoo some people off who were
4 actually on public property. Do you recall doing that?

5 A No, no.

6 Q Have safety concerns and issues at the Tobin
7 increased or decreased since it opened in September of
8 2014?

9 A We've learned how to operate the building, and as a
10 result, we've maintained, gotten better at some of the
11 things -- because of the shows there are more people that
12 are coming and the times they get there.

13 But pretty much with the Symphony we've learned, you
14 know, on Friday nights and Saturday nights and the type of
15 clientele we have there, we expect what number of valet and
16 the other parking. So we have experience with that.

17 Q Do you -- does Tobin allow people to come into the
18 Tobin with backpacks?

19 A No. That's -- we check every bag, and the backpacks
20 are not permitted. There's a no-backpack policy.

21 Q When you say, check every bag, you check every bag
22 that comes into the Tobin?

23 A Yes, yes.

24 Q Would you allow someone with a backpack to walk out
25 around the plaza and hand out materials?

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1 A On our property, no.

2 Q If you saw somebody engaging in this conduct, what
3 would you do?

4 A I would kindly ask them to please go over to city
5 property, and by the time -- Saturday and Sunday we're
6 talking about -- as I said, we know the rules, we've been
7 doing this now for the third and fourth time, and you know
8 where the boundaries are; please comply.

9 MS. McELROY: Pass the witness. Oh, I'm sorry. I'd
10 like to move for the admission of Respondent's Exhibit 2.

11 JUDGE AMCHAN: 3.

12 MS. McELROY: 3. Thank you.

13 MS. SHIH: Just for clarification, can you -- what's
14 the source of the photograph?

15 MS. McELROY: It was the builder who built it for the
16 Tobin.

17 MS. SHIH: Do you know when that photograph was
18 taken?

19 MR. FRESHER: After the building was built. I mean,
20 it's relatively new. Can I take another look at it?

21 JUDGE AMCHAN: Yes.

22 MR. FRESHER: (Perusing document.) It's within the
23 last year, because our garage is there.

24 MS. SHIH: Okay. Yes. Assuming that we'll have the
25 same markings --

1 A So was I.

2 Q Excuse me?

3 A So was I.

4 Q And they weren't physically threatening to anyone,
5 were they?

6 MS. McELROY: Objection. I don't know what the
7 relevance is of --

8 MR. VAN OS: Well, I don't know what the relevancy of
9 his testimony about safety concerns is, unless --

10 THE WITNESS: That was an active street. That's in
11 front -- Auditorium Circle in the front there is an active
12 street, as well as Jefferson. A lot of people come down,
13 because they don't know how to park, and they come right
14 through there. So as a result, they can't go down
15 Auditorium, because they're blocked by the valet. So as a
16 result, they're coming, and there's no stop sign, and they
17 just come flying through, and right down and take a left on
18 Auditorium Circle in front of the building and end up at
19 the stop sign on Navarro Street. That's the threat.

20 JUDGE AMCHAN: I actually think this is somewhat
21 irrelevant, because your position is, threat or no threat,
22 they're not entitled to distribute handbills on Tobin
23 property.

24 MS. McELROY: Right. The rationale is part of it is
25 because of a safety concern. It goes back to the

1 underlying theory as to what --

2 JUDGE AMCHAN: Well, then I'll let me him continue.

3 MR. VAN OS: Thank you.

4 Q BY MR. VAN OS: But would the leafleters have
5 constituted a safety hazard if they had been allowed -- if
6 they had leafleted on the sidewalk that's on the Tobin
7 property?

8 A They had a choice to make a turn right there on city
9 property -- right across the street to go on city property.

10 JUDGE AMCHAN: But that's not the question he asked.

11 Q BY MR. VAN OS: If they were on the Tobin property,
12 they weren't on the street, were they, if they --

13 A Half of them -- some of them were, because they
14 couldn't all fit, and as a result, that was the issue.

15 Q Now, what you're saying --

16 A Down below.

17 Q We've had testimony, Mr. Freeman -- I'll represent to
18 you we've had testimony that there were about 10 to 12
19 leafleters.

20 A There was more than that.

21 Q Okay. How many were there?

22 A I'm going to say over 20.

23 Q Over 20.

24 A Yeah.

25 Q And you're saying that these 20 leafleters could not

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P R O C E E D I N G S

(Start: 9:10 a.m.)

THE HONORABLE JUDGE ARTHUR J. AMCHAN: We're on the record.

MS. SHIH: My next witness is Brian Petkovich. (Whereupon,

BRIAN PETKOVICH

having been sworn/affirmed, was called as a witness herein, and was examined and testified as follows:)

DIRECT EXAMINATION

Q BY MS. SHIH: Could you state and spell your name for the record, please?

A Brian Petkovich; B-r-i-a-n, P-e-t-k-o-v-i-c-h.

Q And how are you currently employed?

A I am a Staff Musician with the San Antonio Symphony.

Q How long have you held that position?

A Since '96, 1996.

Q Are you currently a member of the Union?

A Yes.

Q How long have you been a Union member?

A I've been a member of the AFM since I was seventeen. I have been a member of this local since I moved here in 1996.

Q Any other affiliation with the Union? Any officer positions or other positions?

1 A I've been the Secretary-Treasurer of Local 23 for --
2 I guess it is nine years now, since 2008.

3 Q Is that an elected position?

4 A Yes.

5 Q How many Union officers are there?

6 A There are nine people on the Executive Board, three
7 of which could be considered the officers; the President,
8 Vice-President, and Secretary-Treasurer.

9 Q Were you involved in the Union's plans to leaflet the
10 Ballet?

11 A Yes.

12 Q What was your involvement?

13 A Helping strategize and plan and think about what the
14 right course of action would be.

15 Q Why did the Union decide to leaflet the Ballet?

16 A After frankly years of trying to facilitate
17 collaboration between the Ballet, Opera, and Symphony, it
18 became clear that in order to protect and encourage the
19 San Antonio Symphony, Ballet San Antonio, and Opera San
20 Antonio, to use live music and work together to make that
21 happen, that something had to be said publicly, because
22 our -- our private discourse, our behind the scenes
23 efforts had failed.

24 Q Were you personally involved in any of the leafleting
25 events?

1 A Yes.

2 Q How many?

3 A I was at the two evening performances of Ballet, the
4 Friday night and Saturday night.

5 Q Describe what happens when you first arrived for the
6 first performance on Friday night.

7 A I got there very early and kind of gathered with the
8 people that were leafleting. We discussed, you know, what
9 we were planning to do as far as handouts. You know, how
10 to be cordial to the patrons. You know, engage them in
11 conversation, basically, just about the fact that there is
12 not going to be live music, and it is a shame, basically,
13 but certainly not to boycott, not -- not to say that you
14 shouldn't come in.

15 So, anyway, we met and probably about a quarter to
16 seven, we walked across the street and took positions kind
17 of on the different places on the grounds. I went off
18 with another individual to the -- to basically the far
19 left side of the front, and another group of people went,
20 you know, more towards the direct front. I wasn't in that
21 group.

22 So, as I was walking across the street, I was met by
23 someone and they were -- they asked me -- they told me
24 that I couldn't be up on the curb and that I had to stand
25 in the street.

1 Q Who told you that?

2 A Mike Fresher.

3 Q What did you do in response?

4 A I basically said, "This is a public sidewalk, isn't
5 it?" I said, "Why can't I leaflet up here," and, you
6 know, "Do you really want to keep me from being on the
7 property?"

8 He said, "This is our private property and you can't
9 -- you can't be up on the grounds. You can leaflet in the
10 street, if you want."

11 And so, you know, I basically had decided to be on
12 the far left side of the thing, so I walked around the far
13 side on the other side of the street, and then I still
14 couldn't believe that this is not a sidewalk. It's been a
15 sidewalk for nine years almost.

16 And so, I started leafleting on the sidewalk again
17 over on the far left side of the auditorium, and a little
18 while later someone else came and told me that I can't be
19 on the grounds, that this was not a sidewalk. If you are
20 not blocking the traffic you can't be here.

21 And so I -- and I basically said, "Well, where can I
22 be," you know. So, there is a -- is that Richmond Street,
23 the street that is blocked off to the left of the front of
24 the Tobin Center. So I said, "Well, can I stand in the
25 middle of this closed street, because, you know, this is

1 to -- to keep the Hall like it was in its old
2 configuration as the Municipal Auditorium.

3 Q How long did you observe the protesters there that
4 day?

5 A I didn't stay for the entire event, but I was
6 probably there for about, you know, thirty or forty
7 minutes that they were there.

8 Q Did you observe anyone ask them to leave?

9 A No.

10 Q I am going to turn your attention now towards a
11 different subject which is basically your work season, and
12 there was some testimony yesterday which you heard about
13 the length of your season. Can you clarify how the -- the
14 weeks in your season work, under your contract?

15 A Sure. Basically there is a 39-week window in which
16 whatever guaranteed weeks can be scheduled. So, say we
17 have -- have thirty work weeks, those thirty work weeks
18 need to be scheduled in that 39-week window from basically
19 September to June. Obviously, the number of guaranteed
20 weeks is subject to negotiations.

21 Q I am handing you what's been marked as General
22 Counsel's Exhibit No. 12.

23 **(General Counsel's Exhibit No. 12, marked for**
24 **identification.)**

25 Q BY MS. SHIH: What are these?

1 Sometimes very frequently -- infrequently, rather, they
2 ask for me to identify myself by name, but that's all.

3 Q How often does that happen?

4 A A handful of times that I can remember.

5 Q Does the Union -- where does the Union conduct its
6 meetings?

7 A Sometimes there are -- I mean, usually they are in
8 the Green Room of the Tobin Center.

9 Q Does the Union also hold meetings with the management
10 of the Tobin Center?

11 A Yes.

12 Q During your rehearsal days when you are working at
13 the Tobin Center, is there any Symphony management on-
14 site?

15 A Yes.

16 Q Who can you find on-site?

17 A Usually there is a Stage Manager, a Personnel
18 Manager, sometimes the General Manager is there.

19 Technically, the Conductor's staff is there as well.

20 Q These individuals, the Personnel Manager or the Stage
21 Manager, where are they located?

22 A There's a room next to the Green Room that they use,
23 you know, that they operate from, at least the weeks that
24 we are there.

25 Q I'm handing you what's being marked as General

1 A Yes, this is a letter that the Union sent to Mayor
2 Ivy Taylor and Judge Wolff.

3 Q Were you involved in preparing this letter?

4 A Yes.

5 Q What was your involvement?

6 A I helped draft and edit it.

7 Q In what capacity?

8 A Secretary-Treasurer of Local 23.

9 Q Was this a letter that the Union, either the
10 Executive Board or the officers approved before it was
11 issued?

12 A We had a look at it and we approved it to the
13 President of the Local. So, yes.

14 Q What is the purpose of this letter?

15 A Basically to raise awareness of the fact that the
16 collaboration that was envisioned when we were talking
17 about the Performing Arts Center, between Ballet, Opera,
18 and Symphony, wasn't coming to fruition, and that the --
19 and basically just to disclose how those relations are
20 manifesting over the first couple years of the Tobin
21 Center.

22 Q Are those some of the same concerns that led the
23 Union to leaflet the Ballet in February?

24 A Yes.

25 MS. SHIH: Move for admission of General Counsel's

1 for a special purpose of providing a venue for the
2 auditioning?

3 A No. Usually the auditionee is invited to come in and
4 perform with a regular-scheduled work week, a live
5 performance.

6 Q Just for -- just for the complete record, what is the
7 Laurie Auditorium that you referred to as an occasional
8 venue?

9 A Laurie Auditorium is an auditorium on the campus of
10 Trinity University just north of downtown.

11 Q Is the 39-week window for the performance season set
12 out in the CBA?

13 A Yes.

14 Q When you were told by an Event Staff person that you
15 couldn't be on the Tobin grounds even without the
16 leaflets, how far away was Mr. Freeman?

17 A He was right there, right next to me.

18 Q Did Mr. Freeman make any comment on your being told
19 that you couldn't be on the grounds even without the
20 leaflet?

21 A No.

22 Q And how far away was the police officer?

23 A He was right next to him on the other side.

24 Q Did the musicians who performed in the September 2017
25 production of Macbeth by Opera San Antonio have a union as

1 their exclusive representative and bargaining agent?

2 A Yes.

3 Q Which union?

4 A AF of M Local 23.

5 Q Was the -- was the CBA with Opera San Antonio
6 negotiated by Union representatives?

7 A Yes.

8 Q Who was the chief negotiator for the Union?

9 A I was.

10 JUDGE AMCHAN: And that is a separate Collective
11 Bargaining Agreement from the one that you had with the
12 Symphony?

13 THE WITNESS: Correct.

14 MS. McELROY: You just asked my questions.

15 JUDGE AMCHAN: You can sue me for plagiarism.

16 *[Laughter]*

17 Q BY MR. VAN OS: As the Secretary-Treasurer of Local
18 23, do you have access to the data of which Union members
19 are playing for which employers?

20 A Yes.

21 Q And do you work with that data on a regular basis?

22 A Yes.

23 Q How many musicians performed for -- how many
24 musicians performed in Macbeth?

25 A 58.

1 JUDGE AMCHAN: Oh, I just forgot...

2 So, everybody performed that is also a member of the
3 Symphony, or were there some people --

4 THE WITNESS: There were some exceptions; there were
5 about five.

6 JUDGE AMCHAN: Who were not Symphony members?

7 THE WITNESS: Who performed Macbeth. Part --
8 probably five of that 58 were -- or so, you know.

9 Q BY MR. VAN OS: What do you mean by "or so?"

10 A Within one or two.

11 Q There is a sentence in -- there is a sentence in
12 General Counsel's Exhibit No. 20 that I would like to ask
13 you to look at. It is in the fourth paragraph, about
14 three-fourths of the way down in the fourth paragraph,
15 first page. "This gap will increase the musicians'
16 current season losses on top of the prospect of three
17 weeks of furlough..."

18 What is that referring to? The sentence that starts
19 with "This gap will increase the musicians' current season
20 losses..."

21 A The furlough refers to the three weeks that we were
22 laid off. Let me see.

23 *[Long pause]*

24 A So basically we were concerned that the Opera --

25 Q Have you found the sentence?

1 A Yes. "This gap will increase the musicians' current
2 season losses..."

3 Q What is that referring to -- what is that talking
4 about? What does that sentence --

5 A Because there is -- so this sentence is referring to
6 whether or not we will be playing the Symphony Society
7 under the Symphony's work rules will be playing or the
8 plans of the production of Macbeth during the 2017-2018
9 season, and if -- if that failed to happen, it could and
10 did influence the economic situation of the musicians of
11 the San Antonio Symphony.

12 Q Now, were the 58 musicians who performed on Macbeth,
13 is that the same number of musicians who are paid to
14 perform when the Symphony actually provides the orchestral
15 music for the Opera?

16 A No. There are actually -- let me say that again,
17 actual paid or performed?

18 Q Performed.

19 A There would have been more on stage. The string
20 section was reduced for the Opera company.

21 Q All right, if the Symphony -- there have been
22 occasions when the Symphony provided the live music for
23 Opera San Antonio; is that correct?

24 A Yes.

25 Q And on such occasions, how many -- how many Symphony

1 bargaining unit musicians are paid for that event?

2 A For that week, I think we are at 72 musicians that
3 are paid.

4 *[Long pause]*

5 Q So having that slice of about 14 or so musicians went
6 unemployed as a result of the Symphony not providing, is
7 that right?

8 A Correct.

9 MR. VAN OS: No further questions.

10 MS. McELROY: Can we have a slight recess, a break?

11 JUDGE AMCHAN: Yes. Five minutes?

12 MS. McELROY: Yes.

13 JUDGE AMCHAN: Let's go off the record.

14 *[Off the record]*

15 JUDGE AMCHAN: Back on the record.

16 MS. McELROY: We are on?

17 THE COURT REPORTER: Yes.

18 **CROSS EXAMINATION**

19 Q BY MS. McELROY: Good morning, Mr. Petkovich. I just
20 have a few questions for you.

21 If I am talking too loud, tell me, because I can't
22 hear that well, so sometimes I can get loud.

23 You talked about where you were standing, and I got a
24 little confused, too, in terms of left or right. So let
25 me show you what has been marked as Respondent's Exhibit

1 MS. McELROY: Right.

2 Q BY MS. McELROY: Do you agree with the -- that the
3 Ballet can barely afford to hire the Symphony? Do you
4 agree with that statement?

5 A I have no way of knowing what their financials are.

6 Q So you don't agree nor disagree, I guess.

7 A With?

8 Q With the Ballet's position that they can barely
9 afford to hire the --

10 A I have no basis to know whether they can or not.

11 Q Now, it's -- it is clear that by the exhibits that
12 the GC has introduced, that the Tobin is not the exclusive
13 venue where the Symphony plays, correct?

14 A It is not the exclusive venue.

15 Q And let's talk about the night that -- well, let's
16 answer this question: Do you believe that the Ballet is
17 not worth attending if there is no live music?

18 A Personally?

19 Q Yes.

20 A I wouldn't go to the Ballet if it was using tape, and
21 I have not gone to the Ballet when it has used tape, me
22 personally.

23 Q Because you don't think it is worth going or
24 attending?

25 A No.

1 Does the Tobin operate 365 days a year?

2 A It does.

3 Q And currently, does the City of San Antonio own any
4 part of this Tobin?

5 A No, they do not.

6 Q In 2016 and 2017, or rather in 2016 and any part of
7 2017, did the City own any part of the Tobin?

8 A No.

9 Q What is your position with the Tobin?

10 A President and CEO.

11 Q And has that been since May of 2013?

12 A Yes.

13 Q And as the President and CEO of the Tobin, what are
14 your job duties and responsibilities?

15 A To manage and operate the facility, fund-raising, the
16 -- all operations of the entire enterprise.

17 Q And were you employed by the Tobin while it was still
18 under construction?

19 A I was.

20 Q Describe the Tobin for the Judge.

21 A Okay, it's a three-venue performing arts center. We
22 have the H-E-B Performance Hall which is about 1,750
23 seats. We have the Carlos Alvarez Studio Theater that
24 seats upwards to 300, and then we have an outdoor Will
25 Naylor Smith Plaza where we can put about 1,000 people out

1 there. Out on that Plaza which butts up against the River
2 Walk is a 36-foot video board so we go through a
3 significant number of free programming open to the public,
4 programming out there. It is still managed, but open.

5 We are consistently ranked as one of the top
6 performing arts centers in the world. If we are not
7 number one, we are in the top three every time the
8 rankings come out quarterly, and that is based on
9 attendance and the number of events that we do.

10 Q When did the Tobin open?

11 A When did it open?

12 Q Yes.

13 A September 4th, 2014.

14 Q And would say that the Tobin is a fairly unique
15 property?

16 A It's -- at the time it opened three years ago, it was
17 the most technologically advanced building in the country
18 in terms of acoustics and flexibility. We have a floor,
19 the Tobin -- the H-E-B Performance Hall floor is a raked
20 theater floor, but at a push of the button, it becomes a
21 flat floor, so we can do galas and banquets and things on
22 that floor, and then at night -- or we could do a lunch
23 for a corporate client in the afternoon, flip the floor
24 and do a concert that night in that same space. So -- and
25 that is the only one of its kind in the country.

1 Q Do you have a Chief Experience Officer?

2 A I call our Community -- Director of Community
3 Engagement and -- I'm sorry, our Director of Residential -
4 - Resident and Community Engagement our CEO, so I call him
5 our Chief Experience Officer.

6 Q What is the experience you are trying to create for
7 the patrons of the Tobin?

8 A Well, his responsibility is from the moment someone
9 comes on our website to the time they come to the
10 building, park, walk to the front door, through the lobby,
11 through the concession area, watch the show, and get back
12 in the car, that experience is world class from -- so I
13 put one person in charge of that.

14 Q So it is not just any other concert venue?

15 A Absolutely not.

16 Q As -- in your capacity as President and CEO of the
17 Tobin, are you aware of the Tobin's property lines?

18 A I am.

19 Q And we have been referring to Respondent's Exhibit
20 No. 3 over here that has the yellow marking around the
21 Tobin Center, does that indicate the Tobin Center's
22 property lines?

23 A It does.

24 Q Okay. And the area -- you have referred to a Plaza
25 area before. Where -- can you show the Judge where you

1 are talking about?

2 A The Plaza I was referring to, Judge, is in the back
3 of the building, so that is the Will Naylor Smith Plaza.
4 It is that kind of black -- no, see the trees, the palm
5 trees, the trees going down? Yeah, it is that square that
6 is kind of to the right of that.

7 Q So you are pointing to the left-hand upper corner --

8 A Uh-huh. Yeah, just that kind of black square that is
9 to the left of all of the white roof. You can see that
10 kind of half of -- that two sides of the square. Do you
11 see what I am talking about?

12 JUDGE AMCHAN: Yes.

13 THE WITNESS: Okay.

14 Q BY MS. McELROY: And then this is the entrance where
15 people come?

16 A That is the Valera Plaza, and that's where -- that's
17 the entry, the main entry point for all performances in
18 the H-E-B Performance Hall.

19 Q Is the Valera Entry Plaza considered part --
20 considered a working area when events are ongoing?

21 A The entire campus is considered a working area on any
22 given performance.

23 JUDGE AMCHAN: Just so this ever gets beyond me, when
24 you are talking about the Valera --

25 THE WITNESS: Plaza.

1 JUDGE AMCHAN: -- Plaza, that's on the bottom part of
2 the -- in the picture where it says "Tobin Center," you
3 are talking about the area just below that?

4 THE WITNESS: I am referring to the Valera Plaza, is
5 from the curb line to the glass doors.

6 JUDGE AMCHAN: Okay.

7 THE WITNESS: All of that stairway going right up the
8 middle there.

9 JUDGE AMCHAN: Okay. So just above where it says
10 "Auditorium?"

11 THE WITNESS: Yeah, from that yellow line to the
12 front doors is the Valera Plaza.

13 JUDGE AMCHAN: Okay.

14 THE WITNESS: To answer your question, it is not
15 unusual that we have three performances going on in the
16 three separate venues on any given night. It happens all
17 of the time, so the entire property is a working area.

18 MS. McELROY: So, Counsel, in your notebooks under
19 Tab 19, I am going to show what I have marked as
20 Respondent's Exhibit No. 4. This might help a little bit
21 more.

22 **(Respondent's Exhibit No. 4, marked for identification.)**

23 Q BY MS. McELROY: What does the first page of
24 Respondent's Exhibit No. 4 show?

25 A It shows in the bottom of the picture, the Valera

1 entry, the Valera Plaza --

2 Q And this --

3 A -- in this area here.

4 Q Okay. Can you show the Judge?

5 A Okay. This entry here is the Valera Entry Plaza, so
6 from the curb line to the glass doors.

7 Q I want to make sure we are all looking at the same.

8 A Am I on the wrong one?

9 JUDGE AMCHAN: You are gesturing from the very bottom
10 of the picture to the structure that says "Tobin Center?"

11 THE WITNESS: Correct.

12 Q BY MS. McELROY: And is the next page -- what does
13 the next picture show? I want to make sure --

14 A Okay, so that is the Will Naylor Smith Plaza in the
15 back of the building, and you can see -- this was actually
16 taken during an event, some kind of gala or something that
17 is going on out there. You can see the video board in the
18 distance, or on the side of the building, and then running
19 down the left side of the picture is the River Walk.

20 Q And then the final picture that is in Respondent's
21 Exhibit No. 4?

22 A Again -- again, this shows the front of the building.
23 You can identify Auditorium Circle in the lower right-hand
24 corner, the Valera Plaza leading up to those arches at the
25 front of the building. To the more -- to the top right is

1 where we do our valet parking. You can see -- that road
2 is closed, and we close that by permission from the City
3 to close that.

4 In the left, the very left side of the picture, you
5 will see a glassed-in cube. That is the entry to the
6 studio -- the Carlos Alvarez Studio Theater, and then
7 beyond that where you see the palm trees is where that --
8 the Will Naylor Smith Plaza is.

9 MS. McELROY: Judge, we would move for the admission
10 of Respondent's Exhibit No. 4.

11 MS. SHIH: If I may voir dire?

12 VOIR DIRE

13 Q BY MS. SHIH: Did you take these photos?

14 A No.

15 Q Do you know who took these photos?

16 A We had a drone come in and take the pictures.

17 Q Okay, but these were photos taken at the request of
18 the Tobin Center?

19 A A year ago -- yeah, a year ago probably. Probably
20 over a year ago because I can't see the construction on
21 the parking garage.

22 Q That was my next question. Do you know when they
23 were taken?

24 A Sometime after we opened and before the garage was
25 built.

1 MS. SHIH: No objection.

2 JUDGE AMCHAN: R-4 is received.

3 **(Respondent's Exhibit No. 4, received into evidence.)**

4 **CONTINUING DIRECT EXAMINATION**

5 Q BY MS. McELROY: Before we leave Respondent's Exhibit
6 No. 4, the couple of cars that are parked in front of the
7 Tobin there that we had some conversation about in
8 yesterday's testimony, why are those cars there?

9 A Principal Auto Group which is a local dealership is
10 one of our season sponsors, and as part of the fulfillment
11 of that sponsorship is for us to provide them for
12 visibility of the vehicles on the front plaza.

13 Q And the sign that is out there, does that sign have
14 any -- is that sign an advertisement?

15 A Absolutely not. That sign is directing people to the
16 Box Office.

17 Q Okay.

18 A By agreement with the Tobin Endowment that named the
19 building, we cannot have any other signage or advertising
20 outside the building.

21 Q Okay. In February of 2017, where was most of the
22 parking for the Tobin?

23 A Where Jack has described it.

24 Q Okay. So in surrounding areas?

25 A In surrounding areas, correct.

1 Q Does the Symphony ever rehearse for performances that
2 are being held elsewhere?

3 A Not that I know of.

4 Q There was -- there has been some discussion that the
5 Symphony occasionally meets in a room at the Tobin called
6 the Green Room. Can the Symphony meet at any time it
7 wants in the Green Room, or does it need permission of the
8 Tobin?

9 A Generally when the Symphony is leasing the building
10 from us, they have the ability to use that space at their
11 discretion. If they want to do -- to use that space
12 outside of a lease period, they always ask for permission.

13 Q And does any -- does any member of the Symphony,
14 either the Symphony members, orchestra members, or the
15 management, have keys, or are they able to access the
16 Tobin when they are not leasing the building?

17 A As part of the Use Agreement, I do not believe any of
18 the management or musicians have keys to the building.

19 The lease of the Library, and that Librarian comes in
20 fairly regularly, he may have a key. I am not sure about
21 that though.

22 Q And he is limited as to the ability -- his ability to
23 use that space, correct?

24 A That's right, and that is per our events schedule.

25 Q And what are the limitations on the Library?

1 Suite. It is called the Principal's Suite, and any of our
2 headlining acts -- all of our headlining acts use that
3 suite as the Principal's dressing room.

4 Q When they are leasing the building?

5 A When they are in the building, yes.

6 Q Okay. Have you been -- as far as you know, have you
7 been consistent that the Symphony only has access to this
8 space -- has access to the Tobin when it is rehearsing or
9 playing or has permission to use the room?

10 A As far as I know, and it is limited to the spaces
11 that we put in the agreement. There is -- on occasion we
12 will find musicians in other parts of the building, either
13 practicing or reading a book during a break, and we will
14 ask them to move back to the areas that are under their
15 lease -- Use Agreement.

16 Q Are resident companies housed in the Tobin?

17 A Housed in the Tobin? We have ten -- at that time we
18 had ten resident companies.

19 Define "housed."

20 Q Well, do they have offices inside the Tobin?

21 A In the Tobin Center building itself?

22 Q Yes.

23 A No.

24 Q Are off-duty police officers always on the premises
25 during events?

1 A Yes.

2 Q Has that been the case since the Tobin opened?

3 A Yes.

4 Q Does the Tobin have a written policy for every
5 operational rule?

6 A No.

7 Q Why not?

8 A We have so many different that appear and that can
9 happen with any specific events, and we have had almost
10 1,800 events since we have opened, that we deal with the
11 different operating issues as we go. Many of our staff --
12 all of my senior management staff have years of experience
13 in live entertainment, so they know how to operate a
14 building as well.

15 Q And give the Judge a sense of the varied types of
16 performances that are going on at the Tobin, because I
17 think it is unique in that sense, as well.

18 A Well, the best way to reflect that, Judge, is that --
19 well, on September 4th, we did -- on our first day that we
20 opened, we did not do an opening night; we did a First
21 Performance, and we called it the Celebration of the Arts,
22 where the Tobin Center brought together for the very first
23 time ever the Symphony, Opera, and Ballet all on the stage
24 on the first night to perform. They had never done that
25 before.

1 And then we succeeded -- we commenced a 30-day
2 opening night, so we did an opening night every night for
3 thirty days, which included Carlos Santana, Lynyrd
4 Skynyrd, Renée Fleming, Jason Mraz, rap shows, comedians;
5 every -- basically of every genre you could think of from
6 September 4th to October 4th. We did 45 shows in 30 days,
7 and then we finished it with Paul McCartney as kind of
8 that end of that celebration of opening nights.

9 Q And you have continued in that pattern since.

10 A Yes.

11 Q Okay. And how do you -- with all of these varied
12 types of performances that are coming in, how do you
13 communicate to your employees what rules are in effect
14 regarding the operations of the Tobin?

15 A Again, most of the management team have operated
16 these venues or have been involved in the operation of
17 venues, so many -- much of what we do is standard industry
18 practices. Much of what we do are driven by the various
19 technical and production requirements of the show coming
20 in and how we'll handle that, and then our production team
21 adjusts accordingly.

22 Q So how many employees that are on your management
23 team worked for you previously?

24 A Two.

25 Q Okay. And one of those is Jack, and who is the other

1 one?

2 A Brian Clark.

3 Q Are the Tobin's rules regarding -- well, let me just
4 ask this.

5 What are the Tobin's rules regarding distributing
6 information such as flyers or handouts on its property?

7 A We don't allow it. We don't allow distribution of
8 handbills, leaflets, the selling of t-shirts, selling of
9 scalped or brokered tickets, any of that where we see
10 there is people congregating for, and they are not moving
11 through the space, whether coming in or going out. We ask
12 them to move along.

13 If they are doing something illegal like selling
14 counterfeit merchandise, we will get the police involved.

15 Q And is this consistent with how you managed other
16 venues you have worked at?

17 A Yes.

18 Q So is the Tobin's non-solicitation policy -- it
19 wasn't a new policy in reaction to the Union's activity,
20 was it?

21 A No. It's been the policy in place since we opened
22 the building and other venues we've worked at, as well.

23 Q How do your employees know the non-distribution/non-
24 solicitation policy?

25 A We reiterate it whenever it is attempted to happen.

1 There's numerous occasions where a local bar or a local
2 club will want to do the handout of flyers saying,
3 "There's an after-party at our club; come to our club."
4 We will take those people off of our property. They can't
5 -- they can't trespass and hand out those types of things,
6 or the selling of counterfeit merchandise; those types of
7 things.

8 So, it happens regularly and we -- we don't even let
9 the Girl Scouts sell cookies on property. It is just our
10 policy.

11 Q Is there any restriction against any other symphony
12 playing at the Tobin other than the San Antonio Symphony?

13 A There is no restriction.

14 Q Is the Symphony a contractor of the Tobin?

15 A We have a contract -- they have a lease agreement,
16 but they are not -- they don't provide us any services.

17 Q Right. They are not providing you any goods or
18 services, do they?

19 A Correct.

20 Q What is the relationship between the Tobin and the
21 Symphony?

22 A They have a Use Agreement to use the building as it
23 pertains to the identified dates that are in the contract,
24 and for the purpose of putting on performances.

25 Q So let's look at General Counsel's Exhibit No. 4.

1 [Long pause]

2 Q This has been previously admitted in evidence. Is
3 this the Use Agreement that you were referring to?

4 A It is.

5 [Long pause]

6 Q Look at what is, I guess, Page 2 of the document, the
7 way it is -- it is Page 3 really. It is -- see the term?
8 What is the term of the Use Agreement with the Symphony?

9 A It is for -- this is a three-year term that
10 encompasses the seasons of 2015-2016, 2016-2017, and 2017-
11 2018.

12 Q And has this Use Agreement been extended at all?

13 A No.

14 Q And then turn to Addendum C --

15 MS. McELROY: Oh, Judge, do you need a copy?

16 JUDGE AMCHAN: I don't see one.

17 MS. SHIH: This is not marked, but I have an extra.

18 [Long pause]

19 JUDGE AMCHAN: This is General Counsel what?

20 MS. McELROY: 4.

21 JUDGE AMCHAN: Thank you.

22 Q BY MS. McELROY: Do you see the Addendum C?

23 A Yes.

24 Q Yes. This -- who sets this schedule?

25 A This is a very elongated process between our Booking

1 and Programming Staff working in coordination with the
2 Ballet, Symphony, and Opera, to try to figure out who
3 needs dates, and, you know, how many.

4 Q So the Tobin doesn't tell the Symphony what dates it
5 is required to play, does it?

6 A We do not tell them the dates they are required to
7 play.

8 Q Does the -- and the Symphony doesn't work twelve
9 months a year; is that right?

10 A The Symphony musicians do not work twelve months a
11 year. The Symphony management team certainly do.

12 Q The Symphony musicians, I'm sorry. Thank you for
13 that. Yes.

14 So does the Tobin schedule the Symphony to work
15 around the requirements of the Musicians CBA?

16 A That certainly impacts the dates that the Symphony
17 can perform at the Tobin.

18 Q And does the Tobin have any involvement in the terms
19 of the Collective Bargaining Agreement with this Union?

20 A None.

21 Q And then on Section 11 --

22 *[Long pause]*

23 Q On Section 11, Subpart 3, Relationships of the
24 Parties --

25 A Uh-huh.

1 Q Does it clearly provide that the relationship between
2 the Symphony and the Tobin shall be that of licensor and
3 licensee?

4 MS. SHIH: Objection, Your Honor. The document
5 speaks for itself.

6 MS. McELROY: I am trying to examine him on the
7 document, Judge.

8 JUDGE AMCHAN: Well, I mean --

9 MS. SHIH: She asked if it clearly provides.

10 MS. McELROY: Okay, I will rephrase.

11 Q BY MS. McELROY: Okay, Mr. Fresher, do you see
12 Section 11, Subpart 3, Relationship of the Parties?

13 A Yes.

14 Q Do you see at the bottom there, it says, "It being
15 expressly understood the relationship between the parties
16 hereto is and shall remain that of licensor and licensee?"
17 Do you see that?

18 A Yes.

19 Q Is that your understanding what the relationship is
20 between the Tobin and Symphony?

21 A Yes.

22 Q So let's look now at General Counsel's Exhibit No. 2,
23 which is the Deed, and I will have to get that from the
24 Court Reporter.

25 *[Long pause]*

1 MS. McELROY: Do you have it, Judge?

2 JUDGE AMCHAN: No.

3 MS. McELROY: I don't know if we have an extra copy.

4 Q BY MS. McELROY: Okay, look at Page 4. Are you with
5 me?

6 A I am looking at Page 4.

7 Q So No. 5 defines the public purpose of the building;
8 do you see that?

9 A Uh-huh.

10 Q And it says the phrase, "Public Purpose means use of
11 the Performing Arts Center for performing and visual arts
12 activities in San Antonio, Texas, including but not
13 limited to musical, dance, and theatrical performances,
14 rehearsals, art exhibits, exhibitions, arts, education,
15 and similar activities that are open to the general
16 public."

17 Did I read that correctly?

18 A Uh-huh.

19 Q Is that a "yes?"

20 A Yes. Sorry.

21 Q That's all right.

22 And then No. 6 says the phrase, "Open to the general
23 public means accessible by the general public on a paid or
24 unpaid basis from time to time," correct?

25 A Correct.

1 Q Does this mean that anyone can come into the Tobin --

2 MR. VAN OS: Objection.

3 MS. SHIH: Objection.

4 MR. VAN OS: This Deed was entered into in 2008. He

5 was not present clearly for the negotiation of the Deed.

6 The Deed is a legal instrument that speaks for itself. He

7 has no possible foundation to testify as to the meaning of

8 phrases in the Deed.

9 MS. McELROY: Well, Your Honor, he is the President

10 and CEO of this entity, and he can testify about his

11 understanding of the meaning of these words and his

12 responsibility to manage that Performing Arts Center, and

13 --

14 MS. SHIH: And --

15 MS. McELROY: I am not done.

16 And Counsel in her Opening Statement referred to

17 these various words, so we are entitled to put evidence on

18 as to how we factually interpret these documents.

19 MS. SHIH: If I may, Your Honor --

20 MS. McELROY: If they want to cross examine him on

21 them, they can.

22 MS. SHIH: And in response, the General Counsel also

23 states an objection on the same grounds that the Charging

24 Party is stating an objection, with the further addition

25 that this particular individual's interpretation of the

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1 meaning of any particular phrase in this Deed is
2 irrelevant to the issues in this case.

3 MS. McELROY: Well, he is operating the facility. It
4 is his responsibility to operate it in accordance with the
5 legal documents that they are required to abide by.

6 JUDGE AMCHAN: Well, I am going to allow the question
7 and I will decide it when I read the briefs and issues,
8 and you know, write the Decision, whether I think his
9 opinion is relevant or not.

10 Q BY MS. McELROY: So, Mr. Fresher you can answer my
11 question.

12 Does this mean that anyone can come into the Tobin at
13 any time, whenever they want?

14 A No, it doesn't.

15 Q Does the Tobin, in fact, hold both ticketed and free
16 events for the general public from time to time?

17 A We do.

18 Q In fact, aren't the vast majority of events that the
19 Tobin holds open to the public?

20 A They are ticketed but they are open to the public.

21 Q Correct. The vast majority of events aren't
22 quinceañeras and weddings and things of that --

23 A They are not private events.

24 Q Right.

25 A Correct.

1 Q Exactly.

2 Does this language mean to you that the public can
3 use the space at any time for any reason?

4 A No.

5 Q I want to turn back to Respondent's Exhibit No. 4,
6 just to talk a little bit about it to make sure -- I think
7 you did but I want to make sure, did you point to the
8 Judge where the valet street is on Respondent's -- so he
9 can see it a little better than what is on there.

10 A On this picture, this -- this road running to the
11 right side is where the valet is.

12 JUDGE AMCHAN: Okay. You are looking at Page 3; is
13 that right?

14 THE WITNESS: I am looking at that one.

15 MS. McELROY: That was the third one, yeah. That's
16 right.

17 JUDGE AMCHAN: This one.

18 THE WITNESS: You can see cars are lined up there,
19 and that is people that are getting their cars valeted,
20 and then what happens is those cars are then parked on the
21 closed road. You can see just past them where the --
22 where the cars are parked parallel.

23 JUDGE AMCHAN: Right.

24 Q BY MS. McELROY: And does --

25 JUDGE AMCHAN: In fact, where they are parked back

1 to the front door, to the Box Office --

2 A Uh-huh.

3 Q -- to pass out flyers, sell t-shirts, distribute
4 other items, would that cause a disruption of Tobin -- of
5 Tobin's business during events?

6 A There would be two issues that I have with it. One
7 is -- well, a few. I mean, we have that experience that
8 we work very hard to preserve in terms of people coming to
9 the building and having a world-class experience walking
10 up. So I think with them being approached by folks on
11 this lower level as they are walking in from various
12 parking lots in our neighborhood, I think that would be --
13 that would not be a great experience for them.

14 The second thing is that we don't allow people -- we
15 monitor the activity throughout and around the entire
16 campus throughout the days and nights, but specifically
17 around events, because we are a soft target, and that
18 there are situations where we want to make sure that there
19 is not somebody with a backpack, you know, that shouldn't
20 be there with a backpack.

21 MR. VAN OS: Objection. Irrelevant and -- irrelevant
22 because there is no evidence that the leafleters on the
23 weekend of February 17th presented any of these types of
24 security threats. In fact, Counsel for the Respondent,
25 acknowledged in open court that the Respondent's position

1 is that even one leafleter would have been impermissible
2 because of the private property basis for the Respondent's
3 opposition to these charges.

4 This is -- this is unduly inflammatory and there is
5 no foundation for it, in any evidence that has been
6 presented.

7 JUDGE AMCHAN: Well, I think he is talking about the
8 reason for the general rule, and you are saying it is not
9 applicable, the situation -- the situation is different
10 because of the status of the leafleters who work there.

11 I will allow the question to the extent that I think
12 it is irrelevant to the case, so I will ignore it.

13 MR. VAN OS: Thank you.

14 Q BY MS. McELROY: You may answer -- you may continue
15 with your answer.

16 A Again, for security purposes, particularly when there
17 are folks that are on property that we aren't familiar
18 with, people that don't necessarily perform in the
19 building or are not people that we know. If there is
20 somebody out there that we generally know, we will -- we
21 know that they are just going to be -- we know that they
22 will be moving from place to place or they are coming into
23 the show because they are season ticket holders and we
24 know who they are, and they may be waiting for a friend to
25 get their ticket -- but we monitor if someone is there for

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1 any, you know, for an extended period of time, or doing
2 something that is against our -- our campus policies, we
3 will move them along.

4 Q But you don't wait for a bomb to blow up to put
5 security in place; is that right?

6 A That's correct.

7 MR. VAN OS: Objection. Your Honor --

8 THE WITNESS: That's correct.

9 JUDGE AMCHAN: Well, I do think it is irrelevant to
10 this situation, but --

11 MS. McELROY: But it goes to the reason they have the
12 policy.

13 JUDGE AMCHAN: The overall policy, yeah. I mean,
14 after the Boston Marathon, everybody is careful.

15 MS. McELROY: Correct.

16 Q BY MS. McELROY: You talked about the Tobin being a
17 soft target. Are there concerns at times that certain
18 events at the Tobin, that the clientele of the Tobin could
19 also be soft targets?

20 A Certainly. There is -- you know, there is -- not
21 only is the building, you know, an active venue, so there
22 are thousands of people coming in and out of the building
23 on any given night, but certain -- there are certain
24 demographics of folks, wealthy folks, that may have more
25 of a target on them.

1 When we have corporate events, for instance, with H-
2 E-B, the security levels are presidential in terms of
3 making sure no one is on the property, no one is sitting
4 on the back River Walk having a lunch. We made sure that
5 they are moved right along. There is no -- we can't have
6 anybody around.

7 So it is based on the event and based on what we
8 determine in our planning to -- the security to put into
9 place on any given night.

10 Q Does the Tobin have the right to set up the rehearsal
11 times or performance times of the Symphony?

12 A No.

13 Q Does the Tobin have any right to exclude any Symphony
14 employee from the Tobin during the time they are licensing
15 the facility?

16 A No.

17 Q Does the Tobin provide an employee break room for the
18 Symphony employees?

19 A There is a Performers' Green Room that all performers
20 in the Tobin use as a lunch space, dinner space, coffee
21 break space.

22 Q When --

23 A When they are using the building, correct.

24 Q Per their license agreement?

25 A Under individual license agreements for whatever the

1 events may be.

2 Q Okay. Does the Tobin need the Symphony to sustain
3 its business?

4 A No.

5 Q Would the Tobin make more money if the Symphony had
6 fewer dates at the Tobin?

7 A Yes.

8 Q And does the Union have access to the Tobin 365 days
9 per year?

10 A No.

11 Q Does the Symphony have access to the Tobin 365 days
12 per year?

13 A No, no one entity has access to the building 365 days
14 a year.

15 Q And they only have access in accordance with the
16 terms of their license agreement; is that correct?

17 A Correct. And if they do need -- if they have left
18 something like an instrument or something -- of if there
19 is something they need to come and get, then they have --
20 then by appointment we will make sure they can get in and
21 get what they need.

22 Q What control does the Tobin have over whether the
23 Ballet uses live or recorded music?

24 A None.

25 Q If a Symphony employee is late to a performance, what

1 MS. SHIH: I have no objection to Respondent's 5.

2 JUDGE AMCHAN: Received.

3 **(Respondent's Exhibit No. 5, received into evidence.)**

4 Q BY MS. McELROY: There's been some discussion about
5 instruments that are stored at the Tobin for the Symphony.
6 How many instruments are we talking about?

7 A I think there is probably fifteen and most of them
8 are of such size that they are not easily moved.

9 Q So we allow them to do that for their convenience?

10 A We have musical storage -- instrument storage; the
11 harp, their grand piano, some of their larger encased
12 instruments.

13 Q Does the owner have the right to access the Tobin at
14 any time to retrieve their instrument?

15 A No.

16 Q Was there a Grant Development Agreement in place
17 during the construction of the Tobin?

18 A Yes.

19 Q And under that Grant Development Agreement, what was
20 the situation -- who owns the Tobin?

21 A The property was -- the property was leased from the
22 City to the Bexar County Performing Arts Foundation,
23 during the term of the -- during the term of the Grant
24 Development Agreement, and up until the point that the
25 Performing Arts Center opened for business. At that

1 point, the terms of the GDA were terminated.

2 Q And then that's when the Deed --

3 A Was conveyed.

4 Q -- was conveyed?

5 A Yes.

6 Q To the Tobin?

7 A Yes. And under the terms of the Grant Development
8 Agreement.

9 *[Long pause]*

10 MS. McELROY: I think we are short a copy of this,
11 Judge, but this is marked as Respondent's Exhibit No. 6.
12 **(Respondent's Exhibit No. 6, marked for identification.)**

13 *[Long pause]*

14 Q BY MS. McELROY: Is this the Grant Development
15 Agreement that was in place during the construction of the
16 Tobin Center?

17 A It is.

18 MS. McELROY: Your Honor, we would move for the
19 admission of Respondent's Exhibit No. 6.

20 MS. SHIH: Your Honor, may I voir dire the witness?

21 JUDGE AMCHAN: Yes.

22 **VOIR DIRE**

23 Q BY MS. SHIH: Did you enter into this agreement?

24 A I operate under this agreement.

25 Q Who --

1 Q All right. And you are not sure about the subset of
2 Symphony musicians who you think may have performed on
3 Valera Plaza on that occasion?

4 A I believe -- I have recollection that that has
5 happened, but I just can't give you the specifics.

6 Q Okay. Were any artists of any art form performing on
7 the Tobin Center sidewalks during the weekend of February
8 17th, 2017?

9 A No. No.

10 Q I want to ask you a question that comes from the Use
11 Agreement, and the label on the front of it, the exhibit
12 number is GC Exhibit 4, if that will help you find it.

13 A Uh-huh.

14 Q If you will please turn to Addendum C?

15 A Okay.

16 Q This is the San Antonio Symphony schedule of events
17 for the 2015-2016 season in the Tobin Center

18 A Uh-huh.

19 Q This -- this schedule was arrived at by discussions
20 between Symphony management and the Tobin Center
21 management or staff?

22 A Not exclusively.

23 Q Okay. How was this schedule arrived at?

24 A There is a process that goes -- that happens every
25 year between the Ballet, the Symphony, the Opera, and the

1 Tobin Center staff, to determine what are the needs and
2 the requirements of the resident companies, and how we can
3 get them the most dates -- not all, but the most dates
4 that we possibly can, given -- everybody wants six weeks
5 in December, and there is only four, so we work through it
6 with all of those groups to figure out who gets what.

7 Q So, in other words, when the Symphony, San Antonio
8 Symphony representatives present their request for dates,
9 that request -- their request for dates is not
10 automatically approved.

11 A No.

12 Q And a factor in that decision-making is the Tobin
13 Center's availabilities, correct?

14 A Ask that -- yeah, if the Tobin Center is available.

15 Q Okay.

16 A All right, and that means that the Ballet or the
17 Opera also want that same December 12th, then there is a
18 discussion that has to happen on who is going to get it.

19 Q Well, the Tobin Center is the venue for other
20 companies besides the --

21 A Uh-huh.

22 Q -- three principal resident companies, isn't it?

23 A Yes.

24 Q And so the venues and schedules for other various art
25 companies and organizations is one of the factors in this

1 decision-making --

2 A No, it is not.

3 Q It is not?

4 A The three principal resident companies get basically
5 first pick, and then the other seven -- at that time,
6 seven, kind of filter in around them.

7 Q All right.

8 JUDGE AMCHAN: What happens if Paul McCartney is on
9 tour and he wants to come to San Antonio?

10 THE WITNESS: I will never do that show again.

11 *[Laughter]*

12 THE WITNESS: In addition -- well, we would see what
13 dates are left after everybody has gotten their -- as many
14 dates as they can.

15 JUDGE AMCHAN: Okay.

16 Q BY MR. VAN OS: The Tobin Center is owned by a
17 501(c)(3) entity; is that correct?

18 A That's correct.

19 Q And thus it has to meet the purposes set out in
20 Internal Revenue Code, Section 501(c)(3)?

21 A I am not a tax attorney, but yes. Correct.

22 Q All right. You testified a little while ago that --
23 and I'm certain I've got this down right in my notes of
24 the words that you used, that there was a hope that the
25 resident companies would be able to work together.

1 A Correct.

2 Q And was this hope communicated to you when you came
3 to San Antonio to assume your position at the Tobin
4 Center?

5 A Yes, there was a hope from the people that put this
6 whole thing together that these organizations would be
7 able to work together -- and mostly those three would be
8 able to work together.

9 Q And who communicated this hope to you?

10 A Bruce Bugg.

11 JUDGE AMCHAN: And he is who?

12 THE WITNESS: He was the Chairman of the Board at
13 that time.

14 Q BY MR. VAN OS: Chairman of the Board of the --

15 A Of the Tobin Center.

16 Q Okay.

17 A Of the Bexar County Performing Arts Foundation.

18 Q Right. Which the d/b/a is the Tobin Center; is that
19 correct?

20 A Uh-huh.

21 JUDGE AMCHAN: Did you entice them?

22 THE WITNESS: Well, no.

23 Can I tell you a little story?

24 JUDGE AMCHAN: Uh-huh.

25 THE WITNESS: The original Executive Director, Rodney

AFTER RECORDING RETURN TO:
BEXAR COUNTY PERFORMING ARTS
CENTER FOUNDATION

Attn: J. Bruce Bugg, Jr., Chairman and President
3316 Oakwell Court
San Antonio, Texas 78218

FILED BY
PRESIDIO TITLE
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DEED WITHOUT WARRANTY

Date: August 8, 2008

Grantor: City of San Antonio, Texas, a Texas municipal corporation, pursuant to Ordinance No. 2008-06-19-0547, duly adopted by the City Council of City of San Antonio on June 19, 2008

Grantor's Mailing Address: P. O. Box 839966, San Antonio, Bexar County, Texas 78283-3966, Attention: City Attorney, 3rd Floor, City Hall.

Grantee: Bexar County Performing Arts Center Foundation, a Texas non-profit corporation.

Grantee's Mailing Address: 3316 Oakwell Court, San Antonio, Bexar County, Texas 78218.

Consideration: Cash and other good and valuable consideration and other benefits accruing under the terms of that certain Grant and Development Agreement by and between Grantor, Bexar County, Texas ("County") and Grantee dated July 23, 2008 (the "Grant and Development Agreement"), the sufficiency and receipt of all of which are hereby confessed and acknowledged.

Property (including any improvements):

- Parcel 1: The parcel of land known as 100 Auditorium Circle, San Antonio, Bexar County, Texas 78205, as more particularly described by metes and bounds in Exhibit "A-1", attached hereto as a part hereof for all purposes.
- Parcel 2: The parcel of land known as 115 Auditorium Circle, San Antonio, Bexar County, Texas 78205, as more particularly described by metes and bounds in Exhibit "A-2", attached hereto as a part hereof for all purposes.

GC Ex. 2

Reservations from Conveyance: All portions of the Property which may lie within a public road or right-of-way are saved and excepted from this conveyance.

Exceptions to Conveyance: This conveyance is made subject to the restrictive covenants set forth in Exhibit "B", attached hereto as a part hereof for all purposes (the "**Restrictive Covenants**"), and the Restrictive Covenants shall run with the land and shall be enforceable by Grantor or the County. In addition, this conveyance is subject to validly existing and effective easements, rights-of-way, and prescriptive rights, whether of record or not; all presently recorded and validly existing restrictions, reservations, covenants, conditions, oil and gas leases, mineral interests, and water interests outstanding in persons other than Grantor, and other instruments, other than conveyances of the surface fee estate, that affect the Property; validly existing rights of adjoining owners in any walls and fences situated on a common boundary; any discrepancies, conflicts, or shortages in area or boundary lines; any encroachments or overlapping of improvements; and taxes for 2008, which Grantee assumes and agrees to pay.

Grantor, for the Consideration and subject to the Reservations from Conveyance, the Exceptions to Conveyance and the conditions of automatic reverter set forth in this Deed Without Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's legal representatives, successors and assigns forever, without express or implied warranty. All warranties that might arise by common law as well as the warranties in Section 5.0023 of the Texas Property Code (or its successor) are excluded.

IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT THIS CONVEYANCE SHALL BE EFFECTIVE FOR ONLY SO LONG AS:

A. Fee simple title to the Property is vested in an organization exempt from taxation under Section 501(c) (3) of the Internal Revenue Code of 1986, 26 U.S.C. § 101, et seq., as amended (the "Code");

B. Neither Grantor nor the County has caused to be filed in the Real Property Records of Bexar County, Texas, a Preconstruction Termination Notice (as defined in the Grant and Development Agreement), prior to the date on which a Certificate of Substantial Completion has been filed by Grantee in the Real Property Records of Bexar County, Texas;

C. Efforts to construct the Performing Arts Center on the Property have not been abandoned prior to substantial completion of the Performing Arts Center;

D. Upon completion of the Performing Arts Center, the Property is continuously used (subject to temporary cessation due to force majeure, or for remodeling and repairs, or reconstruction following a casualty) primarily for the Public Purpose; and

E. The County has not provided a County Certificate of Termination (as defined in the Grant and Development Agreement) to Grantor and filed such certificate in the Real Property Records of Bexar County, Texas, prior to the date on which a Certificate of Substantial Completion has been filed by Grantee in the Real Property Records of Bexar County, Texas.

F. If a petition is filed by or against an owner of fee simple title to the Property under any section or chapter of federal or state bankruptcy laws or under any similar law or statute of the United States or any state thereof, the petition shall have been dismissed, withdrawn or otherwise concluded without adjudication within one hundred eighty (180) days after being filed.

In the event that (i) fee simple title to the Property is not vested in an organization exempt from taxation under the Code, (ii) either Grantor or County have caused a Preconstruction Termination Notice to be filed in the Real Property Records of Bexar County, Texas, (iii) efforts to construct the Performing Arts Center have been abandoned prior to Substantial Completion thereof, (iv) the County has provided to Grantor and caused to be filed in the Real Property Records of Bexar County, Texas a County Certificate of Termination prior to the substantial completion of the Performing Arts Center, (v) upon completion, the Performing Arts Center is not continuously used (subject to temporary cessation due to force majeure, or for remodeling and repairs, or reconstruction following a casualty or condemnation) primarily for the Public Purpose, or (vi) a petition is filed by or against an owner of fee simple title to the Property under any section or chapter of federal or state bankruptcy laws or under any similar law of statute of the United States or any state thereof and the petition has not been dismissed, withdrawn or otherwise concluded without adjudication within one hundred eighty (180) days after having been filed, then, upon any such event or occurrence, all right, title and interest conveyed by this Deed Without Warranty shall automatically revert to and vest in Grantor, Grantor's successors and assigns, without the necessity of any further act on the part of or on behalf of Grantor, it being the intent of Grantor to convey a fee simple determinable estate to the Grantee.

For the purposes of this Deed Without Warranty, Grantor and Grantee confirm and agree that:

(1) The word "**abandoned**" means the complete cessation of construction activities related to the Performing Arts Center prior to Substantial Completion of the main performance hall for a continuous period of twelve (12) months unless such cessation results from (a) a Casualty or other Force Majeure Event (as defined in the Grant and Development Agreement) (b) a default by Grantor or the County under the Grant and Development Agreement that continues beyond the expiration of any applicable notice and cure period, or (c) the continuation of litigation, diligently pursued, concerning the Property or the Project (as defined in the Grant and Development Agreement), that continues despite commercially reasonable efforts to minimize the resulting delay.

(2) The phrase "**completion of the Performing Arts Center**" means the point in time at which the Performing Arts Center may be occupied lawfully and utilized for the Public Purpose.

(3) The phrase "**the County**" means Bexar County, Texas.

(4) The phrase "**Performing Arts Center**" means, collectively, a performing arts center open to the general public comprising (a) a multiple purpose, variable acoustic hall of not less than 1700 seats and not less than approximately 180,000 gross square feet,

(b) a multiple purpose, multiple form, acoustically sound studio theater with not less than 250 seats, (c) a rehearsal hall containing at least approximately 3,000 square feet, (d) lobby space containing at least 8 square feet per person, (e) arts education facilities, (f) offices for administrative personnel, (g) offices for San Antonio arts organizations, and (h) other improvements capable of use for the Public Purpose;

(5) The phrase "Public Purpose" means use of the Performing Arts Center for performing and visual arts activities in San Antonio, Texas, including but not limited to musical, dance, and theatrical performances, rehearsals, art exhibitions, arts education, and similar activities, that are open to the general public; it being understood and agreed that ancillary and complimentary commercial uses generating revenue intended to provide financial support for the Performing Arts Center, to enhance the Public Purpose and/or to provide goods, services or amenities to patrons, customers or invitees of the Performing Arts Center shall be deemed consistent with the Public Purpose and permissible; and

(6) The phrase "open to the general public" means accessible by the general public on a paid or unpaid basis, from time to time.

(7) The phrase "substantial completion" means the point of progress of the construction of the applicable improvements when a certificate of occupancy (either temporary or permanent) has been issued by the City of San Antonio.

G. Grantor establishes the Restrictive Covenants as conditions, covenants and restrictions, whether mandatory, prohibitive, permissive or administrative, to regulate the uses of the Property and to restrict the Grantee's rights to grant naming rights to the improvements placed upon it. Grantor and Grantee stipulate that (1) the Restrictive Covenants touch and concern the Property; (2) privity of estate exists by reason of the ownership of the Property; (3) notice is given by the filing of this Deed Without Warranty in the Public Records; and (4) the Restrictive Covenants are reasonable; (5) the Restrictive Covenants are for the common benefit of Grantor and Grantee and the citizens who will use the Property for the Public Purpose. The Restrictive Covenants will run with the Property, are binding upon Grantee, and its successors and assigns, and inure to the benefit of Grantor, Grantee and the citizens who use the Property for the Public Purpose, and their respective successors and assigns, forever or until such time as the right, title and interest in and to the Property conveyed by this Deed Without Warranty shall automatically revert to and vest in Grantor.

THIS PROPERTY IS CONVEYED BY GRANTOR AND ACCEPTED BY GRANTEE "AS IS," "WHERE IS" AND "WITH ALL FAULTS," AND GRANTEE ACKNOWLEDGES THAT IT IS NOT RELYING ON ANY WRITTEN, ORAL, IMPLIED OR OTHER REPRESENTATIONS, STATEMENTS OR WARRANTIES BY GRANTOR OR ANY AGENT, EMPLOYEE, OFFICER, ELECTED OFFICIAL OR OTHER REPRESENTATIVE OF GRANTOR. EXCEPT FOR THE GRANT AND DEVELOPMENT AGREEMENT, ALL PREVIOUS WRITTEN, ORAL, IMPLIED OR OTHER STATEMENTS, REPRESENTATIONS, WARRANTIES OR AGREEMENTS, IF ANY, ARE MERGED IN THIS DEED WITHOUT WARRANTY. EXCEPT AS EXPRESSLY SET FORTH HEREIN, GRANTOR SHALL HAVE NO LIABILITY TO GRANTEE, AND GRANTEE HEREBY

RELEASES GRANTOR FROM ANY LIABILITY (INCLUDING CONTRACTUAL AND/OR STATUTORY ACTIONS FOR CONTRIBUTION OR INDEMNITY AND CLAIMS BASED ON GRANTOR'S NEGLIGENCE IN WHOLE OR IN PART AND CLAIMS BASED ON STRICT LIABILITY), FOR, CONCERNING OR REGARDING:

A. THE NATURE AND CONDITION OF THE PROPERTY, INCLUDING THE SUITABILITY THEREOF FOR ANY ACTIVITY OR USE INCLUDING, WITHOUT LIMITATION, THE PUBLIC PURPOSE;

B. ANY IMPROVEMENTS OR SUBSTANCES LOCATED OR COMPRISING THE PROPERTY; OR

C. THE COMPLIANCE OF THE PROPERTY WITH ANY STATUTE, LAW, TREATY, RULE, CODE, ORDINANCE, REGULATION, PERMIT, OFFICIAL INTERPRETATION, CERTIFICATE, JUDGMENT, DECISION, DECREE, INJUNCTION, WRIT, ORDER OR LIKE ACTION OF ANY FEDERAL, STATE, COUNTY, MUNICIPALITY, COURT, TRIBUNAL, REGULATORY COMMISSION OR OTHER OR OTHER GOVERNMENTAL ENTITY, AUTHORITY, AGENCY OR BODY, WHETHER LEGISLATIVE, JUDICIAL OR EXECUTIVE (OR A COMBINATION OR PERMUTATION THEREOF) WITH JURISDICTION OVER THE PROPERTY.

GRANTOR HAS NOT MADE, DOES NOT MAKE AND EXPRESSLY DISCLAIMS, ANY WARRANTIES, REPRESENTATIONS, COVENANTS OR GUARANTEES, EXPRESSED OR IMPLIED, OR ARISING BY OPERATION OF LAW, AS TO THE MERCHANTABILITY, HABITABILITY, QUANTITY, QUALITY OR ENVIRONMENTAL CONDITION OF THE PROPERTY OR ITS SUITABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OR USE. GRANTEE AFFIRMS THAT PRIOR TO DELIVER OF THIS DEED WITHOUT WARRANTY, GRANTEE HAS INVESTIGATED AND INSPECTED THE PROPERTY TO ITS SATISFACTION AND BECOME FAMILIAR AND SATISFIED WITH THE CONDITION OF THE PROPERTY, AND GRANTEE HAS MADE ITS DETERMINATION AS TO (1) THE MERCHANTABILITY, QUANTITY, QUALITY AND CONDITION OF THE PROPERTY, INCLUDING THE POSSIBLE PRESENCE OF TOXIC OR HAZARDOUS SUBSTANCES, MATERIALS OR WASTES OR OTHER ACTUAL OR POTENTIAL ENVIRONMENTAL CONTAMINANTS, AND (2) THE PROPERTY'S SUITABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OR USE.

WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, GRANTEE AND ITS SUCCESSORS AND ASSIGNS HAVE ASSUMED ALL RISK AND LIABILITY WITH RESPECT TO THE PRESENCE OF TOXIC OR HAZARDOUS SUBSTANCES, MATERIALS OR WASTES OR OTHER ACTUAL OR POTENTIAL ENVIRONMENTAL CONTAMINANTS ON, WITHIN OR UNDER THE SURFACE OF THE PROPERTY, WHETHER KNOWN OR UNKNOWN, APPARENT, NON-APPARENT OR LATENT, AND WHETHER EXISTING PRIOR TO, AT OR SUBSEQUENT TO TRANSFER OF THE AUDITORIUM TRACT OR SAFD TRACT TO GRANTEE.

GRANTOR IS HEREBY RELEASED BY GRANTEE AND ITS SUCCESSORS AND ASSIGNS OF AND FROM ANY AND ALL RESPONSIBILITY, LIABILITY,

OBLIGATIONS AND CLAIMS, KNOWN OR UNKNOWN, RELATING TO THE PROPERTY, OR EITHER OF THEM, INCLUDING ACTIONS FOR CONTRIBUTION OR INDEMNITY, THAT GRANTEE OR ITS SUCCESSORS AND ASSIGNS MAY HAVE AGAINST GRANTOR OR THAT MAY ARISE IN THE FUTURE, BASED IN WHOLE OR IN PART UPON THE PRESENCE OF TOXIC OR HAZARDOUS SUBSTANCES, MATERIALS OR WASTES OR OTHER ACTUAL OR POTENTIAL ENVIRONMENTAL CONTAMINANTS ON, WITHIN OR UNDER THE SURFACE OF THE PROPERTY, INCLUDING ALL RESPONSIBILITY, LIABILITY, OBLIGATIONS AND CLAIMS THAT MAY ARISE UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, AS AMENDED 42 U.S.C. § 9601 ET SEQ. GRANTEE FURTHER ACKNOWLEDGES THAT THE PROVISIONS OF THIS PARAGRAPH HAVE BEEN FULLY EXPLAINED TO GRANTEE AND THAT GRANTEE FULLY UNDERSTANDS AND ACCEPTS THE SAME.

This conveyance is intended to include any property interests obtained by after-acquired title.

When the context requires, singular nouns and pronouns include the plural.

[Signatures appear on following pages.]

Signed to be effective as of the first date above written.

GRANTOR:

CITY OF SAN ANTONIO, TEXAS, a Texas
municipal corporation

By: [Signature]
Name: Penny Post oak Ferguson
Title: Assistant City Manager

ATTEST:

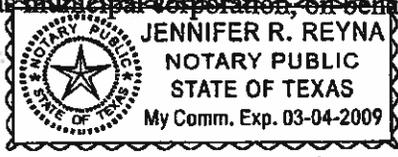
[Signature]
City Clerk

APPROVED AS TO FORM:

[Signature]
[Assistant] City Attorney

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This instrument was acknowledged before me on the 10th day of August 2008, by Penny Post oak Ferguson, Asst. City Manager of **CITY OF SAN ANTONIO, TEXAS**, a Texas municipal corporation, on behalf of said municipal corporation.

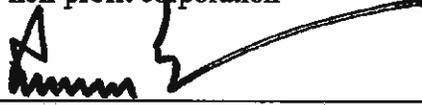


[Signature]
Notary Public in and for the State of Texas

My commission expires: 3/4/09

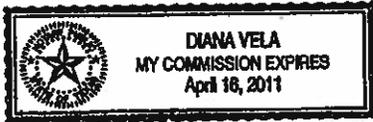
GRANTEE:

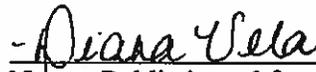
**BEXAR COUNTY PERFORMING ARTS
CENTER FOUNDATION,
a Texas non-profit corporation**

By: 
Name: J. Bruce Bugg, Jr.
Title: Chairman and President

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This instrument was acknowledged before me on the 31st day of July, 2008, by J. Bruce Bugg, Jr., Chairman and President of Bexar County Performing Arts Center Foundation, a Texas non-profit corporation, on behalf of said corporation.




Notary Public in and for the State of Texas

My commission expires: 4/16/2011

EXHIBITS:

- Exhibit A-1 Description of Auditorium Tract
- Exhibit A-2 Description of SAFD Tract
- Exhibit B Restrictive Covenants

EXHIBIT "A-1" TO DEED WITHOUT WARRANTY**DESCRIPTION OF AUDITORIUM TRACT**

3.360 ACRES OF LAND SITUATED IN THE CITY OF SAN ANTONIO, BEXAR COUNTY, TEXAS, BEING A PORTION OF LOT 15, URSULINE ADDITION, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 105, PAGE 251, DEED AND PLAT RECORDS OF BEXAR COUNTY, TEXAS, A PORTION OF THE ABANDONED OLD SAN ANTONIO RIVER LOCATED IN N.C.B. 180 AND A PORTION OF LOT 19, N.C.B. 412; SAID 3.360 ACRES BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING, AT A FOUND 100D NAIL, ON THE WESTERLY LINE OF AUDITORIUM CIRCLE, MARKING THE MOST NORTHERLY CORNER OF LOT 12, N.C.B. 180, URSULINE ADDITION, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 105, PAGE 251, DEED AND PLAT RECORDS OF BEXAR COUNTY, TEXAS, SAME BEING THE MOST EASTERLY CORNER OF LOT 11 AS CONVEYED TO OLD HAVANA INN, L.L.C., AS DESCRIBED IN VOLUME 7062, PAGE 158, REAL PROPERTY RECORDS OF BEXAR COUNTY, TEXAS;

THENCE, N 15° 01' 47" W, ALONG THE COMMON BOUNDARY LINE BETWEEN SAID LOT 11 AND THIS TRACT, A DISTANCE OF 58.02 FEET, TO A FOUND MAG NAIL MARKING THE MOST NORTHERLY CORNER OF LOT 11, SAME BEING THE MOST EASTERLY CORNER OF LOT 10 AND THE MOST EASTERLY CORNER OF THAT CERTAIN TRACT OF LAND CONVEYED TO OLD HAVANA INN, L.L.C., AS DESCRIBED IN VOLUME 7256, PAGE 1696, REAL PROPERTY RECORDS OF BEXAR COUNTY, TEXAS;

THENCE, N 02° 26' 52" W, CROSSING SAID AUDITORIUM CIRCLE, A DISTANCE OF 71.61 FEET TO A SET "X" IN A ROCK PLANTER;

THENCE, N 89° 43' 36" E, ALONG THE SAID ROCK PLANTER, A DISTANCE OF 39.99 FEET, TO A SET "X" IN THE ROCK PLANTER;

THENCE, N 00° 16' 24" W, ALONG THE SAID ROCK PLANTER, A DISTANCE OF 4.54 FEET, TO A SET P.K. NAIL AT THE BASE OF THE NORTHERLY FACE OF A RETAINING WALL LOCATED ALONG THE SOUTHERLY LINE OF THE SAN ANTONIO RIVER;

THENCE, N 89° 46' 23" E, ALONG THE NORTHERLY FACE OF SAID RETAINING WALL, SAME BEING THE SOUTHERLY LINE OF THE SAN ANTONIO RIVER, A DISTANCE OF 246.01 FEET, TO A SET P.K. NAIL AT THE BASE OF THE RETAINING WALL; SAID NAIL MARKING AN ANGLE POINT IN THE RETAINING WALL;

THENCE, N 00° 10' 33" E, ALONG THE WESTERLY FACE OF THE RETAINING WALL, SAME BEING THE SOUTHERLY LINE OF THE SAN ANTONIO RIVER, A DISTANCE OF 6.89 FEET, TO A SET P.K. NAIL AT THE BASE OF THE RETAINING WALL; SAID NAIL MARKING AN ANGLE POINT IN THE RETAINING WALL;

THENCE, N 89° 50' 57" E, ALONG THE NORTHERLY FACE OF THE RETAINING WALL, SAME BEING THE SOUTHERLY LINE OF THE SAN ANTONIO RIVER, A DISTANCE OF 12.25 FEET, TO A SET P.K. NAIL AT THE BASE OF THE RETAINING WALL;

THENCE, N 65° 07' 13" E, ALONG THE SOUTHERLY LINE OF THE SAN ANTONIO RIVER, A DISTANCE OF 76.25 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED IN THE SOUTHWESTERLY RIGHT OF WAY LINE OF FOURTH STREET (55.6' WIDE);

THENCE, S 55° 13' 29" E, ALONG THE SOUTHWESTERLY RIGHT OF WAY LINE OF FOURTH STREET, A DISTANCE OF 149.37 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP AT THE WESTERLY CURB LINE OF AUDITORIUM CIRCLE;

THENCE, ALONG THE WESTERLY AND NORTHERLY CURB LINE OF AUDITORIUM CIRCLE, THE FOLLOWING COURSES:

S 41° 32' 40" W, A DISTANCE OF 53.68 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

S 50° 10' 18" W, A DISTANCE OF 58.37 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

S 00° 34' 03" W, A DISTANCE OF 38.23 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

S 00° 28' 58" E, A DISTANCE OF 83.93 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

S 25° 19' 12" W, A DISTANCE OF 70.57 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

S 32° 22' 17" W, A DISTANCE OF 88.63 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

SOUTHWESTERLY, ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 9.97 FEET, A CENTRAL ANGLE OF 60° 51' 16" AN ARC LENGTH OF 10.59 FEET AND A CHORD BEARING: S 56° 49' 19" W, 10.10 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

S 89° 49' 38" W, A DISTANCE OF 202.78 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

NORTHWESTERLY, ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 10.17 FEET, A CENTRAL ANGLE OF 59° 34' 52" AN ARC LENGTH OF 10.57

FEET AND A CHORD BEARING: N 57° 59' 35" W, 10.10 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

N 31° 35' 41" W, A DISTANCE OF 96.93 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP;

NORTHWESTERLY, ALONG THE ARC OF A CURVE TO THE LEFT HAVING A RADIUS OF 14.46 FEET, A CENTRAL ANGLE OF 39° 41' 47" AN ARC LENGTH OF 10.02 FEET AND A CHORD BEARING: N 48° 06' 00" W, 9.82 FEET, TO A SET "X";

N 00° 22' 12" W, A DISTANCE OF 107.03 FEET, TO A SET P.K. NAIL;

S 89° 29' 03" W, CROSSING AUDITORIUM CIRCLE, A DISTANCE OF 20.55 FEET, TO A FOUND CONCRETE NAIL MARKING THE MOST EASTERLY CORNER OF THE AFOREMENTIONED LOT 12, N.C.B. 180;

THENCE N 15° 07' 00" W, ALONG THE COMMON BOUNDARY LINE BETWEEN THIS TRACT AND SAID LOT 12, A DISTANCE OF 58.10 FEET, TO THE POINT OF BEGINNING AND CONTAINING 3.360 ACRES OF LAND MORE OR LESS.

EXHIBIT "A-2" TO DEED WITHOUT WARRANTY

0.457 ACRES OF LAND SITUATED IN THE CITY OF SAN ANTONIO, BEXAR COUNTY, TEXAS BEING ALL OF LOT 12 AND A PORTION OF LOT 15, N.C.B. 180, URSULINE ADDITION, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 105, PAGE 251, DEED AND PLAT RECORDS OF BEXAR COUNTY, TEXAS; SAID 0.457 ACRES BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING, AT A FOUND 100D MARKING THE MOST NORTHERLY CORNER OF SAID LOT 12, SAME BEING THE MOST EASTERLY CORNER OF LOT 11, AS CONVEYED TO OLD HAVANA INN, L.L.C., AS DESCRIBED IN VOLUME 7062, PAGE 158, REAL PROPERTY RECORDS OF BEXAR COUNTY, TEXAS;

THENCE, S 15° 07' 00" E, ALONG COMMON BOUNDARY LINE BETWEEN THIS TRACT AND LOT 12, A DISTANCE OF 58.10 FEET, TO A FOUND CONCRETE NAIL MARKING THE MOST EASTERLY CORNER OF SAID LOT 12;

THENCE, INTO AND ACROSS SAID LOT 15, THE FOLLOWING COURSES:

N 89° 29' 03" E, CROSSING AUDITORIUM CIRCLE, A DISTANCE OF 20.55 FEET, TO A SET P.K. NAIL;

S 00° 22' 12" E, A DISTANCE OF 107.03 FEET, TO A SET "X";

SOUTHEASTERLY, ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 14.46 FEET, A CENTRAL ANGLE OF 39° 41' 47" AN ARC LENGTH OF 10.02 FEET AND A CHORD BEARING: S 48° 06' 00" E, 9.82 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED AT THE BACK OF CURB ON THE EASTERLY SIDE OF AUDITORIUM CIRCLE;

S 69° 25' 06" W, CROSSING AUDITORIUM CIRCLE, A DISTANCE OF 88.98 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED AT THE BACK OF CURB;

S 72° 48' 34" W, A DISTANCE OF 37.37 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED AT THE BACK OF CURB;

S 86° 19' 20" W, A DISTANCE OF 5.68 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED AT THE BACK OF CURB;

WESTERLY, ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 14.56 FEET, A CENTRAL ANGLE OF 20° 39' 25" AN ARC LENGTH OF 5.25 FEET AND A CHORD BEARING: N 82° 39' 01" W, 5.22 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED IN THE EASTERLY RIGHT OF WAY LINE OF NAVARRO STREET (55.6 R.O.W.);

THENCE, ALONG THE EASTERLY RIGHT OF WAY LINE OF NAVARRO STREET, THE FOLLOWING COURSES:

N 00° 01' 03" W, A DISTANCE OF 62.31 FEET, TO THE MOST SOUTHERLY BUILDING CORNER OF THE BUILDING SITUATED ON SAID LOT 12;

N 42° 49' 14" W, A DISTANCE OF 50.19 FEET, TO THE MOST WESTERLY BUILDING CORNER OF THE BUILDING SITUATED ON SAID LOT 12; SAID CORNER FURTHER MARKING THE MOST WESTERLY CORNER OF LOT 12, SAME BEING THE MOST SOUTHERLY CORNER OF LOT 11 AS CONVEYED TO OLD HAVANA INN, L.L.C., AS DESCRIBED IN VOLUME 7062, PAGE 158, REAL PROPERTY RECORDS OF BEXAR COUNTY, TEXAS;

THENCE, N 46° 56' 36" E, LEAVING THE EASTERLY RIGHT OF WAY LINE OF NAVARRO STREET AND ALONG THE COMMON BOUNDARY LINE BETWEEN LOT 12 AND LOT 11, A DISTANCE OF 164.61 FEET, TO THE POINT OF BEGINNING AND CONTAINING 0.457 ACRES OF LAND MORE OR LESS.

EXHIBIT "B" TO DEED WITHOUT WARRANTY**RESTRICTIVE COVENANTS**

1. Subject to the approval rights retained by Grantor under the terms of these Restrictive Covenants, Grantee will have the sole, exclusive and non-delegable right to enter into Naming Agreements. Each Naming Agreement shall identify specifically the name thereby authorized to be used.
2. Each Naming Agreement shall adopt and require compliance with the Naming Parameters. A copy of each Naming Agreement shall be given to Grantor by Grantee not less than thirty (30) days prior to the date on which such Naming Agreement will become effective.
3. Subject to the circumstances described in Section 4 below, the Naming Agreement for each of the following purposes shall be subject to and require the prior approval of Grantor, which may not be unreasonably withheld, conditioned or delayed, as a condition precedent to the validity and legally binding effect thereof:
 - A. Subject to the circumstances described in Section 4 below, the general name to be used in connection with the Performing Arts Center at any time located on Tract 1; and
 - B. The general name to be used in connection with the Performing Arts Center at any time located on Tract 2.
4. Grantee will not be required to obtain Grantor's approval of any named to be used or the terms of the Naming Agreement for the Performing Arts Center located on Tract 1, if that Naming Agreement:
 - A. Evidences a legally binding and enforceable obligation of a single licensee to fund an amount not less than ten percent (10%) of the total Capital Budget as consideration for such Naming Agreement;
 - B. Provides that it will terminate in all respects if such amount is not fully paid to Grantee;
 - C. Requires Grantor's approval, which may not be unreasonably withheld, conditioned or delayed, for any material waiver or amendment of the Naming Agreement, including, but not limited to, any reduction or extension of time related to the payment obligations of such licensee thereunder; and
 - D. Otherwise complies with Section 5 of these Restrictive Covenants.
5. Each Naming Agreement shall contain the following restrictions, limitations and conditions:
 - A. Each name to be used in connection with the Performing Arts Center shall:

Center;

- (1) Include the name of a facilitator or benefactor of the Performing Arts

- (2) Honor a person, place, institution, group, entity or event, whether now existing or that existed in the past;

- (3) Recognize events or affairs of historic significance; or

- (4) Embrace civic ideals or goals.

B. A name to be used in connection with the Performing Arts Center shall not include a name or reference that:

- (1) Is defamatory, libelous, obscene, vulgar or offensive to the general public;

- (2) May violate the rights of any person, institution, group or entity;

- (3) Identifies or is identified with distilled liquor or spirits, habit-forming drugs, tobacco products, adult-only entertainment, sexually-oriented businesses or publications, pornography, massage parlors, erectile dysfunction, birth control or sexually transmitted diseases firearms or firearm ammunition, tattoo parlors, pawn shops, check-cashing establishments, or any product or service which is prohibited by applicable law;

- (4) Advocates or opposes any political candidate, issue, cause, or belief;

- (5) Identifies or is identified with a person or organization that has been convicted of a criminal offense; or

- (6) Advocates violence, criminal activity or immorality.

C. The consideration payable to Grantee pursuant to such Naming Agreement shall be paid in not less than five (5) equal, annual installments provided, however, that consideration of at least \$15,000,000 may be paid in up to fifteen (15) equal annual installments.

6. Neither the Property nor any interest therein may be voluntarily or involuntarily, transferred, sold, encumbered, leased or conveyed without the prior written consent of Grantor and County, which consent may not be unreasonably withheld, conditioned or delayed, and any attempted conveyance or encumbrance of the Property shall be void and of no legal effect; provided, however, that notwithstanding the foregoing, without the prior consent of Grantor and County, (i) portions of the Property may be leased or licensed when such lease or license is consistent with the Public Purpose, and (ii) subject to obtaining any approvals required with respect to such easements under the San Antonio City Code, utility, drainage and access easements and similar rights and interests in and to the Property may be granted to the extent necessary or desirable in connection with the development and use of the Property.

7. For the purpose of this Declaration:
- A. "**Capital Budget**" means the total budget prepared by Grantee for the development, construction, equipping and furnishing of the Performing Arts Center.
- B. "**Naming Agreement**" means an agreement granting the right to use a specific name to identify the Performing Arts Center or a component part thereof;
- C. "**Naming Parameters**" means the requirements and limitations described in Section 4 of these Restrictive Covenants.
8. These Restrictive Covenants run with the Property and are binding upon Grantee and Grantee's successors and assigns until title to the Property shall automatically revert to and vest in Grantor.
9. Failure by Grantor to enforce these Restrictive Covenants is not a waiver.
10. Grantor may correct typographical or grammatical errors, ambiguities or inconsistencies contained in these Restrictive Covenants, provided that any such correction must not impair or affect a vested right of Grantee or any party to a Naming Agreement.
11. These Restrictive Covenants may be amended at any time by the mutual consent of Grantor and Grantee.
12. The provisions of these Restrictive Covenants are severable. If any provision hereof is invalidated or declared unenforceable, the other provisions will remain valid and enforceable.
13. Any notice required or permitted by these Restrictive Covenants must be given in writing by certified mail, return receipt requested. Unless otherwise required by law or by these Restrictive Covenants, actual notice to the party to be notified is sufficient.
14. Grantor may bring an action against Grantee to enforce or enjoin a violation of these Restrictive Covenants. If Grantor is successful in such proceeding, Grantee shall be liable to Grantor for all costs and reasonable attorneys' fees incurred by Grantor in enforcing or enjoining a violation of these Restrictive Covenants. Grantee acknowledges that the Restrictive Covenants are necessarily special, unique and extraordinary and that the harm to Grantor arising from a breach thereof cannot be reasonably and adequately be compensated by money damages, as such breach will cause Grantor to suffer irreparable harm. Accordingly, upon failure of Grantee to comply with the Restrictive Covenants at any time, Grantor or any of its successors or assigns shall be entitled to injunctive relief or other extraordinary relief, such injunctive or other extraordinary relief to be cumulative to, but not in limitation of, any other remedies that may be available at law or equity, but Grantor shall not be entitled to, and Grantor hereby waives the right to, any punitive or consequential damages.

AFTER RECORDING RETURN TO:
BEXAR COUNTY PERFORMING ARTS
CENTER FOUNDATION
Attn: J. Bruce Bugg, Jr., Chairman and President
3316 Oakwell Court
San Antonio, Texas 78218

FILED BY
PRESIDIO TITLE
108545BW

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

CORRECTION DEED WITHOUT WARRANTY

Date: September 9, ~~2009~~ ²⁰¹⁰

Grantor: City of San Antonio, Texas, a Texas municipal corporation, pursuant to Ordinance No. 2008-06-19-0547, duly adopted by the City Council of City of San Antonio on June 19, 2008

Grantor's Mailing Address: P. O. Box 839966, San Antonio, Bexar County, Texas 78283-3966, Attention: City Attorney, 3rd Floor, City Hall.

Grantee: Bexar County Performing Arts Center Foundation, a Texas non-profit corporation

Grantee's Mailing Address: 3316 Oakwell Court, San Antonio, Bexar County, Texas 78218.

Consideration: Cash and other good and valuable consideration and other benefits accruing under the terms of that certain Grant and Development Agreement by and between Grantor, Bexar County, Texas ("County") and Grantee dated June 30, 2008 (the "Grant and Development Agreement"), the sufficiency and receipt of all of which are hereby confessed and acknowledged.

Property (including any improvements): Being two parcels of land, to-wit:

Parcel 1: The parcel of land known as 100 Auditorium Circle, San Antonio, Bexar County, Texas 78205, as more particularly described by metes and bounds in Exhibit "A-1", attached hereto as a part hereof for all purposes.



CERTIFICATE

The page to which this certificate is affixed may have been altered to redact confidential personal information but is otherwise a full, true and correct copy of the original on file and of record in my office.

ATTESTED:
GERARD C. RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS

BY: [Signature]
Deputy

10/5/17
Date
JA180

GC Exh 3

Parcel 2: The parcel of land known as 115 Auditorium Circle, San Antonio, Bexar County, Texas 78205, as more particularly described by metes and bounds in Exhibit "A-2", attached hereto as a part hereof for all purposes.

Reservations from Conveyance: All portions of the Property which may lie within a public road or right-of-way are saved and excepted from this conveyance.

Exceptions to Conveyance: This conveyance is made subject to the restrictive covenants set forth in Exhibit "B", attached hereto as a part hereof for all purposes (the "Restrictive Covenants"), and the Restrictive Covenants shall run with the land and shall be enforceable by Grantor or the County. In addition, this conveyance is subject to validly existing and effective easements, rights-of-way, and prescriptive rights, whether of record or not; all presently recorded and validly existing restrictions, reservations, covenants, conditions, oil and gas leases, mineral interests, and water interests outstanding in persons other than Grantor, and other instruments, other than conveyances of the surface fee estate, that affect the Property; validly existing rights of adjoining owners in any walls and fences situated on a common boundary; any discrepancies, conflicts, or shortages in area or boundary lines; any encroachments or overlapping of improvements; and taxes for 2008, which Grantee assumes and agrees to pay.

Grantor, for the Consideration and subject to the Reservations from Conveyance, the Exceptions to Conveyance and the conditions of automatic reverter set forth in this Deed Without Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's legal representatives, successors and assigns forever, without express or implied warranty. All warranties that might arise by common law as well as the warranties in Section 5.0023 of the Texas Property Code (or its successor) are excluded.

IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT THIS CONVEYANCE SHALL BE EFFECTIVE FOR ONLY SO LONG AS:

A. Fee simple title to the Property is vested in an organization exempt from taxation under Section 501(c) (3) of the Internal Revenue Code of 1986, 26 U.S.C. § 101, et seq., as amended (the "Code");

B. Neither Grantor nor the County has caused to be filed in the Real Property Records of Bexar County, Texas, a Preconstruction Termination Notice (as defined in the Grant and Development Agreement), prior to the date on which a Certificate of Substantial Completion has been filed by Grantee in the Real Property Records of Bexar County, Texas;

C. Efforts to construct the Performing Arts Center on the Property have not been abandoned prior to substantial completion of the Performing Arts Center;



CERTIFICATE

The page to which this certificate is affixed may have been altered to redact confidential personal information but is otherwise a full, true and correct copy of the original on file and of record in my office.

ATTESTED: _____
GERARD C. RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS

BY: [Signature]
Deputy

10/5/17
Date
JA181

D. Upon completion of the Performing Arts Center, the Property is continuously used (subject to temporary cessation due to force majeure, or for remodeling and repairs, or reconstruction following a casualty) primarily for the Public Purpose; and

E. The County has not provided a County Certificate of Termination (as defined in the Grant and Development Agreement) to Grantor and filed such certificate in the Real Property Records of Bexar County, Texas, prior to the date on which a Certificate of Substantial Completion has been filed by Grantee in the Real Property Records of Bexar County, Texas.

F. If a petition is filed by or against an owner of fee simple title to the Property under any section or chapter of federal or state bankruptcy laws or under any similar law or statute of the United States or any state thereof, the petition shall have been dismissed, withdrawn or otherwise concluded without adjudication within one hundred eighty (180) days after being filed.

In the event that (i) fee simple title to the Property is not vested in an organization exempt from taxation under the Code, (ii) either Grantor or County have caused a Preconstruction Termination Notice to be filed in the Real Property Records of Bexar County, Texas, (iii) efforts to construct the Performing Arts Center have been abandoned prior to Substantial Completion thereof, (iv) the County has provided to Grantor and caused to be filed in the Real Property Records of Bexar County, Texas a County Certificate of Termination prior to the substantial completion of the Performing Arts Center, (v) upon completion, the Performing Arts Center is not continuously used (subject to temporary cessation due to force majeure, or for remodeling and repairs, or reconstruction following a casualty or condemnation) primarily for the Public Purpose, or (vi) a petition is filed by or against an owner of fee simple title to the Property under any section or chapter of federal or state bankruptcy laws or under any similar law of statute of the United States or any state thereof and the petition has not been dismissed, withdrawn or otherwise concluded without adjudication within one hundred eighty (180) days after having been filed, then, upon any such event or occurrence, all right, title and interest conveyed by this Deed Without Warranty shall automatically revert to and vest in Grantor, Grantor's successors and assigns, without the necessity of any further act on the part of or on behalf of Grantor, it being the intent of Grantor to convey a fee simple determinable estate to the Grantee.

For the purposes of this Deed Without Warranty, Grantor and Grantee confirm and agree that:

(1) The word "abandoned" means the complete cessation of construction activities related to the Performing Arts Center prior to Substantial Completion of the main performance hall for a continuous period of twelve (12) months unless such cessation results from (a) a Casualty or other Force Majeure Event (as defined in the Grant and Development Agreement) (b) a default by Grantor or the County under the Grant and Development Agreement that continues beyond the expiration of any applicable notice and cure period, or (c)



CERTIFICATE

The page to which this certificate is affixed may have been altered to redact confidential personal information but is otherwise a full, true and correct copy of the original on file and of record in my office.

ATTESTED: _____
GERARD C. RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS

BY: [Signature] Deputy Date 10/5/17
JA182

Signed to be effective as of the first date above written.

GRANTOR:

CITY OF SAN ANTONIO, TEXAS, a Texas
municipal corporation

By: *Penny Postoak Ferguson*
Name: Penny Postoak Ferguson
Title: Assistant City Manager

ATTEST:
Leticia M. Villed
City Clerk

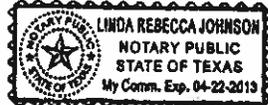


APPROVED AS TO FORM:

[Signature]
[Assistant] City Attorney

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This instrument was acknowledged before me on the 14th day of September, 2008, by Penny Postoak Ferguson, Assistant City Manager of CITY OF SAN ANTONIO, TEXAS, a Texas municipal corporation, on behalf of said municipal corporation.



[Signature]
Notary Public in and for the State of Texas

My commission expires: 4/2/13



CERTIFICATE
The page to which this certificate is affixed may have been altered to redact confidential personal information but is otherwise a full, true and correct copy of the original on file and of record in my office.

ATTESTED:
GERARD C. RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS

BY: *[Signature]* Deputy
Date 10/15/17
JA187

1EXHIBIT "A-1" TO CORRECTED DEED WITHOUT WARRANTY

DESCRIPTION OF PARCEL 1 (100 AUDITORIUM CIRCLE)

3.360 ACRES OF LAND SITUATED IN THE CITY OF SAN ANTONIO, BEXAR COUNTY, TEXAS, BEING A PORTION OF LOT 15, URSULINE ADDITION, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 105, PAGE 251, DEED AND PLAT RECORDS OF BEXAR COUNTY, TEXAS, A PORTION OF THE ABANDONED OLD SAN ANTONIO RIVER LOCATED IN N.C.B. 180 AND A PORTION OF LOT 19, N.C.B. 412; SAID 3.360 ACRES BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING, AT A FOUND 100D NAIL, ON THE WESTERLY LINE OF AUDITORIUM CIRCLE, MARKING THE MOST NORTHERLY CORNER OF LOT 12, N.C.B. 180, URSULINE ADDITION, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 105, PAGE 251, DEED AND PLAT RECORDS OF BEXAR COUNTY, TEXAS, SAME BEING THE MOST EASTERLY CORNER OF LOT 11 AS CONVEYED TO OLD HAVANA INN, L.L.C., AS DESCRIBED IN VOLUME 7062, PAGE 158, REAL PROPERTY RECORDS OF BEXAR COUNTY, TEXAS;

THENCE, N 15° 01' 47" W, ALONG THE COMMON BOUNDARY LINE BETWEEN SAID LOT 11 AND THIS TRACT, A DISTANCE OF 58.02 FEET, TO A FOUND MAG NAIL MARKING THE MOST NORTHERLY CORNER OF LOT 11, SAME BEING THE MOST EASTERLY CORNER OF LOT 10 AND THE MOST EASTERLY CORNER OF THAT CERTAIN TRACT OF LAND CONVEYED TO OLD HAVANA INN, L.L.C., AS DESCRIBED IN VOLUME 7256, PAGE 1696, REAL PROPERTY RECORDS OF BEXAR COUNTY, TEXAS;

THENCE, N 02° 26' 52" W, CROSSING SAID AUDITORIUM CIRCLE, A DISTANCE OF 71.61 FEET TO A SET "X" IN A ROCK PLANTER;

THENCE, N 89° 43' 36" E, ALONG THE SAID ROCK PLANTER, A DISTANCE OF 39.99 FEET, TO A SET "X" IN THE ROCK PLANTER;

THENCE, N 00° 16' 24" W, ALONG THE SAID ROCK PLANTER, A DISTANCE OF 4.54 FEET, TO A SET P.K. NAIL AT THE BASE OF THE NORTHERLY FACE OF A RETAINING WALL LOCATED ALONG THE SOUTHERLY LINE OF THE SAN ANTONIO RIVER;

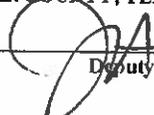
THENCE, N 89° 46' 23" E, ALONG THE NORTHERLY FACE OF SAID RETAINING WALL, SAME BEING THE SOUTHERLY LINE OF THE SAN ANTONIO RIVER, A DISTANCE OF 246.01 FEET, TO A SET P.K. NAIL AT



CERTIFICATE

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ATTESTED:
GERARD C. RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS

BY:  Deputy

10/5/17
Date
JA189

**2EXHIBIT "A-2" TO CORRECTED DEED WITHOUT WARRANTY
DESCRIPTION OF PARCEL 2 (115 AUDITORIUM CIRCLE)**

0.457 ACRES OF LAND SITUATED IN THE CITY OF SAN ANTONIO, BEXAR COUNTY, TEXAS BEING ALL OF LOT 12 AND A PORTION OF LOT 15, N.C.B. 180, URSULINE ADDITION, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 105, PAGE 251, DEED AND PLAT RECORDS OF BEXAR COUNTY, TEXAS; SAID 0.457 ACRES BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING, AT A FOUND 100D MARKING THE MOST NORTHERLY CORNER OF SAID LOT 12, SAME BEING THE MOST EASTERLY CORNER OF LOT 11, AS CONVEYED TO OLD HAVANA INN, L.L.C., AS DESCRIBED IN VOLUME 7062, PAGE 158, REAL PROPERTY RECORDS OF BEXAR COUNTY, TEXAS;

THENCE, S 15° 07' 00" E, ALONG COMMON BOUNDARY LINE BETWEEN THIS TRACT AND LOT 12, A DISTANCE OF 58.10 FEET, TO A FOUND CONCRETE NAIL MARKING THE MOST EASTERLY CORNER OF SAID LOT 12;

THENCE, INTO AND ACROSS SAID LOT 15, THE FOLLOWING COURSES:

N 89° 29' 03" E, CROSSING AUDITORIUM CIRCLE, A DISTANCE OF 20.55 FEET, TO A SET P.K. NAIL;

S 00° 22' 12" E, A DISTANCE OF 107.03 FEET, TO A SET "X";

SOUTHEASTERLY, ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 14.46 FEET, A CENTRAL ANGLE OF 39° 41' 47" AN ARC LENGTH OF 10.02 FEET AND A CHORD BEARING: S 48° 06' 00" E, 9.82 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED AT THE BACK OF CURB ON THE EASTERLY SIDE OF AUDITORIUM CIRCLE;

S 69° 25' 06" W, CROSSING AUDITORIUM CIRCLE, A DISTANCE OF 88.98 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED AT THE BACK OF CURB;

S 72° 48' 34" W, A DISTANCE OF 37.37 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED AT THE BACK OF CURB;

S 86° 19' 20" W, A DISTANCE OF 5.68 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED AT THE BACK OF CURB;



CERTIFICATE

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ATTESTED:
GERARD C. RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS

BY: [Signature]
Deputy

10/8/17
Date
JA192

WESTERLY, ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 14.56 FEET, A CENTRAL ANGLE OF 20° 39' 25" AN ARC LENGTH OF 5.25 FEET AND A CHORD BEARING: N 82° 39' 01" W, 5.22 FEET, TO A SET ½ INCH IRON ROD WITH BPI CAP LOCATED IN THE EASTERLY RIGHT OF WAY LINE OF NAVARRO STREET (55.6 R.O.W.);

THENCE, ALONG THE EASTERLY RIGHT OF WAY LINE OF NAVARRO STREET, THE FOLLOWING COURSES:

N 00° 01' 03" W, A DISTANCE OF 62.31 FEET, TO THE MOST SOUTHERLY BUILDING CORNER OF THE BUILDING SITUATED ON SAID LOT 12;

N 42° 49' 14" W, A DISTANCE OF 50.19 FEET, TO THE MOST WESTERLY BUILDING CORNER OF THE BUILDING SITUATED ON SAID LOT 12; SAID CORNER FURTHER MARKING THE MOST WESTERLY CORNER OF LOT 12, SAME BEING THE MOST SOUTHERLY CORNER OF LOT 11 AS CONVEYED TO OLD HAVANA INN, L.L.C., AS DESCRIBED IN VOLUME 7062, PAGE 158, REAL PROPERTY RECORDS OF BEXAR COUNTY, TEXAS;

THENCE, N 46° 56' 36" E, LEAVING THE EASTERLY RIGHT OF WAY LINE OF NAVARRO STREET AND ALONG THE COMMON BOUNDARY LINE BETWEEN LOT 12 AND LOT 11, A DISTANCE OF 164.61 FEET, TO THE POINT OF BEGINNING AND CONTAINING 0.457 ACRES OF LAND MORE OR LESS.



CERTIFICATE

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ATTESTED:
GERARD C. RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS

BY: [Signature]
Deputy

10/5/17
Date
JA193

3EXHIBIT "B" TO CORRECTED DEED WITHOUT WARRANTY

RESTRICTIVE COVENANTS

1. Subject to the approval rights retained by Grantor under the terms of these Restrictive Covenants, Grantee will have the sole, exclusive and non-delegable right to enter into Naming Agreements. Each Naming Agreement shall identify specifically the name thereby authorized to be used.
2. Each Naming Agreement shall adopt and require compliance with the Naming Parameters. A copy of each Naming Agreement shall be given to Grantor by Grantee not less than thirty (30) days prior to the date on which such Naming Agreement will become effective.
3. Subject to the circumstances described in Section 4 below, the Naming Agreement for each of the following purposes shall be subject to and require the prior approval of Grantor, which may not be unreasonably withheld, conditioned or delayed, as a condition precedent to the validity and legally binding effect thereof:
 - A. Subject to the circumstances described in Section 4 below, the general name to be used in connection with the Performing Arts Center at any time located on Tract 1; and
 - B. The general name to be used in connection with the Performing Arts Center at any time located on Tract 2.
4. Grantee will not be required to obtain Grantor's approval of any named to be used or the terms of the Naming Agreement for the Performing Arts Center located on Tract 1, if that Naming Agreement:
 - A. Evidences a legally binding and enforceable obligation of a single licensee to fund an amount not less than ten percent (10%) of the total Capital Budget as consideration for such Naming Agreement;
 - B. Provides that it will terminate in all respects if such amount is not fully paid to Grantee;
 - C. Requires Grantor's approval, which may not be unreasonably withheld, conditioned or delayed, for any material waiver or amendment of the Naming Agreement, including, but not limited to, any reduction or extension of time related to the payment obligations of such licensee thereunder; and
 - D. Otherwise complies with Section 5 of these Restrictive Covenants.
5. Each Naming Agreement shall contain the following restrictions, limitations and conditions:
 - A. Each name to be used in connection with the Performing Arts Center shall:
 - (1) Include the name of a facilitator or benefactor of the Performing Arts Center;
 - (2) Honor a person, place, institution, group, entity or event, whether now existing or that existed in the past;
 - (3) Recognize events or affairs of historic significance; or
 - (4) Embrace civic ideals or goals.
 - B. A name to be used in connection with the Performing Arts Center shall not include a name or reference that:



CERTIFICATE

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ATTESTED:
GERARD C. RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS

BY: [Signature]
Deputy

10/5/17
Date
JA194

correction must not impair or affect a vested right of Grantee or any party to a Naming Agreement.

11. These Restrictive Covenants may be amended at any time by the mutual consent of Grantor and Grantee.

12. The provisions of these Restrictive Covenants are severable. If any provision hereof is invalidated or declared unenforceable, the other provisions will remain valid and enforceable.

13. Any notice required or permitted by these Restrictive Covenants must be given in writing by certified mail, return receipt requested. Unless otherwise required by law or by these Restrictive Covenants, actual notice to the party to be notified is sufficient.

14. Grantor may bring an action against Grantee to enforce or enjoin a violation of these Restrictive Covenants. If Grantor is successful in such proceeding, Grantee shall be liable to Grantor for all costs and reasonable attorneys' fees incurred by Grantor in enforcing or enjoining a violation of these Restrictive Covenants. Grantee acknowledges that the Restrictive Covenants are necessarily special, unique and extraordinary and that the harm to Grantor arising from a breach thereof cannot be reasonably and adequately be compensated by money damages, as such breach will cause Grantor to suffer irreparable harm. Accordingly, upon failure of Grantee to comply with the Restrictive Covenants at any time, Grantor or any of its successors or assigns shall be entitled to injunctive relief or other extraordinary relief, such injunctive or other extraordinary relief to be cumulative to, but not in limitation of, any other remedies that may be available at law or equity, but Grantor shall not be entitled to, and Grantor hereby waives the right to, any punitive or consequential damages.



CERTIFICATE

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ATTESTED: _____
GERARD C. RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS

BY: JA
Deputy

10/5/17
Date
JA196

Doc# 20100171965
 # Pages 18
 09/23/2010 14:38:13 PM
 e-Filed & e-Recorded in the
 Official Public Records of
 BEXAR COUNTY
 GERARD RICKHOFF COUNTY CLERK

 Fees 80.00

STATE OF TEXAS
 COUNTY OF BEXAR
 This is to Certify that this document
 was e-FILED and e-RECORDED in the Official
 Public Records of Bexar County, Texas
 on this date and time stamped thereon.
 09/23/2010 14:38:13 PM
 COUNTY CLERK, BEXAR COUNTY TEXAS



Gerard Rickhoff



CERTIFICATE

The page to which this certificate is affixed may have been altered to redact confidential personal information but is otherwise a full, true and correct copy of the original on file and of record in my office.

ATTESTED: _____
 GERARD C. RICKHOFF
 COUNTY CLERK
 BEXAR COUNTY, TEXAS

BY:  _____
 Deputy

10/15/10
 Date
 JA197

Gerard Rickhoff

COUNTY CLERK



BEXAR COUNTY

BEXAR COUNTY COURTHOUSE
100 DOLOROSA, SUITE 104
SAN ANTONIO, TEXAS 78205

CERTIFICATE

STATE OF TEXAS §

COUNTY OF BEXAR §

I, GERARD RICKHOFF, COUNTY CLERK OF BEXAR COUNTY, TEXAS, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE OFFICIAL PUBLIC RECORDS OF REAL PROPERTY OF BEXAR COUNTY, TEXAS, NOW IN MY LAWFUL CUSTODY AND POSSESSION AS SAME APPEARS OF RECORD FILED IN:

VOLUME 14655

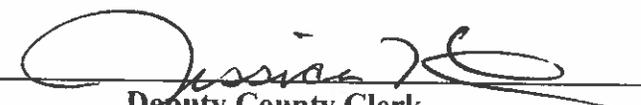
PAGE 579

THIS COPY MAY HAVE BEEN ALTERED TO REDACT CONFIDENTIAL PERSONAL INFORMATION AS REQUIRED BY TEXAS GOVERNMENT CODE 552.147.

IN TESTIMONY WHEREOF, WITNESS MY HAND AND OFFICIAL SEAL OF OFFICE GIVEN IN THE CITY OF SAN ANTONIO, BEXAR COUNTY, TEXAS, ON THIS 5 DAY OF October A.D., 20 17.

GERARD RICKHOFF
COUNTY CLERK
BEXAR COUNTY, TEXAS



BY: 
Deputy County Clerk

ANY PROVISION HEREIN WHICH RESTRICTS THE SALE, RENTAL, OR USE OF THE DESCRIBED REAL PROPERTY BECAUSE OF RACE, COLOR, RELIGION, SEX, HANDICAP, FAMILIAL STATUS OR NATIONAL ORIGIN IS INVALID AND UNENFORCEABLE UNDER FEDERAL LAW.