

Final Brief

Oral Argument Not Yet Scheduled

No. 20-1010

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

LOCAL 23, AMERICAN FEDERATION OF MUSICIANS,  
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent.

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

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**REPLY BRIEF OF PETITIONER LOCAL 23,  
AMERICAN FEDERATION OF MUSICIANS**

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## GLOSSARY

“ALJ” .....Administrative Law Judge

“CBA” .....Collective Bargaining Agreement

“Musicians’ Union” .....Local 23, American Federation of Musicians

“NLRA” or “the Act” .....National Labor Relations Act

“NLRB” or “the Board” .....National Labor Relations Board

“Tobin Center” .....Tobin Center for the Performing Arts

## SUMMARY OF ARGUMENT

Nothing in the National Labor Relations Board's response successfully challenges the showing by Local 23, American Federation of Musicians (the "Musicians' Union") that the Board's decision failed to give appropriate weight to the Section 7 interests of employees in the required accommodation with the property owner's interests.

The NLRB claims that the first step of its new test for determining the Section 7 rights of such employees – whether employees “work both regularly and exclusively” at the facility – is consistent with its pre-*New York New York* precedent. That precedent, however, treated the inquiry as a practical one, aimed at determining whether the property owner's facility was employees' principal workplace. In contrast, the Board here interpreted both “work regularly” and “work exclusively” so strictly as to deprive many employees of the right to engage in Section 7 activity at the only location practical for them to do so, and for reasons that bear no relationship to the owner's property interests.

The second step of the NLRB's new test is even more explicit in its disregard of Section 7 interests. The Board holds that abstract property

interests alone provide sufficient basis to deny employees their organizational rights at their principal workplace, with no requirement that the property owner demonstrate that Section 7 activity would actually interfere with its use of the property. The Board thus inappropriately treats the Section 7 interests of employees who happen to work at a facility owned by an entity other than their own employer as equivalent to those of nonemployee union organizers.

The NLRB's application of its new test to the facts of this case illustrates its flaws. The Tobin Center for the Performing Arts (the "Tobin Center") is indisputably where the musicians "work regularly and exclusively," as that phrase is used in the Board's precedent. The Board's conclusion that the musicians do not "work regularly" at the Center is contrary to Board precedent and common sense. The Board has previously considered even temporary employees to work regularly at a location, and there is no serious claim that the musicians, who perform year after year in public performances at the Center, are strangers to Tobin Center management. Likewise, the Board's conclusion that the musicians do not "work exclusively" at the Center lacks a sound basis. It is undisputed that the musicians have no

practical location other than the Center to exercise their Section 7 rights. And, the fact that the musicians occasionally perform at locations other than the Tobin Center, the Board's stated reason for denying their Section 7 rights, bears no relevance to the Center's property interests.

The NLRB's further conclusion that the Tobin Center was entitled to prohibit the musicians from engaging in Section 7 activity because they had reasonable alternative means of communication, such as leafletting on public property or advertising via social media, constituted an independent error. The Board frankly acknowledged that, under its test, the musicians had *no rights* greater than nonemployee union organizers and, for that reason, the Tobin Center was *not* required to show that permitting the musicians to engage in Section 7 activity would interfere with the Center's actual property interests. The Board's application of its new test, therefore, utterly disregarded its responsibility to reach an *accommodation* of interests.

## ARGUMENT

The NLRB failed in this case to reach *any* “accommodation between the § 7 rights of [a contractor]’s employees and the rights of [the property owner] to control the use of its premises, and to manage its business and property,” *New York-New York, LLC v. NLRB*, 676 F.3d 193, 196 & n.2 (D.C. Cir. 2012) (*New York New York II*) (citation and quotation marks omitted), much less an “[a]ccommodation between the two . . . obtained with as little destruction of one as is consistent with the maintenance of the other,” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The Board does not deny the strength of the employee Section 7 interests at issue. *See* NLRB Br. 20<sup>1</sup> (explaining that the workplace “is a ‘place uniquely appropriate’ for . . . workers to organize on matters of common concern”) (quoting *Republic Aviation Corp.*, 51 NLRB 1186, 1195 (1943)). Yet, the Board’s new test gives decisive weight to the property owner’s “right to exclude” in every case,

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<sup>1</sup> Citations are as follows: “NLRB Br.” refers to the Brief of the NLRB; “Pet. Br.” refers to the Brief of Petitioner Local 23, American Federation of Musicians; “D&O” refers to the NLRB’s Decision and Order in *Tobin Center for the Performing Arts*, 368 NLRB No. 46 (Aug. 23, 2019); “GC Ex.” refers to the NLRB General Counsel’s exhibits; and “Tr.” refers to the transcript of the hearing.

holding that, “under our new standard, the property owner is *not* required to prove that permitting access by off-duty employees of an offsite contractor to engage in Section 7 activity would interfere with the use of its property.” D&O 13 [JA19] (emphasis added). By refusing to appropriately weigh employee Section 7 interests in the required balancing, the Board failed to “exercise[] its discretion within the limits this Court ha[s] set forth” for “how to treat employees of onsite contractors” for purposes of the National Labor Relations Act. *New York New York II*, 676 F.3d at 196.

The Board purported to apply its pre-*New York New York Hotel & Casino*, 356 NLRB 907 (2011), precedent in determining whether employees “work regularly and exclusively” at a facility owned by an entity other than their own employer for purposes of the required accommodation analysis. *See* D&O 8 & n. 59 [JA14] (“We agree with the holding of the Board’s decisions prior to *New York New York*”). *See also* NLRB Br. 15 (Board’s interpretation of “work regularly and exclusively” was “consistent with its pre-*New York New York* [] precedent”). As we demonstrated in our opening brief, Pet. Br. 39-51, however, that precedent treated whether employees “work regularly

and exclusively” at a particular location as a practical inquiry aimed at determining whether that facility is employees’ principal workplace. That inquiry considered both how often employees work at the location as well as whether there is some alternative workplace location where they can exercise their Section 7 rights. The question was whether, “[b]ecause 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.” D&O 8 & n.60 [JA14] (citing *Southern Services*, 300 NLRB 1154, 1155 (1990), *enfd.* 954 F.2d 700 (11th Cir. 1992)).

Applying that precedent, the Tobin Center is indisputably the Symphony’s home, and, therefore, the musicians’ principal workplace, during the Symphony’s annual ten-month performance season.<sup>2</sup> The musicians are neither “strangers’ to” the Tobin Center’s management nor “outsiders’ on” the Center’s property. D&O 8 [JA14]. The

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<sup>2</sup> On its website, for example, the Symphony lists the Tobin Center’s address as the Symphony’s box office and describes the Center as the Symphony’s “home.” See <https://sasymphony.org/faq/> (last checked June 18, 2020). See also D&O 19 [JA25] (Member McFerran, dissenting) (noting that the Symphony describes the Tobin Center as its “home”).

Symphony performs and rehearses at the Tobin Center more often than any other company, in addition to routinely providing live music for performances by the Ballet and Opera, and Musicians' Union members also provide live music to the Opera directly, *i.e.*, without the involvement of the Symphony. It is undisputed that the musicians have no alternative workplace location to exercise their Section 7 rights. The musicians' Section 7 interests in the Tobin Center property, therefore, are identical to what they would be if the Symphony owned the Center itself.

On the property interest side of the balance, the Tobin Center has never articulated any property-related reason why the musicians should be deprived of their Section 7 rights to engage in organizational activity at their principal workplace. For its part, the Board does not deny the strength of the musicians' Section 7 interests, but rather relies solely on the abstract property interests of a generic property owner. *See* NLRB Br. 34 (stating, *e.g.*, "the property owner may have little, if any, idea who the contractor employees are" (quoting D&O 8 [JA14])). Tobin Center management, however, knows the 72 musicians who make up the Symphony, many of whom have worked at the Center since the time

it opened. And, although it is not the musicians' employer, the Center has significant tools to control the musicians' activities while they are on the property through its "Use Agreements" with the Symphony and its ordinary prerogatives as a property owner to prevent actual or threatened interference with its property's use.

Thus, the Board should have placed the burden on the Tobin Center to demonstrate that prohibiting the musicians from engaging in Section 7 activity was necessary to protect specific property interests, rather than requiring the musicians to affirmatively justify their NLRA-protected right to engage in organizational activity at their principal workplace. The NLRB's decision to the contrary – treating the musicians as "hav[ing] *no rights* greater than those of other nonemployee strangers under *Lechmere[, Inc. v. NLRB]*, 502 U.S. 527 (1992)] and *Babcock & Wilcox*," D&O 12 [JA18] (emphasis added) – exceeded the limits of the Board's discretion.

**I. The NLRB's Interpretation of Whether Employees "Work Both Regularly and Exclusively" on the Property Is Contrary to Precedent and Failed to Give Appropriate Weight to Section 7 Interests**

The NLRB justifies its interpretation of the first step of its new test, whether employees "work both regularly and exclusively on the

property,” D&O 2-3 [JA8-9], as “consistent with its pre-*New York New York II* precedent.” NLRB Br. 15, 39 (citing D&O 8 [JA14]).<sup>3</sup> As we explained in our opening brief, and elaborate further below, in that precedent, the Board interpreted the phrase “work regularly and exclusively” in a manner consistent with its underlying purpose: as a tool to determine whether the property at issue was the employees’ principal workplace and, therefore, “the only practical site” for them to exercise their Section 7 rights. *Postal Service*, 339 NLRB 1175, 1178 (2003) (citation and quotation marks omitted). In contrast, in this case, the Board interpreted the phrase so strictly as to deprive many employees of the right to exercise their Section 7 rights at their principal workplace altogether, and it did so for reasons lacking any rational relationship to property interests.

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<sup>3</sup> The NLRB refers to the Board’s 2011 decision on remand from this Court as “*New York New York II*,” whereas we use that same shorthand to refer to this Court’s 2012 decision enforcing that decision. To avoid confusion, we use the phrase “pre-*New York New York* precedent” when referring to the Board’s decisions prior to its 2011 decision in *New York New York*.

**A. The “work regularly” on the property requirement**

In our opening brief, we explained that the NLRB’s interpretation in this case of what it means for employees to “work regularly” at a location is contrary to the precedent on which the Board relies. Pet. Br. 39-41. In response, the NLRB attempts to square the Board’s interpretation with its pre-*New York New York* precedent generally, and with its decision in *Gayfers Dep’t Store*, 324 NLRB 1246 (1997), in particular. NLRB Br. 43-45. *Gayfers*, however, strongly supports the conclusion that the inquiry into whether employees “work regularly” at a location was a practical one aimed at determining whether the facility is the employees’ principal workplace during the period when their employer performs work on the property. The Board’s arguments to the contrary only serve to illustrate how far the Board’s interpretation of that phrase in this case strays from its precedent.

*Gayfers* concerned electricians, employed by a subcontractor on a short-term remodeling job at the Gayfers department store, who engaged in handbilling of store customers on the store’s property. 324 NLRB at 1246. *See id.* at 1250 (subcontractor worked on job for an approximately ten-week period). Rejecting the store’s contention that

the subcontractor's employees were not entitled to handbill on its property because they "did not work 'exclusively and regularly' at the Gayfers' store" but rather "were 'temporary,'" the Board held that "during the time period when [the subcontractor] was performing electrical work at the Gayfers jobsite, [the subcontractor]'s employees were effectively working exclusively and regularly at Gayfers." *Id.* at 1250 n.2. *See also Postal Service*, 339 NLRB at 1177 & n.8 (discussing *Gayfers's* interpretation of the "work regularly and exclusively" standard with approval); *New York New York Hotel and Casino*, 334 NLRB 762, 762 (2001) (same).

The Board claims that there is nothing inconsistent between the meaning attributed to the phrase "work regularly" in *Gayfers* and the Board's decision here because, "[i]n *Gayfers*, there was no evidence that the contractor's electricians worked anything but regularly at a department store's property on an ongoing construction project." NLRB Br. 43-44. But that response elides the most relevant fact: that, notwithstanding the concededly "temporary" nature of the electricians' employment at the Gayfers store, the Board concluded that they "work[ed] exclusively and regularly" "*during the time period* when [the

subcontractor] was performing electrical work at the Gayfers jobsite,” *i.e.*, despite the short-term nature of the job, the electricians were still “*effectively* working exclusively and regularly at Gayfers.” 324 NLRB at 1250 n.2 (emphasis added). The Board’s conclusion in this case that “the Symphony employees did not ‘regularly’ work on the [Tobin Center]’s property because . . . [t]he Symphony’s performance season lasted only 39 weeks of the year,” D&O 10 [JA16], is thus squarely contrary to *Gayfers*.

In response to our additional contention that “[a] rule that a recurring and consistent practice of leasing a property for ten months each year does not constitute ‘regular’ use of the property is contrary to the dictionary definition of the term,” Pet. Br. 40 (citing *Webster’s Third New International Dictionary* (1981)),<sup>4</sup> the Board now contends for the first time that employees work “regularly” at a particular location only if their “pattern of . . . work” takes place at “‘constant’ or ‘definite’ intervals” “over the course of an entire year.” NLRB Br. 44-45 (quoting

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<sup>4</sup> The Board takes issue with our reference to the relationship between the Tobin Center and the Symphony as a “lease,” NLRB Br. 42, but that is how the ALJ described the relationship, D&O 25 [JA31], based on the testimony of the Center’s own witnesses, *see* Tr. 268, 274 [JA140, 145].

Lexico Online Dictionary). *See also id.* at 37-38 (adding the qualifier “so long as the practice is uniform” to the Board’s description of what it means to “work regularly”). On this basis, the Board claims that “it was entirely reasonable for the Board to consider the pattern of Symphony work at the Center over the course of an entire year” and, on that basis, to conclude “that the Symphony and its musicians do not work at the Center at ‘constant’ or ‘definite’ intervals.” *Id.* at 44-45.

In addition to being contrary to ordinary usage – most English speakers would say that a performing arts or professional sports season taking place on the same schedule each year occurs at “‘constant’ or ‘definite’ intervals,” NLRB Br. 45 – Board counsel’s interpretation of what it means to “work regularly” has no basis in the Board’s decision, which defines “work regularly” to mean not “occasionally, sporadically, or on an ad hoc basis.” D&O 8 [JA14]. This Court should “ignor[e] [such] post-hoc rationalizations by counsel,” and instead evaluate the Board’s decision “on its own terms.” *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 311 (D.C. Cir. 2006) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 89-90 (1943)).

Board counsel's proffered interpretation of what it means to "work regularly" at a location is also squarely contrary to *Gayfers*. It goes without saying that if *temporary* employees work at sufficiently constant or definite intervals to be regularly employed "during the time period when [the subcontractor] was performing . . . work at the [property]," 324 NLRB at 1250 n.2, *seasonal* employees must be considered to work at constant or definite intervals during the more extended and annually-repeating periods when their employer performs work at a location.

Moreover, the Board offers no explanation for why denying Section 7 rights to employees who, but for the seasonal nature of their employment, indisputably "work regularly" at a facility within the pre-*New York New York* meaning of the phrase is necessary to protect property rights. From a property perspective, the purpose of the "work regularly" inquiry is to determine whether employees "have a sufficient connection to the property owner" "to engage in Section 7 activity" at that location, D&O 6 [JA12], *i.e.*, to determine whether "[b]ecause of their recurrent presence on the property owner's property, the contractor employees . . . [a]re not 'strangers' to or 'outsiders' on the

property owner’s property,” *id.* at 8 & n.60 [JA14] (citing *Southern Services*, 300 NLRB at 1155). Whether employees work at “‘constant’ or ‘definite’ intervals” at a facility over the course of an entire year tells us nothing about their “recurrent presence on the . . . property,” D&O 8 [JA14], “*during the time period* when [the contractor] [i]s performing . . . work at the [property owner’s facility].” *Gayfers*, 324 NLRB at 1250 n.2 (emphasis added). Board precedent makes clear that it is this latter, common-sense understanding of “work regularly” – rather than a strained interpretation based on uniform intervals between periods of work on the property – that matters for purposes of the accommodation analysis.

**B. The “work exclusively” on the property requirement**

The NLRB’s definition of “work exclusively” – as meaning that “employees . . . perform all of their work for th[e] contractor on the property, even if they also work a second job elsewhere for another employer,” D&O 3 [JA9] – similarly lacks a basis in the Board’s precedent, as well as any rational connection to the required accommodation between Section 7 interests and property interests.

As we explained in our opening brief, Pet. Br. 43-51, the Board's pre-*New York New York* precedent treated whether employees "work exclusively" at a facility owned by an entity other than their own employer as one aspect of the overall practical inquiry for determining whether the facility constituted employees' principal workplace. Whereas the "work regularly" inquiry concerned the frequency of employees' work on the property, the "work exclusively" inquiry considered "the extent of time . . . employees spend at the [property owner]'s propert[y], as opposed to other facilities," *Simon DeBartolo Group*, 357 NLRB 1887, 1892 (2011) (Member Hayes, dissenting), so as to determine whether the location where employees "work regularly" was also "the only practical site for them to discuss union organization," *Postal Service*, 339 NLRB at 1178 (citation and quotation marks omitted). *See* NLRB Br. 47-48 (explaining that, "absent [the exclusivity] requirement, contractor employees with only 'a fleeting working relationship with the property owner's site' would be able to use the property for organizational activity, without any consideration of whether, for example, 'there [was] a home base, owned by [the contractor] . . . at which they could engage in organizational activities

without impinging upon the property rights of third parties”) (quoting *Simon DeBartolo*, 357 NLRB at 1892 (Member Hayes, dissenting)).<sup>5</sup>

Not surprisingly, given the practical nature of this inquiry, nothing in the Board’s precedent supports the strict interpretation of “work exclusively” that the Board adopted in this case – that if employees perform *any* work for their employer at another location, the property owner can deny employees their Section 7 rights altogether at their principal place of employment. In *Gayfers*, once the subcontractor and its electricians completed their “temporary” job of remodeling the department store, they surely went on to another construction job at a

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<sup>5</sup> The Board contends that, “[c]ontrary to the Union’s . . . suggestion, principles of accommodation do not require the Board to interpret the term ‘exclusively’ in a liberal manner, so that most contractor employees can claim a ‘home base’ for Section 7 activity somewhere.” NLRB Br. 48. Our contention is not that the Board is required to interpret “exclusively” in this manner, but that it actually did so in its precedent. *See* Pet. Br. 43-51.

In those cases, the Board interpreted “work exclusively” against the background principle that “the workplace is the logical location for organizational activity if it is ‘the one place’ where employees commonly meet and interact.” NLRB Br. 39 (quoting and summarizing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978)). Thus, “[w]hen employees work regularly and exclusively on the premises of another employer’ . . . they understandably acquire a legitimate claim to engage in protected activity on the premises, because ‘there is no other place at which they can exercise their Section 7 rights.’” *Ibid.* (quoting *Postal Service*, 339 NLRB at 1178).

different location. What mattered was not where the employees worked for the subcontractor at some later date, but rather, at the time of the handbilling, whether “the employees [were] rightfully on the property as a result of the employment relationship.” 324 NLRB at 1250 n.2. Similarly, in *Southern Services*, 300 NLRB at 1154, the Board treated a group of largely part-time evening employees of “a subcontractor . . . [that] regularly perform[ed] janitorial work at the [Coca-Cola] complex” as “work[ing] exclusively at the Coke headquarters.” *See id.* at 1158 (stating that most employees “work[ed] a 5-day week from 5:30 to 9:30 p.m.”). Nothing in that decision suggested, however, that if those part-time employees occasionally worked for the same contractor at another facility they would lose their Section 7 rights at the Coca-Cola complex.

Seeking to respond to our argument that “[i]t is not self-evident – and the Board does not attempt to explain – why a property owner’s interests are different vis-à-vis employees like the musicians in this case, who occasionally work for the Symphony offsite, as compared to employees whose only work for the contractor is on the property owner’s property, but on a part-time, evening, or short-term basis,” Pet. Br. 49 (citing *Southern Services* and *Gayfers*), counsel states that “the Board

reasonably chose not to probe into a contractor employee's possible 'second job elsewhere for another employer' because the only salient employment relationship for purposes of the access analysis is the relationship between the employee and the contractor who brought the employee to the third party's property." NLRB Br. 46 n.8 (quoting D&O 2-3 [JA8-9]). This explanation only highlights the flaw in the Board's interpretation of what it means to "work exclusively" at a particular location. Just as it is not "salient" whether an employee occasionally works a "second job elsewhere for *another* employer," it likewise makes no difference from the property owner's perspective if employees occasionally work "a second job elsewhere for [*the same*] employer." *Ibid.* (emphasis added). Because it is the relationship between employees and the property owner "during the time period" when the contractor and its employees are working on the property that is pertinent, *Gayfers*, 324 NLRB at 1250 n.2, the determination of whether employees "work exclusively" at a particular location must be measured on that basis.

The Board's interpretation of the "work exclusively" standard thus does not relate in any rational way to the property interests cited by the

Board as a basis for its new test. Those interests – that “the property owner . . . ‘has neither hired nor vetted the contractor employees’” and “may have little, if any, idea who the contractor employees are,” NLRB Br. 34 (quoting D&O 8 [JA14]) – have no logical connection to whether employees who are regularly employed on the property also occasionally work elsewhere, much less to whether they occasionally work elsewhere for the same contractor or a different employer.

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Taken together, the Board’s interpretation of both parts of the phrase “work regularly and exclusively” – whose purpose is to determine whether employees “have a sufficient connection to the property owner” “to engage in Section 7 activity” at the location where they work, D&O 6 [JA12]– is contrary to precedent, has no logical connection to the Section 7 interests and property interests at stake in the accommodation analysis, and has the effect of altogether depriving many employees of the right to engage in Section 7 activity at their principal workplaces. The first step of the Board’s new test, therefore, exceeds the limits of the Board’s discretion as set forth by this Court.

## II. The NLRB's Further Requirement that Employees Have "No Reasonable Alternative Means of Communication" Available Constituted an Independent Legal Error

Even if employees meet the Board's strict new definition of what it means to "work regularly and exclusively" at a facility, the second step of the Board's new test allows the property owner to deprive those employees of their Section 7 rights at their principal workplace based on a showing that all, or virtually all, property owners can easily make: that employees "have one or more reasonable nontrespassory alternative means to communicate their message," D&O 3 [JA9], a phrase the Board broadly construes to include communicating from public property and through mass and social media, *see id.* at 12, 13 [JA18, 19]. That second step of the Board's new test independently exceeds the Board's discretion by treating employees, whose Section 7 rights "to make common cause with similarly situated employees" are "personal rather than derivative," *ITT Industries, Inc. v. NLRB*, 413 F.3d 64, 71 (D.C. Cir. 2005), as equivalent to nonemployee union organizers.

The Board does not deny our argument that, by treating employees in the same manner as nonemployees for determining their

Section 7 interests at the location where they work, “the Board failed to account for the ‘distinction of substance,’ between the union activities of employees and nonemployees.” Pet. Br. 57 (quoting *Lechmere*, 502 U.S. at 537, quoting, in turn, *Babcock & Wilcox*, 351 U.S. at 113). Instead, the Board doubles down on its position that *all* employees who work at a facility owned by an entity other than their own employer are, “at bottom, ‘nonemployees in relation to the property owner.’” NLRB Br. 52 (quoting D&O 2 n.14 & 11 n.81 [JA8 & 17]). Thus, even those employees who “work regularly and exclusively” at a facility owned by a third party may engage in Section 7 activity at that location only if they can make the showing required by *Babcock & Wilcox* and *Lechmere*. See D&O 9 [JA15] (endorsing the application of “that same [*Lechmere*] analysis here”); NLRB Br. 50 (stating that the Board “[a]pplied] the same logic [as in *Lechmere*] to the situation of contractor employees”).

While generally asserting the Board’s right to treat employees in the same manner as nonemployee union organizers, Board counsel, like the Board itself, briefly argues as a fallback that this test differs somewhat from that of *Babcock & Wilcox* and *Lechmere* because it “plac[es] the burden with regard to reasonable alternative means, not

on those seeking access (as is the rule where nonemployee union organizers seek access), but on the property owner,” while still acknowledging that, “[t]o be sure, . . . , the property owner can meet its burden in some cases by pointing to the electronic avenues that can help contractor employees reach their target audience.” NLRB Br. 53. As we explained in our opening brief, Pet. Br. 56-57 n.8, that claimed difference is illusory. Because *Lechmere* holds that employees, unless they “reside on [the property owner]’s property, . . . are presumptively *not* ‘beyond the reach’ of the union’s message” conveyed through means such as “mailings,” “phone calls,” “advertising in local newspapers,” and “signs,” 502 U.S. at 540 (quoting *Babcock & Wilcox*, 351 U.S. at 113) (emphasis added), the property owner need do no more than invoke generally-available means of offsite communication, “includ[ing] social media, blogs, and websites,” D&O 10 [JA16], and then it falls to employees to make the same showing required by *Lechmere*.

Requiring employees who work regularly and exclusively at a facility to make that showing as a precondition to exercising their Section 7 workplace rights defies basic labor law principles. The Section 7 interests of employees in their principal workplace are the

same without regard to whether that workplace is owned by a third party or by their own employer. *See New York New York II*, 676 F.3d at 199 (Henderson, J., concurring) (“Ark employees’ lack of an employment relationship with NYNY does not make their Section 7 rights in any way ‘derivative’ of the rights of other employees.” (Citation, quotation marks, and brackets omitted)). Treating employees as “hav[ing] *no rights* greater than those of . . . nonemployee strangers under *Lechmere* and *Babcock & Wilcox*,” D&O 12 [JA18] (emphasis added), solely because their own employer does not own the property, therefore, constitutes an unreasonable interpretation of the NLRA.

Similarly, in terms of property interests, “[b]ecause of their recurrent presence on the property owner’s property, . . . employees who work[] there regularly and exclusively [a]re not ‘strangers’ to or ‘outsiders’ on the property owner’s property.” D&O 8 [JA14]. *See New York New York II*, 676 F.3d at 198 (Henderson, J., concurring) (because “the hotel and casino complex was their workplace,” “the Ark employees were not ‘outsiders’ to the property” (citation and quotation marks omitted)). Moreover, property owners typically have contractual tools at their disposal to regulate employees’ activity while on the property.

*See New York New York II*, 676 F.3d at 199 (Henderson, J., concurring) (noting that “there existed an express contractual commitment on the part of Ark to use its employment authority to enforce NYNY’s rules and so protect against disruption of the hotel’s operations” and that, “[i]n addition, NYNY and Ark shared an economic interest in ensuring that Ark employees do nothing that might interfere with the operations of the hotel” (citation and quotation marks omitted)). No reasonable interpretation of the NLRA, therefore, permits a property owner to prohibit employees who work regularly and exclusively on the property from exercising their Section 7 rights at that location unless they make the same showing required by nonemployee union organizers.

Rather, where employees work regularly and exclusively on the property, it should fall to the property owner to demonstrate that a specific restriction on employees’ exercise of Section 7 rights is necessary to safeguard property interests. The second step of the Board’s test – which instead applies a blanket presumption that property interests trump Section 7 interests in every case – thus completely fails to heed this Court’s admonition that the Board must reach an “*accommodation* between the § 7 rights of . . . employees and

the rights of [the property owner] to control the use of its premises, and to manage its business and property.” *New York New York II*, 676 F.3d at 196 & n.2 (emphasis added; citation and quotation marks omitted).

### **III. The NLRB’s Application of Its New Test to Deny the Musicians the Right to Engage in Section 7 Activity at the Tobin Center Constituted an Abuse of Discretion**

The NLRB’s conclusion that the Tobin Center could lawfully prohibit the musicians from handing out leaflets concerning their working conditions in “an open area at the front of the [Tobin] Center’s property that patrons traverse to reach the box office and main performance hall” in order “to reach [Ballet] patrons arriving for *Sleeping Beauty*,” NLRB Br. 8, demonstrates the failure of the Board’s new test to give any weight to employee organizational interests in the required balancing between Section 7 interests and property interests.

The musicians undoubtedly “work regularly and exclusively” at the Tobin Center within the meaning given that phrase by the Board’s precedent. The Board accuses us of “attempt[ing] to obscure the basic reality that the Symphony’s musicians only work at the Center for 22 weeks primarily by playing up tangential facts.” NLRB Br. 40-41. But there is nothing “tangential” about the facts – found by the ALJ and

ignored, but not disputed, by the Board – that the musicians performed and rehearsed at the Tobin Center not just for the Symphony’s own performances (constituting the 22 weeks to which the Board refers), but additionally to provide live music for performances of the Ballet and Opera. D&O 25 [JA31]. The ALJ also specifically found that “[t]he Union has a separate collective-bargaining agreement with the San Antonio Opera” pursuant to which the musicians provide live music directly, *i.e.*, without the involvement of the Symphony. *Id.* at 25 n.3 [JA 31].<sup>6</sup> The fact that the musicians routinely perform at the Tobin

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<sup>6</sup> Contrary to the Board’s claim that it is owed deference for its factual findings, NLRB Br. 41 n.5, deference is not required where “the evidence supporting that decision is [not] substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.” *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1103 (D.C. Cir. 2001) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). That is certainly the case here. As we explained in our opening brief, in addition to the ALJ’s findings, the Symphony’s detailed schedule for the 2016-17 season includes *both* the Symphony’s own 22 weeks of performances at the Tobin Center as well as the weeks when the Symphony provided live music for the Ballet and Opera at the Center. *See* Pet. Br. 7 (describing GC Ex. 16 [JA394-480]).

For similar reasons, the Board’s claim that we are inappropriately urging a “person-by-person analysis of which individual musicians worked ‘regularly’ at the Center,” NLRB Br. 42 n.6, is groundless. The Symphony’s schedule makes clear that when the Symphony provided live music for the Ballet or Opera at the Tobin Center those

Center not only with the Symphony, but with all three of the Center's principal resident companies, makes clear that the Center is the musicians' principal workplace.

The musicians, unlike the electricians employed on a temporary basis to remodel the department store in *Gayfers*, 324 NLRB at 1250 & n.2, perform and rehearse at the Tobin Center for the Symphony's annual ten-month season, and have done so each year since the Center opened. D&O 25 [JA31]. Certainly, it is likely that, for this reason, Tobin Center management is more familiar with the names and identities of the Symphony musicians than Coca-Cola management was with the part-time, evening employees of the janitorial contractor who cleaned the Coke building in *Southern Services*. 300 NLRB at 1154, 1158. And, the fact that none of the other locations "where the Symphony typically performed only once or, at most, a few times each season would constitute an appropriate work site for the musicians to exercise their Section 7 rights," Pet. Br. 47, is unrebutted, such that it is clear that the Tobin Center "provide[s] the only practical site for [the

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performances were considered part of the Symphony's – and thus the musicians' – overall work. Pet. Br. 7-9 (discussing GC 16 [JA394-480]).

musicians] to discuss union organization,” *Postal Service*, 339 NLRB at 1178 (citation and quotation marks omitted).

On the other side of the equation, the property interests asserted as reasons why the Tobin Center may prohibit the musicians from engaging in Section 7 activity on the property – *e.g.*, that “the property owner . . . ‘has neither hired nor vetted the contractor employees,’ may not ‘have the same confidence in [their] integrity and self-discipline . . . that it has in its own employees,’” and “‘may have little, if any, idea who the contractor employees are,’” NLRB Br. 34 (quoting D&O 8 [JA14]) – simply do not bear scrutiny. Not only is the Symphony a principal resident company of the Tobin Center, no other principal resident company performs as frequently at the Center as the Symphony. Tr. 52 [JA57]. The musicians, in turn, are the public face of the Symphony, and, by extension, of the Tobin Center itself. Many of those musicians have performed at the Center since it first opened. *See, e.g.*, Tr. 77 [JA74] (Joseph Lee Hipp’s testimony that he has performed with the Symphony for 27 years); Tr. 198 [JA119] (Brian Petkovich’s testimony that he has performed with the Symphony since 1996). In the highly unlikely event that a member of Tobin Center management had any

question “who the [Symphony’s] employees are,” NLRB Br. 34, she would need search no further than a program from a recent Symphony performance at the Center.<sup>7</sup>

Moreover, the Tobin Center has existing contractual and economic means to control the activities of the musicians if necessary. As the ALJ found, “the Use Agreement” between the Center and the Symphony “gives [the Tobin Center] powers similar to those of New York, New York vis-à-vis Ark employees,” such as requiring the Symphony “to cause its . . . employees . . . to abide by all rules and regulations as may from time to time be adopted by the Operator (Tobin).” D&O 26 [JA32]. And, because “the Symphony pays the Tobin Center for the use of its venues,” D&O 26 n.5 [JA32] – and, conversely, the Symphony relies on its ability to use the Center as the home for its annual performance season – the two entities, like “NYNY and Ark,” “share an economic interest in ensuring that [the Symphony’s] employees do nothing that might interfere with the operations of the [Tobin Center],” *New York*

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<sup>7</sup> Alternatively, Tobin Center management could simply check the Symphony’s website, which lists each Symphony musician by name with a photograph. See <https://sasymphony.org/the-symphony/> (last checked June 18, 2020).

*New York II*, 676 F.3d at 199 (Henderson, J., concurring) (citation and quotation marks omitted).

The NLRB's conclusion that the musicians can be deprived of their strong Section 7 interests in the Tobin Center as their principal workplace based merely on the Center's invocation of its generalized "right to exclude," D&O 1, 13 [JA7, 19], thus constituted a total failure to accommodate the musicians' Section 7 interests and the Tobin Center's property interests "with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox*, 351 U.S. at 112. Given their "significant work connection to the [Tobin Center]" based on their "recurrent presence on the . . . property," D&O 7, 8 [JA13, 14], throughout the Symphony's ten-month season, the musicians' Section 7 interests in the Tobin Center as their workplace are no different than if the Symphony owned the Center itself. In light of these NLRA-protected interests, the Tobin Center, rather than the musicians, should bear the burden of proving that any specific restrictions on the musicians' ability to engage in Section 7 activity are "necessary to control the use of [the Center]'s premises, and to manage its business and property." *New York New York II*, 676 F.3d at 196 &

n.2 (citation and quotation marks omitted). The Board's failure to require such a showing constituted an abuse of discretion.

### CONCLUSION

The Court should grant the petition for review, vacate the NLRB's decision, and remand this case to the Board.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b) because this brief contains 6,408 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).
  
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/s/ Matthew J. Ginsburg  
Matthew J. Ginsburg

Date: July 15, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2020, the foregoing Final Reply Brief of Petitioner Local 23, American Federation of Musicians was served on all parties or their counsel of record through the CM/ECF system.

/s/ Matthew J. Ginsburg

Matthew J. Ginsburg