No. 06-956

In the Supreme Court of the United States

PROMEDICA HEALTH SYSTEMS, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner discriminatorily enforced its rule against solicitation in patient care areas by disciplining three employees for engaging in union solicitation while permitting widespread commercial and other non-union-related solicitation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 21a-207a) are reported at 343 N.L.R.B. 1351.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2006. The petition for a writ of certiorari was filed on January 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, including the right "to form, join, or assist labor organizations," 29 U.S.C. 157. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

Although solicitation of fellow employees on behalf of a union is protected activity under the Act, the National Labor Relations Board (NLRB or Board) has long recognized that legitimate employer interests justify some restrictions on solicitation. In particular, because "the primary function of a hospital is patient care and * * * a tranquil atmosphere is essential to the carrying out of that function" (*St. John's Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), modified, 557 F.2d 1368 (10th Cir. 1977)), the Board, with this Court's approval, has held that a hospital may prohibit solicitation in patient care areas at all times. *NLRB* v. *Baptist Hosp.*, 442 U.S. 773, 778, 787-790 (1979); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 495, 506-507 (1978). A hospital must, however, apply any restriction on solicitation in an evenhanded manner. The hospital may not enforce even a valid restriction against union solicitation while forgoing enforcement against other types of solicitation prohibited by the rule that are disruptive of patient care or disturbing to patients. *St. Vincent's Hosp.*, 265 N.L.R.B. 38, 39-40 (1982), enforced in pertinent part,

729 F.2d 730, 735 (11th Cir. 1984); see, *e.g.*, *NLRB* v. *St. Francis Healthcare Ctr.*, 212 F.3d 945, 960 (6th Cir. 2000). Discipline of an employee for violating a no-solicitation rule by engaging in union activity violates Section 8(a)(3) and (1) of the Act when the discipline amounts to discrimination in enforcement of the rule. *NLRB* v. *Pneu Elec., Inc.*, 309 F.3d 843, 857 (5th Cir. 2002).

2. a. Petitioner ProMedica Health Systems, Inc., operates several hospitals and related facilities in northwestern Ohio and southwestern Michigan, including petitioner Toledo Hospital and the Flower Hospital. Beginning in early 2000, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) sought to organize employees at the Toledo and Flower Hospitals. Pet. App. 23a.

At all material times, petitioners maintained a facially neutral policy on solicitation that provides, in pertinent part:

> Solicitation by employees for funds, membership or individual enlistment in outside organization[s] or causes is prohibited at all times on work time and in immediate patient care areas. Solicitation is also prohibited if either the soliciting employee or the employee being solicited is on working time. Solicitation by employees shall be permitted during non-working time in all non-working areas of the facility that are not immediate patient care areas.

Pet. App. 48a-49a. The policy defined "immediate patient care areas" as "areas where patient care occurs including patient rooms, patient treatment areas, patient sitting rooms and elevators, stairways and corri-

dors used to transport patients." *Id.* at 50a. Patient care areas also included nurses' stations. *Id.* at 80a.

Notwithstanding that rule, employees at both hospitals regularly sold and solicited sales for numerous products, including Tupperware, cosmetics, candles, and Boy Scout and Girl Scout products. Sales and solicitations occurred openly at the nurses' stations and in other work areas, and booklets and catalogues for some of the products were left for prolonged periods at the nurses' stations, where they were plainly visible. Although supervisors were inevitably aware of those sales and solicitations, supervisors did not enforce the no-solicitation rule or discipline solicitors until the commencement of union activity. Pet. App. 8a-9a, 69a, 80a, 86a, 97a, 133a, 140a-141a.

b. On May 12, 2000, a newspaper article quoted Robert Hasenfratz, a registered nurse at Flower Hospital, as expressing support for a union. On May 17 or 18, Hasenfratz's supervisor called him to a meeting at the end of his shift. The supervisor told Hasenfratz that someone had complained about his soliciting "something" about the Union, but the supervisor refused to identify the complainant. Pet. App. 85a. Hasenfratz said that he had solicited only in the cafeteria and employee breakroom. The supervisor gave him a copy of the solicitation policy and told him to conduct his union activity in the cafeteria. The supervisor also issued him a disciplinary warning called a "coaching." *Id.* at 85a-86a.

On approximately June 4, 2000, Supervisor Susan Sommer called Dea Lynn Keckler, a registered nurse and former supervisor at the Toledo Hospital, to her office for a meeting. Sommer told Keckler that she had received a complaint that Keckler had distributed union

literature at the nurses' station. She told Keckler that union activities were allowed only in the cafeteria and the garage. She subsequently prepared a communication log stating that she had given Keckler a coaching. Pet. App. 68a-69a, 73a.

On July 25, 2000, Supervisor Sommer phoned Cynthia Miller, another Toledo Hospital registered nurse, at home. Sommer told Miller that a supervisor in another unit in the hospital had reported observing Miller distributing union materials in the supervisor's unit. Miller replied that she had only been trying to deliver candles that she had sold to another employee. Sommer also told Miller that an employee had complained about Miller's calling her at home to talk about the Union. She conceded that what Miller did on her own time was her business, but said that the hospital did not want union supporters distributing union materials in the nurses' stations. Sommer subsequently wrote a communication log entry indicating that the foregoing conversation constituted a coaching of Miller. Pet. App. 131a-132a, 134a.

3. The Board's General Counsel issued a complaint alleging, in relevant part, that petitioners violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by disparately enforcing the no-solicitation/no-distribution rules against union solicitation and distributions while not similarly restricting non-union solicitations, and by disciplining Keckler, Hasenfratz, and Miller for their union activities. Pet. App. 67a, 78a, 84a, 95a, 131a, 139a.

The administrative law judge (ALJ) found, in relevant part, that petitioners violated the Act as alleged. The ALJ found that nurses' stations were patient care areas. Pet. App. 80a. He further found that, although petitioners' rule prohibiting solicitation in patient care

areas was facially valid, petitioners permitted widespread, open solicitation for numerous products, including Tupperware, cosmetics, Boy Scout and Girl Scout products, and candles, at nurses' stations and other work areas. *Id.* at 50a, 80a-81a, 97a, 140a-141a. Accordingly, the ALJ concluded, petitioners' enforcement of its solicitation policy against union supporters who distributed in patient care areas, including the nurses' stations, was discriminatory and unlawful. *Id*. at 80a-81a, 141a, 200a.

In finding that petitioners unlawfully disciplined Keckler, Hasenfratz, and Miller, the ALJ first held that the coachings—which could support future formal discipline against the coached employees—were part of petitioners' disciplinary scheme and therefore triggered the protections of Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3).[1] Pet. App. 81a. He further found that petitioners' discipline of the three employees was unlawful because it "was based on [petitioners'] discriminatory enforcement of [their] solicitation policy." *Id*. at 82a; see *id*. at 97a, 141a, 200a-201a.

The Board adopted the ALJ's findings. Pet. App. 22a. The Board ordered petitioners to cease and desist from enforcing their solicitation and distribution policy selectively and disparately, and from discriminatorily issuing disciplinary coachings to employees because of their union activity, and further ordered petitioners to remove references to the unlawful discipline from the employees' files. *Id*. at 31a-32a.[2]

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[1] Petitioners do not challenge that finding, which the Board adopted, Pet. App. 23a-24a, and the court of appeals affirmed, *id*. at 7a.

[2] Petitioners do not challenge other violations found by the Board and upheld by the court of appeals, including that petitioners threatened an employee with reprisals for union activity, told an employee

4. The court of appeals, in an unpublished decision, affirmed the Board's findings that the foregoing disciplinary actions were unlawful and enforced the associated portions of the Board's order. Pet. App. 3a-20a. The court held that substantial evidence supported the Board's finding that petitioners' enforcement of the no-solicitation/no-distribution rule was lax with respect to non-union-related solicitation and distribution. The court stated that the record was "replete" with evidence showing "widespread and open non-union-related solicitation for and distribution of various commercial and charitable products—Tupperware, Avon cosmetics, and Girl Scout Cookies, for example." *Id.* at 8a. The court noted that "books and catalogues offering those products were commonly left lying around work areas, including 'patient care areas' (such as the nurses' station)." *Ibid.* The court therefore concluded that "substantial evidence supports the finding that [petitioners were] aware of the significant volume of non-union-related solicitation/distribution and selectively and disparately enforced the Policy in violation of the Act." *Id.* at 9a.

The court of appeals also affirmed the Board's finding that petitioners violated the Act by discriminatorily issuing coachings to employees Keckler, Miller, and Hasenfratz. The court noted that each employee testified that he or she received coachings "for engaging in pro-Union activities that violated the Policy while [peti-

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that she should cease working for petitioners if she supported the Union, created the impression that an employee's union activities were under surveillance, and issued disciplinary coachings to two other employees because of their union solicitations. Pet. App. 10a-11a, 13a-17a, 22a-32a, 200a-201a.

tioners] generally ignored non-Union-related violations." Pet. App. 10a.

The court of appeals rejected petitioners' argument "that, even if [they] knowingly permitted 'isolated' non-union related solicitations and distributions," petitioners did not violate the Act by enforcing the policy against the three employees who solicited for the Union in patient care areas. Pet. App. 11a. The court noted petitioners' reliance on *Southern Maryland Hospital Center* v. *NLRB*, 801 F.2d 666, 674 (4th Cir. 1986)—in which the Fourth Circuit stated that evidence that a hospital had allowed "some innocuous activity to go unpunished in the past" did not establish "that *any* subsequent attempt by the hospital to control union solicitation in its patient care areas" would be an unfair labor practice. The court stated, however, that its precedent conflicted with that rule, citing its decision in *Mt. Clemens General Hospital* v. *NLRB*, 328 F.3d 837, 848 (6th Cir. 2003), which held that a hospital unlawfully prohibited nurses from wearing, in patient-care areas, a pin related to a bargaining dispute, because the hospital otherwise permitted nurses to wear personal, union, and hospital buttons in patient care areas. Pet. App. 11a.

ARGUMENT

1. The unpublished decision of the court of appeals does not present the legal question that petitioners seek to raise. Petitioners assert that the court of appeals held that a hospital that "has previously permitted or overlooked isolated instances" of solicitations in patient care areas for "Girl Scout cookies, church raffle tickets, or the like" must thereafter also allow union solicitation in those areas. Pet. 1-2; see Pet. 6 (asserting that the court held that "a hospital may not undertake efforts to

control union-related solicitation or distributions in patient care areas if it has ever condoned or overlooked an employee's sale of Girl Scout cookies or charity raffle tickets at a nurses' station"). The court of appeals held no such thing. Instead, the court held that substantial evidence supported the Board's factual findings that non-union-related solicitations in patient care areas, including the nurses' stations, were not isolated but "widespread and open," and that they included purely commercial solicitations for the purchase of products like Tupperware, cosmetics, and candles. Pet. App. 8a. The court of appeals also affirmed the Board's findings that petitioners were aware of those "common-place" commercial solicitations but regularly failed to stop them or to discipline the solicitors. *Id.* at 9a.[3]

To the extent that petitioners take issue (Pet. 4-5) with the concurrent conclusions of the Board and the court of appeals that petitioners knowingly failed to

[3] Contrary to petitioners' contention (Pet. 1-2, 3), the Board also has not held that an isolated failure to enforce a no-solicitation rule precludes a hospital from enforcing the rule against union solicitation. The Board "has evaluated the 'quantum of . . . incidents' involved to determine whether unlawful discrimination has occurred" and has "consistently * * * held that an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule." *Hammary Mfg. Corp.*, 265 N.L.R.B. 57, 57 n.4 (1982) (citations omitted). *See Zurn/N.E.P.C.O.*, 345 N.L.R.B. No. 1, 2005 WL 2041037, at *4 (Aug. 22, 2005) (citing *Hammary* and finding that employer lawfully disciplined employee for engaging in union solicitation at work, even though it allowed solicitation for United Way campaign), petition for review pending on other issues, No. 05-2590 (6th Cir.) (filed Dec. 5, 2005). Because neither the Board nor the court of appeals has adopted the legal rule that petitioners attribute to them, petitioners err in contending (Pet. 10-12) that this Court's review is necessary to prevent "dire consequences for employers, employees, and patients." Pet. 10.

enforce their no-solicitation policy against widespread commercial and other non-union-related solicitation, petitioners raise only a factual issue that does not warrant this Court's review. See *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981).

2. Based on the record evidence that petitioners repeatedly failed to enforce the no-solicitation rule in the face of "widespread" and "common-place" commercial and other non-union-related solicitations, the court of appeals correctly upheld the Board's finding that petitioners engaged in unlawful discriminatory enforcement of the rule against union solicitation. See Pet. App. 6a-11a.

Petitioners erroneously contend that the court of appeals' holding is based on "a highly strained construction of the term 'discrimination.'" Pet. 10. On the contrary, the court's decision is entirely consistent with the generally accepted definition of discrimination—"that the employer treated similar conduct differently." *Restaurant Corp. of Am.* v. *NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987). Here, the no-solicitation rule itself indicates that commercial and other non-union-related solicitation is just as disruptive as the union solicitation that petitioners punished, because the rule treats them equally and prohibits them both. Indeed, petitioners have consistently contended that their managers enforced the no-solicitation rule with respect to sales, fund-raising activities, and charitable solicitations. See Pet. 4. Although the ALJ and the Board did not credit that contention (Pet. App. 97a), it constitutes an acknowledgment that the no-solicitation rule prohibits those activities just as much as union solicitation.

Equal treatment of union solicitation and commercial and other non-union-related solicitation is consistent with the underlying purpose of a no-solicitation rule like the one at issue here. The purpose of a ban on solicitation in patient care areas of a hospital is "to avoid disruption of patient care and disturbance of patients." *NLRB* v. *Baptist Hosp.*, 442 U.S. 773, 778 (1979). This Court has recognized that any solicitation that interferes with the health care activities of doctors, nurses, and staff may disrupt patient care. *Id.* at 781 n.11. "Widespread" and "common-place" commercial solicitation like the solicitation at issue here can interfere with the health care duties of nurses and other staff just as can union solicitation. See *Lucile Salter Packard Children's Hosp. at Stanford* v. *NLRB*, 97 F.3d 583, 592 (D.C. Cir. 1996) (finding that hospital had not shown that union's attempted solicitation—distributing materials from a table near the hospital's cafeteria—was any more disruptive than similar non-union-related distributions in that location allowed by the hospital); *Presbyterian/St. Luke's Med. Ctr.*, 258 N.L.R.B. 93, 99 (1981) (purchase, sale, and distribution of commercial products necessarily distract from patient care), enforced, 723 F.2d 1468, 1478 (10th Cir. 1983). Accordingly, the Board may reasonably find unlawful discrimination when an employer enforces a no-solicitation rule against employees' union solicitation, but not against other prohibited employee solicitation that is "widespread" and "common-place" and thus likely to disrupt patient care or disturb patients.[4]

[4] Contrary to petitioners' suggestion (Pet. 8 n.1), *Sandusky Mall* v. *NLRB*, 242 F.3d 682, 686 (6th Cir. 2001), is not to the contrary. Although that case adopted a narrow definition of "discrimination," it did so only in the context of solicitation by nonemployee union organiz-

3. Petitioners erroneously contend (Pet. 4, 7-9) that this Court's review is necessary because the court of appeals' decision conflicts with *Manchester Health Center, Inc.* v. *NLRB*, 861 F.2d 50 (2d Cir. 1988), and *Southern Maryland Hospital Center* v. *NLRB*, 801 F.2d 666 (4th Cir. 1986). There is no conflict.

In *Manchester Health Center*, the Second Circuit held that "where a health-care facility has been involved in a bitter and divisive strike, it may, as a part of a strike settlement, agree with the union to limit discussion of union affairs to nonpatient areas during nonwork time." 861 F.2d at 51. The court expressly disclaimed any intention "to suggest that an employer may unilaterally impose such a rule." *Id.* at 55. The court also noted that the employer already had a rule prohibiting discussion of controversial matters in the presence of patients, so that union-related discussions were not

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ers. The court in *Sandusky* relied on its prior opinion in *Cleveland Real Estate Partners* v. *NLRB*, 95 F.3d 457, 464-465 (6th Cir. 1996). The Sixth Circuit, however, has expressly declined to apply *Cleveland Real Estate* when, as in this case, the prohibited union solicitation is by employees. See *Meijer, Inc.* v. *NLRB*, 130 F.3d 1209, 1212-1213 (1997). In any event, any tension between the decision in this case and other Sixth Circuit decisions should be resolved by that court, not this one. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

The Seventh Circuit's decision in *6 West Ltd. Corp.* v. *NLRB*, 237 F.3d 767 (2001), on which petitioner also relies (Pet. 8 n.1), is also inapposite. There, the Seventh Circuit determined that, in the context of a restaurant, "innocent" activities, such as the sale of Girl Scout cookies or handmade Christmas ornaments during the holiday season, were not as disruptive to the restaurant's operations as union solicitations would have been. 237 F.3d at 780. That decision obviously does not address the question whether, on the facts of this case, "widespread" and "common-place" commercial solicitations in a hospital's patient care areas were as disruptive of patient care as union solicitation.

singled out for prohibition. *Id.* at 54. In this case, as shown above, petitioners singled out union solicitation for punishment, and did so unilaterally, without any consultation with the Union. There is no conflict with *Manchester Health Center*.

There is also no conflict with *Southern Maryland Hospital Center*. In that case, the Fourth Circuit upheld the hospital's discipline of an employee for violating a no-solicitation rule despite "evidence that *some* raffle tickets, Girl Scout cookies and cosmetics were sold by employees without reproach." 801 F.2d at 674 (emphasis added). On that record, the court characterized the Board's order finding an unfair labor practice as resting on the position that any prior failure to enforce a no-solicitation rule against "some innocuous activity" precludes a hospital from "*any* subsequent attempt" to control union solicitation in patient care areas. *Ibid.* The court rejected that position. *Ibid.* The court did not hold, however, that an employer could validly impose discipline for union solicitation on a record like the one here, involving a pattern of open, widespread, and unpunished disregard of a no-solicitation rule in patient care areas, broken only by rigid enforcement of the rule against union activists.

It is by no means clear that the Fourth Circuit would reject a finding of unlawful discrimination on a record comparable to the one in this case. In a later case also involving Southern Maryland Hospital Center, the court, although it again found no discrimination, stressed the lack of "evidence that the hospital ever allowed salesmen to solicit sales of products to employees in the cafeteria" where it prohibited a nonemployee union organizer from soliciting. *NLRB* v. *Southern Md. Hosp. Ctr.*, 916 F.2d 932, 937 (4th Cir. 1990). The court stated that the

Board's finding of discrimination might have been upheld if it had "presented examples of this type of discriminatory enforcement." *Ibid.* Thus, the Fourth Circuit has not yet taken a position on the precise question presented by this case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Because there is no conflict among the courts of appeals, petitioners are mistaken in contending (Pet. 9-10) that review is warranted because "varying standards applicable to the enforcement of solicitation and distribution policies leave[] employers and employees—not to mention hospital patients—on unstable ground." Pet. 10.