No. 18-608

In the Supreme Court of the United States

CAPITAL MEDICAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA 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, an acute care hospital, violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158 (a)(1), by attempting to prevent two off-duty employees from engaging in peaceful and stationary informational picketing regarding ongoing collective-bargaining negotiations outside a nonemergency hospital entrance on its premises, where petitioner undisputedly failed to establish that such a restriction was necessary to prevent patient disturbance or disruption of health care operations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 909 F.3d 427. The decision and order of the National Labor Relations Board (Pet. App. 20-60) and the decision of the administrative law judge (Pet. App. 61-92) are reported at 364 N.L.R.B. No. 69.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2018. The petition for a writ of certiorari was filed on November 6, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, guarantees employees "the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Subject to certain restrictions not at issue here, picketing by employees against their employer is such a protected concerted activity. See *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 62-63 (1964) (*Tree Fruits*) ("Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable."). Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights.

Congress has entrusted the National Labor Relations Board (Board), in the first instance, to "'apply[] the [NLRA]'s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms'" and "to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978) (citation omitted). In *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945), this Court affirmed the Board's framework for determining the scope of employees' Section 7 rights to solicit union membership by fellow employees in light of their employer's potentially conflicting management interests. Under that framework, an employer's attempt to prohibit its employees from engaging in solicitation on its premises, or distributing literature in non-working areas of its premises,

during non-working time is presumptively unlawful, absent a showing that "special circumstances" make the prohibition "necessary in order to maintain production or discipline." *Id.* at 804 n.10 (citation omitted); see *id.* at 797-798, 803; see also *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 572-573 (1978) (affirming framework).

In the context of hospitals, the Board has applied a modified version of the same framework in light of the employer's need to maintain a tranquil environment for patients and to avoid the disruption of critical health care operations. Under the modified approach, a health care employer may restrict solicitation by its employees in "immediate patient-care areas," but restricting such activity outside patient-care areas during non-working time is presumptively unlawful unless the employer can show that it is "necessary to avoid disruption of health-care operations or disturbance of patients." *Beth Israel Hosp.*, 437 U.S. at 495, 507. The Court has similarly held that this modified framework for hospitals "is consistent with the Act." *Ibid.*; see *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 778-781, 789-790 (1979) (reaffirming framework while suggesting that "corridors and sitting rooms on patients' floors" should be considered "immediate patient-care areas").

This case concerns the Board's application of the *Republic Aviation-Beth Israel* framework to an employer's attempt to restrict peaceful, informational picketing by its employees outside a nonemergency entrance to a hospital operated by the employer.

2. Petitioner's hospital is located in Olympia, Washington. Pet. App. 5, 62. United Food & Commercial Workers Local 21 has been certified as the collective-bargaining representative of technical employees at the hospital for over 14 years. *Id.* at 22. In September 2012,

the collective-bargaining agreement between petitioner and the union expired, and the parties began bargaining for a successor contract. *Ibid.* As of May 2013, the parties had not reached a new agreement. *Ibid.* Frustrated with the state of the ongoing bargaining, the union and some of petitioner's employees decided to engage in informational picketing and handbilling outside the hospital, with the goal of educating the public and encouraging petitioner to discuss certain issues at the bargaining table. *Id.* at 22, 63-64. Pursuant to Section 8(g) of the NLRA, the union provided petitioner with written notice of its plans. *Id.* at 22, 64; see 29 U.S.C. 158(g) (requiring any labor organization to provide at least 10 days' notice before engaging in any picketing at a health care institution).

On the morning of May 20, 2013, a group of petitioner's employees arrived at the hospital to begin handbilling and picketing. Pet. App. 23. From approximately 6 a.m. to 2 p.m., two off-duty employees distributed handbills outside two nonemergency entrances: the main lobby entrance and the physicians' pavilion entrance. *Id.* at 22-23. The employees were instructed by union organizers not to block the entrances, but to stand to the sides of the doors and distribute their handbills, which read:

> OUR PATIENTS MATTER
>
> We are the health care providers who care for patients at Capital Medical Center.
>
> Right now, we are in contract negotiations with our employer, but wanted to let you know that we are having difficulty reaching a compromise. Management continues to refuse to fix problems that leave us short-staffed and cause us to miss our breaks and

> meals. In addition, they have been unwilling to support fair wage increases.
>
> We have already voted down a prior offer from management and are back in negotiations.
>
> THANK YOU
>
> Supporting hospital workers means standing up for the middle class values that respect the dignity of hard work. This includes fair wages, fair benefits, and dependable hours.

Id. at 22-23 & n.5. Meanwhile, approximately 20-25 off-duty employees began picketing at 6 a.m. on the public sidewalk adjacent to petitioner's premises. *Id.* at 23. The employees carried picket signs that were two feet by three feet and included phrases such as "Fair Wages," "Fair Contract Now," and "Respect Our Care." *Id.* at 23 n.6. By the afternoon, approximately 50-60 off-duty employees were handbilling and picketing on the public sidewalk. *Id.* at 23. Petitioner did not attempt to interfere with the activity on the public sidewalk. *Ibid.*

Around 4 p.m., two off-duty employees went to the hospital's main lobby entrance with handbills and picket signs. Pet. App. 24. The employees stood approximately 10-12 feet from the entrance, in line with outdoor pillars along the entryway, holding picket signs that read "Respect Our Care" and "Fair Contract Now." *Id.* at 24, 35, & n.13. They did not patrol, chant, or speak with anyone entering the hospital. *Id.* at 24, 26, 35. One of the two employees initially attempted to pass out handbills while simultaneously holding the picket sign, but ceased doing so after finding it too cumbersome. *Id.* at 24.

Shortly thereafter, petitioner's director of human resources received a report that employees were picket-

ing on hospital premises. Pet. App. 24. Petitioner's security manager, accompanied by several security guards, approached the two employees and informed them that they were not allowed to stand on hospital property holding picket signs. *Ibid.* The security manager instructed the employees to either resume handbilling without the picket signs or to leave the premises, but the employees politely declined. *Ibid.* The same exchange between the manager and the employees repeated itself several times over the next hour. *Ibid.*

Petitioner's security manager was eventually accompanied by petitioner's director of human resources and the attorney for petitioner who was lead negotiator in the ongoing contract bargaining. Pet. App. 24. Petitioner's attorney reiterated that the employees could remain on petitioner's property with handbills, but not with picket signs. *Ibid.* At that point, one of the employees went to the public sidewalk to consult with union representatives. *Id.* at 25. When the representatives returned, petitioner's attorney informed them that the employees would be disciplined if they continued to hold picket signs on hospital premises. *Ibid.* Petitioner's attorney subsequently informed the union's attorney that if they could not resolve the disagreement, the only options were to discipline the employees or to call law enforcement. *Ibid.*

Just before 5 p.m., petitioner called the Olympia Police Department. Pet. App. 26. An officer responded to the call approximately ten minutes later, and petitioner's managers told the officer that they wanted the employees removed from the hospital's premises. *Ibid.* The officer stated that he could not force the employees to leave because they were not being disruptive, not

blocking the doors, and not preventing people from entering the hospital. *Ibid.* The employees left the hospital on their own accord just before 6 p.m. *Ibid.*

3. a. Acting on a charge filed by the union, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, by attempting to prevent off-duty employees from engaging in informational picketing on its premises, by threatening such employees with discipline or arrest, and by summoning the police. Pet. App. 21, 61-62. Following an evidentiary hearing, an administrative law judge (ALJ) sustained the allegations. *Id.* at 61-92. Applying the *Republic Aviation-Beth Israel* framework, the ALJ acknowledged that it was "certainly a possibility" that on-premises picketing by off-duty employees could disrupt hospital operations under some circumstances, but found that petitioner had failed to demonstrate any likelihood of such a disruption from two off-duty employees silently holding picket signs outside the main lobby entrance, without creating any "real or symbolic barrier" to entry. *Id.* at 83-84. The ALJ thus recommended that the Board order petitioner to cease and desist from attempting to prevent employees from engaging in such behavior and to post a notice to its employees that it would not attempt to do so. *Id.* at 88-92.

b. The Board affirmed the ALJ's findings and conclusions, and adopted the ALJ's recommended order with minor changes. Pet. App. 20-38. Like the ALJ, the Board applied the *Republic Aviation* framework, as modified in *Beth Israel* to fit the hospital setting. *Id.* at 27-34. Assuming *arguendo* that the stationary holding of signs in this case amounted to "picketing" within the meaning of the NLRA, *id.* at 21 n.4, the Board con-

cluded that the framework, which would permit an employer to prohibit any picketing that it could show would be unduly disruptive, "adequately accommodates and protects employers' interests" in the context of on-premises picketing by an employer's own off-duty employees. *Id.* at 31; see *id.* at 28-31 & nn.9-10.

The Board rejected petitioner's argument that picketing should be found categorically unprotected on the premises of a hospital. Pet. App. 28-30 n.9. Among other things, the Board observed that Congress contemplated "picketing of hospitals" by employees, subject to advance notice requirements, in Section 8(g), without any suggestion that employees could not picket on hospital property. And the Board noted its prior precedent applying the *Republic Aviation* framework to consider the lawfulness of another employer's efforts to prevent picketing and handbilling at the front entrances of its stores without distinguishing between the two protected activities. *Ibid.* (citing *Town & Country Supermarkets*, 340 N.L.R.B. 1410 (2004)). The Board also explained that its older decision in *Providence Hospital*, 285 N.L.R.B. 320 (1987)—which had approved a hospital employer's restrictions on on-site picketing where picketing on adjoining public property provided a "reasonable alternative means for communicating with its intended audience," *id.* at 322—was based on a long-overruled Board test and "is no longer good law." Pet. App. 33 n.12.

The Board did not purport to fully define "the extent of the right to engage in on-premises picketing." Pet. App. 31-32 n.10. And it disclaimed the notion that picketing, solicitation, and handbilling are indistinguishable, emphasizing that it could "easily envision circumstances, not present here, where picketing on hospital

property would disrupt operations or interfere with patient care while solicitation and distribution would not." *Id.* at 30 n.9. In this case, however, the Board found that petitioner failed to carry its burden of showing that the picketing at issue—consisting of two employees silently holding picket signs outside a nonemergency entrance—was likely to cause patient disturbance or disruption of health care operations. *Id.* at 36. The Board therefore adopted the ALJ's recommended order with a slightly modified notice. *Id.* at 38, 59-60.

c. Member Miscimarra dissented. Pet. App. 39-59. In his view, the *Republic Aviation* framework should not be applied to prohibitions on on-site picketing by off-duty employees because "picketing has a significantly greater impact on legitimate employer interests than solicitation, handbilling and other forms of communication." *Id.* at 46; see *id.* at 44-47. Rather, he concluded, under "an appropriate balancing of the rights and interests at issue," petitioner's attempt to prohibit on-site picketing, while permitting on-site solicitation and handbilling, did not violate the Act. *Id.* at 58-59.

4. The court of appeals denied petitioner's petition for review and enforced the Board's order. Pet. App. 1-19. The court explained that, "[w]hen employees seek to exercise Section 7 rights on their employer's property, the employees' rights are balanced against the employer's property interests and management prerogatives." *Id.* at 4. It observed that this Court approved the Board's framework for balancing those rights in the context of solicitation by off-duty employees on the employer's property in *Republic Aviation*. *Ibid.* And the court held that the Board reasonably chose to apply the same framework, as modified for the hospital context,

to balance the relevant interests here. *Id.* at 9-10 (citing *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984)).

The court of appeals rejected petitioner's argument that picketing should be categorically exempt from that framework because "picketing of any kind is inherently more disruptive than other forms of Section 7 activity." Pet. App. 11; see *id.* at 11-14. The court found reasonable the Board's determinations that "picketing is often neither coercive nor disruptive" and that the stationary informational picketing at issue here was even less confrontational than routine handbilling. *Id.* at 12 (citation omitted). The court also emphasized the Board's recognition of the potentially disruptive effects of other forms of picketing and noted that the Board had "specifically rejected any notion" that "'on-premises picketing must be permitted to the same degree as on-premises solicitation and handbilling.'" *Id.* at 13 (citation omitted).

The court of appeals further concluded that the Board "adequately accounted for its precedents in its decision." Pet. App. 16; see *id.* at 14-17. Specifically, the court reasoned that the Board adequately explained why it was declining to rely on its decision in *Providence Hospital*, given this Court's rejection of the line of precedents on which *Providence Hospital* rested. *Id.* at 15-16 (citing *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992)). The court observed that the Board's decision in this case was consistent with the Board's post-*Lechmere* precedent. *Id.* at 16-17.

Finally, the court of appeals found that the Board's finding, under the *Republic Aviation-Beth Israel* framework, that "the informational picketing at issue here was unlikely to disrupt health operations or cause patient disturbance" was supported by substantial evi-

dence. Pet. App. 18; see *id.* at 18-19. The court explained that the "[u]ndisputed record evidence establishes that there were only two to four employees who held picket signs on the hospital's property, standing stationary by a nonemergency entrance" and that "[t]hey did not chant, march, or obstruct visitors from entering or leaving the hospital." *Id.* at 18. And the court observed that petitioner "offered no evidence demonstrating that the peaceful holding of picket signs nonetheless could disrupt patient care." *Id.* at 18-19. On that basis, the court upheld the Board's findings and "sustain[ed] the Board's resulting conclusion that [petitioner] violated the NLRA by attempting to stop the employees from holding picket signs." *Id.* at 19.

ARGUMENT

Petitioner contends (Pet. 17-35) that the court of appeals erred in sustaining the Board's determination that petitioner violated the NLRA by attempting to prevent its off-duty employees from engaging in peaceful and stationary informational picketing on petitioner's property outside a nonemergency entrance to its hospital. The Board reasonably applied the *Republic Aviation-Beth Israel* framework that this Court has repeatedly approved in similar contexts, and its findings under that framework are supported by substantial evidence. The court of appeals thus properly sustained the Board's determination. Its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. This Court has recognized that, under the NLRA, the Board is tasked in the first instance with balancing "conflicting legitimate interests" when employee activities that fall within Section 7's broad protective language allegedly impinge upon an employer's rights.

Beth Israel Hosp. v. *NLRB*, 437 U.S. 483, 501 (1978) (citation omitted); see *id.* at 491-493, 500-501. Specifically, where employees seek to engage in Section 7 activities on their employer's premises, the Court has explained that the Board must reach an acceptable "adjustment between the undisputed right[s] * * * assured to employees under the [NLRA] and the equally undisputed right of employers to maintain discipline in their establishments." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 571 (1978) (quoting *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 797-798 (1945)).

In *Republic Aviation*, the Court affirmed the Board's framework for balancing those competing rights in the context of solicitation and distribution by off-duty employees on the employer's premises. 324 U.S. at 804-805. Under that framework, the Board presumes that the employees' Section 7 rights cannot be restricted in the non-working areas of an employer's premises during non-working time, but permits an employer to rebut that presumption by showing that a restriction is necessary to protect the employer's legitimate interests. *Ibid.* As modified by the Board in the hospital context, and affirmed by the Court, a hospital employer similarly may presumptively restrict its employees' Section 7 activities in "immediate patient-care areas," but may restrict such activities outside "immediate patient-care areas" during non-working times only if the employer can show that a restriction is "necessary to avoid disruption of health-care operations or disturbance of patients." *Beth Israel Hosp.*, 437 U.S. at 495, 507.

In this case, the Board reasonably determined that "[t]here is nothing in the nature of picketing per se that would support a conclusion that *Republic Aviation* is inapplicable to that activity." Pet. App. 30 n.9. As the

court of appeals observed, the text of the NLRA does not directly address the appropriate accommodation between employees' Section 7 right to engage in picketing at their workplace and an employer's right to maintain discipline on its premises. *Id.* at 9-10. Nor do this Court's opinions resolve the issue. The Board thus undertook its statutorily assigned role of "applying the [NLRA's] general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms," *Republic Aviation*, 324 U.S. at 798, and reasonably determined that picketing is not "necessarily" coercive or disruptive, citing to the "peaceful display" of informational picket signs in this case by two off-duty employees who did not patrol, chant, or impede entry to the hospital. Pet. App. 30 n.9. It therefore applied the same general approach to balancing employees' right to engage in such activity and an employer's right to maintain discipline and order on its premises. *Ibid.*

2. Petitioner's arguments to the contrary lack merit. Petitioner errs in contending (Pet. 28-29) that the court of appeals' and the Board's decisions are inconsistent with this Court's precedent regarding picketing. Petitioner relies on statements by this Court distinguishing picketing from other forms of communication. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 580 (1988) ("[P]icketing is qualitatively different from other modes of communication.") (citation and internal quotation marks omitted); *Hughes* v. *Superior Ct. of Cal.*, 339 U.S. 460, 464 (1950) ("[W]hile picketing is a mode of communication it is inseparably something more and different."). As the court of appeals recognized, the Court in those cases "appeared to have in mind 'those patrolling

a picket line,' * * * as opposed to the stationary holding of picket signs by two to four employees without any patrolling (or even chanting), at issue here." Pet. App. 12 (quoting *Edward J. DeBartolo*, 485 U.S. at 580); see *Hughes*, 339 U.S. at 465 ("Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication.").

In any event, contrary to petitioner's contention (Pet. 29), the Board's decision did not "equate[] picketing with oral solicitation and handbilling" or suggest that "all forms of [Section] 7 activity [are] of one piece." To the contrary, the Board expressly recognized that picketing is not identical to handbilling or solicitation and rejected the notion that "on-premises picketing must be permitted 'to the same degree as on-premises solicitation and handbilling.'" Pet. App. 30 n.9. Indeed, the Board noted that it could "easily envision circumstances," particularly in a hospital setting, where picketing would be disruptive while handbilling or solicitation would not. *Ibid.* It reasonably left to future cases, where such picketing has occurred, the further enunciation of principles "that will guide employers about the circumstances in which they can prohibit picketing on company premises" under the *Republic Aviation* framework. *Id.* at 13.

Petitioner is also wrong to assert (Pet. 25-28) that the court of appeals' and the Board's decisions are inconsistent with this Court's decisions in *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), and *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Those decisions concern the

right to engage in Section 7 activities by nonemployee union organizers or other individuals on the property of a third-party employer. As this Court has stated, the NLRA draws a "distinction 'of substance'" between Section 7 activities by those individuals and an employee's Section 7 activities on the premises of his own employer. *Lechmere*, 502 U.S. at 537 (quoting *Babcock & Wilcox*, 351 U.S. at 113); see *Hudgens*, 424 U.S. at 521-522 & n.10 ("This difference is 'one of substance.'"); see also *Eastex*, 437 U.S. at 571-572 (drawing the same distinction).

The former category of cases requires "[s]triking a balance between [Section] 7 organizational rights and an employer's right to keep strangers from entering on its property." *Eastex*, 437 U.S. at 571. In *Lechmere*, the Court observed that Section 7 is only "derivatively" implicated by the activities of nonemployee union organizers, and thus an employer has no obligation to provide such nonemployees access to its property except in the "rare case" where the employer's own employees are otherwise inaccessible by reasonable alternative means of communication. 502 U.S. at 533, 537 (citing *Babcock & Wilcox*, 351 U.S. at 112). Similarly, in *Hudgens*, the Court suggested that the Board should take into account when individuals are attempting to participate in Section 7 activities on private property that is owned by a different employer against the property owner's wishes. See 424 U.S. at 522.

The Court has indicated, however, that "[a] wholly different balance" may be struck "when the organizational activity [i]s carried on by employees already rightfully on the[ir] employer's property." *Hudgens*, 424 U.S. at 521 n.10. In those circumstances, "the employees' interests" in exercising their Section 7 rights

"are at their strongest." *Beth Israel Hosp.*, 437 U.S. at 504. And "the Board is entitled to view the intrusion by employees on the property rights of their employer as quite limited * * * as long as the employer's management interests are adequately protected." *Eastex*, 437 U.S. at 574. The Court has repeatedly recognized that the *Republic Aviation* framework adequately protects such management interests in related contexts. See *Eastex*, 437 U.S. at 575-576; *Beth Israel Hosp.*, 437 U.S. at 507; *Hudgens*, 424 U.S. at 521 n.10. The Board's decision to apply the same general framework here provides no basis for this Court's review.

Moreover, there is no merit to petitioner's suggestion (Pet. 21-24) that the *Republic Aviation-Beth Israel Hospital* framework will be unworkable in this context. Petitioner unconvincingly claims (Pet. 21, 23) that being required to show a likelihood of disruption is "unrealistic" and that "neither the Board nor the court provide[d] guidance as to how any hospital possibly can carry this burden until the disruption or disturbance actually occurs." Those claims are belied by the Board's longstanding application of its *Republic Aviation-Beth Israel Hospital* framework in hospital settings without the type of legal uncertainty predicted by petitioner. The Board's framework "does no more" than require petitioner to show that particular on-premises picketing "may adversely affect patients." *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 781 (1979). There is no sound reason to expect that such a showing will be any more difficult in the context of picketing than in the context of handbilling or solicitation.

Petitioner's contention (Pet. 31-33) that the Board's decision in this case is inconsistent with its own precedent is also mistaken. Only one of the decisions cited by

petitioner, *Providence Hospital*, 285 N.L.R.B. 320 (1987), involved picketing on the property of the employees' own employer,[*] and both the court of appeals and the Board thoroughly explained why that decision is no longer good law. See Pet. App. 16-17, 33 n.12, 79-81. That decision—as well as the *W. S. Butterfield, Inc.*, 292 N.L.R.B. 30 (1988), and *40-41 Realty Associates, Inc.*, 288 N.L.R.B. 200 (1988), enforced *sub nom.*, *Amalgamated Dental Union Local 38A* v. *NLRB*, 867 F.2d 1423 (2d Cir. 1988) (Tbl.), decisions—were premised on short-lived and obsolete Board tests for balancing Section 7 rights and property rights articulated in *Jean Country*, 291 N.L.R.B. 11 (1988), and *Fairmont Hotel, Co.*, 282 N.L.R.B. 139 (1986). This Court expressly disapproved that line of cases "at least as applied to nonemployee organizational trespassing," *Lechmere*, 502 U.S. at 536, and the Board long ago abandoned the approach in the employee context as well. See Pet. App. 15-17, 74-75. Indeed, in the Board's most recent decision addressing employee on-site picketing, it applied the *Republic Aviation* framework. See *Town & Country Supermarkets*, 340 N.L.R.B. 1410, 1414 (2004).

3. Finally, petitioner also errs when it claims (Pet. 30-31) that the court of appeals' decision conflicts with decisions of the Third and Ninth Circuits regarding the

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[*] See *W. S. Butterfield, Inc.*, 292 N.L.R.B. 30, 32-33 (1988) (noting that it was unclear whether any of the individuals picketing were employed at the cinema where the picketing occurred and analyzing the conduct as if it had been undertaken by nonemployee union agents); *40-41 Realty Assocs., Inc.*, 288 N.L.R.B. 200, 201-203 (1988) (considering picketing by striking workers on property of third-party landlord), enforced *sub nom.*, *Amalgamated Dental Union Local 38A* v. *NLRB*, 867 F.2d 1423 (2d Cir. 1988) (Tbl.); *Scott Hudgens*, 230 N.L.R.B. 414, 415-418 (1977) (analyzing picketing by striking third-party employees on shopping center owner's property).

appropriate framework for evaluating an employer's interference with employee picketing in these circumstances. Both of the decisions on which petitioner relies concerned picketing on the private property of a third-party employer, not on the premises of the employees' own employer.

In *Seattle-First National Bank* v. *NLRB*, 651 F.2d 1272 (9th Cir. 1980), the petitioner was the owner of a 50-story office building and sought to prohibit picketing in the foyer of the 46th floor, outside of a restaurant leased by the picketers' employer. *Id.* at 1273 & n.2. Because the asserted "[S]ection 7 rights of [the] employees conflict[ed] with the private property rights of [the] building owner," the Ninth Circuit applied the standard from *Babcock & Wilcox*, ultimately concluding that the building owner violated the Act by attempting to prohibit the employees' conduct. *Id.* at 1275; see *id.* at 1275-1276.

Similarly, in *NLRB* v. *Visceglia*, 498 F.2d 43 (3d Cir. 1974), the respondent owned a non-retail industrial park and threatened to cause the arrest of employees of another company that leased a warehouse in the industrial park, based on picketing along the respondent's private road that provided access to the warehouse. *Id.* at 45-47. Applying the *Babcock & Wilcox* standard, the court of appeals concluded that "the property rights of [r]espondent" did not "have to yield to the [Section] 7 rights of the pickets" because there existed "reasonable and safe means to communicate" the employees' message without picketing on the respondent's "private property." *Id.* at 49.

In contrast, the Board's application of the *Republic Aviation-Beth Israel* framework here was premised on

the fact that the picketing was undertaken by petitioner's own employees on petitioner's premises. Pet. App. 4, 27, 85. As noted, the Court has consistently reaffirmed that the distinction between employees and nonemployees or third-party employees is one of substance. See *Lechmere*, 502 U.S. at 537; *Hudgens*, 424 U.S. at 521-522 & n.10; *Babcock & Wilcox*, 351 U.S. at 113. Neither *Seattle-First National* nor *Visceglia*, decided now almost 40 and more years ago, suggests that those courts would reject the Board's application of the *Republic Aviation* framework in a case involving Section 7 activities by employees on their own employer's premises. The alleged conflict thus provides no basis for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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