No. 12-451

In the Supreme Court of the United States

NEW YORK, NEW YORK, LLC D/B/A NEW YORK NEW YORK HOTEL AND CASINO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
RUTH E. BURDICK
Supervisory Attorney
AMY H. GINN
Attorney
National Labor Relations Board
Washington, D.C. 20570

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner, a hotel-casino operator, violated Section 8(a)(1) of the National Labor Relations Act by prohibiting off-duty employees of an onsite restaurant and food-service contractor from engaging in handbilling in various nonwork areas open to the public, in furtherance of their efforts to organize employees of the contractor and gain union representation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 676 F.3d 193. The decision and order of the National Labor Relations Board (Board) (Pet. App. 15a-81a) is reported at 356 N.L.R.B. No. 119. A previous decision of the court of appeals (Pet. App. 82a-93a) is reported at 313 F.3d 585 (Pet. App. 82a-93a). Previous decisions and orders of the Board (Pet. App. 94a-160a) are reported at 334 N.L.R.B. 762 and 334 N.L.R.B. 772.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2012. A petition for rehearing was denied on July 6, 2012 (Pet. App. 161a-162a). The petition for a writ of certiorari was filed on October 4, 2012. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 7 of the National Labor Relations Act (NLRA or Act) 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. Employees' right to organize under Section 7 lies "at the very core of the purpose for which the [NLRA] was enacted." *Sears, Roebuck & Co.* v. *San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). That core right of self-organization "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 491 (1978). Section 7 also protects employees' right to seek to improve their terms and conditions of employment through communications with third-party channels outside the immediate employee-employer relationship. *Eastex, Inc.* v. *NLRB,* 437 U.S. 556, 566-567 (1978).

b. Under Section 8(a)(1) of the NLRA, an employer engages in an unfair labor practice when it "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(a)(1). In particular, an employer violates Section 8(a)(1) if it prohibits its own employees from engaging in protected union-organizing activities at the workplace during nonwork time and in nonwork areas, unless the employer can show that prohibiting the activity is necessary to maintain production or discipline. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 803-804 (1945).

The rationale for protecting employees' rights to discuss self-organization at the workplace is twofold. First, "organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 543 (1972). Second, the jobsite is "uniquely appropriate" for the exchange of employees' views regarding union representation, *Republic Aviation*, 324 U.S. at 803 n.6, because it "is the one place where [employees] * * * traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees," *Eastex*, 437 U.S. at 574 (quoting *Gale Prods.*, 142 N.L.R.B. 1246, 1249 (1963)).

The NLRA does not prohibit an employer from restricting the access of nonemployee union representatives from entering private property for the purpose of organizing employees, unless the employees are otherwise beyond the reach of reasonable union efforts to communicate with them. See *Lechmere, Inc.* v. *NLRB,* 502 U.S. 527, 534 (1992); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (*Babcock*). As this Court has explained, "[b]y its plain terms * * * the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532. The Court has thus noted that Section 7 applies to union organizers "only derivatively," *id.* at 533, and only because "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others," *Babcock*, 351 U.S. at 113; see *Central Hardware*, 407 U.S. at 542.

2. Petitioner, which operates a hotel-casino in Las Vegas, Nevada, contracts with Ark Las Vegas Restau-

rant Corporation (Ark) to provide food services to petitioner's patrons, employees, and contractors, including by operating onsite restaurants and a food court. Pet. App. 3a, 20a. Ark operates 24 hours a day, seven days a week at petitioner's hotel-casino, and employs approximately 900 people. *Id.* at 20a.

In 1997, Ark employees began efforts to organize Ark's food-service employees working at petitioner's hotel-casino. Pet. App. 20a. On several occasions in 1997 and 1998, off-duty Ark employees passed out union-related handbills to Ark's and petitioner's customers at the hotel-casino complex in an effort to garner public support for their organizational activities. *Id.* at 3a, 20a, 84a-85a. First, in July 1997, three off-duty Ark employees stood on the sidewalk (owned by petitioner) outside the casino's main entrance and distributed handbills to customers as they entered and exited. *Id.* at 84a. The handbills stated that Ark paid its employees less than comparable union-represented employees and urged customers to tell Ark to sign a union contract. *Id.* at 3a, 84a. One of petitioner's security supervisors told the three off-duty Ark employees that they were trespassing and that they were not allowed to distribute handbills on the property. *Id.* at 84a. In response, the handbillers produced their Ark employee identification cards, asserted they had a right to be there, and refused to leave. Petitioner's security guards called the police who, after speaking to the handbillers onsite, issued trespass citations to them. *Ibid.*

Second, on April 7, 1998, two pairs of off-duty Ark employees distributed handbills to customers in front of two of Ark's restaurants inside the hotel-casino complex. Pet. App. 84a-85a. When the Ark employees refused a request to stop handbilling, petitioner called the police,

who ultimately issued trespass citations to three of the Ark employees. *Ibid.* Finally, on April 9, 1997, two off-duty Ark employees stood outside the main entrance of the hotel-casino again and distributed handbills to individuals entering or exiting. *Ibid.* At petitioner's request, the police issued citations to the handbillers and escorted them off the premises.[1] *Ibid.*

3. a. After each set of incidents, the union seeking to organize Ark's employees filed charges with the Board alleging unfair labor practices. Pet. App. 84a-85a. The Board's General Counsel in turn issued two complaints alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by prohibiting Ark employees from handbilling in various areas on its property. Pet. App. 84a-85a. Two administrative law judges (ALJs) held hearings on the complaints and recommended that the Board find that petitioner violated Section 8(a)(1) by prohibiting the off-duty Ark employees from handbilling outside the main entrance and in front of Ark's restaurants. *Id.* at 85a-86a, 96a-97a, 117a-122a, 127a, 151a-158a.

The Board agreed with the ALJs, concluding that the Ark employees were rightfully on petitioner's property pursuant to their employment relationship with Ark when engaging in the off-duty exercise of their Section 7 rights because they were employees of petitioner's on-site restaurant contractor who work regularly and exclusively on petitioner's property. Pet. App. 99a, 128a. The Board relied on two earlier Board decisions holding that "employees of a subcontractor of a property owner who work regularly and exclusively on the owner's property are rightfully on that property pursuant to the

[1] All of the trespass citations issued to Ark employees in 1998 were dropped. Pet. App. 85a.

employment relationship, even when off duty." *Id.* at 127a (citing *Gayfers Dep't Store*, 324 N.L.R.B. 1246, 1249-1250 (1997); *Southern Servs., Inc.*, 300 N.L.R.B. 1154, 1155 (1990), enforced, 954 F.2d 700 (11th Cir. 1992)). The Board contrasted such employees to "individuals who do not work regularly and exclusively on the employer's property, such as nonemployee union organizers, [who] may be treated as trespassers, and are entitled to access to the premises only if they have no reasonable non-trespassory means to communicate their message." *Ibid.* The Board thus concluded that off-duty Ark employees "may engage in protected solicitation and distribution in nonwork areas of the owner's property unless the owner can show that prohibiting that sort of activity is necessary to maintain production and discipline." *Id.* at 128a-129a; see *id.* at 97a-98a. The Board went on to find that both the sidewalk outside the casino's main entrance and the corridors adjacent to Ark's restaurants were nonwork areas, and that petitioner failed to meet its burden of showing that its prohibition on handbilling was necessary to ensure proper service to guests or for the safety of guests and employees. *Id.* at 97a-105a, 129a-131a.

b. Petitioner filed petitions for review in the District of Columbia Circuit. See Pet. App. 83a. The court of appeals denied enforcement and remanded the consolidated cases for further proceedings, concluding that the Board had not adequately explained its reasoning. The court explained that no decision of this Court had addressed the legal questions presented, and that the Board's decisions had left unanswered too many questions about the application of the legal issues to the particular facts of this case for the court to adequately review the Board's decision. *Id.* at 92a-93a.

In the court of appeals' view, "the critical question in a case of this sort is whether individuals working for a contractor on another's premises should be considered employees or nonemployees of the property owner." Pet. App. 92a. The court of appeals concluded that an examination of this Court's decisions, however, "yields no definitive answer." *Ibid.* The court explained that, although this Court's decisions in *Eastex, Inc.* v. *NLRB*, *supra*, and *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), suggested that "the controlling distinction for [Section] 7 purposes was between invitees and trespassers," the Court's "most recent pronouncement in *Lechmere* reaffirmed the principle announced in *Babcock*[, 351 U.S. at 112,] that the [NLRA] confers rights upon employees, not nonemployees, and that employers may restrict nonemployees' organizing activities on employer property." Pet. App. 87a. The court further noted that this Court has neither "addressed the [Section] 7 rights of employees of a contractor working on property under another employer's control," *id.* at 88a, nor decided "whether the term 'employee' extends to the relationship between an employer and the employees of a contractor working on its property," *id.* at 92a. The court of appeals further explained that this Court has never decided whether such onsite contractor employees "have rights equivalent to the property owner's employees—that is, *Republic Aviation* rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property owner—because their work site, although on the premises of another employer, is their sole place of employment." *Ibid.*

The court of appeals concluded that it could not apply this Court's decisions to resolve the questions in this

case because the Board had not adequately considered or explained how the factual scenarios presented affected the Board's view of the scope of Section 7's protections. Pet. App. 92a-93a. Accordingly, the court set forth questions for the Board to consider on remand:

> Without more, does the fact that the Ark employees work on [petitioner's] premises give them *Republic Aviation* rights throughout all of the non-work areas of the hotel and casino? Or are the Ark employees invitees of some sort but with rights inferior to those of [petitioner's] employees? Or should they be considered the same as nonemployees when they distribute literature on [petitioner's] premises outside of Ark's leasehold? Does it matter that the Ark employees here had returned to [petitioner] after their shifts had ended and thus might be considered guests, as [petitioner] argues? Is it of any consequence that the Ark employees were communicating, not to other Ark employees, but to guests and customers of [petitioner] (and possibly customers of Ark)?

Ibid. The court explained that it was "up to the Board to answer these questions and others, not only by applying whatever principles it can derive from the Supreme Court's decisions, but also by considering the policy implications of any accommodation between the [Section] 7 rights of Ark's employees and the rights of petitioner to control the use of its premises, and to manage its business and property." *Id.* at 93a.

4. a. On remand, the Board considered the court of appeals' questions as well as other questions and policy implications, and concluded that petitioner had violated the NLRA by prohibiting the Ark employees from en-

gaging in organizational activities in nonwork areas of petitioner's hotel-casino. Pet. App. 15a-81a.[2]

The Board first stated that the lack of a direct employment relationship between petitioner and Ark's employees did not answer the question whether petitioner could prohibit the handbilling by Ark's employees. Pet. App. 30a. The Board noted that the definition of "employee" in Section 2(3) of the NLRA, 29 U.S.C. 152(3), is broad and specifically states that it "shall not be limited to the employees of a particular employer." Pet. App. 30a-31a. Accordingly, the Board explained, it and various courts had "held in a wide variety of contexts that 'an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who

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[2] Board Member Becker was a member of the Board that decided this case. On January 25, 2013, a panel of the D.C. Circuit held that the President's authority under Article II, Section 2, Clause 3 of the Constitution to make recess appointments is limited to situations in which the vacancy first arose during an intersession recess and the President makes the appointment during that same recess. *Noel Canning* v. *NLRB*, No. 12-1115, 2013 WL 276024. Member Becker's recess appointment to the Board was not consistent with the asserted limitations on the President's recess appointments power announced in *Noel Canning*. In the view of the government, the decision in *Noel Canning* was erroneous, and the D.C. Circuit acknowledged that the decision conflicts with *Evans* v. *Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc), cert. denied, 544 U.S. 942 (2005); *United States* v. *Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986); and *United States* v. *Allocco*, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). See 2013 WL 276024, at *19. The Solicitor General is considering the matter of further review in *Noel Canning*. Petitioner here has not challenged the validity of Member Becker's appointment, and the decision in this case in any event does not warrant this Court's review for the reasons set forth herein.

do not stand in such an immediate employer/employee relationship." *Id.* at 32a (quoting *International Shipping Ass'n*, 297 N.L.R.B. 1059 (1990)). The Board thus concluded that the Ark employees "are statutorily protected employees, and [petitioner] is a covered employer that can, under certain circumstances, be held to violate the Ark employees' statutory rights, even though the Ark employees are not employees of [petitioner]." *Id.* at 33a.

The Board then sought "to establish an access standard that reflects the specific status of the Ark employees as protected employees who are not employees of the property owner, but who are regularly employed on the property." Pet. App. 33a. The Board noted that this Court's decisions in *Lechmere* (which addressed access rights of nonemployee union organizers) and *Republic Aviation* (which addressed access rights of employees) did not establish such a standard. *Id.* at 33a-34a. In developing the proper standard, the Board sought to accommodate both the Section 7 rights of contractor employees and the property rights and managerial interests of the property owner, "with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 38a (quoting *Hudgens*, 424 U.S. at 521-522).

Considering the rights of the Ark employees, the Board noted both that the employees were exercising their own rights of self-organization (rather than seeking to organize others) and that they were exercising their rights at a location where they were regularly employed. Pet. App. 41a-48a. The Board thus concluded that the Ark employees' "statutorily-recognized interests * * * are much more closely aligned to those of [petitioner's] own employees (who * * * would have been entitled to the access sought) than they are to the

interests of the union organizers at issue in *Lechmere* and *Babcock*." *Id.* at 47a.

The Board then considered petitioner's property rights, giving weight to the fact that the Ark employees would be trespassers under state law and that petitioner had a legitimate interest in preventing interference with the use of its property. Pet. App. 48a-50a. Based on the record evidence, however, the Board concluded that the Ark employees' handbilling did not interfere with operations or discipline at petitioner's complex—because it did not adversely affect the ability of customers to enter, leave, or fully enjoy use of petitioner's facilities and because it did not adversely affect the ability of Ark's or petitioner's employees to perform their work. *Id.* at 50a. The Board also considered whether the Ark employees' lack of an employment relationship with petitioner would justify a prophylactic rule limiting the employees' access even without a showing of disruption. Rejecting that proposition, the Board explained that petitioner already had sufficient means to "exercise control over the Ark employees: its relationship with the employees' employer, Ark." *Id.* at 51a. The Board noted, for example, that the contract between petitioner and Ark required Ark to ensure that its employees abide by petitioner's rules and regulations adopted to preserve order or to assure operation of a "first-class resort hotel facility." *Id.* at 52a-53a. In fact, petitioner already exercised some control over Ark employees' off-duty, on-premises conduct by, *e.g.*, barring them from wearing their uniforms and entering bars in the hotel. *Id.* at 53a. The Board thus concluded "that property owners ordinarily are able to protect their property and operational interests, in relation to employees of contractors working on

their premises, without resort to state trespass law." *Id.* at 56a.

In seeking to accommodate the rights of the employees and of petitioner, the Board concluded that "the property owner generally has the legal right and practical ability to fully protect its interest through its contractual and working relationship with the contractor (as this case illustrates), but the contractor's employees have no parallel ability to protect their statutory rights and legitimate interests in and around their workplace." Pet. App. 57a. In the factual context presented here, the Board therefore concluded that the interests of the employees and the property owner were most appropriately accommodated by permitting the property owner to "lawfully exclude [contractor] employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason." *Id.* at 58a. The Board reaffirmed its earlier conclusions that petitioner violated Section 8(a)(1) by excluding the Ark employees from handbilling on the sidewalk outside the casino's main entrance and in corridors adjacent to Ark's restaurants. *Id.* at 63a-64a.

b. Board Member Hayes dissented in part. Pet. App. 65a-81a. In his view, the Board's decision gave insufficient consideration to petitioner's property interests and erred by declining to consider, see *id.* at 60a-61a, whether the employees had alternative means of communication. *Id.* at 65a. Member Hayes would have concluded that petitioner acted unlawfully only when it excluded the handbillers from the private sidewalk outside the entrance to the casino-hotel. *Id.* at 66a.

5. a. The court of appeals enforced the Board's order and denied petitioner's petition for review. Pet. App. 1a-

14a. The court of appeals noted that the prior panel opinion "held that the Board has discretion over how to answer" the question "whether a property owner may bar employees of an onsite contractor from distributing union-related handbills on the property." *Id.* at 2a (emphasis omitted). The Board had such interpretive discretion, the court explained, because "the governing statute and Supreme Court precedent" had not supplied an answer to the operative question. *Id.* at 5a-6a. And the court of appeals held that on remand the Board had "exercised its discretion within the limits th[e] [court of appeals] had set forth," *id.* at 6a, by concluding "that a property owner generally may not bar employees of an outside contractor from distributing union-related handbills on the property," *id.* at 4a. The court of appeals noted that the Board had "adequately considered and weighed the respective interests" of employees and employers "based on the principles from the Supreme Court's decisions and 'the policy implications of any accommodation between the [Section] 7 rights of Ark's employees and the rights of [petitioner] to control the use of its premises, and to manage its business and property.'" *Id.* at 6a n.2 (quoting *New York New York, LLC* v. *NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002)).

The court of appeals also rejected petitioner's more fact-specific arguments. Pet. App. 7a-8a. Thus, the court rejected petitioner's argument that the handbilling activity was not protected because it was directed at customers, instead of at Ark employees only, noting that both the court and the Board "have made clear that NLRA sections 7 and 8(a)(1) protect employee rights to seek support from nonemployees." *Id.* at 7a (quoting *Stanford Hosp. & Clinics* v. *NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003), cert. denied, 540 U.S. 334 (2004)). The

court also rejected petitioner's arguments that the Board erred both in concluding that the handbilling occurred in nonwork areas and that it did not interfere with passing pedestrians or pose any safety issues. *Id.* at 7a-8a. The court determined that the Board's conclusions were reasonable and supported by substantial evidence. *Ibid.*

b. Judge Henderson filed a concurring opinion. Pet. App. 9a-14a. She wrote separately "to emphasize that * * * the Board is 'obliged to engage in considered analysis and explain its chosen interpretation'" when "reaching a 'proper accommodation' 'between § 7 rights and private property rights.'" *Id.* at 9a (quoting *ITT Indus., Inc.* v. *NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001); *Hudgens*, 424 U.S. at 521). Judge Henderson agreed with the panel majority "that the Board adequately considered the relevant factors and reasonably explained why, under Supreme Court precedent and in the specific context of this case, the Ark employees fall nearer along the 'spectrum' of section 7 access rights to [petitioner's] own employees than to the 'nonemployee union organizers' in" *Babcock* and *Lechmere*. *Id.* at 9a-10a.

ARGUMENT

Petitioner argues (Pet. 10-21) that the court of appeals erred in deferring to the Board's interpretation of Section 7 of the NLRA, 29 U.S.C. 157, as it applies to onsite contractor employees in the particular situation presented in this case. Review of the court of appeals' decision is not warranted because it is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly affirmed the Board's determination that petitioner violated the

NLRA by prohibiting handbilling by Ark employees on petitioner's property during nonwork hours and in nonwork locations.

a. Section 7 of the NLRA provides that: "Employees shall have 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. This Court has held that, "[b]y its plain terms, * * * the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 532 (1992). The Act specifies, however, that the term "employee shall include any employee, and shall not be limited to the employees of a particular employer." 29 U.S.C. 152(3).

This Court has repeatedly recognized that the NLRA requires a balancing of employees' "undisputed right of self-organization" under the Act on one hand with employers' "equally undisputed right * * * to maintain discipline in their establishments" as well as employers' property rights on the other. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 797-798 (1945); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The Court has also acknowledged that the statutory text does not dictate how that balance should be struck in every case, leaving such determinations instead to the expert judgment and discretion of the Board in its case-by-case enforcement of the NLRA. This Court stated in *Republic Aviation*, for example, that the NLRA "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice." 324 U.S. at 798. Instead, the Court explained, "that Act left to the Board

the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Ibid.*; see *Babcock*, 351 U.S. at 112 (noting that the "determination of the proper adjustment" between the rights of employees and employers "rests with the Board").

In this case, the court of appeals correctly concluded that the Board properly exercised its statutory authority to interpret the NLRA in balancing the organizing rights of Ark's employees with the property rights of petitioner. Pet. App. 2a, 5a-7a. As explained above (see pp. 2-3, *supra*), this Court has distinguished between the right of employees to engage in self-organizing behavior—which is protected by the NLRA—and the right of nonemployee union organizers to seek to organize employees—which is not protected by the NLRA except insofar as is necessary to enable employees to learn about the advantages of self-organization from others. But, as the court of appeals correctly concluded, neither the statutory text nor this Court's cases speak directly to how employees such as those at issue in this case should be treated under the Act. The Ark employees are not direct employees of petitioner. But neither are they nonemployee union agents seeking to organize petitioner's employees. They are employees of Ark, which contracts with petitioner; they work exclusively on petitioner's premises, performing services for petitioner and its customers; and petitioner contractually exercises a degree of control over their behavior on the premises during nonwork hours.

The text of the Act is ambiguous as to whether or in what circumstances the Ark employees can exercise their Section 7 rights, and this Court's decisions do not resolve that issue. In determining how to resolve that

ambiguity—*i.e.*, in "determin[ing] the proper adjustment" of competing rights, *Babcock*, 351 U.S. at 112—the Board performed precisely the role contemplated by Congress: The Board undertook "the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms," *Republic Aviation Corp.*, 324 U.S. at 798. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (noting Board's "special function of applying the general provisions of the Act to the complexities of industrial life").

Exercising its discretion, the Board sought "to place the Ark employees and similarly situated, protected employees at a point on the spectrum of accommodation between Section 7 rights and property rights that reflects the similarities and differences between them and other access seekers considered in [this Court's and the Board's] prior jurisprudence, as well as the similarities and differences between [petitioner] and other property owners who wish to exclude the protected employees from their property." Pet. App. 61a. The Board concluded that a property owner such as petitioner "has the legal right and practical ability to fully protect its interests through its contractual and working relationship with" a contractor such as Ark, and that contractor employees in the situation presented here generally "have no parallel ability to protect their statutory rights and legitimate interests in and around their workplace without" the protection of Section 7. *Id.* at 57a. The Board thus held that petitioner violated Section 8(a)(1) by excluding the handbilling employees from its property. *Id.* at 63a-64a. The Board emphasized the narrowness of its opinion, stressing that it "address[ed] only the situation where, as here, a property owner seeks to

exclude, from nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner." *Id.* at 57a-58a.

The Board's interpretation of the Act was reasonable and is therefore entitled to deference. This Court has acknowledged that, "[l]ike other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers." *Lechmere*, 502 U.S. at 536. As the Board explained, the Ark employees at issue qualified as "statutorily protected employees" who were "directly exercising their own Section 7 right to self-organization" rather than seeking access to petitioner's property in order to urge a separate group of employees to exercise their own organizational rights (as were the union agents at issue in *Lechmere* and *Babcock*). Pet. App. 35a; see *id.* at 12a (Henderson, J., concurring) ("[T]hat the Ark employees were exercising nonderivative section 7 rights—distinguishes the Ark employees from the nonemployee union organizers in [*Babcock*] and Lechmere."). The Board further observed that, because Ark's onsite employees worked daily on petitioner's premises for an employer that had a contractual relationship with petitioner to provide food services integral to the overall operation of petitioner's hotel-casino, they shared more in common with petitioner's own employees than they shared with the organizers in *Babcock* and *Lechmere*, who had no connection to the property. *Id.* at 36a-37a. Because petitioner's hotel-casino is the Ark employees' physical place of employment, moreover, the Board noted that denying the employees the right to

organize at that location would impose "serious obstacles to the effective exercise of their Section 7 rights—even though the property owner derives an economic benefit from their work." *Id.* at 35a.

b. There is no merit to petitioner's argument (Pet. 15-17) that the Board's decision impermissibly burdens property rights. The Board gave full consideration to petitioner's rights as employer and as owner of the hotel-casino that was the site of the handbilling, noting that its charge on remand was to "analyz[e] the statutory rights of [the Ark] workers and the property rights and managerial interests of [petitioner], seeking an accommodation between the two." Pet. App. 38a. In considering petitioner's "interests in denying off-duty Ark employees access to portions of its property outside Ark's leasehold for purposes of distributing literature," the Board gave "weight" to petitioner's right as a property owner "to exclude," acknowledging that, countervailing considerations under the NLRA aside, petitioner would have a right to exclude the handbillers as a matter of state law. *Id.* at 48a. The Board further considered petitioner's "legitimate interest in preventing interference with the use of its property" and "the fact that the Ark employees had no employment relationship with [petitioner]." *Id.* at 50a. But the Board also relied on the fact that, as evidenced by its existing contract with Ark, petitioner "was free to negotiate contractual terms with Ark sufficient to protect its interests in relation to Ark's employees." *Id.* at 51a; see *id.* at 51a-57a.

Petitioner asserts that the Board did not consider whether handbilling on the sidewalk in front of the hotel or in areas outside of two restaurants may have negatively affected petitioner's "ability to provide customers and guests with the services the business intends to

provide." Pet. 16. But the Board expressly stated that property owners may be able to exclude employees when their organizing activity would "significantly interfere[] with [the owner's] use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline." Pet. App. 58a. Contrary to petitioner's contention, see Pet. 17, the Board also acknowledged that a property owner may in some circumstances "impos[e] reasonable, nondiscriminatory, narrowly-tailored restrictions on the access of contractors' off-duty employees [that are] greater than those lawfully imposed on its own employees." Pet. App. 59a. The Board determined that petitioner had failed to "demonstrat[e] that the handbilling significantly interfered with its use of the property or that exclusion was justified by some other legitimate business reason." *Id.* at 64a. In its petition for a writ of certiorari, petitioner offers no reason to question the Board's fact-bound conclusion.

2. Petitioner argues (Pet. 9-14) that the court of appeals' decision conflicts with this Court's decisions in *Babcock* and *Lechmere*. In particular, petitioner argues (Pet. 10) that this Court held in *Babcock* (and affirmed in *Lechmere*) that the text of the NLRA confers rights only on employees of the particular employer who owns the premises, and that there is no room under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), for the Board to interpret the Act to protect individuals who are not direct employees of the relevant employer. In petitioner's view, the decision in *Babcock* controls the outcome of this case. See Pet. 11 ("The holding in *Babcock* was dispositive."). Petitioner is incorrect.

The handbillers at issue in *Babcock* and *Lechmere* were nonemployee union organizers who had no relationship with the employer or the employer's property. See *Babcock*, 351 U.S. at 106-108, 112-113; *Lechmere*, 502 U.S. at 529-530. Because such nonemployees do not have rights under Section 7 of the NLRA vis-à-vis the employer, the Court held that the employer could exclude them from its property unless the employer's direct employees were otherwise "beyond the reach of reasonable union efforts to communicate with them." *Babcock*, 351 U.S. at 113. But both cases also confirmed that Section 7 does protect the self-organizational activity of "employees" under the Act. *Lechmere*, 502 U.S. at 532-533; *Babcock*, 351 U.S. at 112.

The handbillers at issue in this case, in contrast to those in *Babcock* and *Lechmere*, are "employees" under the Act. The Board considered the text of the Act, including its definition of the term "employee," and concluded that the Act "regulates the relationship between an employer (such as [petitioner]) and employees of other employers (such as the employees of Ark)." Pet. App. 30a. The Board thus found that the Ark employees at issue here "are statutorily protected employees." *Id.* at 33a. The Board further concluded that this Court's decisions in *Babcock*, *Lechmere*, and *Republic Aviation* do not address the rights of "protected employees who are not employees of the property owner, but who are regularly employed on the property." *Ibid.* That conclusion is correct, and the outcome of this case is therefore not governed by any of those decisions. For the reasons explained above, the Board's application of the Act to the circumstances of this case was reasonable; the court of appeals correctly deferred to the Board's inter-

pretation, and its decision does not conflict with any decision of this Court.

3. Finally, petitioner does not identify any decision of another court of appeals that conflicts with the decision here. In fact, no other court of appeals has had occasion to consider the question presented in this case. That is a sufficient reason to deny the petition for a writ of certiorari.

Petitioner argues that the Board's decision will "have a profoundly destructive effect on employer property rights," Pet. 17, because there will be no limits on contractor employees' ability to engage in self-organizing activity on an employer's property, Pet. 19-20. That is not so. Petitioner points to the Board's more recent decision in *Reliant Energy*, 357 N.L.R.B. No. 172, 2011 N.L.R.B. Dec. (CCH) ¶ 15,535, at 29,334 (Dec. 30, 2011), enforced, No. 12-60041, 2012 WL 6217502 (5th Cir. Dec. 14, 2012). But, contrary to petitioner's suggestion, that decision did not expand the Board's decision in this case. *Reliant Energy* did not address the issue here—*i.e.*, under what circumstances a property owner may exclude from its property contractor employees who seek to engage in self-organizing activity during nonwork hours. In *Reliant Energy*, a contractor employee was removed from a worksite for engaging in union activity during his work shift. *Id.* at 29,335-29,336. The Board concluded that the employer violated Section 8(a)(1) when it ordered the removal because the contractor was at his workplace to perform work and the union activity neither violated any workplace rule nor interfered with the employee's own work or the work of other employees. *Id.* at 29,335-29,339. As the Board noted, its decision in this case did "not bear" on the situation presented in *Reliant Energy* because the contractor employee

in *Reliant Energy* was "engaging in protected concerted activity while at his workplace to perform work." *Id.* at 29,339.[3]

[3] Amicus National Retail Federation cites two other cases in which the Board relied on its decision in this case. Br. 16-23 (citing *Simon DeBartolo Group*, 357 N.L.R.B. No. 157, 2011 N.L.R.B. Dec. (CCH) ¶ 15,552, at 29,243 (Dec. 30, 2011), and *Nova Se. Univ.*, 357 N.L.R.B. No. 74, 2011 N.L.R.B. Dec. (CCH) ¶ 15,477, at 29,045 (Aug. 26, 2011), petition for review pending, No. 11-1297 (D.C. Cir.)). Both decisions are straightforward applications of the rule announced in this case—*i.e.*, that Section 7 protects the right of contractor employees regularly working on an employer's property to engage in self-organizing activities on the property during nonwork hours if the employer's exclusion of such activity is not justified by a legitimate business reason such as the need to maintain production and discipline. *Simon DeBartolo Group*, 357 N.L.R.B. No. 157 Dec. at 29,246-29,247; *Nova Se. Univ.*, 357 N.L.R.B. No. 74 Dec. at 29,046-29,047. Although amicus posits various hypothetical ways in which such self-organizing activity could have interfered with the businesses at issue in those cases (see Br. 16-23), the Board found "no evidence" that such interference had occurred. *Simon DeBartolo Group*, 357 N.L.R.B. No. 157 Dec. at 29,246-29,247; see *Nova Se. Univ.*, 357 N.L.R.B. No. 74 Dec. at 29,047.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
RUTH E. BURDICK
Supervisory Attorney
AMY H. GINN
Attorney
National Labor Relations Board

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