UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S INC.,	)	
	)	
and	)	Case No. 30-CA-17185
	)	
MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO	)	
	)	

BRIEF OF *AMICUS CURIAE*
COALITION FOR A DEMOCRATIC WORKPLACE
IN SUPPORT OF RESPONDENT

Maurice Baskin, Esq.
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004

Attorneys for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*

The Coalition for a Democratic Workplace (the "Coalition") is an amalgam of hundreds of employer associations and other organizations. The membership of the Coalition represents millions of businesses of all sizes from every industry sector in every region of the country. Many of the diverse employers represented by the Coalition, particularly those in the construction, retail, and hospitality industries, have had significant experience with union boycotts, including union efforts to engage in consumer boycott handbilling on employers' private property.

The primary interest of the Coalition in this case is to preserve the legitimate private property rights of employers, as they have been recognized and upheld by the United States Supreme Court and numerous courts of appeals. These rights have been threatened by past NLRB decisions that have improperly upheld union demands of access to employers' private property for the purpose of engaging in harmful consumer boycott activity against such employers, as occurred in *Sandusky Mall Co*., 329 NLRB 618, 623 (1999), *enf. den*., 242 F. 3d 682 (6th Cir. 2001).

The Coalition welcomes the Board's invitation of *amicus* briefs for the purpose of revisiting the holding of *Sandusky Mall* and related cases. In accordance with the overwhelming weight of judicial authority, as further discussed below, the Board should overrule its decision in *Sandusky Mall* and should allow employers to refuse nonemployee union access to private property, particularly where such labor organizations seek to engage in harmful boycott activities.

ISSUES PRESENTED

On November 12, 2010, the Board issued an order inviting interested *amici* to file briefs on the following questions:

1. In cases alleging unlawful employer discrimination in nonemployee access, should the Board continue to apply the standard articulated by the Board majority in *Sandusky Mall Co*., 329 NLRB 618, 623 (1999), *enf. den*. 242 F. 3d 682 (6th Cir. 2001)?
2. If not, what standard should the Board adopt to define discrimination in this context?
3. What bearing, if any, does *Register Guard*, 351 NLRB 1110 (2007), enf den in part 571 F. 3d 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in nonemployee access cases?

As further explained below, the Coalition answers the above questions as follows:

1. The Board should not continue to apply the standard of *Sandusky Mall*, which has been repeatedly denied enforcement in the courts over the past decade.
2. Instead, the Board should hold that employers are not required to allow nonemployee union agents to trespass on private property for the purpose of harming the employer's business through consumer boycotts under any circumstances. Alternatively, the Board should adopt the standard defining discrimination articulated by the dissenters in *Sandusky Mall*, *i.e*., employers should not be required to allow nonemployee union agents access to private property for the purpose of harming the employer's business, unless the employer permits such access to non-labor organizations for similarly harmful purposes.
3. The *Register Guard* decision, which did not involve a nonemployee consumer boycott of an employer on the employer's private property, nevertheless supports the adoption of a new

standard in the present case. The Board in *Register Guard* recognized that some greater measure of comparability was required to determine whether discrimination has occurred, even in the context of employee solicitations in the workplace. Given that nonemployee unions engaged in consumer boycotts have much weaker (or nonexistent) claims to Section 7 protections than do employees engaged in union organizing, it is anomalous for the Board to apply a more demanding standard for discrimination in the present context. Any new standard that is adopted should be consistent with *Register Guard*.

ARGUMENT

I. Overwhelming Judicial Authority Has Rejected The Board's Analysis in *Sandusky Mall,* And That Decision Should Now Be Overruled By the Board.

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992), the U.S. Supreme Court reaffirmed its ruling in *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), to the effect that "an employer may validly post his property against nonemployee distribution of union literature." The *Lechmere* Court further held as follows:

> While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, **his right to do so remains the general Rule**. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. **That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.**

502 U.S. at 535. (emphasis supplied).

Regrettably, in the years following *Lechmere*, the Board has issued a series of decisions that have failed to give proper deference to the holdings of the Supreme Court and have infringed on the private property rights of employers. This is particularly true with regard to the Board's

test for unlawful "discrimination" in the context of nonemployee unions seeking access to employers' private property for the purpose of publicizing consumer boycotts against the employers or their tenants. Numerous courts of appeals have denied enforcement of the Board's findings of unlawful employer discrimination in such cases as *NLRB v. Pay-Less Drug Stores Northwest, Inc*., 1995 WL 323832 (unpub.) (9th Cir. 1995); *Cleveland Real Estate Partners v. NLRB*, 95 F. 3d 457 (6th Cir. 1996); *Riesbeck Food Markets v. NLRB,* 1996 WL 405224 (4th Cir. 1996); *Be-Lo Stores v. NLRB*, 126 F. 3d 268 (4th Cir. 1997); *Sandusky Mall Co. v. NLRB*, 242 F. 3d 682 (6th Cir. 2001); and *Salmon Run Shopping Center LLC v. NLRB*, 534 F. 3d 108 (2d Cir. 2008). In each of the above cited cases, the courts found that the Board improperly declared employers to have "discriminated" against union solicitation on private property merely because the employers permitted beneficent solicitation by other organizations, while refusing union access for consumer boycotting that was plainly harmful to the employers' business objectives.

The *Sandusky* case, the focal point of the Board's present Order requesting *amicus* briefs, is both typical and instructive regarding the disconnect between the Board and the courts on the issue of "discrimination." The owner of the Sandusky Mall allowed charitable, civic and other organizations to solicit on its premises, in accordance with a stated policy of permitting such solicitation only where it benefited the business interest or good will of the mall or its tenants and did not create controversy or political divisiveness. *See* 329 NLRB 618, at 619. At the same time, the owner refused to allow the Carpenters Union to distribute handbills on mall property, because the union handbills advocated a public boycott of a mall tenant for using a nonunion contractor on a construction project. *Id*.

The Board decision in *Sandusky* declared that the mall owner's allowance of anything more than isolated charitable solicitors on its private property constituted prohibited

discrimination within the meaning of *Lechmere* and *Babcock & Wilcox*. 329 NLRB at 621. Members Brame and Hurtgen dissented. Member Brame declared that a finding of discriminatory conduct should only be made "among comparable groups or activities." *Id*. at 626. He elaborated as follows:

> [T]he Board must ask what is the nature of the conduct for which access is sought and what effect would this type of conduct reasonably be expected to have? Certainly, employers must be able to make distinctions based on the time, place, and means of solicitation to the extent that mall business may be negatively affected by one and not another. For example, outside solicitors from an organization sitting quietly at a table in a remote section of the mall would likely have a far different impact than if they were distributing handbills while roaming the common areas or picketing within the mall.

329 NLRB at 628, quoted approvingly in *Sandusky Mall Co. v. NLRB*, 242 F. 3d 682 (6th Cir. 2001).

Member Hurtgen added that messages in support of a boycott are qualitatively different from other solicitation that does not have a boycott message. Therefore, it cannot be "discrimination" to prohibit boycott messages by a union on private property when the owner of the property would have forbidden boycott activity on its property by anyone, whether it was a union or not, due to the obvious detrimental effect of such activity on the owner's business, "irrespective of the identity of the boycotter." 329 NLRB at 623.

The Sixth Circuit agreed with the dissenting Board members, and with its own prior decision in *Cleveland Real Estate Partners v. NLRB, supra*, 95 F. 3d at 457. The court therefore denied enforcement of the Board's order in *Sandusky Mall v. NLRB, supra,* 242 F. 3d 682. The court of appeals reaffirmed that nonemployee union agents engaged in a consumer boycott of an employer have no right to engage in handbilling on the employer's private property, where such union conduct is not similar to the harmless or even beneficial solicitation activities of civil and charitable organizations who the employer has permitted to use its property.

The Sixth Circuit's holding was consistent with that of the Ninth Circuit in *NLRB v. Pay Less Drug Stores Northwest, Inc., supra*, 1995 WL 323832, *1. There, the Ninth Circuit held that "a business should be free to allow local charitable and community organizations to use its premises, whether for purely altruistic reasons or as a means of cultivating good will, without thereby being compelled to allow the use of those same premises by an organization that seeks to harm that business." In *Pay Less*, the Board had found discrimination because the employer had allowed solicitations on its private property by a bloodmobile, the girl scouts, a school group, and a classic car club. None of these other organizations attempted to harm the business of the employer or its tenants.

Likewise, the Fourth Circuit in *Riesbeck Food Markets v. NLRB, supra*, 1996 WL 405224, at *1, found that discrimination claims under *Lechmere* and *Babcock & Wilcox* require a finding that an employer has treated similar conduct differently. The court held that "an employer must have some degree of control over the messages it conveys to its customers on its private property," and to distinguish between a message (the union's) that directly undermines the owner's purpose of selling goods and services as opposed to a message (the charitable organizations') that encourages business activity.

In its subsequent decision in *Be-Lo Stores v. NLRB*, 126 F. 3d 268 (4th Cir. 1997), the Fourth Circuit cast doubt on whether the *Babcock* discrimination exception should apply to economic protesters at all.[1] The court noted that nonemployee access claims to an employer's private property "are at their nadir when the nonemployees wish to engage in protest or

[1] "[W]e seriously doubt, as do our colleagues in other circuits, that the *Babcock & Wilcox* disparate treatment exception, post-*Lechmere*, applies to nonemployees who do not propose to engage in organizational activities …." 126 F. 3d at 284. *See also Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206, n. 42 (1978) ("Area standards picketing … has no … vital link to the employees located on the employer's property.").

economic activities," as opposed to organizational activities. *Id*. at 284. The Fourth Circuit nevertheless agreed with the Sixth Circuit's analysis in *Cleveland Real Estate Partners*, subsequently reaffirmed in *Sandusky Mall,* holding that "no relevant labor policies are advanced by prohibiting an employer from allowing charitable solicitations if it excludes nonemployee union distributions."

Most recently, in *Salmon Run Shopping Center LLC v. NLRB, supra*, 534 F. 3d at 108, the Second Circuit again denied enforcement of the Board's continued insistence on finding unlawful discrimination without regard to the comparability between prohibited union consumer boycott activity and permitted beneficent activities of other groups. As in the cases previously cited, the union in *Salmon Run* did not seek to communicate with the employer's employees but with the "general public." The court therefore held that "the content and context of the proposed literature distribution approaches the unprotected end of the spectrum." Agreeing with the analysis of other circuit courts, the Second Circuit reaffirmed that "the focus of the discrimination analysis under Section 7 of the Act must be upon disparate treatment of two like persons or groups." As the court further held:

> To amount to *Babcock*-type discrimination, the private property owner must treat a nonemployee who seeks to communicate on a subject protected by section 7 less favorably than another person communicating on the same subject. The disparate treatment must be shown between or among those who have chosen to enter the fray by communicating messages on the subject, whether employers or employees. * * * The solicitation of Muscular Dystrophy donations by firefighters or the distribution of educational promotional materials on Higher Ed Night do not serve as valid comparisons to the Carpenters' Union distribution of literature touting the benefits of its apprenticeship programs or decrying the failure of a mall tenant to pay area standard wages.

Ibid.

In the face of such overwhelming judicial rejection of the Board's analysis in *Sandusky Mall*,[2] it is well past time for the Board to change its overbroad view of "discrimination," at least in the context of consumer boycotts of employers by nonemployee union agents demanding access to private property. Therefore, in response to the Board's first question in its invitation for *amicus* briefs in the present case ("should the Board continue to apply the standard articulated by the Board majority in *Sandusky Mall*?"), the answer must be an emphatic "no."

II. The Board Should Hold That Employers Are Not Required To Allow Nonemployee Union Agents To Trespass On Private Property For The Purpose Of Harming The Employer's Business Under Any Circumstances. Alternatively, the Board Should Adopt The "Discrimination" Standard Articulated By The Dissenters In *Sandusky Mall.*

In response to the Board's second question to *amici* ("What standard should the Board adopt to define discrimination in this context?"), the answer is that the Board should stop requiring employers to allow nonemployee union agents to trespass on private property for the purpose of harming the employer's business, under any circumstances. In other words, the Board should acknowledge that the discrimination exception to private property rights described in *Babcock & Wilcox* and *Lechmere* is limited to employee organizing efforts, and has no application to activities such as consumer boycotts, whose purpose and effect is to harm an employer's business. In this narrow context, as noted by the courts, the access claims of labor organizations are "at their nadir." *Be-Lo Stores v. NLRB, supra*, 126 F. 3d at 284. *See also Sears Roebuck & Co. v. San Diego County Carpenters District Council, supra*, 436 U.S. at 206, n. 42.

[2] *See also Guardian Industries Corp. v. NLRB*, 49 F. 3d 317 (7th Cir. 1995), *denying in part* 313 NLRB 1275 (1994), rejecting the Board's overbroad discrimination test, even in the context of employee organizing. The Seventh Circuit observed: "Discrimination is a form of inequality, which poses the question: 'equal with respect to what?' * * * A rule distinguishing pro-union organization from anti-union organization would be disparate treatment. A rule banning all organizational notices … is impossible to understand as disparate treatment of unions." *Accord, Fleming Co. v. NLRB,* 349 F. 3d 968 (7th Cir. 2003).

Moreover, continued Board action that forces an employer to give up its private property to an outside organization for a use that is plainly harmful to the employer's business may constitute a "taking" within the meaning of the U.S. Constitution, requiring just compensation to the employer. The Supreme Court so held in *Lloyd Corp. Ltd v. Tanner*, 407 U.S. 551, 569 (1972).[3]

To the extent that the Board still believes that *Babcock*'s discrimination standard has continuing relevance in the context of nonemployee consumer boycotts, then at a minimum the Board should narrow its definition of "discrimination" in a manner consistent with the overwhelming weight of judicial authority discussed above. Towards this end, the Board should acknowledge that the only unlawful form of discrimination in the current context is that which permits ***comparable activity*** to be engaged in by other organizations. As the courts have made clear, groups that are engaged in beneficent activities are obviously not comparable to unions engaged in consumer boycotts. Therefore, employers who allow beneficent activities by other groups do not discriminate when they prohibit harmful activities by unions on the employers' private property.

The dissents of Members Brame and Hurtgen in *Sandusky Mall, supra*, 329 NLRB at 623 and 624, discussed above at p. 4-5, set forth appropriate standards for discrimination which the Board should now adopt. Thus, the Board should accept Member Hurtgen's finding that employers are entitled to make judgments as to whether nonemployee union activity is consistent with the commercial and retail purposes of the property to which access is sought. The Board

[3] In responding to this contention in the *Sandusky Mall* opinion, the Board majority incorrectly relied on the Supreme Court's decision in *Pruneyard Shopping Center v. Rollins*, 447 U.S. 74, 83 (1980). Though the Court did not find a taking to have occurred on the particular facts of *Pruneyard*, those facts included the "clear" finding that the property owner could "restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." By forcing employers to permit union interference with commercial functions by advocating consumer boycotts on employers' own private property, the Board's continued adherence to its *Sandusky Mall* holding threatens to violate the Takings Clause.

should further declare now, as Member Hurtgen did then, that employers may permissibly take into consideration whether nonemployee union activity on private property conflicts with the business of the employer or tenant, and whether the activity concerns or likely creates a dispute, controversy, or politically divisive issue. *See* 329 NLRB at 623.

Member Brame's multi-part analysis in *Sandusky Mall* is to the same effect: With regard to nonemployee solicitors, his analysis would require the Board to ask the relationship of the solicitation to the business of the employer, the likely effect of the solicitation on the employer's customers and/or tenants, and the nature of the conduct for which access is sought. Ultimately, as summarized by Member Brame, "[E]mployers must be able to make distinctions based on the time, place, and means of solicitation to the extent that … business may be negatively affected by one and not another." *Id* at 628.

The subsequent judicial formulations described above are not substantively different from either the Hurtgen or Brame formulation. What they all have in common is the recognition that comparability of the types of conduct at issue is crucial to a finding of discrimination. Any new Board standard of discrimination must take this factor into account.

Application of the proposed new standard to the present case involving Roundy's should result in a finding that the Respondent's refusal of access to nonemployee union agents was entirely permissible. The union handbills asked consumers not to patronize Roundy's and urged shoppers to go to competitor stores due to Respondent's contracting with non-union construction contractors. None of the other solicitors who Roundy's permitted at its stores engaged in

comparably harmful activity, *i.e.*, none of them urged shoppers to take their business elsewhere.[4] Thus, under any appropriate new standard adopted by the Board, there should be no finding of discrimination in the present case.

III. The Board's Holding In *Register Guard* Supports The Adoption Of A New Standard in Consumer Boycott Nonemployee Access Cases.

The final question on which the Board has asked for comment from *amici* is what bearing, if any, the Board's *Register Guard* decision has on the Board's standard for finding unlawful discrimination in nonemployee access cases. The answer to this question is that *Register Guard* plainly supports the adoption of the proposed new standard for consumer boycott nonemployee access cases.

Of course, the facts of *Register Guard* dealt solely with employee organizing, not consumer boycotts on private property by nonemployee union agents. *See* 351 NLRB 1111-1114. It is nevertheless significant that the Board held in that case that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status…." *Id.* at 1119.[5] The Board extensively relied on the Seventh Circuit's analysis in *Guardian Industries v. NLRB, supra*, 49 F. 3d at 317, and

[4] The Administrative Law Judge suggested that solicitation engaged in by an environmental group and/or a politician might have "offended some of Respondent's customers," creating an arguable distinction from the holding of *Sandusky Mall*. It is undisputed, however, that no other solicitor permitted on Roundy's property advocated a consumer boycott of the store. The activities that the Respondent chose to permit were thus in no way comparable to the union activity which posed a direct threat to the Respondent's business.

[5] As the Board further elaborated in *Register Guard*: "[I]n order to be unlawful, discrimination must be along Section 7 lines. * * * However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non business-related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish the rule discriminates along Section 7 lines." 351 NLRB at 1118.

Fleming Co., supra, 349 F. 3d at 968, for the proposition that "the concept of discrimination involves the unequal treatment of equals." *Register Guard*, 351 NLRB at 1117. The *Guardian Industries* decision in turn was cited favorably in the Sixth Circuit's decisions in *Sandusky Mall v. NLRB, supra,* and *Cleveland Real Estate Partners v. NLRB, supra,* thereby indicating that the Board's holding in *Register Guard* is consistent with the court rulings that compel adoption of a new Board standard for discrimination in the context of nonemployee customer boycotts.[6]

Absent adoption of a new standard for discrimination in the context of nonemployee consumer boycotts, including adoption of a standard that is at least as narrow as the Board's *Register Guard* standard, the state of current Board law will be anomalous. The Board will be awarding greater rights of access to nonemployees engaged in consumer boycott activity than it awards to employees seeking to use employer property (such as computers) for organizational purposes. Such a result would be completely antithetical to the settled principle announced in *Lechmere* and subsequent cases, *i.e.*, that nonemployee rights of access to private property are derivative of and weaker than the rights of employees.[7]

The proper means of resolving the present anomaly is certainly not to overrule or weaken the holding of *Register Guard*, which was properly decided. Rather, for the reasons stated by the numerous court decisions that have overwhelmingly rejected the Board's *Sandusky Mall* analysis for more than a decade before *Register Guard* was even decided, the Board must change its discrimination standard in the nonemployee union context to make it more consistent with *Register Guard*.

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[6] The Board opinion in *Register Guard* stated that its view of discrimination is "broader" than that of the court in *Cleveland Real Estate Partners v. NLRB*. 351 NLRB at 1119, n. 21. If so, the difference is slight, and in any event, as discussed above, consumer boycott activity by nonemployees is entitled to less Section 7 protection than organizational activity by employees of the sort described in *Register Guard*.

[7] "By its plain terms, … the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere, supra*, 502 U.S. at 532.

Conclusion

For the reasons set forth above, the Board should abandon and overrule its holding in *Sandusky Mall*. The Board should adopt a new standard which recognizes that no employer should be required to give private property access rights to a nonemployee labor organization for the purpose of engaging in activities, such as consumer boycott handbilling, which are plainly harmful to the business of the owner of the property.

Respectfully submitted,

Maurice Baskin

Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823
202-344-8300
mbaskin@venable.com

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Attorneys for the Coalition as
Amicus Curiae