No. _____

In the Supreme Court of the United States

CAPITAL MEDICAL CENTER,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 21,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Glenn Bunting
Constangy, Brooks, Smith & Prophete LLP
230 Peachtree Street, N.W.
Suite 2400
Atlanta, GA 30303
(757) 710-2181
(678) 999-7875 (fax)
gbunting@constangy.com

Charles P. Roberts III
Counsel of Record
Constangy, Brooks, Smith & Prophete LLP
100 N. Cherry Street
Suite 300
Winston-Salem, NC 27101
(336) 721-6852
(336) 748-9112 (fax)
croberts@constangy.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board (Board), as affirmed by the D.C. Circuit, correctly determined that *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945) and *Beth Israel Hospital v. NLRB,* 437 U.S. 483 (1978)) (approving the Board's presumption that employees of an acute-care hospital have a right under Section 7 of the National Labor Relations Act to orally solicit coworkers during nonworking time, other than in immediate patient care areas, and to communicate through distribution of written literature in non-patient care/non-work areas, during nonworking time), rather than *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956) and *Hudgens v. NLRB,* 424 U.S. 507 (1976) (Section 7 and private property rights must be balanced across a spectrum that depends on the nature and strength of the respective rights in any given context), establish the governing framework when employees seek to engage in informational picketing immediately in front of the main entrances to the employer's acute care hospital.

2. Whether the Board, as affirmed by the D.C. Circuit, properly found that Capital Medical Center committed unfair labor practices by requesting that off-duty employees refrain from picketing immediately in front of the Hospital's main lobby entrance and by threatening discipline and contacting local law enforcement when employees declined to comply, even though employees were freely permitted to distribute informational handbills both on and off Hospital property and were safely and effectively able to engage in informational picketing on the public sidewalks surrounding the Hospital's private property.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is Capital Medical Center. The respondents are the National Labor Relations Board and Intervenor United Food and Commercial Workers Local 21.

CORPORATE DISCLOSURE STATEMENT

Capital Medical Center is owned and operated by Columbia Capital Medical Center Limited Partnership, a Washington limited partnership. The partners of Columbia Capital Medical Center Limited Partnership are Columbia Olympia Management, Inc., a Delaware corporation; Capital Medical Center Partner, LLC, a Delaware limited liability company; WPC Holdco, LLC, a Delaware limited liability company; CCMC Holdco, LLC, a Delaware limited liability company; and individual physician limited partners. The Columbia Olympia Management, Inc.; Capital Medical Center Partner, LLC; and WPC Holdco, LLC are subsidiaries of Capital Medical Center Holdings, LLC, a Delaware limited liability company. CCMC Holdco, LLC is owned by RCCH-UW Medicine Healthcare Holdings, LLC and the University of Washington, an agency of the State of Washington. Capital Medical Center Holdings, LLC and RCCH-UW Medicine Healthcare Holdings, LLC are indirect subsidiaries of Capella Health Holdings, LLC, a Delaware limited liability company, which is a direct subsidiary of RegionalCare Hospital Partners Holdings, Inc., a Delaware corporation, d/b/a RCCH Healthcare Partners ("RCCH"). RCCH is wholly owned by DSB Acquisition LLC, a Delaware limited liability company, which is owned indirectly by members of

management and funds affiliated with Apollo Global Management, a publicly traded company (APO).

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. Employees Picket Immediately In Front Of Hospital Entrances 2

B. The Court's Decisions In Republic Aviation And Beth Israel Hospital 5

C. The Court's Decisions In Babcock And Hudgens 6

D. The Case Below -- ALJ's Analysis And Decision 10

E. The Board Majority's Analysis And Decision . . 13

F. The Dissenting Opinion 14

G. The D.C. Circuit's Opinion 15

REASONS FOR GRANTING THE PETITION . . . 17

A. The Decisions Below Hopelessly Muddle The Court's Decisions Regarding The Manner In Which Section 7 And Private Property Rights Are Balanced. 25

B. The Decisions Below Lay Waste To The Court's Picketing Decisions. 28

C. The D.C. Circuit's Decision Conflicts With Decisions Of The Third And Ninth Circuits. . . 30

D. The Board's Decision Radically Alters Its Historical Precedents. 31

E. This Case Presents A Significant Question Of Federal Labor Law And Is An Ideal Vehicle For This Court To Once Again Provide Guidance On The Appropriate Accommodation Between Section 7 And Private Property Rights. 33

CONCLUSION 35

APPENDIX

Appendix A Opinion of the United States Court of Appeals for the District of Columbia Circuit (August 10, 2018) . . . . . App. 1

Appendix B Decision and Order of the National Labor Relations Board (August 12, 2016) . . . . . App. 20

Appendix C Decision of the Administrative Law Judge (July 17, 2014) . . . . . App. 61

TABLE OF AUTHORITIES

CASES

40-41 Realty Associates, Inc.,
288 NLRB 200 (1988) 32

Amalgamated v. NLRB,
867 F.2d 1423 (2d Cir. 1988) 32

Beth Israel Hospital v. NLRB,
437 U.S. 483 (1978) . . . . . *passim*

Central Hardware Co. v. NLRB,
407 U.S. 539 (1972) 8, 18, 28

Chevron U.S.A. Inc. v. Nat'l Res. Def. Council,
467 U.S. 837 (1984) 16

Eastex, Inc. v. NLRB,
437 U.S. 556 (1978) 25

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,
485 U.S. 568 (1988) 19, 28, 29

Fairmont Hotel,
282 NLRB 139 (1986) 11, 12

Hudgens v. NLRB,
424 U.S. 507 (1976) . . . . . *passim*

Hughes v. Superior Court of California,
339 U.S. 460 (1950) 18, 23, 28

Jean Country,
291 NLRB 11 (1988) 11, 12

Lechmere, Inc. v. NLRB,
502 U.S. 527 (1992) . . . . . *passim*

NLRB v. Babcock & Wilcox Co.,
351 U.S. 105 (1956) . . . . . *passim*

NLRB v. Baptist Hospital,
442 U.S. 773 (1979) 6, 17, 19

NLRB v. Retail Store Employees Union,
447 U.S. 607 (1980) 19, 29

NLRB v. United Steelworkers of America,
357 U.S. 357 (1958) 26

NLRB v. Visceglia,
498 F.2d 43 (3d Cir. 1974) 20, 30, 31

Providence Hospital,
285 NLRB 320 (1987) 10, 11, 12, 16, 32

Reno v. Bossier Parish School Board,
528 U.S. 320 (2000) 25

Republic Aviation Corp. v. NLRB,
324 U.S. 793 (1945) . . . . . *passim*

Scott Hudgens,
230 NLRB 414 (1977) 9, 10

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,
436 U.S. 180 (1978) 19

Seattle-First National Bank,
243 NLRB 898 (1979) 32

Seattle-First National Bank v. NLRB,
651 F.2d 1272 (9th Cir. 1980) 20, 30, 31, 32

Town & Country Supermarkets,
340 NLRB 1410 (2004) 12, 13, 26, 32, 33

Tri-County Medical Center,
222 NLRB 1089 (1976) 21

W.S. Butterfield, Inc.,
292 NLRB 30 (1988) 32

STATUTES

28 U.S.C. § 1254 (1) 1

29 U.S.C. § 150 et seq. 17

29 U.S.C. § 157 1

29 U.S.C. § 158(a)(1) 2, 10, 13, 32

29 U.S.C. § 158(b)(4) 29

29 U.S.C. § 158(b)(7) 29

29 U.S.C. § 158(g) 2, 14, 15, 16, 29

29 U.S.C. § 160(e) 16

29 U.S.C. § 160(f) 16

Petitioner Capital Medical Center respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-19) is reported at ___ Fed. Appx. ___, and is available at 2018 WL 3893172. The National Labor Relations Board's ("Board") Decision and Order (Pet. App. 20-60) is reported at 364 NLRB No. 69. The Administrative Law Judge's decision (Pet. App. 61-92) is also reported at 364 NLRB No. 69.

JURISDICTION

The court of appeals entered its judgment on August 10, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. § 157, provides:

> 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

> organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 8(g) of the Act, 29 U.S.C. § 158(g), provides:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

STATEMENT

A. Employees Picket Immediately In Front Of Hospital Entrances

Capital Medical Center ("Hospital") is an acute care hospital located in Olympia, Washington. United Food and Commercial Workers Union Local 21 ("Union") is the certified collective-bargaining representative of the

Hospital's technical employees. In September 2012, the parties began negotiations for a new collective bargaining agreement to replace the agreement that was set to expire on September 30, 2012. As of May 2013, however, a new agreement had not been reached, and on May 9, 2013, the Union provided written notice to the Hospital that it intended to engage in picketing and handbilling on May 20, 2013, between the hours of 6 a.m. and 6 p.m. (Pet. App. 22).

On the morning of May 20, around 6 a.m., 20-25 employees began picketing at different locations on the public sidewalks surrounding the entrances to the Hospital's parking lot, and four off-duty employees began distributing handbills, two at the front lobby entrance to the Hospital and two at the physicians' pavilion entrance. Picketing on the public sidewalks continued throughout the day. (Pet. App. 21-22).

At about 4 p.m., two off-duty employees (Arland and Durfey) approached the main entrance lobby carrying handbills and picket signs. The picket signs bore the messages "Respect Our Care" and "Fair Contract Now." Upon learning of the presence of picketers in front of the lobby entrance, the Hospital's security manager, Bruce Hillard, approached and advised Arland she could continue to handbill at the entrance, but that she could not carry a picket sign. He politely asked her to leave and she politely refused. During the next hour, the same conversation occurred several times. (Pet. App. 24).

When it became clear that a stalemate existed, Hospital director of human resources Heather Morotti and Glenn Bunting, the Hospital's outside labor counsel and chief negotiator, approached the picketers.

Arland was told she could remain on the Hospital's property with handbills, but not with a picket sign. Durfey then departed and sought out Union representative Jenny Reed, who, along with another Union representative, Cathy MacPhail, approached the group. Reed asserted that the employees had the right to picket by the Hospital entrance. Bunting requested Reed and MacPhail to meet with him and Morotti in Morotti's office to discuss the matter privately. The Board found that during this conversation, Bunting stated that the employees needed to leave and that discipline was possible if they refused. Reed replied that the Union's attorney, James McGuinness, had advised the employees that they possessed a legal right to picket outside the hospital doors. (Pet. App. 24-25).

This triggered a call by Bunting to McGuinness to discuss the situation. The two attorneys did not agree, and Bunting told McGuinness that the only options left for the Hospital were either to discipline the employees or call law enforcement. As the dispute remained at an impasse, Morotti and the Hospital's CEO decided not to issue discipline, but instead to call the police if the picketers were still present at 5 p.m. (Pet. App. 25).

Thereafter, Bunting and Morotti again approached the picketers. Arland was again told that the Hospital would have no choice but to contact law enforcement if the picketing continued. At 4:59 p.m., a Hospital security officer called the Olympia Police Department. At 5:11 p.m., Patrol Sergeant Dan Smith arrived at the Hospital and spoke with Bunting and Morotti, who advised Smith that the Hospital did not want anyone arrested, but could not permit the unauthorized picketing to continue. After speaking to Reed, who

advised that the Union was about to conclude picketing for the day, Smith informed Bunting and Morotti that because the picketing was peaceful and entrances were not being blocked, he could not compel the picketers to leave. Smith left the scene at 5:49 p.m. Because it was getting close to 6:00 p.m., when the picketing was scheduled to end, the Union at that time withdrew the picketers from the Hospital's property. (Pet. App. 26).

B. The Court's Decisions In Republic Aviation And Beth Israel Hospital

In *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945), the Court considered two petitions, one filed by Republic Aviation and the other by Le Tourneau Company of Georgia. In the case of Republic, the employer, relying upon a preexisting rule prohibiting solicitation, discharged an employee who distributed union membership cards to employees during his lunch period. The Board found the rule to be overly restrictive of employee rights and the discharge in reliance upon such rule to be unlawful. The Second Circuit affirmed. In Le Tourneau, the employer suspended two employees for distributing union literature in the employer's parking lots during nonworking time, in violation of a rule prohibiting distribution of literature on employer property without permission. The Board found violations of the Act, but the Fifth Circuit reversed. This Court subsequently granted the respective petitions for certiorari and consolidated the cases for decision. *Id.* at 795-798.

In affirming the Second Circuit and reversing the Fifth Circuit, the Court concluded that the Board's presumptions, which permitted an employer to restrict solicitation for organizing purposes during working

time (in contrast to nonworking time), and to restrict distribution of literature in work areas (in contrast to non-work areas), represented an appropriate balancing of employee and employer rights. Similarly, it was not unfair to place the burden upon the employer to overcome the presumption by establishing special circumstances if it wished to impose additional restrictions. *Id.* at 802-804 & n. 10.

In *Beth Israel Hospital v. NLRB,* 437 U.S. 483 (1978), the Court approved the Board's adoption of a modified presumption for acute-care hospitals, one that recognized the hospital's right to restrict solicitation in immediate patient care areas even during an employee's non-work time as such solicitation had the potential to be unsettling to patients. *Id.* at 502. A year later, in *NLRB v. Baptist Hospital,* 442 U.S. 773 (1979), the Court was concerned primarily with the Board's narrow view of "immediate patient care areas." The Court concluded that the hospital had justified the need to restrict solicitation not only in patients' rooms and treatment rooms, but also in corridors and sitting rooms on patient floors. *Id.* at 785-786.

C. The Court's Decisions In Babcock And Hudgens

In *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), the Court considered whether the Board acted within the scope of its authority by ordering a manufacturing employer to grant nonemployee union organizers access to the employer's private property in order to distribute handbills to employees. The Board based its order on its finding that the employees were isolated and difficult to reach other than at their workplace and that handbilling on public property

could not be conducted safely and effectively. Although the Court accepted these findings, it nevertheless concluded that "an employer may validly post his property against nonemployee distribution of literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. The Court explained that "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights," and "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id.* The Court further held there is a substantive "distinction between rules of law applicable to employees and those applicable to nonemployees." *Id.* at 113.

Whereas *Babcock* involved nonemployees seeking to distribute literature on private property, *Hudgens v. NLRB,* 424 U.S. 507 (1976) addressed the right of warehouse employees of Butler Shoe, who were engaged in an economic strike, to picket in front of a retail store operated by Butler in a mall owned by Scott Hudgens, a third-party landlord. The Board concluded that the employees possessed a right to picket on Hudgens' private property, but as described in the Court's opinion, the Board was unable to espouse a coherent and consistent analysis, shifting its position throughout the course of the litigation. The Board initially decided that First Amendment principles were controlling. On remand from the Fifth Circuit, the administrative law judge applied a *Babcock* analysis. The Board then adopted this analysis, but disclaimed

any consideration of alternative means of communication. Back in the Fifth Circuit, the Board "changed its tack and urged that the case was controlled not by *Babcock & Wilcox*, but by [*Republic Aviation*], a case which held that an employer commits an unfair labor practice if he enforces a no-solicitation rule against employees on his premises who are also union organizers unless he can prove that the rule is necessitated by special circumstances." *Id*. at 511. The Fifth Circuit rejected this theory, but enforced the Board's order under yet another theory, i.e., that the Board's General Counsel had carried his burden of establishing that less intrusive locations for picketing were either unavailable or ineffective. *Id.* at 511-512. When the case finally reached this Court, the Board abandoned its *Republic Aviation* theory and reverted to a First Amendment analysis. *Id.* at 512.

The *Hudgens* Court rejected the applicability of First Amendment principles, finding instead that "the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act." *Id.* at 521. Discussing its prior decisions in *Babcock* and *Central Hardware Co. v. NLRB,* 407 U.S. 539, 543 (1972), the Court emphasized that the "basic objective under the Act" is to accommodate §7 rights and private property rights in a manner that best preserves each without destroying the other. *Id.* at 522. The Court acknowledged that *Babcock* and *Central Hardware* "involved organizational activity carried on by nonemployees on the employer's property." *Id.* at 521. In contrast, in *Hudgens,* "the Section 7 activity was carried on by the employer's own employees rather than outsiders." *Id.* at 522. The Court noted that this was one of a number of differences "which may or may

not be relevant in striking the proper balance." *Id.* Nevertheless, the Board was required to perform a balancing analysis and determine a proper accommodation. "The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Id.* at 522.

On remand, *Scott Hudgens,* 230 NLRB 414 (1977), the Board attempted to balance the employees' Section 7 rights against Hudgens' property rights. The Board found that economic strike activity and organizational activity were both protected by the Act, but that these activities were directed at different audiences. In an organizational campaign, the group of employees being targeted is readily identifiable and can be targeted away from the employer's property. Consumer picketing, however, is directed at customers who, in the case of Butler Shoe, could be identified "only when individual shoppers decide to enter the store." *Id.* at 416.

Although Hudgens was not the employer of the picketing employees, he was not a "completely neutral bystander." *Id.* at 417. Hudgens had a financial interest in the success of the businesses, provided security services, and in many ways functioned as an advocate for and agent of the various shopkeepers. The mall was open to the public, the businesses within the mall had leasehold interests in the property, and the picketers were employees of one of Hudgens' lawful tenants. *Id.* 417-418. In these circumstances, "Hudgens necessarily submitted his own property rights to whatever activity, lawful and protected by the Act,

might be conducted against the merchants had they owned, instead of leased, the premises." *Id.* at 418.

The fact that the intended audience could not be identified until they actually made a decision to enter the Butler store became the lynchpin for the Board's ultimate conclusion that Hudgens' property rights would have to yield to the employees' Section 7 rights. Picketing on the public sidewalks surrounding the mall was not a reasonable alternative because the closest public area was 500 feet from the store, picketing on the periphery of the mall would potentially enmesh neutral employers, and many persons did not choose to do business with Butler until they approached the store. *Id.* at 417.

D. The Case Below -- ALJ's Analysis And Decision

Following the Union's filing of an unfair labor practice charge alleging that the Hospital had violated § 8(a)(1) by its various efforts to prohibit employees from picketing on Hospital property, the Board's Regional Director issued a complaint. The matter was heard by an Administrative Law Judge ("ALJ"). On July 17, 2014, the ALJ issued her decision, in which she concluded that this Court's decisions in *Republic Aviation* and *Beth Israel* provided the governing standard for cases involving employee picketing. (Pet. App. 61).

The ALJ declined to follow the Board's decision in *Providence Hospital,* 285 NLRB 320 (1987), where the Board concluded that the hospital employer lawfully denied employees the right to picket on hospital property. In *Providence*, the Board had applied a

Babcock / Hudgens balancing analysis. At the time, the Board's balancing test was one that it had adopted in *Fairmont Hotel,* 282 NLRB 139 (1986). The *Fairmont* test first assessed the relative strengths of the respective rights, and if one of those rights clearly was greater than the other, that right would prevail. However, if the rights were relatively equal, the Board would examine the availability of alternative means of communication, and the burden would be on the Board's General Counsel to establish "that the Union, in the absence of access to the Respondent's property, had no reasonable alternative means for communicating with its intended audience." 285 NLRB at 322. The Board subsequently modified its *Fairmont Hotel* analysis in *Jean Country,* 291 NLRB 11 (1988), and held that "the availability of reasonable alternative means is a factor that must be considered in every access case where a legitimate property interest and a Section 7 right must be accommodated." *Id.* at 14. The Board's decisions in *Fairmont Hotel* and *Jean Country* were intended to establish uniform standards for balancing Section 7 and property rights in all cases, whether the persons seeking access were employees or nonemployees. *Jean Country* itself, however, involved nonemployee union agents seeking to engage in informational picketing on private mall property in front of a nonunion Jean Country store. In *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), a case that also involved nonemployee union agents seeking access to private property, this Court held that *Jean Country* could not be applied to cases in which nonemployees sought access, as *Babcock* had already performed the requisite balancing. Thus, "[a]t least as applied to nonemployees," *Jean Country's* balancing analysis was inconsistent with *Babcock's* general rule. *Id.* at 535.

Although she acknowledged that *Lechmere* overruled *Jean Country* only as applied to nonemployees, the ALJ viewed *Fairmont Hotel, Providence Hospital,* and *Jean Country* as outdated precedents even in cases where employees were seeking to exercise Section 7 rights. The more appropriate precedent, she found, was *Town & Country Supermarkets,* 340 NLRB 1410, 1414 (2004), (Pet. App. 76), where the Board cited *Republic Aviation* as support for its finding that a retail grocery store committed an unfair labor practice by prohibiting its employees from "engaging in picketing and handbilling" outside the entrances and exits to two of its stores.

In the ALJ's view, there were "three primary considerations: (1) the characteristics of the individuals engaging in the activity at issue, i.e., employee versus nonemployee; (2) the ownership of the property, i.e., ownership by the employer versus ownership by another entity; and (3) the nature of the rule or prohibition, i.e., a rule barring access to anyone other than employees who are on the clock versus a rule targeting certain activities on the work premises." (Pet. App. 80-81). The ALJ considered it immaterial that the §7 right at issue involved picketing, as opposed to solicitation or distribution of literature. Because the Hospital's employees sought to picket on the Hospital's property, and the Hospital permitted access for handbilling, but not for picketing, the ALJ found that the employees had a presumptive right to picket outside the Hospital entrances. She further found that the Hospital had failed to carry its affirmative burden to establish a likelihood of disruption or interference with patient care, and thus concluded that the Hospital

had violated §8(a)(1) by "threatening employees with discipline for engaging in this activity, summoning the police to the scene, and threatening employees with arrest." (Pet. App. 87).

E. The Board Majority's Analysis And Decision

The Hospital filed timely exceptions to the ALJ's decision, and on August 12, 2016, the Board issued a 2-to-1 decision affirming and adopting the ALJ's decision. (Pet. App. 20). As the Hospital had not interfered with the employees' Section 7 right to handbill on Hospital property, the sole issue before the Board was whether the Hospital violated the Act by taking steps, ultimately unsuccessful, to prohibit picketing on the Hospital's private property. Although the picketers were peaceful and did not engage in any patrolling, the parties clearly believed the employees were engaged in picketing, and the Board majority, accepted for decisional purposes that the employees were in fact engaged in picketing within the meaning of the Act. (Pet. App. 21, n. 4).

As had the ALJ, the Board majority relied upon *Republic Aviation* and *Beth Israel,* as well as its *Town & Country* decision, to find that the employees had a presumptive right to engage in picketing on Hospital property and that the Hospital failed to carry its affirmative burden to rebut the presumption. The Board majority concluded that any distinctions between *Town & Country* and the case at bar were immaterial, (Pet. App. 27- 28 & n. 9), and that "*Republic Aviation* adequately accommodates and protects employers' interests, allowing for restrictions on employees' Section 7 activity where the employer meets its burden to show that such a restriction is

necessary to maintain discipline and production." (Pet. App. 31). The Board majority also claimed support in Section 8(g) of the Act, asserting that "Congress recognized the adverse effects that picketing might have on patient care, and explicitly balanced the interest in limiting such effects against the workers' newly granted rights." (Pet. App. 28-29, n. 9).

The Board majority did not dispute, but deemed it irrelevant, that the employees safely and effectively picketed on the public sidewalks. Similarly, that employees were permitted to handbill at the front lobby entrance was deemed not to be a defense as "the picket signs in this case facilitated communication with the hospital's patrons because even those who did not take a handbill would have been able to see the employees' message" and "employees should [not] be required to forgo their chosen method of communication," absent proof that restricting the chosen method "was necessary to prevent patient disturbance or disruption of health care operations." (Pet. App. 37).

F. The Dissenting Opinion

Board member Miscimarra issued a vigorous dissent. (Pet. App. 39). In his opinion, the majority's "holding contradicts Supreme Court precedent recognizing that picketing is qualitatively different from handbilling" and "improperly discount[s] Board and court cases holding that hospitals have an especially important interest in preventing the on-premises picketing of patients and visitors." (Pet. App. 39). Member Miscimmara believed the case to be controlled by *Babcock* and *Hudgens*, rather than *Republic Aviation* and *Beth Israel*. He noted that the Board's standards for solicitation and literature

distribution "recognized that permitting a complete prohibition of workplace solicitation and distribution would have a substantial adverse impact on Section 7 activity, but unrestricted solicitation and distribution would unduly interfere with an employer's legitimate control over production, discipline and property interests." (Pet. App. 44). However, "[n]othing in *Republic Aviation* or any other Supreme Court case suggests that *picketing* on an employer's premises is entitled to the same protection as solicitation and distribution." (Pet. App. 45). *Babcock,* on the other hand, held that property rights are entitled to as much protection as §7 rights, and "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." (Pet. App. 42). Member Miscimmara further observed that while there were different considerations in cases involving employees as opposed to nonemployees, "the competing rights still must be balanced in 'cases involving *employee* activities.'" [quoting *Lechmere*]. (Pet. App. 42-43). Finally, he rejected the majority's reliance on § 8(g) as irreconcilable "with the statute's plain language." (Pet. App. 50-51). In his view, "[n]othing could be farther from the 'restful atmosphere' envisioned by the Supreme Court than a hospital forbidden to impose restrictions against on-premises picketing of patients and visitors." (Pet. App. 55).

G. The D.C. Circuit's Opinion

The Board's Decision and Order was a final order that disposed of all claims. The Hospital, as an aggrieved party, filed its petition for review in the D.C. Circuit on September 16, 2016. The Act does not specify

any time period for filing a petition for review, and the D.C. Circuit had jurisdiction pursuant to 29 U.S.C. § 160(f). The Board subsequently filed a cross-application for enforcement of its order pursuant to 29 U.S.C. § 160(e).

On August 10, 2018, the D.C. Circuit issued its opinion (Pet. App. 1) denying the Hospital's petition and granting the Board's cross-application. The court of appeals recognized that the central legal issue before it was whether the Board properly applied *Republic Aviation* to picketing. In reviewing this question, the court concluded that it was required under *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council,* 467 U.S. 837, 842-843 (1984) to give deference to the Board's "application of the *Republic Aviation* framework." (Pet. App. 10). The court accepted the Board majority's position that "the *Republic Aviation* framework gives effect to an employer's interests in the hospital setting on a case-by-case basis by enabling a hospital to 'prohibit Section 7 activities in non-patient care areas if it shows that the prohibition is needed to prevent patient disturbance or disruption of health care operations.'" (Pet. App. 10-11). The court also accepted the Board majority's position that employee picketing was not "categorically different [from handbilling], such that the *Republic Aviation* framework should have no application to picketing as a blanket matter" (Pet. App. 11) because "picketing is often neither coercive nor disruptive," (Pet. App. 12), and held that the Board majority adequately explained its refusal to apply *Providence Hospital*. (Pet. App. 17). Finally, although Section 8(g) did not speak to whether picketing would occur on a hospital's property, the court believed that it supported "the general idea that picketing of

hospitals need not be subjected to different standards than other Section 7 activity." (Pet. App. 15).

REASONS FOR GRANTING THE PETITION

The proposition that employees of a private acute-care hospital possess a presumptive legal right to picket immediately in front of the main doors to the hospital is so startling as to have never in the first seventy years of the Taft-Hartley Act, 29 U.S.C. § 150 et. seq., been suggested to this Court, the Board, or any federal court of appeals. Here, however, the Board found such a right, and the court of appeals enforced the Board's order, even though the employees were permitted to handbill outside the main entrance, and the Union and its employee members picketed safely and effectively on the public sidewalks surrounding the Hospital's parking lots. In finding this previously-unknown right, the Board concluded that the issue was predetermined by the Court's decision in *Republic Aviation,* as modified for acute-care hospitals and other health-care institutions in *Beth Israel Hospital* and *Baptist Hospital*.

The Board's conclusion, affirmed by the D.C. Circuit, that *Republic Aviation* and *Beth Israel* established a general presumption that applied to all forms of otherwise lawful Section 7 activity by employees, including picketing, grossly distorts the Court's holdings in these cases, hopelessly muddles the Court's holdings in *Babcock, Hudgens,* and *Lechmere;* conflates all Section 7 activities without any analysis of the material distinctions between picketing and mere solicitation; tramples over the Court's jurisprudence regarding picketing; subordinates private property rights to the Section 7 rights of employees in every

instance; and threatens the ability of hospitals and other health care institutions to ensure that patient care is neither disrupted nor hindered, all without any plausible showing that the ability to picket on Hospital property was necessary to preserve employee Section 7 rights.

This Court's intervention is essential in order to protect the integrity of its decisions regarding the proper balance between Section 7 and private property rights, reestablish the principle that picketing is more than mere communication, and remind the Board that [h]ospitals carry on a public function of the utmost seriousness and importance," *Beth Israel,* 437 U.S. at 508, and are "where the patient—and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." *Id.* at 509 (Blackman J., concurring).

The Court has a long history of ensuring that Section 7 and private property rights are properly balanced, as well as differentiating picketing from other forms of communication. From *Hughes v. Superior Court of California,* 339 U.S. 460, 464 (1950) ("[W]hile picketing is a mode of communication it is inseparably something more and different"); to *Babcock,* 351 U.S. at 112 (Section 7 and private property rights must be balanced "with as little destruction of one as is consistent with the maintenance of the other"); to *Central Hardware,* 407 U.S. at 543 (1972) ("The Board and the courts have a duty to resolve conflicts between organization rights

and property rights, and to seek a proper accommodation between the two"); to *Hudgens,* 424 U.S. at 521 (proper accommodation "in any situation may largely depend upon the content and context of the § 7 right being asserted"); to *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 205 (1978) (trespassory picketing "is far more likely to be unprotected than protected"); to *Baptist Hospital,* 442 U.S. at 789, n. 16 ("the Board must frame its rules and administer them with careful attention to the wide variety of activities within the modern hospital"), to *NLRB v. Retail Store Employees Union,* 447 U.S. 607, 619 (1980) (*Safeco*) (Stevens, J., concurring in part) ("picketing is a mixture of conduct and communication" and "[i]n the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment"); to *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568 (1988) (consumer handbilling is materially different from picketing); to *Lechmere,* 502 U.S. at 538 ("[s]o long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place"); this Court has repeatedly stepped in to resolve important federal labor law questions concerning picketing, Section 7 rights, and private property rights.

The D.C. Circuit's opinion, enforcing the Board's decision, turns *Republic Aviation* into a general rule that purports to establish the appropriate accommodation in all situations where employees seek to exercise §7 rights on private property owned or

occupied by their employer, effectively repudiates the *Babcock / Hudgens* balancing analysis, and creates a conflict with decisions from the United States Courts of Appeals for the Fifth and Ninth Circuits, *Seattle-First National Bank v. NLRB,* 651 F.2d 1272 (9th Cir. 1980); *NLRB v. Visceglia,* 498 F.2d 43 (3d Cir. 1974), as well as the Board's own historical precedents.

The Board has chosen to hold that the Section 7 rights of employees are always presumed to be superior to private property rights, regardless of the nature of the employee activity or the availability of effective and reasonable alternative locales for carrying out such activity. Specifically, employees are entitled to picket on private property owned or occupied by their employer at the point of maximum impact, unless "special circumstances" can be established rendering such activity a threat to production or discipline, or, in the case of health care institutions, a threat to patient care or health care operations.

The proper scope of *Republic Aviation* and *Beth Israel,* and their applicability to picketing by employees is an issue of immense importance in the field of labor relations and one that has not been, but should be, decided by the Court. The Board's decision is not restricted to health care institutions, but it is particularly troubling for such institutions, where "the employer's interest in protecting patients from disturbance cannot be gainsaid." *Beth Israel,* 437 U.S. at 505.

The Board's application of a *Republic Aviation / Beth Israel* presumption to picketing by employees establishes an untenable baseline for all hospitals and health care institutions. It irrationally presumes,

without any supporting empirical evidence, that picketing on hospital property is not materially different from handbilling and will not adversely impact patient care or health care operations in the "ordinary" hospital. There are no meaningful limits to the Board's presumption. It applies without regard to the precise location of the picketing, provided it does not occur in "work" or "immediate patient care" areas. Thus, picketing by employees *presumptively* is permitted not only in the parking lots and outside the main Hospital entrance, but in front of emergency entrances, as well as in interior non-work, non-patient care areas such as the lobby and the cafeteria.[1] The presumption applies without regard to the number of employees involved, the size of the picket signs, or the specific conduct of the picketers.

The position of the Board and the court of appeals in this case that the Hospital's rights are adequately balanced by placing an affirmative burden on it to establish a likelihood of patient disturbance or disruption of health care operations is a wholly unrealistic and unsatisfactory means of balancing the competing rights, as it places a metaphorical boulder on the scales. Indeed, it is the antithesis of the *Republic Aviation*/*Beth Israel* framework. Under the historical analysis in these cases, the affirmative

---

[1] Although an employer may maintain a rule that prohibits off-duty employees from returning to the interior of the facility when they are not scheduled to work, *Tri-County Medical Center,* 222 NLRB 1089 (1976), this does not apply to employees who are scheduled to work, but are simply on break, lunch, or other non-work time. Thus, on-duty employees presumptively could picket in the lobby or cafeteria during scheduled break and lunch periods.

burden to rebut the Board's articulated time-and-place presumptions regarding solicitation and distribution of literature was imposed only *after* the Board had balanced the respective rights of employers and employees. Thus, when it initially established its presumptions regarding solicitation and distribution, the Board addressed oral solicitation and distribution of literature as separate §7 activities with different considerations and different accommodations. The Board first assessed each activity in the abstract context of the "ordinary" employer or hospital. It then established a generalized rule that presumptively permitted each activity at certain times and places, while permitting the employer or hospital to categorically prohibit each activity at all other times and places, without making any showing that oral solicitation or handbilling in any specific instance was disruptive. Only then did the Board place the burden on the employer or hospital, if it wished to place further restrictions on either activity, to rebut the presumption by demonstrating special circumstances. Thus, *the presumptions were the accommodations,* and they were tailored to the specific §7 rights being asserted. Permitting an employer to rebut the presumption was not the accommodation; it was an affirmative defense that could be raised where unusual circumstances rendered the presumption inappropriate. Here, however, the Board has taken a presumption that was created in one context and imposed it in an entirely different context without any specific evaluation of the uniqueness of picketing or whether the presumption has any meaning. In essence, *the affirmative defense has become the accommodation.* This is wholly inconsistent with what this Court had in mind in *Hudgens,* where it held that the specific

accommodation in "each generic situation" would turn on "the nature and strength of the respective § 7 rights and private property rights asserted in any given context." 424 U.S. at 522.

What the Board has not done in the decision below, or in any other case, is evaluate the differences between picketing and oral solicitation/handbilling. It cannot be denied that picketing is a generically different type of §7 activity. "[P]icketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent." *Hughes,* 339 U.S. at 465. The Board's decision here, equating picketing with mere distribution of literature, lays waste to the Court's picketing decisions.

The court of appeals noted that the burden was not to show *actual,* only *likely,* disruption, (Pet. App. 18), but neither the Board nor the court provides guidance as to how any hospital possibly can carry this burden until the disruption or disturbance actually occurs. Remember that the presumption here, dubious as it may be, assumes that in the ordinary hospital, picketing in non-patient care areas will not be unduly disruptive or disturbing to patients. The burden on any hospital faced with potential picketing, if it wishes to act rather than react, is to establish either that it is somehow different from the ordinary hospital such that the presumption does not apply, or establish that the picketing is likely to be disruptive or disturbing. It is the rare hospital that will be able to establish that it is somehow unique such that the presumption is unwarranted. And how does a hospital establish that picketing, which has not yet occurred, will likely be disruptive or disturbing when the union is under no

obligation to inform such hospital that it intends to send employee picketers onto hospital property, or to provide any information regarding the number of pickets, the precise areas in which employees will picket, the specific times in which on-site picketing will occur, or the size or content of the picket signs? The hospital is left with no choice but to wait and see, and then to react.

Even then, what circumstances will suffice to carry the hospital's burden? How many pickets are too many? What areas, if any, are off limits? Must patients or visitors actually be impeded? Must complaints be received? The Board's paradigm answers none of these questions, leaving hospitals and other health care institutions to guess at when they lawfully may react to picketing and leaving the Board and the courts to apply a legal standard of "I know it when I see it."

The position of the Board and the D.C. Circuit in this case that *Babcock, Hudgens,* and *Lechmere* have no applicability when employees, rather than nonemployees, are seeking to access private property in order to exercise § 7 rights destroys decades of settled precedent without any meaningful legal analysis or any compelling justification. The D.C. Circuit's enforcement of the Board's order creates a split among the circuits. The Court's intervention and clarification is essential, and this case presents the ideal opportunity to do so. The essential facts are undisputed, and both the Board and the court of appeals recognized that the questions presented are narrow questions of law regarding a federal labor statute and the applicability of various Court precedents to picketing by employees immediately in front of the main entrance to the

Hospital, where the employees were freely permitted to handbill at that location and effectively and safely picketed on the public sidewalks surrounding the Hospital. This Court should grant the petition.

A. The Decisions Below Hopelessly Muddle The Court's Decisions Regarding The Manner In Which Section 7 And Private Property Rights Are Balanced.

The Board's conclusion that *Republic Aviation* applies to all forms of Section 7 activity by employees, including picketing, represents a gross misreading of the Court's decision, has no plausible basis, and is entitled to no deference. *Reno v. Bossier Parish School Board,* 528 U.S. 320, 336, n. 5 (2000) (no deference owed to agency's interpretation of Court's own decision). The Board majority criticized dissenting Member Miscimarra for citing no case specifically holding that "picketing is excepted from the general rule of *Republic Aviation,"* (Pet. App. 28, n. 9), but this criticism falsely assumes that *Republic Aviation,* on its face, established a "general rule" that broadly encompasses all forms of Section 7 activity.

The proposition that *Republic Aviation* creates a general rule that is applicable to all forms of Section 7 activity, including picketing, is a question that the Court has never decided. Indeed, the Board and the courts have never described *Republic Aviation* as establishing any right other than the right of employees to solicit co-employees during non-work time and to distribute literature to co-employees during non-work time and in non-work areas. *See generally, Eastex, Inc. v. NLRB,* 437 U.S. 556, 575-576 (1978) (Board properly applied *Republic Aviation* to

distribution of newsletter addressing right-to-work and minimum wage laws). In *Babcock,* the Court characterized the *Republic Aviation* rule as follows: "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." 351 U.S. at 113. And other than its dubious 2004 decision in *Town & Country,* the Board is unable to cite a single case in the entire history of the Act where *Republic Aviation* has been applied to picketing or to any activity other than oral solicitation and distribution of written literature.

The Board's misapplication of *Republic Aviation* must be corrected. Once *Republic Aviation* and *Beth Israel* are untethered from their essential context, i.e., the right of employees to communicate orally and in writing in the workplace regarding union organization, they become a vehicle by which the Board is free to eliminate the ability of employers to place any restrictions on how and in what manner §7 activities may be exercised in the workplace and on the employer's premises. Section 7 rights become paramount to the Hospital's property and managerial rights in every instance, subject only to the Hospital's ability to establish, after the fact, that "special circumstances" warrant some restriction and then to react in the least restrictive manner. This view is patently inconsistent with the Act, which "does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers." *NLRB v. United Steelworkers of America,* 357 U.S. 357, 364 (1958).

The decisions below hopelessly confuse the Court's repeated admonitions since its decision in *Republic Aviation* that Section 7 rights are not absolute and that such rights must be balanced against equally compelling employer rights and interests. One might reasonably wonder why this Court has continued to make such declarations if, as the Board and the D.C. Circuit held, *Republic Aviation* provides the appropriate accommodation in every situation in which employees seek to exercise §7 rights on property owned or occupied by their employer. In *Lechmere,* this Court disabused the Board of the notion that any balancing is required when nonemployee union organizers seek to access private property, as *Babcock* had determined that nonemployees have no access rights except in the rare situation where the union lacks any other means of communicating with employees. So, if *Babcock*/*Lechmere* is determinative with respect to nonemployees and *Republic Aviation*/*Beth Israel* is conclusive with respect to employees, whose rights remain to be balanced?

The decisions of the Board and the court of appeals essentially render the Court's *Hudgens* decision a nullity. Indeed, *Hudgens* bears far more similarity to this case than does *Republic Aviation.* Unlike *Republic Aviation, Hudgens* was a picketing case, and it involved *employees* seeking to exercise §7 rights on private property. Although not explicitly stated by the ALJ or the Board, it is as if they are of the mindset that *Lechmere* rearranged the entire legal landscape, such that the only material fact is whether employees or nonemployees are involved. Nonemployees have no rights, while employees' rights are essentially unfettered. *Lechmere,* however, did not overrule

Hudgens. The Court should grant the petition and clarify the interrelationship between its decisions in *Republic Aviation, Beth Israel, Babcock, Central Hardware, Hudgens,* and *Lechmere.*

B. The Decisions Below Lay Waste To The Court's Picketing Decisions.

Picketing in the abstract, and subject to certain statutory limitations, is a legitimate form of Section 7 activity, but it is undeniably different from mere solicitation and handbilling. The distinctions between picketing and other forms of communication have been catalogued in numerous decisions of this Court. In *Hughes,* the Court addressed the question of whether the Fourteenth Amendment barred a state from issuing an injunction against picketing of a business solely to compel racial proportionality in the composition of the employees of the business. Answering the question in the negative, this Court observed that "while picketing is a mode of communication it is inseparably something more and different," *Id.* at 464, and "picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent." *Id.* at 465. "[T]he very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Id.*

In *Edward J. DeBartolo,* the Court considered whether a union's peaceful handbilling of patrons of a shopping mall informing them of a labor dispute and asking that they not shop at the mall until the mall owner paid fair wages and benefits for all construction work was proscribed by the secondary boycott

provisions of the Act. The Court distinguished its decision in *Retail Store Employees,* (*Safeco*), which found certain secondary picketing to be proscribed by § 8(b)(4), as involving picketing, a much different activity from mere handbilling. The Court cited back to Justice Stevens' concurring opinion in *Safeco*: "[P]icketing is a 'mixture of conduct and communication' and the conduct element 'often provides the most persuasive deterrent to third persons about to enter a business establishment.'" 485 U.S. at 580.

The government may place restrictions on picketing that may not constitutionally be placed on handbilling. Indeed, the limitations that Congress has expressly imposed on picketing are a result of its uniqueness. *See* 29 U.S.C. § 158(b)(4) ("nothing contained in [§ 8(b)(4)] shall be construed to prohibit publicity, other than picketing, ..."); 29 U.S.C. § 158(b)(7), (proscribing picketing for the purpose of obtaining recognition, except under certain specified conditions); 29 U.S.C. § 158(g) (requiring a labor organization to provide ten days' notice to the employer and the FMCS "before engaging in any strike, picketing, or other concerted refusal to work at any health care institution.")

Picketing is a unique form of Section 7 activity that is neither the factual nor the legal equivalent of mere speech. The Board's decision, which equates picketing with oral solicitation and handbilling, and treats all forms of §7 activity as being of one piece, cannot be squared with the Court's picketing decisions. The Court should intervene to protect the integrity of its decisions.

C. The D.C. Circuit's Decision Conflicts With Decisions Of The Third And Ninth Circuits.

In *Seattle-First National Bank,* the Ninth Circuit addressed the right of employees of a restaurant who were engaged in an economic strike to engage in picketing in front of the restaurant, which was located on the 46th floor of a 50-floor building. In doing so, the court applied the Board's balancing analysis in *Scott Hudgens* (following remand from this Court). The Ninth Circuit observed that "[c]rucial to the Board's decision [in *Scott Hudgens*] was its finding that picketers could not identify potential customers of the shoe store when they entered the mall, but only when they entered the store." 651 F.2d at 1275. The Ninth Circuit agreed with the Board that there were no other realistic locations for picketing that would be less intrusive. Patrons of the restaurant could not be identified until they got off the elevator, and picketing outside the building would adversely impact neutral tenants of the building. In these circumstances, the landlord's property rights were required to yield to the employees' § 7 rights. The court made no reference to *Republic Aviation.*

In *Visceglia,* the Third Circuit refused to enforce a Board order finding that the landlord violated the Act by threatening to arrest employees of a tenant who were picketing on the landlord's private property in front of one of the tenant's buildings. The court assumed that the *Babcock* analysis was applicable to economic picketing, but concluded that in order to require the landlord's private property rights to yield, "it would at least require a situation where there was no reasonable and safe means to communicate with

employees, customers, suppliers, management, and other relevant groups, except by picketing on private property (e.g., on a private road) at a primary site within an industrial park." 498 F.2d at 49. As there was "no evidence that it was essential for the pickets to be directly in front of Building 426 in order to communicate their message effectively" or any finding that picketing at the sole entrance to the property in question, "which was about a fifth of a mile from Building 426, was ineffective in communicating its message to the appropriate people," *Id.,* the court denied enforcement.

The D.C. Circuit's decision in the instant case conflicts with the *Babcock / Hudgens* analysis applied by the Third and Ninth Circuits. Although *Seattle-First* and *Visceglia* involved picketing by employees on property leased, rather than owned, by their employer, the same was true in *Scott Hudgens,* and in that case, the Board concluded that the landlord was not a disinterested neutral and was entitled to no greater protection than the employers to whom he leased. The conflict in these decisions lies not in the facts, but in the legal standard applied by the courts: *Babcock / Hudgens* versus a *Republic Aviation* analysis. This conflict should be resolved by the Court.

D. The Board's Decision Radically Alters Its Historical Precedents.

Following this Court's *Hudgens* decision, the Board itself consistently applied a *Babcock / Hudgens* analysis to employee picketing cases. Although the specific iteration of this analysis varied over the years, until 2004, the Board never once relied upon *Republic Aviation* in an employee picketing case. Instead, it

applied a balancing analysis both where the employer owned the property and where the employer leased the property. This balancing analysis yielded different results, turning primarily on whether picketing could be safely and effectively conducted on nearby public property without unnecessarily enmeshing neutral employers in the dispute. When it could, private property rights prevailed. When it could not, private property rights were required to yield to the §7 right to picket. In this fashion, the Board balanced the respective rights in a manner that sought to preserve each side's rights without sacrificing the other side's rights. *Compare W.S. Butterfield, Inc.,* 292 NLRB 30 (1988) (picketing could not be safely and effectively conducted on nearby public property); *Seattle-First National Bank,* 243 NLRB 898 (1979) (same), *modified,* 651 F.2d 1272 (9th Cir. 1980); *Scott Hudgens,* (picketing on public property would be ineffective and would impact neutral employers), *with 40-41 Realty Associates, Inc.,* 288 NLRB 200 (1988) (picketing could be safely and effectively conducted on nearby public property), *enf'd sub. nom. Amalgamated v. NLRB,* 867 F.2d 1423 (2d Cir. 1988) (Table); *Providence Hospital* (same).

It was not until 2004, almost sixty years after *Republic Aviation,* that the Board even referenced that decision as having any applicability to picketing. In *Town & Country,* the Board, citing *Republic Aviation,* found that a retail supermarket violated §8(a)(1) by "[p]rohibiting employees from picketing and distributing handbills . . . in front of its Portage and Valparaiso stores by demanding that they leave, threatening them with arrest, calling the police to remove them, having them arrested, or in any other

way interfering with such picketing and distribution." 340 NLRB at 1416. As in this case, however, the *Town & Country* Board engaged in no independent analysis or any effort to balance Section 7 and private property rights. Although *Republic Aviation* was clearly applicable to the employees' handbilling activities, the Board proffered no reasons for concluding that it also applied to picketing.

The Board's abrupt departure from its prior precedents and its conclusion, almost sixty years after this Court's decision, that *Republic Aviation*, rather than *Babcock/Hudgens*, is controlling in cases involving employee picketing on private property is alarming and warrants this Court's intervention.

E. This Case Presents A Significant Question Of Federal Labor Law And Is An Ideal Vehicle For This Court To Once Again Provide Guidance On The Appropriate Accommodation Between Section 7 And Private Property Rights.

This Court has a long history of addressing questions regarding the appropriate accommodation between Section 7 and private property rights. However, it has been twenty-six years since the Court, in *Lechmere,* last weighed in on this issue. This extended quiet period reflects the fact that for decades the Board and the courts were uniform in their recognition that *Babcock* mandated that the Board balance the respective rights "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. With respect to picketing, that uniform approach held that private property rights would prevail except where employees could not safely

and effectively picket on nearby public property, or where neutral parties would be impacted. This accommodation was well understood by labor and management, and provided some level of certainty to all parties, thereby preserving labor peace. The decisions of the Board and court below, however, have suddenly, and without any compelling reason, overturned this long-standing accommodation, thereby injecting legal uncertainty into an area of the law where such uncertainty breeds discontent and strife. Most critically, they have done so in the setting of an acute-care hospital, where the health and welfare of patients and their families is of utmost importance. Picketing immediately outside the main entrance doors of the Hospital inherently creates unnecessary tension and doubt in the minds of patients and visitors. This case represents the perfect vehicle for this Court to once again reestablish and clarify the guiding principles for balancing Section 7 and private property rights.

Intervention by this Court is necessary to preserve the integrity of its historical precedents, as well as to resolve the conflict that the D.C. Circuit's decision creates with the Third and Ninth Circuits. Further, the Board has strayed so far from its historical precedents that employers and unions are left in a state of complete uncertainty. Labor peace and stability are not served when the Board suddenly reverses direction and adopts a position that it has never previously taken with no meaningful explanation.

Absent intervention by this Court, the Board's decision, with the D.C. Circuit's stamp of approval, establishes a new paradigm in which Section 7 rights

are king and employer rights, both property and managerial, are the king's subjects. In the case of hospitals and other health care institutions, they are left to guess whether employee picketing on the institution's premises has exceeded the point where patient care and health care operations are threatened. Only then may they react and when they react, they do so at their peril. The consequences of the Board's decision are widespread, and established principles of labor relations are dramatically altered.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

Charles P. Roberts III
Counsel of Record
Constangy, Brooks, Smith & Prophete LLP
100 N. Cherry Street, Suite 300
Winston-Salem, NC 27101
(336) 721-6852
(336) 748-9112 (fax)
croberts@constangy.com

Glenn Bunting
Constangy, Brooks, Smith & Prophete LLP
230 Peachtree Street, N.W., Suite 2400
Atlanta, GA 30303
(757) 710-2181
(678) 999-7875 (fax)
gbunting@constangy.com

Counsel for Petitioner