No. 18-608

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

REPLY BRIEF FOR PETITIONER

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

This case is an appropriate vehicle to resolve the questions presented. The National Labor Relations Board's brief in opposition ("Opp.") is tepid and unconvincing.

I. The Board Acknowledges That The Question Presented Is An Important Question Not Previously Decided By This Court: Whether The *Republic Aviation/Beth Israel* Presumptions And Framework Apply To Picketing By Employees Of An Acute Care Hospital Immediately Outside The Front Entrance To The Hospital.

The basic question presented by Petitioner is whether the Board, as affirmed by the D.C. Circuit, properly applied this Court's decisions in *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945), and *Beth Israel Hospital v. NLRB,* 437 U.S. 483 (1978) in determining whether an acute care hospital may lawfully restrict its employees from picketing immediately outside the front entrance to the hospital; or, instead, whether this Court's decisions in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956) and *Hudgens v. NLRB,* 424 U.S. 507 (1976) required the Board to conduct a more focused balancing of the respective interests of the hospital and the employees vis-à-vis the specific Section 7 activity of picketing. The Board acknowledges that *Republic Aviation* and *Beth Israel* merely "affirmed the Board's framework for balancing those competing rights in the context of solicitation and distribution by off-duty employees on the employer's premises," (Opp. 12), and that neither

"this Court's opinions" nor the "text of the NLRA" address or resolve "the appropriate accommodation" between the Section 7 right of employees to engage in picketing and their employer's private property and managerial rights. (Opp. 13). Thus the question presented is clearly one this Court has not directly addressed.

The Board does not suggest that this is a trivial or unimportant question unworthy of resolution by this Court. Indeed, it concerns a core issue under federal labor law that has reached this Court on multiple occasions, in various contexts, over the last seventy years: how best to balance the competing interests of employers and employees when employees seek to engage in activities protected by §7 of the Act, 29 U.S.C. § 157, on private property. Although the Court's decisions have resolved many questions, the decisions below, as well as the Board's brief in opposition, reflect considerable confusion regarding the scope and interplay of multiple decisions from this Court: *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992); *NLRB v. Baptist Hospital,* 442 U.S. 773 (1979); *Beth Israel; Hudgens; Central Hardware Co. v. NLRB,* 407 U.S. 539, 543 (1972); *Babcock;* and *Republic Aviation.* At a minimum, this confusion raises the following sub-questions:

1. Do the *Republic Aviation/Beth Israel* presumptions and framework have any relevance outside the context of oral solicitation and handbilling? Specifically, are they controlling when employees seek to *picket* on their employer's property, or must the Board

develop presumptions that are specific to *picketing*?

2. Did *Lechmere* alter the legal landscape such that the only relevant question is whether it is employees or nonemployees who are seeking access to private property?

3. Under *Lechmere, Hudgens, Central Hardware,* and *Babcock,* does an employer possess legitimate property rights, or only managerial rights, when off-duty employees seek access to engage in picketing?

4. Is *Hudgens,* which mandated that the Board apply a *Babcock* balancing analysis when employees seek to picket on property *leased* by their employer, irrelevant when the property is *owned* by their employer?

5. Under *Lechmere, Hudgens,* and *Babcock,* when *employees* are seeking access to private property to engage in picketing, does it matter whether the employees have reasonable and effective alternative locations for picketing?

6. Under *Beth Israel* and *Baptist Hospital,* what protection should an acute care hospital have when it is faced with the prospect of its employees seeking to picket on hospital property?

Only this Court can bring clarity to these questions and protect the integrity of its decisions.

II. Applying The *Republic Aviation/Beth Israel* Presumptions And Framework To Picketing Is Irrational And Unworkable.

The Board's opposition to the petition is premised almost entirely upon the proposition that the *Republic Aviation/Beth Israel* framework is as applicable to picketing as it is to solicitation and handbilling. Yet, other than make this assertion, the Board proffers no plausible response to Petitioner's contention that the framework is unworkable and indefensible as applied to picketing. The core of the *Republic Aviation/Beth Israel* framework is its creation of a set of presumptions, one for oral solicitation by employees and a second for distribution of written materials. These presumptions accommodate the respective interests by permitting employees to engage in each type of §7 activity at certain times and in certain places, while allowing the employer to prohibit each activity at all other times and in all other places. In this fashion, the Board created a high degree of certainty for both employers and employees.

The overriding problem here is that the Board concedes that it has created no set of presumptions that is specific to picketing. That approach might pass muster if picketing was essentially no different than oral solicitation or handbilling, such that the presumptions created for one could easily be applied to picketing. But the Board does not take that position. It argues weakly that this Court's picketing decisions focused primarily on the patrolling of a picket line. (Opp. 13-14). In fact, however, picketing has coercive effects beyond those that may be produced by actual

patrolling back and forth. "'Picketing' after all, is defined as posting at a particular place, see Webster's Third New International Dictionary 1710 (1981)," *Frisby v. Schultz,* 487 U.S. 474, 482 (1988), and "[a] state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual." *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl,* 315 U.S. 769, 775 (1942). In *Frisby,* this Court upheld a local ordinance prohibiting focused picketing in front of a targeted residence, noting that "the actual size of the group is irrelevant; even a solitary picket can invade residential privacy." *Id.* at 486. In *Hill v. Colorado,* 530 U.S. 703 (2000), the Court upheld state restrictions on speech occurring within 100 feet of the entrance to any health care institution "for the purpose of passing a leaflet or handbill to, *displaying a sign to,* or engaging in oral protest, education, or counseling with such other person ...." *Id.* at 707 (emphasis supplied). The Court observed that the "right of free passage" is one that "applies equally—or perhaps with greater force to access to a medical facility." *Id.* at 717. "Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions." *Id.* at 729.

Despite its efforts to downplay the import of this Court's picketing decisions, the Board renders the debate academic by conceding that (1) "picketing is not identical to handbilling or solicitation," (2) on-premises picketing need not be permitted "to the same degree" as either solicitation or handbilling, and (3) it could readily envision circumstances, "particularly in a hospital setting, where picketing would be disruptive

while handbilling or solicitation would not." (Opp. 14). Having made these concessions, the Board concedes away any rational justification for applying the *Republic Aviation/Beth Israel* presumptions to picketing. *What we are left with are presumptions that were not created with picketing in mind and which do not even purport to address the uniqueness of picketing.*

The Board compounds the problem by re-characterizing the *Republic Aviation/Beth Israel* "special circumstances" affirmative defense as the purported reasonable accommodation. The Board does not dispute Petitioner's contention that under this framework, picketing is presumptively protected, during nonworking time, at any place inside or outside the hospital facility that does not qualify as either a work area or an immediate patient care area, but asserts that it can adequately accommodate a hospital employer's interests by permitting it to prove on a case-by-case basis that picketing is likely to disturb patients or disrupt health care operations. (Opp. 16). This case-by-case approach to picketing is wholly unsatisfactory. Indeed, it represents no accommodation at all. The Board sanguinely suggests that there is nothing "unworkable" about requiring the hospital to establish that picketing would likely disrupt patient care and that there "is no sound reason to expect that such a showing will be any more difficult in the context of picketing than in the context of handbilling or solicitation." (Opp, 16). Yet the Board fails to cite a single case in the history of the Act, and Petitioner is unaware of any such case, where an employer successfully rebutted the presumption in the context of solicitation and distribution of literature; i.e.,

successfully established that oral solicitation during non-work time or distribution of literature in nonwork areas was disruptive or interfered with operations. The presumptions, not the affirmative defense, are determinative.

The Board does not even attempt to answer the question posed by Petitioner (Pet. 23-24) regarding how a hospital can be expected to establish this affirmative defense until *after* disruption or disturbance of patients occurs, at which point the harm has already occurred. The Board does not dispute that a union is under no obligation to inform the hospital that it intends to move its picketing onto the hospital's premises or to provide any information regarding the specific location, the number of employees who will picket, or for what duration. Nor does the Board suggest what showing might possibly suffice for a hospital to restrict employee picketing on hospital property.

Given the Board's necessary acknowledgement that picketing is a distinct § 7 activity with different consequences, the Board's rote extension of the *Republic Aviation / Beth Israel* framework to picketing, without adopting any presumptions specific to picketing, can only be characterized as an irrational and unreasonable extension of this Court's decisions in *Republic Aviation* and *Beth Israel*. The Board has clearly shirked its responsibility to assess "the nature and strength of the respective §7 rights and private property rights asserted in any given context" and to determine "[i]n each generic situation" where the "locus

of that accommodation . . . may fall." *Hudgens,* 424 U.S. at 522 (1976).[1]

III. The Board's Decision Misconstrues *Lechmere,* Effectively Repudiating *Hudgens.*

The Board not only has misapplied *Republic Aviation* and *Beth Israel,* but it has misconstrued *Lechmere* in a manner that effectively repudiates *Hudgens*. The Board argues that *Lechmere* drew a "distinction 'of substance'" between the rights of employees and nonemployees, (Opp. 15), a true statement in itself, but extrapolates from this that *Lechmere* created a new legal universe in which there are two categories of actors—employees whose rights are determined by *Republic Aviation/Beth Israel* and nonemployees who have no rights under *Babcock/Lechmere*. According to the Board, *Lechmere* thereby renders the various balancing tests adopted by the Board post-*Hudgens* "short-lived and obsolete." (Opp. 17). It then asserts (at least implicitly), because it must in order for its argument not to fall apart completely, that *Hudgens* is relevant only "when individuals are attempting to participate in Section 7 activities on private property that is owned by a

---

[1] The Board, quoting the D.C. Circuit's assertion that the Board "presumably will develop principles on a case-by-case basis," (Pet. App. 13), posits that "[i]t reasonably left to future cases, where such picketing has occurred, the further enunciation of principles 'that will guide employers about the circumstances in which they can prohibit picketing on company premises.'" (Opp. 14). This certainly is not the type of balancing that this Court envisioned in *Babcock* and *Hudgens*.

different employer against the property owner's wishes." (Opp. 15). These contentions are nothing more than wishful thinking.

First, *Lechmere* did nothing more than reaffirm *Babcock's* central holding that nonemployees have no right to access private property except where the targeted employees are otherwise beyond the union's reach. And it overruled a line of Board cases that had construed *Hudgens* as authorizing the Board to balance §7 and private property rights in *all cases*, "[a]t least as to nonemployees." 502 U.S. at 538. *Lechmere* simply did not address the rights of *employees,* whether they work on property owned or leased by their employer. The Court in no way impugned *Hudgens,* and cited with approval *Hudgens'* reaffirmation of the Board's obligation to balance employer property rights and employee §7 rights. *Id.* at 534. *Hudgens* itself dealt with a situation in which *employees* were seeking *to engage in picketing* on property leased and used by *their employer* for commercial purposes. Inasmuch as *Hudgens* was decided some thirty years after *Republic Aviation*, it simply cannot be that *Republic Aviation* controls whenever *employees* seek access to private property for any purpose other than solicitation and handbilling. Recognizing this dilemma, the Board proffers the only distinction it can; i.e., that in *Hudgens,* employees were seeking to picket on property lawfully occupied, but not owned, by their employer. The Board suggests that *Hudgens* has no relevance when employees seek to picket on property owned by their employer. (Opp. 15-16).

This distinction based on whether the employer owns or leases the property to which access is sought is not a distinction that the Board itself, or any court, has ever found to be determinative. *Indeed, the post-Hudgens decisions of the Board and the courts of appeals uniformly held that because of the commercial nature of the relationship between landlord and tenant, the third-party landlord was entitled to no greater protection from lawful §7 activity by the tenant employer's employees than was the tenant employer himself.* In essence, the landlord stands in the shoes of the tenant. On remand from this Court in *Scott Hudgens,* 230 NLRB 414 (1977), the Board considered this distinction, but concluded that Hudgens was not a "completely neutral bystander." *Id.* at 417. Rather, he had a financial interest in the success of the businesses, the mall was open to the public, the businesses within the mall were lessees, 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. *See Seattle-First National Bank v. NLRB,* 651 F.2d 1272 (9th Cir. 1980); *NLRB v. Visceglia,* 498 F.2d 43 (3d Cir. 1974); *40-41 Realty Associates, Inc.,* 288 NLRB 200 (1988), *enf'd sub. nom. Amalgamated v. NLRB,* 867 F.2d 1423 (2d Cir. 1988). This Court's decision in *Hudgens* cannot be brushed away and rendered inconsequential when the employees work on property owned, rather than leased by, their employer.

IV. The D.C. Circuit's Decision Conflicts With Decisions From The Third And Ninth Circuits, As Well As The Board's Historical Precedents.

The Board does not dispute that the only other circuits to have addressed the right of *employees* to *picket* on private property applied a *Babcock/Hudgens* balancing analysis, without any reference to *Republic Aviation*. As it does with this Court's *Hudgens* decision, the Board discounts the decisions of the Third (*Visceglia)* and Ninth (*Seattle-First National)* Circuits on the ground that the employers in those cases leased, rather than owned, the property in question. For the reasons described above, this is a distinction that has never been found determinative. Each of these cases involved (1) picketing by (2) employees on property lawfully occupied by (3) their employer. And in each case, the court applied the balancing analysis applied by the Board on remand in *Scott Hudgens*. This analysis focused on whether employees could safely and effectively picket on nearby public property. If they could, private property rights would prevail. If they could not, private property rights would have to yield to the employees' Section 7 rights. The conflict between the D.C. Circuit's decision and the decisions of the Third and Ninth Circuits is direct and immediate. This Court should resolve that conflict.

Further, the Board's attempt to explain away the Board's own historical decisions (Opp. 16-17) fails because, as explained above, *Lechmere* did not create some new legal universe in which the only relevant question is whether the actors are employees or

nonemployees. Nor did it hold that employees have weaker §7 rights when their employer leases, rather than owns, the property on which they are employed. *Hudgens* makes it clear that the Board remains obligated to balance §7 rights and private property rights when employees seek to access private property in order to picket.

CONCLUSION

The Board's decision, as enforced by the D.C. Circuit, and as defended in this Court, reflects considerable confusion and misunderstanding regarding the scope and interplay of this Court's decisions in *Republic Aviation, Babcock, Central Hardware, Hudgens, Beth Israel, Baptist Hospital,* and *Lechmere*. The Board's blanket application of *Republic Aviation/Beth Israel* to picketing by employees, without adopting presumptions that are specific to picketing, is unworkable and represents an abdication by the Board of its obligations under *Babcock* and *Hudgens*. The Board has misinterpreted *Lechmere* as eliminating any obligation on the part of the Board to conduct any balancing analysis when employees seek to picket on their employer's property. Further, without any legal support, it seeks to limit the impact of *Hudgens* to situations where employees seek to picket on property leased, but not owned, by their employer, thereby irrationally making the scope of employee rights turn on the fortuity of whether their employer owns or leases the work place. The D.C. Circuit's decision conflicts with decisions from the Third and Ninth Circuits. The questions presented are highly important questions of federal labor law that impact

not only all health care institutions, but all employers covered by the Act. Absent intervention by this Court, the Board's confusion will remain unabated, the integrity of this Court's decisions will continue to be undermined, and labor peace and stability will be threatened.

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