Kroger Limited Partnership I Mid-Atlantic *and* United Food and Commercial Workers Union Local 400. Case 05–CA–155160

September 6, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue before us is whether the National Labor Relations Act required the Respondent to grant a nonemployee union agent access to its property to solicit its customers to boycott its store.[1] The Respondent undisputedly had a property right to exclude the union agent from its premises. See *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others. That is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (internal citation and quotation omitted). And, as a general matter, nothing in the Act compels an employer to grant nonemployee union agents access to its property. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992); *NLRB v. Babcock & Wilcox, Inc.*, 351 U.S. 105, 112 (1956). Under an exception to that general rule, however, an employer may not discriminate against nonemployee union agents by excluding them from its property while allowing "other distribution." *Babcock & Wilcox*, supra at 112. The scope of this *Babcock* discrimination exception—left undefined in *Babcock* itself—is at issue in this case.[2]

In *Sandusky Mall Co.*, 329 NLRB 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001), the Board interpreted the *Babcock* discrimination exception to require employers to grant access to nonemployee union agents for any purpose if the employer has allowed "substantial civic, charitable, and promotional activities" by other nonemployees. Id. at 622. Applying *Sandusky Mall*, the judge in this case found that the Respondent discriminated against the Union within the meaning of *Babcock* by permitting a variety of charitable and civic organizations, such as the Girl Scouts and the Salvation Army, to fundraise on its property while ejecting the nonemployee union agent who entered its property to solicit the Respondent's customers to boycott its store.

Sandusky Mall and its progeny have been roundly rejected by the courts of appeals. Courts have consistently limited the *Babcock* discrimination exception to situations where an employer ejects nonemployee union agents seeking to engage in activities *similar in nature* to activities the employer permitted other nonemployees to engage in on its property. Moreover, in a case decided before *Sandusky Mall* and never relevantly overruled, the Board itself limited *Babcock*'s discrimination exception the same way, stating that "a denial of access for Sec[tion] 7 activity may constitute unlawful disparate treatment where by rule or practice a property owner permits *similar activity in similar relevant circumstances*." *Jean Country*, 291 NLRB 11, 12 fn. 3 (1988) (emphasis added).[3] After careful consideration, we agree with the reasoning of these courts and with the Board's interpretation of *Babcock* discrimination in *Jean Country*. *Sandusky Mall* improperly stretched the concept of discrimination well beyond its accepted meaning in a manner that finds no support in Supreme Court precedent or the policies of the Act. Accordingly, we find that *Sandusky Mall* and similar cases should be overruled.[4]

[1] On September 9, 2016, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Walls Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] A second exception to the rule of *Babcock*—the general rule that an employer may deny access to its property by nonemployee union agents—is the inaccessibility exception. Under this exception, if the union has no other reasonable means of communicating its message to employees, the employer's property interest must yield to the extent needed to permit communication. 351 U.S. at 112.

[3] In *Jean Country*, the Board also adopted a balancing test to determine whether access by nonemployee union agents must be permitted under *Babcock*'s inaccessibility exception. In *Lechmere*, the Supreme Court overruled the *Jean Country* balancing test as an impermissible interpretation of the *Babcock* inaccessibility exception. However, the Court in *Lechmere* did not disturb or alter the *Babcock* discrimination exception, implicitly including the "similar activity in similar relevant circumstances" interpretation of discrimination within the meaning of *Babcock* set forth in *Jean Country*.

[4] See, e.g., *Be-Lo Stores*, 318 NLRB 1 (1995) (finding that employer discriminatorily denied access to nonemployee union agents to engage in protest activities because it had granted access to other nonemployees to engage in charitable or commercial solicitation on more than isolated occasions), enf. denied in relevant part 126 F.3d 268 (4th Cir. 1997); *D'Alessandro's, Inc.*, 292 NLRB 81 (1988) (finding that employer violated Sec. 8(a)(1) by denying access to nonemployee union pickets urging a customer boycott because the employer had permitted a "wide

Under the standard we adopt today, to establish that a denial of access to nonemployee union agents violated the Act under the *Babcock* discrimination exception, the General Counsel must prove that an employer denied access to nonemployee union agents while allowing access to other nonemployees for activities similar in nature to those in which the union agents sought to engage. Consistent with this standard, an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities.[5] Additionally, an employer may ban nonemployee access for union organizational activities if it also bans comparable organizational activities by groups other than unions. Because the General Counsel has not shown that the Respondent has ever permitted any nonemployees, whether affiliated with a union or not, to engage in protest activities on its premises comparable to the boycott solicitation at issue in this case, we shall reverse the judge's decision and dismiss the unfair labor practice complaint.

Background

The Respondent, which is engaged in the retail sale of grocery items, operated a store (Kroger 538) in Portsmouth, Virginia, from at least 1997 until April 11, 2015.[6] Kroger 538 was located within a multi-tenant retail shopping center on a parcel of land leased by the Respondent from Sterling Creek Commons, Limited Partnership. The leased premises for Kroger 538 included a sidewalk in front of the store and an enclosed foyer at the customer entrance.

The shopping center had a parking lot, and Kroger 538 shared with its shopping center co-tenants a right of easement to the parking lot. There is no dispute that the landlord vested in the Respondent a sufficient property interest and the authority to enforce the lease agreement's "no solicitation/no loitering" rule. In relevant part, the lease agreement between the Respondent and the landlord stated:

> To the extent not prohibited by applicable laws, the Parking Areas and Common Facilities shall be subject to a uniform "no solicitation/no loitering" rule, pursuant to which all soliciting, loitering, handbilling and picketing for any cause or purpose whatsoever shall be prohibited within the Parking Areas and Common Facilities. Either Landlord or Tenant may enforce said uniform "no solicitation/no loitering" rule, to the extent it can be done in a lawful manner, by excluding or removing persons engaged in soliciting, loitering, handbilling, or picketing from the Parking Areas and Common Facilities or by otherwise lawfully enforcing said rule. Tenant shall have the right, coupled with an interest, and is hereby expressly authorized by Landlord to enforce in a lawful manner said uniform "no solicitation/no loitering" rule within the Parking Areas and Common Facilities . . . .

Further, the landlord's representatives sent the Respondent a letter, dated March 25, 2014, regarding Kroger 538. In this letter, the landlord expressed concern with "continuous and smooth operation of the shopping center" and the prevention of "disruptive activities or nuisances that have a potentially adverse impact on our tenants and their customers, our shopping center and the community at large." The letter further stated:

> For the above purposes and to facilitate a prompt response to situations which may arise in conjunction with any protesting, demonstrating, picketing, hand billing, or related disruptive activities on the premises, the undersigned Landlord for the above referenced location(s) hereby states that, to the maximum extent permitted by law, no person or organization (whether or not involving a labor union) shall be permitted to engage in such activities within the property limits owned by us, including that portion on which your store currently operates its business under the terms of our Lease, and any such person or organization shall be dealt with as a trespasser and removed from the property owned by us and/or leased by your organization. Landlord further agrees that should any such person or organization engage in such activities on our property Landlord gives Kroger Limited Partnership I the authority to have police or other authorities, to the extent permitted by law, remove the trespassers from the property referenced.

---

range" of commercial and charitable solicitation by nonemployees on its property).

[5] The "similar in nature" standard encompasses more than the literal activity engaged in; it also includes the purpose of the activity. For example, distributing handbills near the entrance to a grocery store to advertise a food drive for the local food bank, and distributing handbills to appeal to shoppers to boycott the store because it sells genetically modified foods, involve the same activity of distributing handbills; but the distributions are not similar *in nature* because the purposes behind the two distributions are radically different. Although the Board in *Jean Country* did not explain its interpretation of *Babcock*'s discrimination exception, we observe that it, too, required more than disparate treatment of similar activity—i.e., similar activity "in similar relevant circumstances." 291 NLRB at 12 fn. 3. Of course, reliance on the purpose of the activity in a *Babcock* discrimination analysis is limited by Sec. 7: an employer cannot discriminate with regard to nonemployee access on the basis that the purpose of the prohibited activity is to support a union, and of the permitted activity to oppose the union—or more generally, where the facts of the particular case support a reasonable inference "that a discriminatory motive lies behind the exclusion." *Four B Corp. v. NLRB*, 163 F.3d 1177, 1184 (10th Cir. 1998).

[6] All dates refer to 2015 unless otherwise indicated.

The record does not show that the Respondent maintained any written policies governing the handling of requests by outside organizations to access its property. However, the judge recounted the testimony of several former Kroger 538 managers that their unofficial policy or practice at the store was that organizations' requests to solicit on Kroger 538's property would be forwarded to the store manager for review, and that Kroger 538 store managers approved some groups' requests but denied other groups' requests. For example, one former Kroger 538 manager, Timothy Lynch, testified that during his approximately 10-month tenure at Kroger 538, he required an organization seeking to solicit or distribute on Kroger 538's property to submit a request on the organization's letterhead. He would then notify the organization that he had either approved or disapproved the request. Donati High, another former manager of Kroger 538, testified that when a group made a request to him, he asked it to submit the request in writing, and he would either approve or deny it. High further testified that he would favorably consider requests for "anything civic, like the local fire departments, military veterans, the Lions Club, those were typically the criteria," provided there were "available dates because you don't want to over-swarm the customers, people in the parking lot every day."

The judge credited testimony establishing that the Respondent allowed several entities to pass out literature and/or sell goods on the sidewalk area on either side of the front entrance to Kroger 538. The Girl Scouts sold cookies for a week or more in the spring of every year; the Lions Club collected donations or sold items on two occasions; the Salvation Army collected donations during the weeks between Thanksgiving and Christmas each year; and a breast-cancer awareness group solicited donations, passed out literature, and sold items on one occasion. Also, on one occasion 4 or 5 years before the events at issue here, the Respondent permitted the American Red Cross to run its mobile blood drive in the parking lot of Kroger 538. On another occasion, the Respondent allowed local firefighters to collect donations in the parking lot.

The record also shows that Kroger 538 prohibited certain groups from soliciting on its property. On several occasions, a church group engaged in solicitation on the Respondent's property, and a manager instructed them to leave each time.

Since around March 28, 2010, the Union has represented a unit of employees at Kroger 538 (and other Kroger stores in the Hampton Roads area of Virginia) for purposes of collective bargaining. The Respondent and the Union entered into a collective-bargaining agreement that was effective August 3, 2014, through August 4, 2018.

In late 2014, the Respondent opened two new Kroger Marketplace stores in southeastern Virginia. In November, it opened Kroger 542 in Portsmouth, Virginia (only a few miles from Kroger 538), and in December, it opened Kroger 554 in Suffolk, Virginia. The employees at both stores were not represented by a union during the events at issue in this case. Shortly after the two new stores opened, the Respondent began the process of closing other stores, including Kroger 538.

As part of the process of closing stores, the Respondent, through its human resources coordinator, Diego Duran, met over the course of several weeks with the Kroger 538 employees and their nonemployee Union Representative, Heath Fenner. The Respondent offered Kroger 538 employees the opportunity to transfer to other Kroger stores. However, a point of contention during these meetings concerned the Respondent's refusal to offer Kroger 538 employees the option to transfer to the nearby, newly-opened Kroger Marketplace stores. Instead, the Respondent offered Kroger 538 employees reassignment to unionized stores, with "key roles" to be filled in Virginia Beach stores and the remaining positions to be filled at a store in Yorktown, Virginia. The Union contended that the Respondent should also offer its Kroger 538 employees the ability to transfer to the new Marketplace stores.[7]

On April 2, while Duran and Fenner were meeting with employees to finalize relocation plans, another nonemployee Union Representative/Organizer, Brandon Forester, began soliciting customers in the parking lot in front of Kroger 538 to sign a petition protesting the Respondent's decision to transfer Kroger 538 employees to stores outside the Portsmouth area. The petition displayed a banner stating, "#KrogerStrong SOLIDARITY with Virginia Kroger Workers," and it went on to state as follows:

> As a loyal Kroger customer and member of the Portsmouth community I am appalled that Kroger is taking good jobs out of our town and forcing the employees who have helped me at my store for years move to a store over 25 miles away.
>
> **I will *not shop* at either of the newly opened Marketplace stores unless the employees at this store are allowed to transfer there with all the benefits they currently enjoy as union members.**

[7] There is no complaint allegation that the Respondent violated the Act by declining to offer to unit employees the opportunity to transfer to the two new Marketplace stores.

(Emphasis in original.) Either during a break or after Fenner's meeting with Duran, Fenner joined Forester in the parking lot. He supported Forester's efforts, but there is no evidence that he assisted Forester in asking customers to sign the petition.

Kroger 538's Store Manager, Donati High, was advised that union agents were soliciting in the parking lot. He notified Duran, who phoned his district manager to obtain guidance. According to Duran, the district manager told him to get a copy of the above-mentioned March 25, 2014 letter. After High and Duran located the letter, they went outside and confronted Forester (who, by that time, had been joined by Fenner). High and Duran showed the letter to Forester and Fenner and told them that they were not authorized to solicit on the premises and to leave the Respondent's property. One of the union representatives stated that "they would only listen to the blue," which Duran interpreted to mean that they would only leave if the police told them to leave.

High and Duran returned to the front of the store and followed the district manager's further instruction to call the police if Forester continued to approach people in the parking lot. There is no dispute that, as Forester continued to solicit customers, either High or Duran called the police and asked them to stop the Union's solicitation efforts in the parking lot. There is also no dispute that, when asked by police officers, Forester left the premises. At that point, Fenner returned to the store.

The Respondent closed Kroger 538 around April 11. Its unionized employees who chose to continue working for the Respondent transferred to one of the unionized Kroger stores mentioned above.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by prohibiting, under the no-solicitation/no-loitering policy in its lease, nonemployee union representatives from soliciting the Respondent's customers, in the parking area adjacent to the Respondent's facility, to sign a petition; demanding that the union representatives leave that area; and calling the police to remove the union representatives from that area. The judge found that the Respondent violated Section 8(a)(1) as alleged and ordered the Respondent to cease and desist from discriminatorily denying access to the Union and to post a remedial notice.

The judge first determined that Forester, in soliciting signatures for the Union's petition in support of Kroger 538 employees, was engaged in activity protected by the Act. Second, the judge found that the Respondent possessed an undisputed property right to exclude individuals from its leased premises. Third, citing *Sandusky Mall*, the variety of permitted nonemployee solicitations, and the fact that the Respondent permitted the Salvation Army and Girl Scouts to solicit donations and sell items for "weeks at a time each year," the judge found that the Respondent unlawfully discriminated against the Union by regularly allowing various entities to solicit on its property while prohibiting the nonemployee union representatives from doing so.

The Respondent excepts to the judge's decision. It argues that its conduct was not unlawful and asserts that the Union's petition activity was not protected. The Respondent further asserts that the Board should reconsider its approach to nonemployee union solicitation as reflected in *Sandusky Mall* and related cases. According to the Respondent, *Sandusky Mall* is inconsistent with the Supreme Court's decisions in *Babcock & Wilcox* and *Lechmere*. Further, the Respondent argues that the Board has failed to properly consider persistent judicial criticism of its interpretation of *Babcock*'s discrimination exception, and an employer that allows charitable or civic entities to solicit for their causes on its property should not be compelled to open its property to solicitation by nonemployee union representatives.

The General Counsel and the Union contend that the Union's conduct was protected under the Act. They further contend that the judge correctly applied extant Board law in finding a discriminatory denial of access and that the Respondent has not provided a sound basis for overruling Board law in this area.

For the reasons stated below, we find merit in the Respondent's argument that the Board's current interpretation of the *Babcock* discrimination exception, as exemplified in *Sandusky Mall*, should be revised. Applying our new approach retroactively to the instant case, we shall dismiss the complaint.

Discussion

I. LEGAL BACKGROUND

In *Sandusky Mall* and its progeny, the Board has taken a broad view of what constitutes a discriminatory denial of access, finding that there is no meaningful difference between nonemployee union agents' boycott or organizational activities, on the one hand, and charitable, civic, or commercial activities on the other. The Board has created only two minor exceptions to this broad view of *Babcock* discrimination. First, an employer does not "discriminate" against nonemployee union solicitation by barring it while tolerating a few isolated instances of charitable solicitation. *Hammary Mfg. Co.*, 265 NLRB 57, 57 fn. 4 (1982). Second, an employer does not "discriminate" if it permits nonemployee solicitations that relate to the employer's business functions and purpose. *Rochester General Hospital*, 234 NLRB 253, 259 (1978).

In *Sandusky Mall*, two nonemployee union agents distributed handbills at the entrance of a store in a shopping mall. The handbills urged the public not to patronize the store because a nonunion construction company remodeling the store allegedly did not pay prevailing wages. The mall ejected the nonemployee union handbillers. Both before and after the union handbilling, the mall had allowed the Salvation Army, the American Red Cross, and the United Way to solicit within the mall concourse. The mall had also granted access to other nonemployees to conduct an Arthur Murray dance marathon, a beauty pageant, and a gift-wrapping booth sponsored by the American Lung Association, along with other events. Applying *Babcock*, the Board found that the mall had discriminated against the nonemployee union handbillers by regularly allowing other nonemployee solicitation, even though none of that solicitation involved attempts to encourage mall patrons to boycott a mall store.

The 6th Circuit refused to enforce the Board's order. *Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001). The court applied its view that "discrimination" under *Babcock* "'means favoring one union over another, or allowing distribution of employer-related information while barring similar union-related information.'" Id. at 686 (quoting *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 464–465 (6th Cir. 1996)). Further, the court agreed with former Member Brame's dissenting view in *Sandusky Mall* that "the alleged 'discriminatory' conduct in allowing solicitation o[r] handbilling require[s] that 'discrimination be among comparable groups or activities,' and that the activities themselves under *consideration* must be '*comparable*.'" Id. at 690 (emphasis in original). The court found that the employer had not discriminated "because the conduct of the nonemployee union handbillers [wa]s not similar conduct to that of civil and charitable organizations who obtained permission from Sandusky to use the mall in a limited way deemed beneficial." Id. at 692.[8]

Other courts of appeals have likewise disagreed with the Board's broad interpretation of *Babcock*'s discrimination exception. In *Riesbeck Food Markets, Inc. v. NLRB*, 91 F.3d 132 (4th Cir. 1996) (unpublished), the 4th Circuit disagreed with the Board's conclusion that an employer had discriminated against nonemployee union agents by denying them access to engage in protest activities after having allowed a significant amount of charitable and civic solicitations by nonemployees on its property. In *Riesbeck*, nonemployee union agents engaged in picketing and handbilling to urge customers to boycott the employer's food stores. The employer asked the nonemployee union agents to leave. When they refused, the employer commenced trespass actions against the union. Applying the broad construction of *Babcock*'s discrimination exception, the Board found that the employer had violated Section 8(a)(1) of the Act. *Riesbeck Food Markets*, 315 NLRB 940 (1994).

On review, the 4th Circuit rejected the Board's broad theory of discrimination, reasoning that "[d]iscrimination claims 'inherently require a finding that the employer treated similar conduct differently[.]'" Id. (quoting *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 937 (4th Cir. 1990) (per curiam)). The court took note of the "legally significant differences between the charitable solicitation which Riesbeck allowed and the union's 'do not patronize' solicitation which Riesbeck prohibited." Id. The court explained that Riesbeck could reasonably be seen to have allowed the civic and charitable solicitations out of feelings of altruism or civic duty, and it noted that such motivations would not allow for the union's do-not-patronize message. The court further explained that Riesbeck "has a strong interest in preventing the use of its property for conduct which directly undermines its purposes, i.e., the sale of goods and services to Riesbeck's customers, which was implicated by the union's solicitations but not by the charitable solicitations." Id. Finally, the court observed that there was no evidence of even a single instance in which Riesbeck had permitted commercial, political, or other controversial groups to solicit on its property. For these reasons, the court ruled that the Board's finding of discrimination could not stand.

Similarly, in *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997), the 4th Circuit disagreed with a Board finding that an employer had discriminated against nonemployee union agents by denying them access to a number of its properties to protest the employer's alleged unfair labor practices where the employer had tolerated some amount of charitable, civic, and commercial solicitation at several of its stores.[9] After summarizing *Babcock* and *Lechmere*, the court cited approvingly the D.C. Circuit's observation in *UFCW v. NLRB*, 74 F.3d 292, 300 (D.C. Cir. 1996), that

[8] See also *Albertson's Inc. v. NLRB*, 301 F.3d 441 (6th Cir. 2002) (holding that Board erred in finding that employer had discriminated against nonemployee union organizational solicitors by regularly permitting the Salvation Army, Girl Scouts, and others to engage in charitable solicitation on its premises).

[9] On this point, the court recounted the Board's factual findings that "Muslims selling oils and incense were present on a 'pretty constant' basis in front of Store 232 and were present on a 'regular' basis in front of Store 236. Further, an 'occasional' Jehovah's Witness distributed the Watchtower magazine at Store 148 and on one occasion a local Lions Club solicited at that store. Also, Lyndon LaRouche followers on a 'couple of occasions' handed out literature at Stores 28 and 120. In addition, a person sold a cookbook inside Store 102 and 'occasional[ly]' individuals sold Girl Scout cookies and greeting cards inside Store 232." Id. at 284–285.

nonemployees' claims of a right to access an employer's private property are at their nadir when nonemployees seek to engage in protest or economic activities as opposed to organizational activities. The 4th Circuit also rejected the view that the employer's approval of limited charitable or civic distribution while excluding union distribution constituted discrimination, stating that "[n]o relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature when access to the target audience is otherwise available." 126 F.3d at 284 (citing *Cleveland Real Estate Partners v. NLRB*, 95 F.3d at 465). Enforcing the Board's order, said the court, would be "tantamount to a holding that if an employer ever allows the distribution of literature on any of its property, then it must open its property to paid nonemployee union picketers." Id. at 284. "We are confident," the court concluded, "that the Supreme Court never intended such a result." Id. at 285.[10]

In *Salmon Run Shopping Center LLC v. NLRB*, 534 F.3d 108 (2d Cir. 2008), the 2d Circuit similarly rejected the Board's *Sandusky Mall* standard, holding instead that "[t]he focus of the discrimination analysis under Section 7 of the Act must be upon disparate treatment of two like persons or groups." Id. at 116 (citing *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995)). The court further explained that "to amount to *Babcock*-type discrimination, the private property owners 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." Id. at 116–117. Accordingly, the court found that the solicitation by firefighters of donations to fight muscular dystrophy and the distribution of promotional materials for a "Higher Ed Night," permitted by the employer, did "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 standards wages." Id. at 117.

The 9th Circuit, too, has rejected the Board's view of *Babcock*'s discrimination exception. See *NLRB v. Pay Less Drug Stores Northwest, Inc.*, 57 F.3d 1077 (9th Cir. 1995) (unpublished). In that case, the employer had ejected nonemployee union agents who sought to picket on the sidewalk in front of the employer's store with signs proclaiming the employer's nonunion status and urging the public not to patronize the store. *Pay Less Drug Stores Northwest, Inc.*, 312 NLRB 972, 972 (1993), enf. denied mem. 57 F.3d 1077 (9th Cir. 1995). In the past, the employer had permitted others, including the Girl Scouts and volunteers for a community bloodmobile, to solicit on its property. In finding that the Board had erred in finding *Babcock*-type discrimination, the court stated that "a business should be free to allow local and charitable 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." 57 F.3d 1077. The court found "no similarity" between the union's conduct and the conduct permitted by the employer, and hence concluded that "the NLRB incorrectly interpreted and applied the Act to the facts of this case." Id.; cf. *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 780 (7th Cir. 2001) (holding that employer did not "discriminate" by permitting solicitations for Girl Scout cookies, Christmas ornaments, and hand-painted bottles while prohibiting union organizational solicitations).

The D.C. and 10th Circuits have found that employers discriminated within the meaning of *Babcock* where they banned nonemployee access to engage in union organizational solicitation while allowing nonunion activities of a similar nature. In *Lucile Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583 (D.C. Cir. 1996), the court affirmed the Board's finding that a hospital discriminated against nonemployee union agents seeking access to distribute union organizational literature in a hallway near the hospital's cafeteria. The hospital had "regularly" granted access to other nonemployees to engage in a variety of civic and commercial activities. For example, a local credit union solicited employees to become members, an insurance company sold insurance, and a family-services company distributed literature about family-care resources. The hospital also permitted a number of vendors to sell their wares (including flowers, balloons, gifts, jewelry, and scrubs) near the cafeteria, with 10–15 percent of vendor proceeds going to an employee-activity committee. In affirming the Board's decision, the court recognized that "[a]n employer may not exercise its usual right to preclude union solicitation and distribution on its property if the employer permits *similar activity* by other nonemployee entities '*in similar relevant circumstances*.'" Id. at 587 (quoting *Jean Country*, 291 NLRB at 12 fn. 3) (emphasis added). But the court deferred to the Board's finding that the union's organizational solicitation was similar in relevant respects to the wide variety

[10] See also *NLRB v. Southern Maryland Hospital Center*, 916 F.2d at 937 ("Claims of disparate enforcement inherently require a finding that the employer treated similar conduct differently, and we see a difference between admitting employee relatives for meals and permitting outside entities to seek money or memberships.") (citation omitted).

of commercial and charitable solicitation the hospital had allowed.[11]

In contrast, the 6th Circuit has held the Board's extant interpretation of the *Babcock* discrimination exception impermissible to the extent it treats nonemployee union *organizational* activity as comparable to nonemployee charitable, civic, or commercial activity. *Albertson's Inc. v. NLRB*, 301 F.3d at 446–447. In *Albertson's*, the court explained that its holding was compelled by its earlier decision in *Cleveland Real Estate Partners*, supra, which defined "discrimination" as "favoring one union over another, or allowing employer-related information while barring similar union-related information." 95 F.3d at 465. The *Albertson's* court rejected the Board's attempt to distinguish *Cleveland Real Estate Partners* on the ground that it involved boycott activity rather than organizational activity. 301 F.3d at 447. The court explained that the Board's proposed distinction was unpersuasive because the court's understanding of discrimination was grounded in *Babcock & Wilcox*, which itself dealt with organizing activity. Id.

II. ANALYSIS

A. Babcock Discrimination is the Unequal Treatment of Activities Similar in Nature.

1. Judicial precedent supports such a standard.

Section 7 of the Act provides that "[e]mployees 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 . . . ." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." Consistent with these statutory provisions, the Board and the courts have long held that "[n]o 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." *Babcock*, 351 U.S. at 113. But the Act confers no such right on nonemployees, *Lechmere*, 502 U.S. at 532, and an employer is entitled to exclude nonemployee union agents from its property, subject to two narrow exceptions. Thus, for more than 60 years, the Supreme Court has held that "[a]n employer may validly post his property against nonemployee distribution of union 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." *Babcock*, supra at 112. The former exception is termed the "inaccessibility" exception. Here, we are concerned with the scope of the latter "discrimination" exception.

As previously noted, *Babcock* itself did not provide any specific definition of the "discrimination" exception, although it is reasonable to infer that this exception should be limited, as is the *Babcock* inaccessibility exception, in order to be consistent with the general rule that employers have a right to exclude nonemployee union agents and their supporters.[12] Indeed, as discussed above, several

[11] See also *Four B Corp. v. NLRB*, 163 F.3d 1177 (10th Cir. 1998) (affirming Board's finding that employer discriminated against nonemployee union agents by denying them access to engage in organizational activities while granting access to other nonemployees to engage in a substantial amount of commercial and charitable activities under "similar, relevant circumstances," reasoning that the disparate treatment evidenced an anti-union motive). In *Four B,* the employer's written solicitation policy (i) prohibited nonemployee solicitation inside its store, (ii) allowed various charitable and civic solicitations in the parking lot, but (iii) prohibited nonemployee union organizational solicitation anywhere on its premises. The court approved the Board's finding of discrimination based on the particular facts of the case: "[W]hen an employer . . . has a published rule prohibiting solicitation under stated circumstances, and excludes a union from its property under materially different circumstances in which no other outside organization has been excluded, it is fair to infer, as we do here, that a discriminatory motive lies behind the exclusion." Id. at 1184. The court also cited approvingly decisions by other courts recognizing that employers may make neutral, non-Section 7–based distinctions between different kinds of solicitations, such as distinguishing between "charitable solicitations which encouraged [the employer's] business activity and the union's do-not-patronize message," which was harmful to the employer's business, citing *Riesbeck Food Markets*, supra.

The 7th and 8th Circuits have reached similar results. See *North Memorial Health Care v. NLRB*, 860 F.3d 639 (8th Cir. 2017) (adopting the Board's finding that the employer discriminated against union representatives by denying them access to a public cafeteria based on the content of their conversation where, among other things, the employer told the union representatives that they could "talk about the Twins" with off-duty employees but could not "talk about union business"); *Montgomery Ward & Co., Inc. v. NLRB*, 692 F.2d 1115 (7th Cir. 1982) (affirming the Board's finding that employer violated the Act by granting access to commercial solicitors while denying access to nonemployee organizers).

In *Belcher Towing Co. v. NLRB*, 614 F.2d 88 (5th Cir. 1980), the court rejected the Board's finding that the employer had promulgated a no-solicitation rule that discriminated against nonemployee union organizers, where the employer had allowed access by nonemployees other than union organizers, but there was no evidence that the employer allowed solicitation by *anyone*. In analyzing this issue, the court stated that "a no-solicitation rule is discriminatory only if the employer allows non-union [s]olicitation (for example, solicitation by charitable organizations)." Id. at 90. In context, we believe that the court's analysis is consistent with our focus on whether permitted activities, if any, were similar in nature to the prohibited activity of nonemployee union representatives.

[12] In *Babcock*, the Supreme Court cited its earlier decision in *NLRB v. Stowe Spinning Co*., 336 U.S. 226 (1949), where it upheld the Board's finding that it was unlawful under the Act "to discriminate against a union by denying it the only available meeting hall in a company town when . . . the sole purpose of the discriminatory denial is to impede,

federal courts of appeals have rejected the interpretation of *Babcock*'s discrimination exception espoused by the Board in *Sandusky Mall* and other cases as far too expansive. Instead, to warrant a finding of discrimination, those courts have demanded proof that the activities of nonemployees admitted to the property were sufficiently similar to those of nonemployees excluded from the property (or that the admitted and excluded groups were comparable). See, e.g., *Riesbeck Food Markets, Inc. v. NLRB*, supra ("Discrimination claims 'inherently require a finding that the employer treated similar conduct differently[.]'"); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d at 465 ("No relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature when access to the target audience is otherwise available."); *Salmon Run Shopping Center LLC v. NLRB*, 534 F.3d at 116 ("The focus of the discrimination analysis under Section 7 of the Act must be upon disparate treatment of two like persons or groups."). While the courts of appeals that have considered the issue have differed in their definition of what nonemployee activities are comparable, they are unanimous in the conclusion that nonemployee protest or boycott activities are not comparable to nonemployee charitable, civic, or commercial solicitations, and that an employer does not engage in "discrimination" within the meaning of *Babcock* when it forbids the former but permits the latter.[13] We are unaware of a single case where a court has affirmed a Board decision finding that an employer discriminated against nonemployee union agents seeking to engage in protest activities—urging customers not to do business with the employer—because the employer granted access to other nonemployees to engage in charitable, civic, or commercial activities.

In our view, the criticisms leveled by the courts against the *Sandusky Mall* standard are just and counsel modification of the Board's current definition of the *Babcock* discrimination exception.

2. Sandusky Mall is flawed on both legal and policy grounds.

The *Sandusky Mall* Board provided no valid justification for its view that the *Babcock* discrimination exception applies whenever an employer prohibits nonemployee union access while "at the same time allowing substantial civic, charitable, and promotional activities." 329 NLRB at 622. It offered no principled defense of its interpretation of the *Babcock* discrimination exception. Instead, it echoed *Babcock*'s terse language as though its meaning were self-evident, id. at 620–621, and asserted that the courts should defer to its interpretation of *Babcock* because it had applied that interpretation consistently, id. at 621 fn. 12.[14] But the *Sandusky Mall* Board overlooked the fact that the Board itself had previously interpreted *Babcock*'s discrimination exception in a manner congruent with the views of the appellate courts discussed above. See *Jean Country*, 291 NLRB at 12 fn. 3; supra fn. 3 and accompanying text. Thus, in adopting an interpretation of *Babcock*'s discrimination exception that aligns with that of the federal courts of appeals, we also return to an interpretation embedded in the Board's own pre–*Sandusky Mall* precedent—precedent that the Board in *Sandusky Mall* did not even mention.

No principle of property law or policy of the Act supports the Board's decision in *Sandusky Mall*.[15] An employer's right to exclude from its property uses it finds objectionable is not diminished, as a matter of property law, merely because it allows other, different uses to which it does not object. See *NLRB v. Pay Less Drug Stores Northwest, Inc.*, 57 F.3d at 1077 ("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."); *Sandusky*

prevent, and discourage self-organization and collective-bargaining by the (company's) employees . . . ." Id. at 227 (internal quotations omitted). For the reasons explained below, our decision today is consistent with the holding of *Stowe Spinning*.

[13] *Lucille Salter* and *Four B Corp.* are not to the contrary. Both cases predated *Sandusky Mall* and thus had no occasion to pass on its expansive definition of *Babcock* discrimination. Both cases also involved union organizational activities, rather than boycott activities like those at issue in this case. Moreover, as noted above, in both cases the court considered whether the nonemployee activities permitted by the employer were similar in nature to the nonemployee union activities that the employer prohibited. Our decision today does likewise.

[14] The *Sandusky Mall* Board dismissed the employer's stated distinction between activities that might benefit and were consistent with the purposes of the mall and its tenants (e.g., charitable and civic solicitations) and those that were not (e.g., urging a boycott of a mall tenant) as amounting to little more than the employer permitting solicitation that it likes and prohibiting solicitation that it dislikes. And the *Sandusky Mall* Board found prohibited discrimination even though the employer had also denied access to *nonunion* nonemployee organizations on the same basis. The courts have rejected this reasoning, and we do as well.

[15] See Stein, *Keep Off the Grass: Prohibiting Nonemployee Union Access Without Discriminating*, 73 N.Y.U.L. Rev. 2029, 2050 (1998):

> There are two possible explanations for the *Babcock* discrimination bar. It may serve to indicate that an employer has a sufficiently weak property interest that even a derivative § 7 interest should outweigh it. Alternatively, discrimination may be frowned upon because it evidences possible union animus, i.e., specific targeting of a union for adverse treatment. However, neither of these rationales provide adequate support for the Board's broad definition of discrimination and blanket application of the discrimination exception.

Mall Co. v. NLRB, 242 F.3d at 692 (finding no discrimination within the meaning of *Babcock* where "the conduct of the nonemployee union handbillers [wa]s not similar conduct to that of civil and charitable organizations who obtained permission from Sandusky to use the mall in a limited way deemed beneficial").

Sandusky Mall's broad interpretation of *Babcock*'s discrimination exception is not necessary to protect employees' exercise of their Section 7 rights. Our decision to overrule *Sandusky Mall* has no effect whatsoever on the right of employees to engage in Section 7 activity on their employer's premises, subject to the employer's legitimate management interest in maintaining production and discipline, as discussed above. See, e.g., *F.W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993) (finding that off-duty employees were engaged in protected activity when they positioned themselves near store entrances, distributed handbills to potential customers, and asked them to shop elsewhere during their labor dispute with employer). The Supreme Court has recognized that employees' "'right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others,'" *Lechmere*, 502 U.S. at 532 (quoting *Babcock*, 351 U.S. at 113), but nonemployee union organizers can communicate their message to employees through nontrespassory means. The Supreme Court has held that such methods of communication are sufficient to enable employees to exercise their own statutory right to self-organization in all but the extremely rare case where employees are inaccessible. Id. at 533–535.[16] There is, accordingly, no basis for finding that such nontrespassory means are insufficient for the purpose of communicating with customers or the public. The denial of trespassory access may make such communications more difficult, or even less effective, but such considerations are, standing alone, no valid basis for requiring an employer to allow nonemployee access. *Lechmere,* supra at 539. Accordingly, such considerations also would not justify *Sandusky Mall*'s overbroad interpretation of the *Babcock* discrimination exception.

Nor would there be any valid basis for assuming that employees will be deterred from engaging in union activities or from otherwise supporting a labor organization merely because their employer bars nonemployee access for activity that is not comparable to permitted nonunion activity. For example, if an employer bars nonemployee boycott picketing while permitting the Salvation Army to ring its bell for donations during the holidays, no reasonable employee would conclude that the employer acted with union animus, as opposed to a union-neutral desire to exclude *any* nonemployee group that seeks to urge its customers not to purchase its goods or services. And any suggestion that employees would be chilled from engaging in such activities themselves merely because their employer does not allow nonemployees to engage in them on its premises would be contrary to the holdings of *Lechmere* and *Babcock.*

The broad interpretation of discrimination advanced by the *Sandusky Mall* Board is also in tension with the Supreme Court's opinions in *Lechmere* and *Babcock.*[17] While those decisions addressed the scope of the inaccessibility exception to the rule of *Babcock*, the Court's opinions in those cases provide useful guidance to determining the scope of the discrimination exception as well. In *Babcock*, the Court stated that "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. And as we have just seen, the Court in both *Babcock* and *Lechmere* emphasized that the role of nonemployees in the maintenance of workers' organizational rights is sufficiently fulfilled, in all but the rarest circumstances, through nontrespassory means of communication. Accordingly, the Court in *Lechmere* stated that the "exception to *Babcock*'s rule is a narrow one," 502 U.S. at 539, and that the Act restricts an employer's right to exclude nonemployee union organizers from its property only in "limited circumstances," id. at 532. While the Court was specifically discussing the inaccessibility exception, we believe that its repeated affirmation of the *Babcock* rule that an employer may "post his property against nonemployee distribution of union literature" and its characterization of exceptions to that rule as "narrow" and "limited" in the context of employee inaccessibility also counsel against a broad interpretation of *Babcock*'s discrimination exception.[18]

[16] Employees are inaccessible within the meaning of *Lechmere* and *Babcock* where "'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them,'" *Lechmere*, supra at 533–534 (quoting *Babcock*, supra at 113)—i.e., where employees, "by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society," such as in logging camps, mining camps, and at mountain resort hotels. *Lechmere*, supra at 539–540.

[17] The Supreme Court has repeatedly reaffirmed the principles of *Babcock & Wilcox*, albeit without applying its discrimination exception. See *Lechmere*, supra; *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 204–205 & fn. 40 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 511, 521–522 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543–545 (1972).

[18] In this respect, we find useful guidance in the Supreme Court's subsequent decision in *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 48 (1983), a First Amendment case, where the Court

Simply put, the rule of *Babcock* is the rule, and the exceptions are exceptions—and under *Sandusky Mall*, the Board permitted the *Babcock* discrimination exception to swallow the rule. Nothing could be more common than the sight of Girl Scouts selling cookies or Salvation Army bell ringers on the sidewalk in front of a grocery or department store. If allowing access for these and similar activities (on more than isolated occasions) while excluding nonemployees who seek to advocate a store boycott constitutes discrimination for purposes of *Babcock*, then the discrimination "exception" will almost always apply. And an exception that almost always applies is not an exception, but a rule.

3. *Sandusky Mall* is overbroad—but the 6th and 2d Circuit's standards are too narrow.

Although we overrule today *Sandusky Mall*, we respectfully disagree with the 6th Circuit that *Babcock* discrimination is limited to "favoring one union over another, or allowing employer-related information while barring similar union-related information," *Cleveland Real Estate Partners v. NLRB*, 95 F.3d at 465, and with the 2d Circuit that it means "treat[ing] a nonemployee who seeks to communicate on a subject protected by section 7 less favorably than another person communicating on the same subject," *Salmon Run Shopping Center LLC v. NLRB*, 534 F.3d at 116–117. We agree with these courts, of course, that an employer discriminates within the meaning of *Babcock* when it grants nonemployee access in support of one union while denying nonemployee access in support of another union, or when it grants nonemployee access for antiunion activity while denying nonemployee access for prounion activity. But we believe the scope of *Babcock*'s discrimination exception is not limited to such circumstances. In our view, a standard that allows an employer, for example, to grant access to nonemployee handbillers urging a boycott of the employer for environmental reasons while denying access to nonemployee handbillers urging a boycott in connection with a labor dispute insufficiently accounts for the protection of Section 7 interests. Disparate treatment of this nature reasonably supports an inference of hostility to union activity rather than legitimate opposition to any group that seeks to injure the employer's business interests, and therefore it would reasonably tend to interfere with employees' own Section 7 activity in a manner that, in our judgment, the *Babcock* Court did not intend to countenance. See *Babcock*, supra at 113–114 (recognizing that the Act requires that "the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights").[19]

4. The new standard: *Babcock* discrimination is the unequal treatment of activities similar in nature.

For all the foregoing reasons, we overrule *Sandusky Mall* and other Board decisions to the extent they adopt a similarly broad interpretation of *Babcock*'s discrimination exception.[20] We hold instead that an employer discriminates within the meaning of the *Babcock* discrimination exception when it treats nonemployee activities that are similar in nature disparately, and that the Board may not find discrimination when the nonemployee activities permitted by an employer on its property are not similar in nature to those that it prohibited. See *Sandusky Mall v. NLRB*, 242 F.3d at 690; *Riesbeck Food Markets v. NLRB*, 91 F.3d 132 at *3. We agree with the 4th Circuit that an employer "has a strong interest in preventing the use of its property for conduct which directly undermines its purposes, i.e., the sale of goods and services to [its] customers," *Riesbeck*, 91 F.3d 132 at *4, and that protest and boycott activities undermine that strong interest, unlike

held that a public-school district did not discriminate by granting access to its internal mail system to various outside organizations while prohibiting access to a nonincumbent union. The Court explained that even assuming the school district had created a "limited public forum" by granting access to the Cub Scouts, the YMCA, and parochial schools, "the constitutional right of access would in any event extend only to other entities of a similar character" that, like the organizations previously permitted access, engage in "activities of interest and educational relevance to students," but it did not have to grant access to the nonincumbent union, "which [was] concerned with the terms and conditions of teacher employment." Id.

[19] As the foregoing discussion demonstrates, the dissent mischaracterizes our position when she claims that we "view union solicitation and distribution as inherently 'disruptive' simply because a union is involved" and that, under the standard we adopt today, "union representatives will always fall into their own, unique category—and thus can never suffer discrimination, because no other person will ever be sufficiently similar to serve as a comparator." These are not the only statements in our colleague's dissent that misrepresent our views. For example, the dissent asserts that our decisions in this case and in *UPMC*, 368 NLRB No. 2 (2019), and *Bexar County Performing Arts Center*, 368 NLRB No. 46 (2019), make it lawful to engage in "discrimination in its most obvious form" by "[s]ingling out union activity for negative treatment." Our colleague also indulges in misrepresentation by implication. Thus, she says we hold today that "mere opposition to statutorily protected activity" is "a legitimate reason for exercising the property owner's right to exclude an unwelcome person." The obvious and therefore intended implication is that we believe property owners have a right to exclude persons engaged in statutorily protected activity *because it is statutorily protected*—not because the activity injures the owner's business, and the owner has *never* permitted access by nonemployees seeking to injure its business. Disagreement forcefully expressed is every Board member's right, but statements like these test the limits of fair argument.

[20] Additionally, because our interpretation of *Babcock*'s discrimination exception permits an employer to tolerate substantial charitable solicitation without requiring it to grant access to nonemployee union agents to engage in protest or organizational activities, we overrule *Hammary Mfg. Co*., supra, and like cases to the extent they hold that an employer violates the Act if it excludes nonemployee union agents while granting nonemployee access for more than a small number of isolated beneficent acts.

charitable, civic, and commercial activities (which, in fact, may promote its business interests). For this reason, we hold that protest and boycott activities are not sufficiently similar in nature to charitable, civic, or commercial activities to warrant a finding of discrimination based on disparate treatment of such conduct, regardless of the amount of charitable, civic, or commercial activities permitted. This approach, which focuses on whether the permitted and prohibited nonemployee activities are similar in nature, will apply equally to nonemployee *organizational* activity. Thus, we will permit an employer to ban nonemployee access for union organizational activities if it also bans comparable organizational activities by non-labor groups, such as membership drives by fraternal societies and religious organizations.

B. Retroactive Application of the Revised Standard

We find it appropriate to apply our new standard retroactively. The Board's "usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage." *SNE Enterprises*, 344 NLRB 673, 673 (2005) (internal citations and quotations omitted). In determining whether to apply a change in law retroactively, the Board must balance any ill effects of retroactivity against "'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *SNE Enterprises*, 344 NLRB at 673 (quoting *Securities & Exchange Commission v. Chenery Corp*., 332 U.S. 194, 203 (1947)). In other words, the Board will apply a new rule "to the parties in the case in which the new rule is announced and in other cases pending at the time so long as [retroactivity] does not work a 'manifest injustice.'" Id. In determining whether retroactive application will work a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. Id.

After consideration of these factors, we find that retroactive application of our new standard would not result in any manifest injustice. We assume that nonemployee union agent Forester relied on *Sandusky Mall* and similar Board cases in refusing to leave the Respondent's premises until directed by the police. That reliance interest is tempered here, however, by the uniform judicial hostility to the *Sandusky Mall* standard. Further, retroactivity will not result in any particular injustice to the parties in this case. Forester departed the Respondent's property when directed to do so by the police; he was not arrested and did not suffer any other adverse consequences. Dismissing the complaint will not deny him any affirmative relief for conduct that the Board would have found to be an unfair labor practice under *Sandusky Mall*. For these reasons, we will follow the Board's usual practice and apply the standard we announce today to the present case and to all pending cases at whatever stage.

C. Application of the New Standard to the Instant Case

The judge found, and we agree, that nonemployee union agent Forester, when asking the Respondent's customers to sign the boycott petition, "assist[ed]" a labor organization or "engage[d] in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7 of the Act. See *Salmon Run Shopping Center, LLC*, 348 NLRB 658, 658 fn. 1 (2006) (finding that nonemployees of mall were engaged in protected activity when they engaged in boycott activities on mall's premises), enf. denied on other grounds 534 F.3d 108 (2d Cir. 2008). As explained above, whether nonemployee Forester was statutorily entitled to access the Respondent's property turns on whether the Respondent discriminated against his boycott activities by granting access to other nonemployees to engage in comparable activities. The record shows that the Respondent regularly allowed various charitable and civic entities onto its property to solicit donations and raise funds, but there is no evidence that the Respondent ever permitted any nonemployees onto its property to urge its customers to stop shopping at one of its stores. Accordingly, we reverse the judge's finding that the Respondent discriminated against nonemployee union solicitation within the meaning of *Babcock*'s discrimination exception, and we will dismiss the complaint.

RESPONSE TO DISSENT

Our dissenting colleague criticizes our decision on several grounds, none of which has merit. First, she contends that the judge found the denial of union access unlawful on the independent basis of "the 2014 letter" "clearly target[ing] union activity," and that the Board should adopt that finding without reaching the issue of discrimination. The basis for this purported finding is the March 24, 2014 letter, quoted above, from the Respondent's *landlord*, authorizing the Respondent to remove *any* persons engaged in "protesting, demonstrating, picketing, hand billing, or related disruptive activities on the premises . . . (whether or not involving a labor union)."

Contrary to the dissent, the judge did not find a violation on these grounds, and she could not properly have done so. The only unfair labor practice alleged in the complaint

is discriminatory enforcement,[21] and throughout this litigation, the General Counsel has consistently taken the position that the sole issue presented is whether the Respondent discriminatorily enforced its access restrictions.[22] The judge's statement that the March 2014 letter "targeted unions and other groups that wanted or tried to protest, demonstrate, picket, handbill, or otherwise engage in what was considered to be 'related disruptive activities on the premises'" did not—and consistent with principles of due process, it could not—represent a finding that the Respondent, separate and apart from any discriminatory enforcement, violated Section 8(a)(1) of the Act by promulgating uniformly applied access restrictions with an antiunion motive. Accordingly, the question of whether the Respondent promulgated access restrictions in response to union activity is not before us, and we properly rule on the Respondent's exceptions to the judge's finding of discriminatory enforcement.[23]

Second, our dissenting colleague complains that we have revisited *Sandusky Mall* without soliciting briefs from the public. However, nothing in the Act, the Board's Rules, the Administrative Procedure Act, or procedural due process principles requires the Board to invite amicus briefing before reconsidering precedent, and the Board has frequently overruled or modified precedent without soliciting additional briefing.[24] Moreover, the continued validity of *Sandusky Mall* was squarely joined in the parties' briefs, and we find it unnecessary to solicit additional input in light of the uniform judicial hostility to Board decisions finding that employers violate the Act by prohibiting nonemployee union agents from engaging in protest

[21] The complaint alleges that "[a]bout April 2, 2015, Respondent, by Diego Duran and Donati High, enforced [the access restriction in its lease], *selectively and disparately*, by prohibiting representatives of the Charging Party from soliciting signatures in the parking area adjacent to Respondent's facility; by demanding representatives of the Charging Party leave the parking area adjacent to Respondent's facility; and by calling the police to remove representatives of the Charging Party from the parking area adjacent to Respondent's facility" (emphasis added).

[22] In her opening statement, counsel for the General Counsel stated that "this case presents a single issue, whether Respondent disparately and discriminatorily enforced a no solicitation/no loitering rule against the Union to prevent it from petitioning the public about a labor dispute it had with the Respondent" (Tr. at 18). Consistent with that opening statement and the complaint, the General Counsel's answering brief to the Board states: "This case presents a singular issue: whether Respondent violated Section 8(a)(1) of the Act on or about April 2, 2015, when it disparately and discriminatorily enforced a no solicitation/no loitering rule against the Union . . ." (Br. at 1 (footnote omitted)). The General Counsel does not argue that the judge made two separate unfair labor practice findings, either of which would be sufficient to support the judge's recommended Order. Only the dissent makes this unsupportable claim. That the Board has, in rare cases, found violations for different reasons or on different theories than those advanced by the General Counsel does not warrant doing so here. Simply put, we have decided the precise issue the complaint frames and the parties have asked us to resolve.

Our colleague's reliance on *United Food & Commercial Workers, Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000), in support of her assertion that the instant case should be decided on a different ground is also unavailing. In that decision, the court remanded the case to the Board because there was "no substantial evidence" to support the factual basis of the Board's decision. Id. at 1033–1034, 1039. No such circumstance exists here. The record supports our factual findings, and the parties' briefs squarely present the issue that we decide today.

We have explained why the dissent is mistaken in her criticism that we have violated "the norm of exercising administrative restraint: disposing of a case without deciding unnecessary issues." But even aside from its mistakenness, it is a criticism our colleague is not well situated to level. See *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016). In *Miller & Anderson*, Member McFerran joined a Board majority that overruled precedent to clear the way to an election, notwithstanding the pendency of a motion to dismiss the representation petition supported by a sworn affidavit stating that the petitioned-for unit *did not exist*. Two weeks later, the Regional Director granted the union's request to withdraw the petition. As an exercise in administrative unrestraint, *Miller & Anderson* is unsurpassed.

[23] The evidentiary support for a finding of discriminatory promulgation is, in any event, slim at best. The letter cited by the judge and the dissent was promulgated in March 2014, more than a year before the denial of access at issue in this case. The only apparent basis for the judge's finding that it was promulgated in response to some *other* union activity is former Store Manager Timothy Lynch's vague testimony that he "believe[d]" that the landlord sent the letter to the Respondent because "the Union had come and wanted to do some solicitation at the store."

Because the charge in this case was filed on June 30, 2015, Sec. 10(b) precludes any finding that the promulgation of the letter itself violated the Act. Our colleague posits that the letter nevertheless demonstrates "the Respondent's antiunion motive in ejecting Forester from the parking lot," but she fails to justify her position that a letter, issued by the Respondent's *landlord*, is persuasive evidence of the *Respondent's* motives for actions it took more than a year after the letter was written. This is especially true since the letter proscribes "*any* protesting, demonstrating, picketing, hand billing, or related disruptive activities on the premises . . . *(whether or not involving a labor union)*" (emphasis added).

[24] See, e.g., *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing). Our colleague cites her dissent in *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46, slip op. at 14 fn. 2 (2019), where she offered post hoc justification in each of the cited cases for not inviting briefing. Here as in *Bexar*, this is beside the point. As stated above, the Board had no legal obligation to justify its decision not to invite briefing in these or any of the many other cases over the decades in which it has overruled precedent without amicus briefing.

activities on their property while tolerating charitable, civic, or commercial activities by other nonemployees.[25]

Third, the dissent argues that our position was "expressly repudiated" by "the only Supreme Court decision that provides substantive guidance in this area," *NLRB v. Stowe Spinning*, supra. The dissent contends that *Stowe Spinning* compels the Board to find unlawful discrimination when an employer denies access to nonemployee union agents seeking to engage in protest activities after having granted access to organizations such as the Girl Scouts and the American Red Cross to engage in charitable, civic, or commercial activities. According to the dissent, the Court's decision precludes the Board from analyzing whether the conduct of nonemployee union agents is similar in kind to the conduct of other nonemployees tolerated by an employer on its property. The dissent vastly overreads *Stowe Spinning*.

As we recently explained in *UPMC*, 368 NLRB No. 2 (2019), the Supreme Court in *Stowe Spinning* upheld the Board's finding that the employer had violated the Act when it refused to allow the union to use the only available meeting hall in a company town. The union had requested to use a meeting hall in the company-owned post office. Most of the building had been built by the employer for use by the Patriotic Order Sons of America. *Stowe Spinning*, 336 U.S. at 228. The president of the Patriotic Order initially granted the union's request, but the employer subsequently denied the request because it had come from a "textile organizer." Id. at 229. Moreover, the Patriotic Order had allowed third parties to use the hall in the past, and the employer had never interfered with the Patriotic Order's use or rental of the hall to third parties. Id. Thus, the Court upheld the Board's finding that the denial constituted "unlawful disparity of treatment and discrimination against the union" because the denial was based solely on the requesting party's *identity* as a union organizer.[26] Our decision today, which turns on the nature of union agent Forester's *conduct* and its dissimilarity with the conduct of nonemployees tolerated by the Respondent on its property, in no way conflicts with the Supreme Court's prohibition against discrimination based solely on union identity.

Finally, we reject the dissent's attempt to frame the conduct at issue as "solicitation of customers," as though all solicitation is the same, and the related premise that if an employer that has allowed some nonemployee solicitation ever bars nonemployee union access, it necessarily follows that "the employer's real objection is not to solicitation and distribution by outsiders on its property, but rather to the presence of union representatives." All solicitation is *not* the same, and it defies common sense to suggest that employers never object to a boycott solicitation because it calls for a boycott rather than because of the identity of the messenger. That absurd assumption is the premise underlying *Sandusky Mall*, and, as shown, every circuit court that has squarely considered that premise to date has rejected it.[27] We do likewise here.

CONCLUSION

The Board has had no success in obtaining enforcement in any court of any unfair labor practice finding based on a *Babcock* discrimination theory absent evidence that the permitted activities were similar in nature to the prohibited nonemployee union activity. That interpretation of *Babcock* is consistent with the policies of the Act, while at the same time giving due recognition to an employer's property right to exclude nonemployees. The Supreme Court has instructed the Board time and again that the Act constrains that right only in narrow and limited

[25] There is also no merit to the dissent's claim that our decision today is somehow inconsistent with the Board's announced intent to engage in future rulemaking regarding access to an employer's private property. Any rules adopted in that proceeding will apply prospectively only. See *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988); 5 U.S. C. § 551(4). It would be unfair to the parties to this case to make them wait for a resolution of their dispute until the conclusion of a rulemaking that cannot resolve it. We will consider with an open mind all comments received in response to any future notice of proposed rulemaking, and we trust that our colleague will do the same.

[26] The employer in *Stowe Spinning* did not contest the Board's finding "that antiunion bias was the cause for [the] refusal of the hall." 336 U.S. at 230 fn. 7. There was, moreover, no suggestion in *Stowe Spinning* that the nature of the proposed union meeting differed in any way from the third-party meetings the employer had allowed. Further, neither the Board nor the Court in *Stowe Spinning* relied on discrimination alone. See id. at 233 (noting that the Board "found that the refusal [of access] . . . was unreasonable because the hall had been given freely to others, *and because no other halls were available for organization*") (emphasis supplied); id. at 230 ("We cannot equate a company-dominated North Carolina mill town with the vast metropolitan centers where a number of halls are available within easy reach of prospective union members."). Indeed, *Phillips Petroleum Co.,* 92 NLRB 1344 (1951), a case cited by the dissent, describes the holding of *Stowe Spinning* as follows: "[I]t was a violation of Sec. 8 (1) of the Wagner Act for an employer to discriminate against a union by refusing it permission to use a company-owned meeting hall in an isolated company town, where such a building was the only available meeting place in the immediate vicinity." Id. at 1348.

[27] Our colleague asserts that "of the adverse decisions" we cite, "not one is expressly premised on the fact that union representatives were soliciting for a boycott." This is irrelevant. As we have shown, various courts have held that all solicitation is *not* the same and that there is a legally significant difference between, for example, permitted charitable solicitation and prohibited do-not-patronize solicitation. See, e.g., *Riesbeck Food Markets, Inc. v. NLRB*, 91 F.3d at 132; *NLRB v. Pay Less Drug Stores Northwest, Inc.*, 57 F.3d at 1077. Further, our colleague's reliance on *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573 (1978), is misplaced. That case involved the right of *employees* to distribute literature in nonworking areas of a plant during their nonwork time. *Eastex* did not involve an attempt by *nonemployees* to access an employer's property to urge customers not to patronize the employer's business.

circumstances. *Sandusky Mall* paid insufficient heed to that instruction. Our decision today respects it.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 6, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

In a series of decisions reversing Board precedent without prior notice, the majority has made it increasingly easy for employers to exclude both employees and union organizers from property open to the public, in order to prevent their exercise of labor-law rights. In *UPMC*,[1] the majority allowed a hospital to exclude union organizers from a cafeteria because they were talking to hospital employees about union issues over lunch. In *Bexar County Performing Arts Center*,[2] the majority allowed an arts venue to eject symphony musicians employed there because they passed out leaflets to ballet patrons on a sidewalk, asking them to support live music at performances. Today, the majority allows a grocery chain—which had regularly permitted solicitation by other groups—to bar a union representative from its parking lot, because he asked shoppers to sign a petition supporting workers who sought transfers from a closing store. Applying a standard announced in *UPMC*, the majority confirms what was already clear: that its new approach—which ostensibly assesses whether an employer has barred property access by nonemployee union representatives "while permitting similar activity in similar relevant circumstances by other nonemployees"—contradicts the understanding of discrimination reflected in the Supreme Court's 1949 *Stowe Spinning* decision and in more than 70-years' worth of Board decisions.[3] Singling out union activity for negative treatment—discrimination in its most obvious form—is precisely what the Court outlawed in *Stowe*, and, until recently, it has never been lawful under the National Labor Relations Act.

The majority here also doubles down on two other basic errors of its *UPMC* decision. First, to overrule precedent, the majority reaches out to decide an issue that is not required to resolve the case before the Board. Here, the judge found that the Respondent violated the Act by adopting and then implementing a no-solicitation policy directly in response to union activity. That explicit motive-based determination easily supports finding a violation here, making it unnecessary to reach the disparate-treatment issue.[4] Instead, the majority passes over the judge's finding and dismisses the complaint. Second, as it has done many times now,[5] the majority again reverses precedent on a major labor-law issue without providing notice to the public and inviting briefs. Curiously, the majority recently announced its intention to "engage in rulemaking to establish the standards . . . for access to an employer's property"[6]—an action that would necessarily require the submission and consideration of public comments. Public participation is valuable, but now is the time to seek it—not *after* the Board has already remade access law through adjudication.

I.

In my dissent in *UPMC*, supra, I laid out the relevant legal landscape:[7] In 1956, the Supreme Court established the basic rule that governs nonemployee access cases under Section 8(a)(1) of the National Labor Relations Act:

[1] 368 NLRB No. 2 (2019).

[2] 368 NLRB No. 46 (2019).

[3] *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949).

[4] See, e.g. *Four B. Corp. v. NLRB*, 163 F.3d 1177, 1184 (10th Cir. 1998), enfg. *Price Chopper*, 325 NLRB 186 (1997).

[5] See *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 17 & fn. 25 (2019) (Member McFerran, dissenting); *UPMC*, 368 NLRB No. 2, slip op. at 18 & fn. 56 (2019) (Member McFerran, dissenting); *SuperShuttle DFW, Inc.*, 367 NLRB No. 75, slip op. at 15 & fn. 2 (2019) (Member McFerran, dissenting); *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 12 & fn. 18 (2019) (Member McFerran, dissenting); *E.I. Du Pont de Nemours, Louisville Works*, 367 NLRB No. 12, slip op. at 3–4 (2018) (Member McFerran, dissenting); *Boeing Co.*, 366 NLRB No. 128, slip op. at 9–10 (2018) (Members Pearce and McFerran, dissenting); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 22 (2017) (Members Pearce and McFerran, dissenting); *PCC Structurals, Inc.*, supra, slip op. at 14, 16 (Members Pearce and McFerran, dissenting); *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156, slip op. at 36, 38 (2017) (Members Pearce and McFerran, dissenting), vacated 366 NLRB No. 26 (2018); *Boeing Co.*, 365 NLRB No. 154, slip op. at 30–31 (2017) (Member McFerran, dissenting); *UPMC*, 365 NLRB No. 153, slip op. at 17–19 (2017) (Member McFerran, dissenting).

[6] National Labor Relations Board, Semiannual regulatory agenda, 84 Fed. Reg. 29776 (June 24, 2019).

[7] *UPMC,* supra, 368 NLRB No. 2, slip op. at 9–10 (dissenting opinion).

> [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other 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*.

NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (emphasis added). *Babcock & Wilcox* thus creates a general rule permitting employers to exclude nonemployees, with two exceptions: (1) if employees are inaccessible to the union; or (2) if the employer "discriminate[s] against the union by allowing other distribution." Id.[8]

Babcock & Wilcox involved only the inaccessibility exception to the general rule. The discrimination exception, as recognized by the Court, was grounded in existing Board case law and in an earlier Supreme Court decision, *Stowe Spinning*.[9] As I will explain, both before and after *Babcock & Wilcox*, the Board has ordered access to employer property based on the employer's discriminatory exclusion of union representatives. The Board has consistently taken a broad view of what constitutes discrimination sufficient to trigger an access obligation, focusing simply on whether the employer has permitted nonunion actors to engage in solicitation and distribution on its property, regardless of whether those actors were otherwise similarly situated to the union in terms of their identity or aims.[10] The Board has never deemed *union* solicitation and distribution to be inherently distinguishable from the same conduct carried out by other actors because it may communicate a particular message or may otherwise trigger the employer's opposition. *Stowe Spinning* reflects the Supreme Court's clear endorsement of the Board's approach.

The majority today, building on its recent decision in *UPMC*, radically narrows the scope of the discrimination exception, holding that:

> an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities.

It holds also that "an employer may ban nonemployee access for union organization activities if it also bans comparable organizational activities by groups other than unions." As I will explain, this approach cannot be squared with either Supreme Court precedent or statutory policy. In fact, it creates a license for an employer to permit almost any third-party activity on its property *but* union solicitation and distribution—a result that cannot stand.

A.

The facts here are straightforward and undisputed. In their key aspects, they make this case essentially indistinguishable from the many decisions since the 1940's where the Board has found unlawful discrimination. Here, too, an employer excluded a union representative from property where other persons, with no union connection, had been permitted to solicit customers. In this case, moreover, it is clear that the employer acted from an unlawful motive, because the employer's general prohibition against so-called "disruptive activities" was itself adopted in response to peaceful union activity, a fact sufficient to invalidate it. Both of these grounds independently support finding a violation of Section 8(a)(1) here.

1.

The Union has represented a unit of the Respondent's employees including those at Kroger 538 in Portsmouth, Virginia—the site of the incident in this case—since 2010. In late-2014, the Respondent opened two new stores, one in Portsmouth and the other in nearby Suffolk, Virginia. Employees at the new stores were not represented by a union. At the same time, the Respondent decided to close Kroger 538. During May and April 2015, the Respondent and the Union discussed the effects of Kroger 538's

[8] See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (reaffirming inaccessibility exception of *Babcock & Wilcox* and rejecting Board's approach to cases not involving discriminatory denials of access). The *Lechmere* Court rejected the Board's "multifactor balancing test" applying the inaccessibility exception, which called for an accommodation of Sec. 7 rights and employer property rights in every case. The Court held, rather, that only where inaccessibility has first been demonstrated does it "become[] necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights." 502 U.S. at 538.

[9] *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949).

[10] See, e.g., *Sandusky Mall Co.*, 329 NLRB 618 (1999) (mall owner violated Sec. 8(a)(1) by excluding area-standards picketers of mall tenant while permitting access to various charitable, civic, and other organizations), enf. denied 242 F.3d 682 (6th Cir. 2001); *Four B. Corp. d/b/a Price Chopper*, 325 NLRB 186, 186–188, (1997) (retail grocer violated Sec. 8(a)(1) by banning union organizers after permitting various charitable and civic groups to solicit its customers), enfd. 163 F.3d 1177 (10th Cir. 1998); *D'Alessandro's, Inc.*, 292 NLRB 81, 83–84 (1988) (retail grocer violated Sec. 8(a)(1) by excluding area-standards picketers while permitting a wide range of commercial, charitable, and civic access); *Chrysler Corp.*, 232 NLRB 466, 466 (1977) (vehicle manufacturer violated Sec. 8(a)(1) by prohibiting union organizational activity in its parking lot while permitting a wide variety of commercial activity), affd. sub nom. *Smith v. NLRB*, No. 77-1938, 1979 WL 6182 (D.C. Cir. 1979) (unpublished); *Priced-Less Discount Foods*, 162 NLRB 872, 872 fn. 1, 875 (1967) (retail grocer violated Sec. 8(a)(1) by excluding union organizers from its parking lot while permitting other charitable, religious and civic access); *United Aircraft Corp.*, 67 NLRB 594, 602–604 (1946) (manufacturer violated the Act by excluding union organizers from property it controlled while permitting various commercial solicitors).

closure on unit employees. The Union sought the opportunity for unit employees to transfer to the nearby newly opened stores in Portsmouth and Suffolk, but the Respondent offered transfers only to more distant stores already covered by the Union's collective-bargaining agreement.

On April 2, 2015, the Respondent's District Human Resources Coordinator Diego Duran met with Union Representative Heith Fenner and Kroger 538 employees to discuss the store closure. During this meeting, another nonemployee Union Representative, Brandon Forester, asked customers in the store parking lot to sign a petition stating:

> As a loyal Kroger customer and member of the Portsmouth community I am appalled that Kroger is taking good jobs out of our town and forcing the employees who have helped me at my store for years move to a store over 25 miles away. I will not shop at either of the newly opened Marketplace stores unless the employees at this store are allowed to transfer there with all the benefits they currently enjoy as union members.

The judge found that Forester's activity was peaceful and not disruptive. As the judge found, and my colleagues recognize, Forester's appeal to the Respondent's customers to support unit employees was clearly protected by Section 7 of the National Labor Relations Act.[11]

Duran and store manager Donati High sought direction from a district manager about how to address Forester's activity. The district manager advised Duran and High that Forester's activity was prohibited pursuant to a March 2014 letter from the Respondent's landlord.[12] In that letter, the landlord expressed its desire to prevent "disruptive activities or nuisances that have a potentially adverse impact on our tenants and their customers, our shopping center and the community at large" and to ensure the "continuous and smooth operation of the shopping center." The letter stated that "no person or organization (whether or not involving a labor union)" was permitted to engage in "any protesting, demonstrating, picketing, handbilling or related disruptive activities on the premises;" it directed that anyone engaging in these activities be dealt with as a trespasser and removed from the property.

Officials Duran and High confronted Union Representatives Forester and Fenner in the parking lot with a copy of that letter and told them to leave the Respondent's property. Forester declined to do so until the police were called and then peacefully departed when asked to do so by a police officer. The judge found that, although Kroger 538 did not have a formal or written policy regarding how to handle requests to solicit on store property, its unofficial policy was to forward all requests to the store manager to review them and to approve or disapprove them on an ad hoc basis. The record establishes that, prior to excluding its employees' union representative, the Respondent permitted or tolerated extensive solicitation of its customers—near its entrance and in its parking lot—by a wide variety of civic, religious, commercial, and charitable organizations, including the Girl Scouts, the Salvation Army, the Lion's Club, the American Red Cross, local firefighters, the Boy Scouts, veterans groups, a breast cancer awareness group, a church group collecting donations for the homeless and battered women and placing flyers on cars, local dance club promoters, and college students selling encyclopedias.

On this basis, the judge correctly concluded that the Respondent violated the Act "by excluding union solicitation on its premises while at the same time favoring and permitting charitable and civic solicitation activity." Longstanding Board precedent establishes that the Respondent's exclusion of union solicitors, considered in light of its toleration of solicitation on its property by other outsiders, was unlawful under the *Babcock* discrimination exception. The many Board decisions supporting the judge's conclusion span decades.[13]

[11] "Employees indisputably have a Section 7 right to concertedly appeal to their employer's customers for support in a labor dispute." *Macy's, Inc.*, 365 NLRB No. 116, slip op. at 3 (2017). It follows that, had the individuals soliciting customers in the parking lot here been off-duty Kroger employees, the *Babcock & Wilcox* framework for evaluating nonemployee access would not apply and their activities would be indisputably protected by the Act. See *Nashville Plastic Products*, 313 NLRB 462, 463 (1993) (holding that off-duty employees were entitled to access to outside nonworking areas of employer's property and expressly rejecting the argument that "off-duty employees should be viewed in the same light as nonemployee union organizers for purposes of defining their right of access to the Respondent's property."). Here, of course, the ejected union representative represented the Respondent's employees, but was denied access to an area from which off-duty employees could not lawfully have been excluded.

[12] The Respondent leased the property at issue and shared with other tenants a common right of easement in the parking lot. No party disputes that the landlord conferred on the Respondent, via a term in the parties' lease, a sufficient property interest to exclude trespassers from the parking lot; the record establishes that neither the landlord nor the Respondent uniformly enforced this lease term.

[13] See, e.g., *Chrysler Corporation*, supra, 232 NLRB at 477 (nonemployee sales of "pizzas, chicken dinners, and other goods, wares, and merchandise"), affd. sub nom. *Smith v. NLRB*, No. 77-1938, 1979 WL 6182 (D.C. Cir. February 7, 1979) (unpublished); *Montgomery Ward & Co.*, 256 NLRB 800, 810 (1981) (nonemployee solicitation for the American Bar Association or the Girl Scouts), enfd. 692 F.2d 1115 (7th Cir. 1982), cert. denied 461 U.S. 914 (1983); *Knogo Corp.*, 262 NLRB 1346, 1361 (1982) (nonemployee food vendor), enfd. in relevant part 727 F.2d 55 (2d Cir. 1984); *Montgomery Ward & Co.*, 288 NLRB 126, 126–127, 182–183 (1988) (nonemployee political solicitation and Girl Scout

2.

Although the majority's decision focuses entirely on the finding of discrimination, the judge separately found too that the 2014 letter, which the Respondent used to justify its removal of Forester, "clearly targeted unions" in its prohibition on protesting, demonstrating, picketing, and handbilling. In this respect, the judge credited testimony from Timothy Lynch, the manager of Kroger 538 when the letter issued in March 2014, stating his understanding that the origin of the letter "was due to the fact that the Union had come and wanted to do some solicitation at the store." The judge also noted that no one disputed Lynch's testimony that the letter issued in response to the Union's desire to solicit at Kroger 538.

On this basis, the judge found that the letter clearly targeted union activity, establishing the Respondent's antiunion motive in ejecting Forester from the parking lot. This finding, too, was correct, and it independently establishes a violation of Section 8(a)(1). See, e.g. *Four B. Corp. v. NLRB*, 163 F.3d 1177, 1184 (10th Cir. 1998) (holding that where "[s]ubstantial evidence supports the Board's finding that [access] ban was motivated by an anti-union animus . . . [court] need go no further to find that [the employer] violated section [Section] 8(a)(1)."), enfg. *Price Chopper*, 325 NLRB 186 (1997).[14]

B.

The majority's decision to reverse precedent is wrong—indeed, impermissible under Supreme Court law. Before explaining why, it is important to highlight the longstanding procedural norms that are bypassed to reach today's result.

First, is the norm of exercising administrative restraint: disposing of a case without deciding unnecessary issues.[15] Here, the majority passes over the judge's express finding that the Respondent—in adopting and enforcing its no-demonstrating/no-picketing/no-handbilling policy—acted with antiunion animus. The Board could and should find a violation of Section 8(a)(1) on this basis.[16] There is no

cookie sales), remanded on other grounds 904 F.2d 1156 (7th Cir. 1990); *D'Alessandro's, Inc.*, supra, 292 NLRB at 82–84 (nonemployee fundraising by Girl Scouts, Salvation Army, YMCA, and Jaycees and nonemployee advertising and sales of cars, boats, trailers, Christmas trees and firewood); *Ordman's Park & Shop*, 292 NLRB 953, 955–956 (1989) (nonemployee fundraising by school cheerleaders, Lions Club, Jaycees, youth football association, and Lutheran Church and use by Chamber of Commerce); *Food Lion, Inc.*, 304 NLRB 602, 603–604 (1991) (nonemployee fundraising by the Salvation Army, the Knights of Columbus, the Junior Chamber of Commerce, the Girl Scouts, the Lions Club, the Pan African Church, "and other organizations of a similar nature."); *Davis Supermarkets*, 306 NLRB 426, 427 & fn. 5 (1992) (nonemployee church and school organizations and a rival union's nonemployee organizers), enfd. on other grounds 2 F.3d 1162 (D.C. Cir. 1993); *Richards United Super*, 308 NLRB 201, 202 (1992) (nonemployee fundraising by the Shriners, the Salvation Army, little league baseball teams, the Boy Scouts, and school organizations and nonemployee commercial leafletting by a donut shop, an auto repair company, an auto parts store, and an antique and gun show); *Great Scot, Inc.*, 309 NLRB 548, 549 (1992) ("a half-dozen [nonemployee] charitable and civic organizations, such as the Port Clinton High School Band Boosters"), enf. denied on other grounds 39 F.3d 678 (6th Cir. 1994); *Pay Less Drug Stores Northwest, Inc.*, 312 NLRB 972, 974 (1993) (nonemployee fundraising by Girl Scouts, a school or athletic group, and a classic car club), enf. denied 57 F.3d 1077 (9th Cir. 1995) (unpublished table decision); *Riesbeck Food Markets, Inc.*, 315 NLRB 940, 940–941 (1994) (nonemployee fundraising by volunteer fire departments, various youth sport groups, Easter Seals, V.F.W., and the Salvation Army), enf. denied, 91 F.3d 132, (4th Cir. 1996) (unpublished); *Big Y Foods, Inc.*, 315 NLRB 1083, 1085 (1994) (nonemployee solicitation by the Knights of Columbus, the Lions Club, Wilbraham Brownie Troupe, Harrington Women's Club, Longmeadow Council on Aging, Oxford Dog Pound Committee, Starr's Library, Springfield Central High Key Club, Springfield Christian School, Christ Church Day School, St. Patrick's School, St. Catherine's Athletic Association, Pop Warner Football, Torrington Varsity Basketball, George Hummel Little League, Gathering Pentecostal Church, St. Jude's Hospital, the American ex-POWs, the Committee to elect Attorney Barbara Green, and a petitioner to abolish the Blue Laws of Massachusetts); *Cleveland Real Estate Partners*, 316 NLRB 158, 166–167 (1995) (nonemployee fundraising by schoolchildren and a petitioner to put a term-limit proposition on a state ballot), enf. denied 95 F.3d 457 (6th Cir. 1996); *Be-Lo Stores*, 318 NLRB 1, 10–11 (1995) (nonemployee fundraising by Lions Club and Girl Scouts, literature distribution by Jehovah's Witnesses and Lyndon LaRouche followers and commercial sales of a cookbook, oils, and incense), enf. denied in relevant part, 126 F.3d 268, 284 (4th Cir. 1997); *Schear's Food Center*, 318 NLRB 261, 262 (1995) (nonemployee solicitation by the Seventh-Day Adventist Church and Girl Scouts and Jaycees voter registration drive); *Great American*, 322 NLRB 17, 24, 28–29 (1996) (nonemployee solicitation by Veterans of Foreign Wars, the American Cancer Society, the Salvation Army, the League of Women Voters, "and other similar organizations."); *Four B Corp. d/b/a Price Chopper*, supra, 325 NLRB at 186–187, 192 (nonemployee solicitation by "various civic and charitable organizations" including the Salvation Army and the Shriners), enfd. 163 F.3d 1177 (10th Cir. 1998); *Sandusky Mall Co.*, supra, 329 NLRB at 619 (nonemployee solicitation by Arthur Murray dance, Young American Miss Pageant, United Way, Easter Seals, the American Lung Association, the Salvation Army, and the American Red Cross); *Albertson's Inc.*, 332 NLRB 1132, 1133 (2000) (nonemployee solicitation and literature distribution by the Salvation Army, Camp Fire Boys and Girls Clubs, Boy Scouts, Girl Scouts, Brownies, public schools, other youth and school organizations, the Veterans of Foreign Wars, and the Disabled Veterans of America), enf. denied 301 F.3d 441 (6th Cir. 2002).

[14] Accord *Cannondale Corp*., 310 NLRB 845, 847 (1993) (employer's no-solicitation rule unlawful because promulgated in response to protected activity); *State Chemical*, 166 NLRB 455 (1967) (same). See also *Bigg's Foods*, 347 NLRB 425, 425 fn. 7, 433 (2006) (employer's amendment to no-distribution rule unlawful because promulgated in response to off-duty employees' union handbilling activities); *Providence Hospital*, 285 NLRB 320, 322–323 (1987) (same).

[15] To take just one example, the Board routinely finds it unnecessary to pass on one ground for a finding a violation of the Act, when another ground presents a clearly sufficient basis. See, e.g., *UPMC*, 366 NLRB No. 142, slip op. at 1, fn. 5 (2018).

[16] Contrary to the majority, the judge did, in fact, make a finding of antiunion animus, and he was entirely justified in doing so based on the record evidence. The majority contends that any such finding was precluded by the General Counsel's failure to raise this theory of the violation in his complaint. But "the Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from

need, then, for the Board to reach the issue that my colleagues use as a vehicle for revisiting the law and reversing long-established, consistently-applied, and judicially-approved precedent.[17]

Second, the majority breaks with the norm of encouraging public participation in the Board's decision-making, at least where important labor-law issues are at stake. Here, the majority again overrules well-established precedent without first providing notice to the public and inviting briefs.[18] There is no good reason for the Board to deprive itself of the benefits of public participation.[19] But the majority's action here is particularly confounding in light of the Board's recent announcement, via a semiannual regulatory agenda in the Federal Register, that it plans in the near future to "engage in rulemaking to establish the standards under the National Labor Relations Act for access to an employer's private property."[20] Because today's decision and other recent decisions already make major changes in this area of the law, interested members of the public will feel not only surprised, but perhaps misled. And if the proposed aim of future rulemaking is to codify then-existing law—that is, to turn the majority's recent reversals of precedent into Board rules—then the process will surely seem arbitrary. Comment would be invited on proposed legal rules that had recently been adopted through adjudication, but without public participation. The rulemaking process, then, would merely serve to ratify new changes in Board law, rather than present an occasion for open-minded consideration of whether such changes are warranted in the first place.[21]

II.

For decades, the Board has dealt with claims that an employer's discriminatory denial of access to nonemployee union representatives violated Section 8(a)(1) of the Act, because it "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed in [S]ection 7 of the Act." 29 U.S.C. §158(a)(1).[22] The analytical starting point, as suggested, is the Supreme Court's decision in *Babcock & Wilcox*, which—drawing on Board decisions and the Court's own earlier decision in *Stowe Spinning*—recognized a discrimination exception to the general rule permitting employers to exclude nonemployee union representatives from their property. No post-*Babcock & Wilcox* decision of the Court (including *Lechmere*) has applied, explained, or modified the discrimination exception.[23]

---

those of . . . the General Counsel, even in the absence of exceptions, where the unlawful *conduct* was alleged in the complaint." *Local 58, International Brotherhood of Electrical Workers, AFL–CIO (Paramount Industries, Inc.)*, 365 NLRB No. 30 (2017), slip op. at 4, fn. 17, enfd. 888 F.3d 1313 (D.C. Cir. 2018), and the judge properly did so here. See, e.g., *Hawaiian Dredging Construction Co.*, 362 NLRB 81, 82 fn. 6 (2015); *Pepsi America, Inc.*, 339 NLRB 986 (2003); *Jefferson Electric Co.*, 274 NLRB 750, 750–751 (1985), enfd. 783 F.2d 679 (6th Cir. 1986). See also, e.g., *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959) (enforcing Board decision that found a violation on a theory different from the one relied upon by the judge, despite the General Counsel and the charging party's failure to except to the judge's decision).

The violation is alleged in the complaint—which contended, among other things, that the Respondent violated Sec. 8(a)(1) by "selectively and disparately . . . . prohibiting representatives of the Charging Party from soliciting signatures in the parking area adjacent to Respondent's facility." Moreover, the factual basis for the violation is clear from the record, the law is well established, and no due process concerns are implicated. See *Paramount Industries*, supra, 365 NLRB No. 30, slip op. at 4, fn. 17. Specifically, the Respondent had an opportunity to rebut Lynch's testimony regarding the adoption and enforcement of the rule, but failed to do so.

In addition, I reject the majority's assertion that the letter could not constitute evidence of the Respondent's antiunion motive because it had originated with the Respondent's landlord. As the judge found, the Respondent's express reliance on a letter that "clearly targeted unions" as well as "its own unwritten practice and policy," discriminated against the Union and violated the Act. See, e.g. *Ward Manufacturing, Inc.*, 152 NLRB 1270, 1271 (1965) (finding unlawful the employer's application of rule that was adopted and promulgated "for a discriminatory purpose.").

[17] In *United Food & Commercial Workers, Local 400 v. NLRB*, 222 F.2d 1030 (D.C. Cir. 2000), the D.C. Circuit reversed a Board decision that had overturned precedent when the facts of the case did not present the issue decided. This case, too, could and should be decided on an entirely different ground than the one chosen by the majority.

[18] See fn. 5, supra. Indeed, a previous Board solicited public input when it announced its decision to consider this very issue. See *Roundy's*, Inc., 30–CA–17185 (Nov. 12, 2010) (Notice and Invitation to File Briefs), https://www.nlrb.gov/case/30-CA-017185. (That case ultimately settled before the Board issued a decision.)

[19] Rather than offer a rationale for rejecting public participation here (and elsewhere), the majority simply asserts that the Board "has frequently overruled or modified precedent without soliciting additional briefing." But the six cases the majority cites are all distinguishable from this one. See *Bexar County Performing Arts Center*, 368 NLRB No. 46, slip op. 14 at fn. 2 (2019), for a full discussion of why these cases do not support the majority's decision to forgo briefing here and in other recent decisions.

[20] National Labor Relations Board, Semiannual regulatory agenda, 84 Fed. Reg. 29776 (June 24, 2019).

[21] In response, the majority asserts that, because any rule will apply prospectively only, it would "be unfair to the parties to this case to make them wait for a resolution of their dispute until the conclusion of a rulemaking that cannot resolve it." But I do not suggest that course of action at all. Indeed, the most obvious way around this problem would be to resolve the current case under longstanding precedent and to wait for the promised rulemaking to propose any sweeping changes in this area of the law.

[22] I n cases like this one, it is Sec. 8(a)(1) of the Act that is implicated, not the Act's general prohibition against "discrimination in regard to hire or tenure of employment or any term or condition of employment," embodied in Sec. 8(a)(3). 29 U.S.C. §158(a)(3).

[23] In *Lechmere*, the issue was whether the union had reasonable access to employees outside the employer's property. No issue of discrimination was involved. As the *Lechmere* Court observed, the employer's prohibition against solicitation and distribution on its property had been "consistently enforced . . . inside the store as well as on the parking lot

A.

In *Babcock & Wilcox*, the Court held that the Board had erred in applying the same rules of law regarding access to both employees *and* nonemployees, neglecting a "distinction . . . of substance" between the two. 351 U.S. at 113. The Board had relied upon its rule, affirmed by the Supreme Court in *Republic Aviation*,[24] that employers could not lawfully prohibit their employees from distributing union literature on company property, on nonworking time. But the standard adopted by the *Babcock & Wilcox* Court *preserved* one aspect of the Board's established approach that *did* treat claims by employees and nonemployees identically: An employer was permitted to exclude union representatives only if did "not discriminate against the union by allowing other distribution." Id. at 112.

Discrimination was not an issue in the case before the Court, but the Court's opinion took care to note cases in which "[a]n element of discrimination existed," including its own decision in *Stowe Spinning*, supra. Id. at 111 fn. 4.[25] In finding a right to access for nonemployee union organizers at least where discrimination was established, the *Babcock & Wilcox* Court endorsed the prevailing judicial view,[26] and upheld (to this extent) established Board doctrine. In its brief in the case, notably, the Board had urged the Court to preserve the Board's prohibition on employer "rules which permit solicitation for all causes except unions, or which permit distribution of all types of literature except union."[27]

B.

The Supreme Court's decision in *Stowe Spinning*—decided 7 years before *Babcock & Wilcox* and cited with approval there—illustrates the then-prevailing judicial acceptance of the Board's approach to discriminatory denials of access.

In *Stowe Spinning*, the Court endorsed the Board's holding that an employer violated Section 8(a)(1) of the Act by permitting outside community groups to use an employer-owned meeting hall, while prohibiting its use by union organizers. The Court observed that the meeting hall "had been given freely to others" and that "[w]hat the Board found . . . is discrimination." 336 U.S. at 233. The Court rejected the dissenting view of Justice Jackson that "discrimination . . . could hardly occur unless some other *union* had been allowed to use the hall." 336 U.S. at 235 (dissent)(emphasis added). A version of the dissenting view had been taken by the court below, the 4th Circuit, whose decision the Court reversed.[28] Instead the Court endorsed the Board's broader view of discrimination and its holding that the employer's prohibition against union use of the meeting hall "constituted unlawful disparity of treatment and discrimination." Id. at 229, quoting *Stowe Spinning Co.*, 70 NLRB 614, 622 (1946).[29]

(against, among others, the Salvation Army and the Girl Scouts)." 502 U.S. at 530 fn. 1.

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Supreme Court had considered *Babcock & Wilcox* in addressing whether a state court trespass lawsuit directed against union area standards picketing was preempted by the Act. The Court described *Babcock & Wilcox* as holding that "[t]o 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*." 436 U.S. at 205 (emphasis added).

[24] *Republic Aviation Corp. v. NLRB*, 324 U.S 793 (1945), aff'g *LeTourneau Co. of Georgia*, 54 NLRB 1253 (1944).

[25] The *Babcock & Wilcox* Court observed that "[a]n element of discrimination existed in the Carolina Mills case [*Carolina Mills, Inc.*, 92 NLRB 1141 (1951)], . . . such as existed in [*Stowe Spinning*], . . . but this was not relied upon in the opinion." 351 U.S. at 683 fn. 4. In *Carolina Mills*, the employer had prevented nonemployee union representatives from distributing literature on its property near plant entrances and on the plant parking lot, but had no general rule prohibiting distribution and (after excluding the union) had "permitted the distribution of literature on the parking lot." 92 NLRB at 1165–1166.

See also Note, *"Not as a Stranger": Non-Employee Union Organizers Soliciting on Company Property*, 65 Yale L. J. 423, 423 & fn. 4, 425 & fn. 21 (1956) (cited in *Babcock & Wilcox* for its collection of cases and itself citing, in turn, cases involving the discriminatory denial of access to nonemployee union organizers, such as *United Aircraft Corp.*, 67 NLRB 594, 603–604 (1946)).

[26] *Babcock & Wilcox* affirmed the decision of the United States Court of Appeals for the 5thCircuit, which denied enforcement of the Board's order. *NLRB v. Babcock & Wilcox Co.*, 222 F.2d 316 (5th Cir. 1955). The 5th Circuit had observed that

> [T]he courts have held that Section 7 of the Act . . . gives a right to a non-employee to enter and solicit union membership on employer's premises under two general situations, the first of which is where there has been discrimination. . . .

Id. at 318, citing (inter alia) *Stowe Spinning*, supra. But, as the 5th Circuit noted, the rule at issue "had always and uniformly been enforced in a completely non-discriminatory way." Id.

[27] Brief for the National Labor Relations Board, *NLRB v. Babcock & Wilcox Co.*, 1955 WL 72467 at * 36 (U.S.).

[28] *NLRB v. Stowe Spinning Co.*, 165 F.2d 609 (4th Cir. 1947). In denying enforcement to the Board's order, the 4th Circuit had opined:

> There is no general provision of the Act which requires an employer to treat a labor union in the same manner as it treats other persons or organizations which are not concerned with the interests or activities of labor.
>
> * * *
>
> [A]cts of discrimination on the part of an employer by which one labor organization or one employee is favored over another or discriminated against in the free exercise of rights under the statute may amount to unfair labor practices and violations of the Act. None of these practices, however, are involved in the use or non-use of the assembly hall.

165 F.2d at 611.

[29] The Board's traditional approach to employer discrimination involving *employees* who engage in solicitation or distribution at work is entirely consistent with *Stowe Spinning*: Disparate treatment is established if the employer treats union-related activity less favorably than

The Board in *Stowe Spinning* had applied a balancing test to resolve the access issue before it, finding that the employer's "bare property right"—the employer did "not claim that 'inconvenience' or 'dislocation of property rights' would result from the [u]nion's use of its property—was outweighed by the union's statutory interest in using the meeting hall. 70 NLRB at 623–624. The Board emphasized the "arbitrariness . . . of [the] decision" denying access "which resulted in the discriminatory treatment of the [u]nion," and it cited earlier Board decisions in which similar discriminatory denials of access to union representatives had been found unlawful. Id. at 622 & fn. 9, 624.

Stowe Spinning, in short, reflected the Board's already well-established approach. By the time of the Supreme Court's 1956 decision in *Babcock & Wilcox*, Board decisions had found that an employer violated the Act by denying access to nonemployee union organizers where it had previously admitted teachers and entertainers,[30] vendors,[31] and religious organizations and social societies.[32] *Phillips Petroleum Co.*, 92 NLRB 1344, 1346 (1951), provides one illustrative example. There, the Board found that an employer unlawfully discriminated against union organizers by prohibiting them from using a meeting hall that had been previously used for social gatherings, safety meetings, and church services. The Board observed:

> While it is true that the [employer] may not be under an obligation to provide such a meeting place, once having provided it, the [employer] cannot thereafter *arbitrarily and for no valid reason* select the [u]nion for special treatment by denying its use. Discrimination of this nature is here admitted.

Id. at 1349 (emphasis added).

C.

My colleagues criticize the Board's 1999 decision in *Sandusky Mall*—a routine application of the longstanding principles described—for "echo[ing] *Babcock*'s terse language [regarding discrimination] as though its meaning were self-evident." It is true that in recognizing the discrimination exception, the Supreme Court's opinion in *Babcock & Wilcox* did not itself fully explain it. But, as noted, the Supreme Court's exception originated not with *Babcock & Wilcox*, but rather with *Stowe Spinning*. And traditional Board doctrine, endorsed by the *Stowe Spinning* Court, does indeed reflects a rationale: Where an employer has permitted solicitation and distribution on its property by nonemployees other than union representatives—as opposed to uniformly prohibiting access by nonemployees for such purposes—the employer's claim that granting access to the union would burden its property rights is necessarily weakened, for purposes of the Act.

The *Babcock & Wilcox* Court explained that access cases involving nonemployee union representatives require the Board to balance the rights affirmatively protected by Section 7 of the National Labor Relations Act[33] with the property rights of employers:

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.
>
> * * *
>
> The determination of the proper adjustment rests with the Board.

351 U.S. at 112.[34]

As already discussed, pre-*Babcock & Wilcox* Board decisions involving the access claims of nonemployee union

solicitation and distribution that have no relation to labor issues, and not merely when the employer favors one union's supporters over another's or favors antiunion activity over prounion activity. See, e.g., *Greenville Cabinet Co.*, 102 NLRB 1677, 1698–1699 (1953), citing *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358, 1364–1365 (1949). See also Note, *No-Solicitation and No-Distribution Rules: Presumptive Validity and Discrimination*, 112 U. Pa. L. Rev. 1049, 1060–1061 (1964) (collecting cases).

[30] *Weyerhaeuser Timber Co.*, 31 NLRB 258, 263 (1941).

[31] *United Aircraft Corp.*, 67 NLRB 594, 607 (1946).

[32] *Stowe Spinning Co.*, supra, 70 NLRB at 621. See also *Gallup American Coal Co.*, 32 NLRB 823, 828–829 (1941), enfd. 131 F.2d 665 (10th Cir. 1942) (employer violated Sec. 8(a)(1) where it allowed advertisers and religious groups, but not a union, to put signs on its property).

[33] Sec. 7 of the Act provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157. Sec. 2(3) of the Act defines "employee" to "include any employee, . . . not limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . . " 29 U.S.C. §152(3).

[34] The Court had made essentially the same point in *Stowe Spinning*, supra, observing that:

> It is not "every interference with property rights that is within the Fifth Amendment *** Inconvenience or even some dislocation of property rights may be necessary in order to safeguard the right to collective bargaining."

336 U.S. at 232 (ellipsis in original), quoting *Republic Aviation*, supra, 324 U.S. at 802 fn. 8.

representatives engage in the balancing of interests endorsed by the Court. They make clear that where employers have freely granted access to nonemployees *other* than union representatives (as the Respondent did here), then the employer's real objection is not to solicitation and distribution by outsiders on its property, but rather to the presence of union representatives. The employer's conduct has demonstrated that its legitimate property interests are not impaired by solicitation and distribution by outsiders—including union representatives. Thus, insofar as the Act is concerned, the exclusion of union representatives is arbitrary and therefore unlawful. Put somewhat differently, in the context of discrimination, the employer's bare property right to exclude unwelcome persons is not entitled to weight in the statutory balancing test used to determine access. If statutory rights are to be preserved, mere opposition to statutorily protected activity cannot be a legitimate reason for exercising the property owner's right to exclude an unwelcome person.[35] Today, of course, the majority holds otherwise.

In the decades after *Babcock & Wilcox*, as indicated, the Board regularly has found that discriminatory denials of access to nonemployee union representatives violate Section 8(a)(1). Its decisions, if not always fully explicated, are consistent with the rationale of the Board's early decisions[36]—and, of course, with the Supreme Court's access standard, the force of which is independent of any rationale that the Board offers (or fails to offer) for it.[37] Although the federal courts of appeals are divided, a majority of the Circuits that have addressed the issue—the 5th, 7th, 8th, 10th, and District of Columbia Circuits—have approved the Board's approach.[38]

The 5th Circuit has observed that, under *Babcock*, "a no-solicitation rule is discriminatory only if the employer allows non-union solicitation (*for example, solicitation by charitable organizations*)."[39] Similarly, the 7th Circuit affirmed the Board's conclusion that a retail sales employer violated the Act by excluding union organizers from its cafeteria pursuant to a policy which would have permitted similar solicitation for the American Bar Association or the Girl Scouts.[40] The 8th and 10th Circuits have likewise

[35] The Board's decisions, however, did not require proof of the employer's antiunion motive to establish a violation of Sec. 8(a)(1). Contemporary judicial decisions had held that an unlawful motive was not an element of a 8(a)(1) violation. See, e.g., *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946) (rule prohibiting employee solicitation during nonworking hours violated Sec. 8(a)(1) unlawful, absent evidence that rule was necessary to maintain production or preserve discipline, regardless of employer's motive). Subsequently, the Supreme Court made clear that:

> [I]t is only when the interference with §7 rights outweighs the business justification for the employer's action that §8(a)(1) is violated.... *A violation of §8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive.*

Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965) (citations omitted; emphasis added).

[36] See, e.g., *Priced-Less Discount Foods*, supra, 162 NLRB at 875 ("The fact that [the employer] permitted approved causes, such as school and church groups, to use the parking lot for solicitation purposes, is proof that [the employer] did not consider soliciting as such on the parking lot as any interference to its business operations or in any other way prejudicial to it.").

[37] As the Supreme Court emphasized in *Lechmere*, supra, which rejected the Board's approach to the inaccessibility exception as inconsistent with *Babcock & Wilcox*, once the Court has "'determined a statute's clear meaning, . . . it judge[s] an agency's later interpretation of the statute against [the Court's] prior determination of the statute's meaning.'" 502 U.S. at 537, quoting *Maislin Industries, U.S, Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

[38] The 1st and 3d Circuits appear never to have considered the scope of the *Babcock* discrimination exception. The 2d, 4th, 6th, and 9th Circuits have taken a different approach from the Board. Thus, multiple decisions by the 6th Circuit following *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996), denying enf. to 316 NLRB 158 (1995), and the 2d Circuit's decision in *Salmon Run Shopping Center, LLC v. NLRB*, 534 F.3d 108 (2d Cir. 2008), denying enf. to 348 NLRB 658 (2006) have denied enforcement to Board orders in this area. Nonprecedential decisions by the 4th and 9th Circuits—relied upon by today's majority—have also disagreed with the Board's established standard. See *Riesbeck Food Markets, Inc. v. NLRB*, 91 F.3d 132 (4th Cir. 1996) (unpublished table decision), denying enf. to 315 NLRB 940 (1994); *NLRB v. Pay Less Drug Stores Northwest, Inc.*, 57 F.3d 1077 (9th Cir. 1995) (unpublished table decision), denying enf. to 312 NLRB 972 (1993). Additionally, two precedential decisions by the 4th Circuit have denied enforcement to Board orders on grounds not implicating the Board's standard. *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997) (holding exclusion of union agents was not *Babcock* discrimination where court found that isolated exceptions to employer's no-solicitation policy were not sufficiently widespread to establish it had permitted "other distribution"), denying enf. to 318 NLRB 1 (1995); *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932 (4th Cir. 1990) (court found no discrimination where employer had permitted nonemployee access not including nonemployee *solicitation*), denying enf. to 293 NLRB 1209 (1989).

[39] *Belcher Towing Co. v. NLRB*, 614 F.2d 88, 90 (5th Cir. 1980) (emphasis added) (holding employer did not unlawfully discriminate by denying access to union organizers while permitting other nonemployee access for purposes other than solicitation), denying enf. to 238 NLRB 446 (1978). The 11th Circuit appears never to have addressed the issue, but has adopted 5th Circuit precedent predating October 1, 1981—including *Belcher Towing*—as binding. See, e.g., *Security Walls, Inc. v. NLRB*, 921 F.3d 1053, 1057 fn. 6 (11th Cir. 2019) (citing *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)).

[40] *Montgomery Ward & Co. v. NLRB*, 692 F.2d 1115, 1123 (7th Cir. 1982), enfg. 256 NLRB 800 (1981), cert. denied 461 U.S. 914 (1983). The 7th Circuit decision in *Montgomery Ward* also relied upon a balancing analysis similar to the Board's *Jean Country* analysis abrogated by the Supreme Court in *Lechmere*. 692 F.2d at 1123–1128. That part of the court's *Montgomery Ward* decision is, accordingly, no longer good law. See *New York, New York*, 313 F.3d 585, 589 (D.C. Cir. 2002). But nothing in *Lechmere* calls into question *Montgomery Ward*'s interpretation of the *Babcock* discrimination exception.

A different 7th Circuit decision, *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995) involved an employer's policy governing *employee* postings on its bulletin boards. The majority notes that the 2d Circuit relied on *Guardian Industries* in its only case to examine the

enforced Board decisions finding discrimination under *Babcock* without drawing a distinction between union solicitation and similar nonemployee charitable, civic, or commercial activity.[41] Finally, the District of Columbia. Circuit has consistently reflected the same understanding of the controlling Supreme Court interpretation of the Act. Thus, in affirming the Board's finding that a hospital discriminated by excluding union organizational solicitation while permitting a variety of other nonemployee solicitation on its property, the court observed that "[t]he fact that the nonemployee solicitations permitted by the employer are 'charitable' in nature, however, is not in itself sufficient to immunize the practice of disparately treating union solicitations."[42] The court went on to find the nonemployee solicitations at issue there "*indistinguishable in nature* from Union solicitations." Id. at 592 (emphasis added). Subsequent opinions from the District of Columbia Circuit reflect the same understanding of *Babcock* and *Stowe*.[43]

D.

As articulated by the *Babcock & Wilcox* Court, the discrimination exception is triggered when the employer "discriminate[s] against the union by allowing *other* distribution." 351 U.S. at 112 (emphasis added). The Court's opinion gave no indication that "other distribution" referred to only *certain types* of distribution by other nonemployees apart from the union. Indeed, as explained, in *Stowe Spinning,* the Court had already rejected the dissenting view of Justice Jackson, and the similar position of the 4th Circuit below, that "discrimination" could only mean disparate treatment of rival unions or disparate treatment of union supporters and union opponents, and was not implicated by disparate treatment of union representatives compared with "other persons or organizations which are not concerned with the interests or activities of labor" (in the 4th Circuit's phrase, 165 F.2d at 611). The Board's approach has, as a general rule, hewed closely to *Babcock & Wilcox* and *Stowe Spinning* (and the Board precedent on which those decisions drew) in declining to apply the discrimination exception narrowly.[44]

III.

Today's decision fundamentally changes that approach, in a manner that, as I will explain, is at odds with *Stowe Spinning*, and misconstrues the meaning of discrimination within the framework of Section 8(a)(1).

A.

In *UPMC*, the majority here held that the employer (a hospital) did not violate the Act by removing nonemployee union representatives from a cafeteria that was

Babcock discrimination exception, *Salmon Run Shopping Center*. But *Babcock* itself settled that different legal standards apply to employees and nonemployees. Similarly, the majority's reliance on *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 780 (7th Cir. 2001) is misplaced because the solicitations permitted there were—as in *Guardian Industries*—by *employees*, and therefore legally distinguishable from the prohibited nonemployee union organizational solicitations.

[41] *North Memorial Health Care v. NLRB*, 860 F.3d 639, 646–647 (8th Cir. 2017) (hospital's prohibition on nonemployee union representatives' union activity in cafeteria associated with informational picket was unlawful *Babcock* discrimination where employer did not similarly interfere with nonemployee conversations in cafeteria about other subjects), enfg. 364 NLRB No. 61 (2016); *Four B. Corp. v. NLRB*, 163 F.3d 1177 (10th Cir. 1998) (finding *Babcock* discrimination where retail grocer banned union organizers after granting access to "various charitable groups"), enfg. *Price Chopper*, 325 NLRB 186 (1997).

[42] *Lucile Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 587 fn. 4 (D.C. Cir. 1996) (citing *Stowe Spinning*, above, 336 U.S. at 233), enfg. 318 NLRB 433 (1995) The *Lucile Salter* court also rejected the same argument relied upon by today's majority that a different result was required by the Supreme Court's First Amendment decision in *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37 (1983). 97 F.3d at 592. In *Perry*, the Court found that a school that permitted outside groups integrally related to the school's primary educational purpose to use its mail system was not thereby obligated by the First Amendment to provide similar access to groups with no such relationship. Id. The D.C. Circuit found persuasive the Board's argument in *Lucile Salter* that the permitted nonemployee use there was not comparable to the use permitted in *Perry*, because it was not integral to the hospital's purpose. Id. Here, similarly, the numerous nonemployee activities permitted by the Respondent are clearly not integral to the Respondent's primary business purpose of selling groceries to its customers.

[43] See *UFCW Local 400 v. NLRB*, 222 F.3d 1030, 1036 fn. 8 (D.C. Cir. 2000) (citing *Lucille Salter Packard*, above, at 587 & fn. 4) (addressing existence of property interest in exclusion from easements under Virginia law: "if [respondent] were permitted to exclude the organizers, it could be *required* to exclude other solicitors, including in some circumstances charitable solicitors, in order to avoid a charge of anti-union discrimination"), denying enf. to *Farm Fresh*, 326 NLRB 997 (1998); *American Postal Workers Union v. NLRB*, 370 F.3d 25, 28–29 (D.C. Cir. 2004) (Postal Service did not discriminate under *Babcock* by excluding nonemployee organizers, in part because "preexisting rule against *commercial or charitable solicitation*" met *Babcock* requirement to "not discriminate against the union by allowing other distribution.") (emphasis added), affg. *USPS*, 339 NLRB 1175 (2003).

The D.C. Circuit's decision in *Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334 (D.C. Cir. 2003), denying enf. in relevant part to *UCSF Stanford Health Care*, 335 NLRB 488 (2001), is not to the contrary. There, the court found no *Babcock* discrimination because it found no "differential treatment of union and nonunion solicitors" when the hospital ejected "a self-confessed serial violator of Stanford's solicitation and distribution rules" without disturbing "non-soliciting bench sitters." 325 F.3d at 346.

[44] In the nonemployee access context, the Board has developed two principal limitations on the discrimination exception. First, it has held that an employer does not discriminate against union-related distribution or solicitation by permitting a small number of isolated charitable or "beneficent" acts. See *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982). Second, it has held that an employer does not discriminate against union distribution or solicitation by permitting solicitations that relate to the employer's "business functions and purposes." *Postal Service*, 339 NLRB 1175, 1178 (2003), enfd. 370 F.3d 25 (D.C. Cir 2004).

otherwise open to the public. In so holding, the majority—citing *Jean Country*, a Board case that did not involve the discrimination exception—defined discrimination as "disparate treatment where by rule or practice a property owner bars access by nonemployee union representatives seeking to engage in certain activity while permitting similar activity in similar relevant circumstances by other nonemployees."[45] Applying this new standard, the Board overruled longstanding precedent and found that there was "no evidence that the [employer had] knowingly allowed any other promotional or organizational activity by nonemployees on its premises."[46] As I stated in my dissent there, the majority's new standard had "no clear origin in Board case law involving access to employer property by nonemployee union representatives."[47] In addition, "the majority's application of this principle . . . reveals that the majority's definition of 'discrimination' is actually impermissibly narrower than the Board's traditional, broad understanding of the principle—which was endorsed by the Supreme Court in *Stowe Spinning*."[48] The majority made clear that—under its new formulation of discrimination—union organizers could be removed from the cafeteria simply for talking about the union.[49]

The majority today picks up where *UPMC* left off. Applying the same new standard articulated there, it holds that "an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities." Accordingly, it finds, contrary to decades of Board precedent, that the Respondent did not violate the Act by removing Forester—a union representative who was soliciting customer signatures for a petition—from its parking lot, even though it had routinely permitted a wide range of third-party solicitation and distribution in the same area. The majority also holds that "an employer may ban nonemployee access for union organizational activities if it also bans comparable activities by groups other than unions." In reaching its decision, the majority relies heavily on the holdings of federal appellate courts that have rejected the Board's approach. At its core, the majority's view is that third party activities—including charitable, civic, and commercial activities—are not "sufficiently similar" to union activity to constitute a basis for finding discrimination under the Act.

B.

The majority essentially adopts the approach *rejected* by the Supreme Court in *Stowe Spinning*. Indeed, its position echoes that of the 4th Circuit in that case: that court had insisted that the Act did not "require[ ] an employer to treat a labor union in the same manner as it treats other persons or organizations which are not concerned with the interests or activities of labor," 165 F.2d at 611, but its decision was reversed on review. Likewise, several of the court decisions cited by the majority take the position of *Stowe Spinning* dissenting Justice Jackson (who would have found unlawful only discrimination between favored and disfavored unions, see 336 U.S. at 235).[50] Because the majority adopts a position that was expressly repudiated by the Supreme Court, its holding cannot stand.[51]

Moreover, a close reading of *Babcock & Wilcox*—which cited *Stowe Spinning*, as well as Board decisions involving an "element of discrimination," see infra—decisively refutes the majority's statements that the Board's traditional approach is "in tension with the Supreme Court's opinions in *Lechmere* and *Babcock*" and that the Court has never provided a "specific definition" of discrimination in this context.[52] As I have emphasized, *Babcock & Wilcox,* and *Stowe Spinning* before it, endorsed existing Board doctrine and rejected contrary positions. *Lechmere*, in turn, did not address the discrimination exception at all. Determining what the Supreme Court meant does not require waiting for clarification from the Court. Nor is the Board free to substitute some new view

[45] 368 NLRB No. 2 (2019), slip op. at 4 (internal quotation omitted).

[46] Id., slip op. at 5.

[47] Id., slip op. at 15.

[48] Id., slip op. at 16.

[49] Id., slip op. at 18.

[50] For example, the 6th Circuit, has held that the "term 'discrimination' as used in *Babcock* means favoring one union over another, or allowing employer-related information while barring similar union-related information." *Cleveland Real Estate Partners*, supra, 95 F.3d at 465.

The 2d Circuit has held that "[t]o 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." *Salmon Run Shopping Center*, supra, 534 F.3d at 116–117.

The7th Circuit, in a decision involving *employee* solicitation, has found no discrimination where the employer prohibited union solicitation, but permitted sales-related solicitation, while noting that discrimination would have been established, if the employer had "allowed employees to solicit business, political, religious, or other association membership." *6 West Limited Corp.*, supra, 237 F.3d at 780 & fn. 18. But in an earlier case involving union representatives' access, the 7th Circuit found discrimination based, among other things, on the employer's tolerance of an employee who "solicit[ed] fellow employees on work time to buy cosmetics and jewelry." *Montgomery Ward*, supra, 692 F.2d at 1123.

[51] In contrast, the D.C. Circuit, endorsing the Board's approach, has relied upon *Stowe Spinning Lucile Salter Packard Children's Hosp. at Stanford v. NLRB*, 97 F.3d 583, 587 fn. 4 (1996) ("The fact that nonemployee solicitations permitted by the employer are 'charitable' in nature . . . is not in itself sufficient to immunize the practice of disparately treating union solicitations."); see also *Montgomery Ward & Co., Inc. v. NLRB*, 692 F.2d 1115, 1123 (7th Cir. 1982).

[52] *Cleveland Real Estate Partners*, supra, 95 F.3d at 465.

of discrimination for the Court's, just as the Board in *Lechmere* was not free to depart from the inaccessibility exception as defined in *Babcock & Wilcox*.[53]

Alarmingly, the majority decision—which purports to present an authoritative overview of the relevant legal landscape—mentions *Stowe Spinning*, the only Supreme Court decision that provides substantive guidance in this area, only in passing. And in its response to the dissent, the majority mistakenly dismisses the significance of that case, reasoning that, in *Stowe*, union representatives were denied access "based solely on [their] *identity* as . . . union organizer[s]," rather than their conduct (emphasis in original).[54] But the holding in *Stowe Spinning* included no such limitation. In fact, *Stowe Spinning* made clear that discrimination based solely on union affiliation—however it is disguised or characterized—is not lawful.[55] Tellingly, *Babcock & Wilcox* cited *Stowe Spinning* in connection with establishing the discrimination exception to the nonemployee-access rule. Clearly, then, what the *Babcock & Wilcox* Court regarded as discrimination in *Stowe Spinning*—the denial of union access to the meeting hall, while permitting its use by other community groups—is what is relevant about that case (as Justice Jackson's dissent illustrates). See *Marshall Field & Co. v. NLRB*, 200 F.2d 375, 379 (7th Cir. 1953) ("In upholding a Board order permitting nonemployee organizers to use an employer-owned meeting hall, the court [in *Stowe Spinning*] emphasized the antiunion discrimination resulting from the fact that other organizations were permitted to use the hall.").[56]

Even accepting the majority's mischaracterization of *Stowe Spinning*, its reasoning fails here. The relevant conduct here is solicitation of customers. Where an employer permits extensive third-party solicitation of customers on its premises, its exclusion of union representatives is powerful evidence that it is their identity (and not some interference with property interests) that is the basis for excluding them. This result is manifestly inconsistent with Supreme Court precedent.

The majority permits employers to treat union representatives as distinct based on their supposed "boycott and protest activities," as opposed to their actual conduct: solicitation of customers. Whatever particular considerations might be raised by a boycott *message*, the majority's notion of "boycott and protest activities" is so vague and sweeping that it encompasses virtually every message that a union representative might wish to communicate to customers.[57] The majority's approach here is identical to the

[53] See Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* §8.4 at 243–244 (2d ed. 2004) (describing 6th Circuit's view as "puzzling" in light of *Stowe Spinning*).

[54] 368 NLRB No. 2, slip op. at 6.

[55] It is wrong, too, to suggest that *Stowe Spinning* provides no guidance in cases like this one. *Albertson's*, supra, 301 F.3d at 452 fn. 5. It is true that *Stowe Spinning* "was not interpreting the 'discrimination exception' announced [later] in *Babcock & Wilcox*," as the 6th Circuit has observed, but this observation misses the point: i.e., that *Babcock & Wilcox* drew on *Stowe Spinning*, as well as on Board doctrine, in crafting the discrimination exception.

Likewise, there is no basis to conclude that *Stowe Spinning* is somehow "distinguishable on its facts" from the access cases in which the Board has long applied the discrimination exception. *Albertson's*, supra, 301 F.3d at 452 fn. 5. If, as the majority and the 6th Circuit have suggested, *Stowe Spinning* turned on the union's lack of reasonable alternative means of reaching employees, then the *Babcock & Wilcox* Court would have cited the earlier decision as support not for the discrimination exception, but rather for the inaccessibility exception also adopted there. The *Stowe* Court focused its analysis on the question of discrimination and noted the relative isolation of the company town where the meeting hall was located only to respond to the argument that "the Board is now invading private property unconnected with the plant, for a private purpose." *Stowe Spinning*, supra, 336 U.S. at 229. In any case, of course, the *Babcock* Court cited *Stowe* as illustrating the discrimination exception recognized by the Court.

Nor, contrary to the 6th Circuit, does *Stowe Spinning* suggest that evidence of unlawful antiunion animus, as reflected in other unfair labor practices committed by the employer, is necessary (and not merely sufficient) to trigger to the discrimination exception of *Babcock & Wilcox*. Had the Supreme Court intended to create such a steep requirement for finding discrimination, it presumably would have said so.

[56] Notably, the Court in *Stowe Spinning* held that the proper remedy was to order the employer to "refrain from any activity which would cause a union's application [to use the hall] to be treated on a different basis than those of others similarly situated." 336 U.S. at 233. In that case, the Board had identified "similarly situated" parties as church groups, school groups, civic societies, and a fraternal order without regard to how closely their specific activities or conduct aligned with those of the union representatives seeking access. 70 NLRB at 620–621. The majority's observation that there was "no suggestion in *Stowe Spinning* that the nature of the proposed union meeting differed in any way from the third-party meetings the employer had allowed" simply underscores the fact that this was not a relevant consideration for the Board or the Court.

[57] Indeed, the majority's attempt, in response to my dissent, to frame today's decision as narrowly addressing "boycott solicitation" is belied by the broad nature of the holding here, which permits employers to "deny access to nonemployees seeking to engage in protest activities." Presumably, had the majority's primary concern been boycott solicitation, it could have formulated a test creating a limited carve-out from the general rule addressing that specific category of activity. Instead, it permits an employer to preclude *all* nonemployee "protest activity," a category that is general and vague enough to encompass nearly all Sec. 7 activity. The majority today also permits an employer to "ban nonemployee access for union organizational activities if it also bans comparable organizational activities by groups other than unions."

Notably, of the adverse court decisions that the majority cites, not one is expressly premised on the fact that union representatives were soliciting for a boycott. There is no suggestion in the cases that union representatives' message implicated the employer property rights or otherwise justified their exclusion from the property. In an analogous situation involving employee access to employer property, the Supreme Court has explained that:

> Even if the mere distribution by employees of material protected by Sec. 7 can be said to intrude on petitioner's property rights in any meaningful sense, *the degree of intrusion does not vary with the content of the material*. [The employer's] only cognizable property right in this

approach it took in *UPMC*, where it permitted a hospital to exclude union representatives from the cafeteria, because the majority deemed their lunchtime table conversations with employees—unlike other lunchtime conversations between employees and nonemployees—to be "promotional." For the majority, union representatives will always fall into their own, unique category—and thus can never suffer discrimination, because no other person will ever be sufficiently similar to serve as a comparator. Just like the Respondent here, the majority seems to view union solicitation and distribution as inherently "disruptive" simply because a union is involved.

Nor is the majority correct in asserting that "no policy of the Act" supports the Board's traditional doctrine in this area. Indeed, the discrimination exception is properly understood only by focusing on its origins under the Act. In contrast, the majority, as well as the Circuits that it cites favorably, have approached the issue as if a broader, conceptual analysis of "discrimination," largely divorced from the Act, were required. In adopting a narrower view of what constitutes discrimination in the nonemployee-access context, for example, the 2d Circuit in *Salmon Run Shopping Center*—upon which the majority relies—drew on a 7th Circuit decision involving employees' bulletin-board use, which rejected the Board's approach as contrary to a perceived uniform "antidiscrimination principle" at work in "many bodies of federal doctrine" from the First Amendment to the Age Discrimination in Employment Act. See *Salmon Run*, supra, 534 F.3d at 116, citing *Guardian Industries*, supra, 49 F.3d at 319. Simply put, however, this approach fails to take into account the origins of the discrimination exception, as reflected in *Babcock & Wilcox* and *Stowe Spinning*, as well as the larger context in the National Labor Relations Act and the jurisprudence of Section 8(a)(1), a statutory provision that is not an analogue of employment discrimination statutes.[58]

Indeed, Section 8(a)(1) is intended affirmatively to promote the exercise of Section 7 rights (union solicitation and distribution, for example), and not simply to shield protected concerted activity from reprisal. As I have explained, the gravamen of the unfair labor practice under Section 8(a)(1) is not antiunion discrimination, as it is under Section 8(a)(3), which ordinarily focuses on employer motive. The question rather, is whether there has been an unreasonable interference with the exercise of Section 7 rights. Nonemployee access cases start from the premise that some interference with Section 7 rights has occurred—the employer has precluded employees from receiving an organizational message from union organizers or from those organizers communicating a prounion message to the public on the employees' behalf.

The determination as to whether that interference is unlawful—that is, whether it is "unreasonable"—is made by a balancing test in which weight is given to an employer's legitimate interests, including (in this context) the right to exclude unwanted persons from its property.[59] Discrimination, broadly understood, is relevant to the Board's inquiry in nonemployee-access cases because of its relationship to the employer's asserted countervailing interest and the extent to which it must properly be accommodated under the Act—as the 7th Circuit itself has recognized in a case like this one.[60] Where an employer regularly has permitted nonemployees to engage in solicitation and

> respect is in preventing employees from bringing literature onto its property and distributing it there-not in choosing which distributions protected by Sec. 7 it wishes to suppress.

Eastex, Inc. v. NLRB, 437 U.S. 556, 573 (1978) (emphasis added). So, here, the "degree of intrusion" by the union representatives would not seem to vary with their message.

[58] See White, *Modern Discrimination Theory and the National Labor Relations Act*, supra, 39 Wm. & Mary L. Rev. at 115–118 (contrasting NLRA Sec. 8(a)(1) and disparate treatment under Title VII, and criticizing analysis of courts that have rejected Board's approach to discrimination). As Professor White explains:

> This [judicial] application of disparate treatment analysis, . . . although wrong, is understandable. The lower courts routinely review disparate treatment claims under Title VII, section 1981, section 1983, and the Age Discrimination in Employment Act (ADEA). Questions of discrimination under section 8(a)(1) appear far less frequently before the appellate courts.
>
> * * *
>
> It is thus not surprising that these courts would draw on their understanding of disparate treatment theory in defining discrimination under section 8(a)(1). Yet these courts are incorrect in so doing.
>
> * * *
>
> [S]ection 8(a)(1) does not require animus for a violation. The question instead is one of balancing employee rights against employer interests. An employer that has opened a channel of communication within the workplace for some purposes has a more difficult time explaining how using that channel for organizational activity adversely affects its managerial or property interests.

Id. at 116–117 (footnotes omitted).

[59] This determination demonstrates the essential difference between the analysis of violations of Sec. 8(a)(1) and violations of other employment laws, such as Title VII and those modeled on Title VII. The fact of the interference with employee rights, regardless of the employer's motivation, establishes the predicate for a violation, whereas under Title VII, without improper employer motivation, there is no basis for finding a violation.

[60] See *Montgomery Ward*, supra, 692 F.2d at 1124 ("If a no-solicitation rule is enforced in a discriminatory fashion, that fact goes to the weight of employer's interest: if non-union solicitation is permitted, does the employer *really* care about the impact of this activity upon his property or managerial rights?"). See also *Sears, Roebuck & Co.*, supra, 436 U.S. at 226 & fn. 11 (Brennan, Stewart, and Marshall, Js., dissenting) (agreeing with the majority that nonemployee area standards picketing was arguably protected: "The fact of prior solicitation [by the Lion's Club, Salvation Army, and League of Women Voters] simply confirms

distribution on its property, but has denied access to union representatives, the evidence strongly suggests that permitting the union to engage in substantially the same activity would not interfere with the employer's use of the property. In such circumstances, the balance between statutory rights and the employer's legitimate interests tips toward requiring access.

The majority puts the conduct at issue in this case into an ill-defined category of "boycott and protest activity" that an employer may now bar at will. That step threatens to cover any message that a union might seek publicly to address to an employer, or to the employer's customers, in its capacity as a collective-bargaining agent. Such a standard abandons any attempt to safeguard statutory rights, sacrificing them instead to the employer's property rights. It is inconceivable that this is what the Supreme Court in *Stowe Spinning* or *Babcock & Wilcox* contemplated, much less what Congress intended when it enacted Section 7 of the National Labor Relations Act.

IV.

Compounding the damage it has already done to the access rights of union representatives and employees, the majority now comes dangerously close to eliminating the discrimination exception altogether. By holding that essentially *no* other activity is "sufficiently similar" to union activity to form a basis for finding discrimination, the majority allows statutorily-protected activity to be targeted for exclusion as "disruptive" (as the Respondent deemed it here) This result—reached without inviting briefs, in a case where the resolution of the discrimination issue is unnecessary—is simply untenable under Supreme Court precedent and the Act itself. For all of these reasons, I dissent.

Dated, Washington, D.C. September 6, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Stephanie Cotilla Eitzen, Esq., for the General Counsel.
King F. Tower, Esq. (Woods Rogers, PLC), for the Respondent.
Carey R. Butsavage, Esq. & Blaine Z. Taylor, Esq. (Butsavage & Durkalski, PC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Norfolk, Virginia, on March 29, 2016. The United Food and Commercial Workers Union, Local 400 (the Union/Local 400/Charging Party) filed the charge in this case on June 30, 2015,[1] and the General Counsel issued the complaint on December 31, 2015.[2] The complaint alleges that Partnership I Mid-Atlantic (Respondent/Employer) violated Section 8(a) (1) of the National Labor Relations Act (the Act) when it discriminatorily enforced a no-solicitation/distribution rule by prohibiting certain of the Union's representatives from soliciting signatures on a petition in the parking area adjacent to its facility; demanding that they leave that area; and calling the police to remove them from the area. In its timely filed answer, Respondent denied the alleged violations of the Act and asserted several affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited partnership, is engaged in the retail sale of grocery items for home preparation and consumption, and has operated stores throughout the state of Virginia, including the store at issue in this case, Kroger 538 (Kroger 538), located in Portsmouth, Virginia. During the 12-month representative period ending on November 30, 2015, Respondent, in conducting its operations, derived gross revenue in excess of $500,000. During the same period, Respondent purchased and received at Respondent's facility goods valued in excess of $5000 directly from points located outside the State of Virginia. Therefore, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Union and Respondent, I make the following

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations

From at least 1997 until it closed on April 11, 2015, Respondent operated Kroger 538 located at 5601 High Street West,

what would have been clear in any case: that the Union picketing was not incompatible with [Sears'] retail operations.").

[1] All dates are in 2015 unless otherwise indicated.

[2] For brevity purposes, Counsel for the General Counsel will be referred to as the "General Counsel."

[3] See Joint Exhibit 2 (Jt. Exh. 2) in which the parties have stipulated to a number of facts concerning this case. Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "U. Exh." for Union's exhibit; "GC Br." for General Counsel's brief; "R. Br." for Respondent's brief; and "U. Br." for Union's brief. Specific citations to the transcript and exhibits are included where appropriate to aid review but are not necessarily exclusive or exhaustive.

Portsmouth, Virginia. For all material times, Diego Duran (Duran), Respondent's district human resources coordinator, and Donati High (High), Respondent's Kroger 538 manager, were supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act.

Kroger 538 was situated on a parcel of land comprised of about 55,000 square feet of "surface area" within a retail shopping center owned by Sterling Creek Commons, Limited Partnership (the landlord). During that time, Respondent leased this property for Kroger 538 from the landlord. Kroger 538 was one of several tenants in this retail shopping center and shared with those cotenants a right of easement to the common parking lot. Part of the property leased by Respondent for Kroger 538 also included a sidewalk in front and an enclosed foyer which provided the entry and exit points for customers.

The part of the lease agreement between Respondent and the landlord for Kroger 538, relevant to this case, reads as follows:

> To the extend not prohibited by applicable laws, the Parking Areas and Common Facilities shall be subject to a uniform 'no solicitation/no loitering' rule, pursuant to which all soliciting, loitering, handbilling and picketing for any cause or purpose whatsoever shall be prohibited within the Parking Areas and Common Facilities. Either Landlord or Tenant may enforce said uniform 'no solicitation/no loitering' rule, to the extent it can be done in a lawful manner, by excluding or removing persons engaged in soliciting, loitering, handbilling, or picketing from the Parking Areas and Common Facilities or by otherwise lawfully enforcing said rule. Tenant shall have the right, coupled with an interest, and is hereby expressly authorized by Landlord to enforce in a lawful manner said uniform 'no solicitation/no loitering' rule within the Parking Areas and Common Facilities…

(Jt. Exh. 2, p. 3.) There is no dispute in this case that the landlord vested in Respondent, through the language in this lease agreement, sufficient property interest and authority to enforce the lease agreement's "no solicitation/no loitering" rule. (Id.)

Further, the landlord's representatives sent a three-page letter, dated March 25, 2014, to Fenton Childers (Childers), Respondent's real estate manager for its Mid-Atlantic marketing area regarding Kroger 538. The landlord expressed concern with "continuous and smooth operation of the shopping center" and prevention of "disruptive activities or nuisances that have a potentially adverse impact on our tenants and their customers, our shopping center and the community at large." (R. Exh. 1.) The landlord further advised that:

> For the above purposes and to facilitate a prompt response to situations which may arise in connection with any protesting, demonstrating, picketing, hand billing or related disruptive activities on the premises, the undersigned Landlord for the above referenced location(s) hereby states that, to the maximum extent permitted by law, no person or organization (whether or not involving a labor union) shall be permitted to engage in such activities within the property limits owned by us, including that portion on which your store currently operates its business under the terms of our Lease, and any such person or organization shall be dealt with as a trespasser and removed from the property owned by us and/or leased by your organization. Landlord further agrees that should any such person or organization engage in such activities on our property Landlord gives Kroger Limited Partnership I the authority to have police or other authorities, to the extent permitted by law, remove the trespassers from the property referenced.

The letter also authorized Respondent to post signs at appropriate locations on the shopping center premises and otherwise notify "protesters, demonstrators, picketers, hand billers or other trespassers that no such activity or solicitation is permitted . . . ." This also included the right to "paint up to a 6 [inch] wide blue line, on the pavement and grass area just inside the property lines in and around the entrances and exits for the noted property in order to assist in keeping protesters, demonstrators, picketers, hand billers or other trespassers off the property." (Id.) There is no evidence, however, showing that Respondent, its supervisors or agents placed any such signs or blue lines on the Kroger 538 property.

Further, there is no evidence that Respondent maintained any of its own formal or written no solicitation/no distribution/no loitering or trespassing policy or rule. It did, however, as described below, on numerous occasions, over an extended period of time, allow various charitable/nonprofit organizations to set up tables, solicit for monetary donations, sell goods, and distribute literature on the side walk on either side of the entrance in front of Kroger 538. And, on at least two occasions, allowed, through its supervisors and/or agents at Kroger 538, two of these groups to solicit and disseminate information and services in the store parking lot.

B. The Union and Solicitation at the Kroger 538

Union organization and store closings

The Charging Party Union is and has been for all times material to this case a labor organization within the meaning of Section 2(5) of the Act. Since about March 28, 2010, through the present, the Union has been the collective-bargaining representative of all employees, except store management, professional pharmacy department employees, pharmacy technicians, store department heads, wine specialists, security employees, demonstrators and all clerical employees in certain of Respondent's stores in the Hampton Roads, Virginia area, including Kroger 538. Respondent and the Union are parties to a collective-bargaining agreement (CBA) that has been in effect from August 3, 2014, through August 4, 2018. (Jt. Exhs. 1–2.)

To better understand the issues in the complaint, it is important to describe, for background purposes only, the underlying dispute between the Union and Respondent. Respondent opened two new large Kroger marketplace stores in November (store 542 in Portsmouth, Virginia) and December (store 554 in Suffolk, Virginia) of 2014. Shortly thereafter, Respondent began the process of closing other stores, including Kroger 538. As a part of the closing process, Respondent, through its Human Resource Manager Duran, engaged in meetings with its affected Kroger 538 employees (also referred to as associates) and their union representative, Heith Fenner (Fenner), for several weeks before Kroger 538 closed. Respondent, through Duran, discussed with and ultimately offered Kroger 538 employees transfer opportunities. One of the main points of contention arising

out of those meetings was Respondent's refusal to offer its affected Kroger 538 employees transfers to the new nonunion Portsmouth Kroger marketplace store located only a few miles from Kroger 538, or the other newly opened marketplace store in nearby Suffolk. Rather, Respondent only offered reassignment to its unionized stores, with "key roles" to be filled in Virginia Beach stores and the remaining positions in Kroger store 555 in Yorktown, Virginia. In particular, the Yorktown store is about 25 miles away from the former Kroger 538, and requires a long bus ride with transfers for those employees without their own transportation. (Tr. 41–44.)[4] Thus, it was the Union's belief that Respondent intentionally denied Kroger 538 union employees such employment in order to avoid unionization at the new nonunion Kroger marketplace stores. [5]

Respondent closed Kroger 538 on about April 11, 2015, and its union employees who opted to continue working for Respondent transferred to one of the other union stores.

Union petition solicitation at Kroger 538

On April 2, while Duran and Fenner met with Kroger 538 employees to finalize relocation talks, another nonemployee union representative and organizer, Brandon Forester, began peacefully soliciting customers in the parking lot in front of Kroger 538.[6] Forester did so to garner customer support of the Union's efforts by asking Kroger 538 customers to sign a petition in protest of Respondent's decision to transfer Kroger 538 employees to its stores outside of the Portsmouth area. The petition contained a logo, "#KrogerStrong SOLIDARITY with Virginia Kroger Workers," and stated:

> As a loyal Kroger customer and member of the Portsmouth community I am appalled that Kroger is taking good jobs out of our town and forcing the employees who have helped me at my store for years move to a store over 25 miles away.
> **I will not shop at either of the newly opened Marketplace stores unless the employees at this store are allowed to transfer there with all the benefits they currently enjoy as union members.**

(GC Exh. 3.) At some point during a break or after his meeting with Duran ended, Fenner joined Forester in the parking lot. There is no evidence that Fenner actually assisted Forester in asking customers to sign the petition, but he did support his efforts.

After being advised that union agents were soliciting in the parking lot, Kroger 538 manager, Donati High (High), notified Duran, and in turn Duran called his district manager for guidance on how to handle the situation. According to Duran, he was told to get a copy of the above—referenced March 2014 letter from the landlord, regarding its no-solicitation policy and instructions for Kroger 538. (Tr. 45–47; R. Exh. 1.) Once they found the letter, Duran and High went out and confronted Forester, who by that time had been joined by Fenner. [7] Duran and High showed them the letter, told them that they were not authorized to solicit on the premises and told them to leave Respondent's property. Duran testified that one of the Union agents (he could not recall which one) responded "that they would only listen to the blue," which he interpreted to mean that they would only leave if told to do so by the police. (Tr. 28–29.) High recalled that it was Forester who made this statement, and Fenner did not recall anyone making or hearing it. [8] There is no dispute, however, that Forester refused to stop soliciting in the parking lot, until asked to do so by the police.

Fenner disagreed with Duran and High that the landlord letter purportedly shown to him and Forester was the 3-page letter admitted as Respondent Exhibit 1. Rather, he testified that he and Forester were quickly shown a 1-page document and denied an opportunity to copy it. Duran recalled that Forester took a picture of the letter. (Tr. 48–49, 58–61.) I find it rather unusual and unbelievable that neither Duran nor High could recall how or where they found the landlord's letter, especially since it was the first time that they had seen or heard of it. It is unnecessary, however, to resolve this disagreement, as the material facts necessary for me to make a decision in this case remain undisputed.

Duran and High returned to the front or foyer of the store, and according to Duran, followed further instruction from the district manager (via telephone), to call the police if Forester continued to approach people in the parking lot. In the meantime, Forester continued to approach customers. Neither Duran nor High could recall which of them actually called and talked to the police. Although there was disagreement about who said what and what was specifically said during the encounter between management officials and union officials in Respondent's parking lot, and also as to whether Duran or High called and spoke to police officers, there is no dispute that Duran or High called the police and requested to have them stop the Union's solicitation efforts in the Kroger 538 parking lot.[9] There is also no dispute that when asked by the police officers, Forester left the premises, and Fenner returned to the store.

Fenner perceived that both Duran and High became irritated

---

[4] Although Duran testified that the new Kroger marketplace stores were already fully staffed at the time

Kroger 538 was closing, he also made it clear that the Local 400 represented Kroger 538 employees were only offered transfer positions to other unionized stores. (Tr. 42.)

[5] Apparently, the Union has raised these "double breasting" allegations in another case, which is not before me to consider or decide. Therefore, as stated, they are only mentioned to show the backdrop against which the Union in this case sought to petition for public support of its position that Respondent was wrongfully displacing its union employees.

[6] There is no evidence whatsoever that Forester's union activity in Respondent's parking lot caused any disruption, or that it was anything but peaceful.

[7] Duran testified that this was his first time seeing this letter and believed that it was on file in the store. High also testified that he first saw the landlord letter on April 2, but he did not know where or how it was found. He only knew that Duran helped him find it. (Tr. 154–155.)

[8] credit testimony that Forester told Duran and High that he would not leave unless asked or told to do so by the police. High remembered Forester saying that he would continue to get signatures until the police came and would only then leave the property. (Tr. 58–61, 144–145.)

[9] Duran testified that he believed that High called the police, and that "I'm not sure what he told them." (Tr. 48–49.) High did not know whether he or Duran called the police, nor what was specifically said to them. (Tr. 159–160.)

and angry with him and Forester in the parking lot, and that Duran's attitude towards him changed from the time they had been discussing the employee transfers. On the other hand, Duran claimed that they "very professionally and calmly" approached them. It would not be surprising that High and Duran became upset during their encounter with the union representatives in the parking lot since Forester initially refused to leave, even after they threatened to call the police. There is no doubt, however, that Duran and High did not want the Union soliciting at Kroger 538.

C. Respondent's Practice Regarding Solicitation Requests from Other Organizations

Although Kroger 538 did not have any formal or written policies regarding how to handle organizations' requests to solicit on Kroger 538's property, several of its former managers testified that the unofficial policy or practice was to forward all requests to the store manager to review and either approve or disapprove them. They agreed that throughout the years they allowed various charitable organizations to solicit for donations or to sell items on the sidewalk near the entrance of Kroger 538, and at times in the parking lot. They did not, however, approve requests from noncharitable organizations, religious groups or unions. None of them kept copies of those requests or their decisions to permit or not permit groups to solicit.

In addition, two former Kroger 538 employees observed several charitable organizations, as well as others, regularly or on numerous occasions, asking for donations, selling items or distributing flyers outside the entrance to Kroger 538 and in its parking lot. Former Kroger 538 employee, Tonja Edwards (Edwards), testified that during her 7 year tenure at the store (and up until the store closed in April), she observed several organizations passing out literature and/or selling goods on the sidewalk area on either side of Kroger 538's front doors.[10] They included the Girl Scouts selling cookies for a week or more in the Spring of every year; the Lion's Club collecting donations or selling items on two occasions; the Salvation Army collecting donations on the weeks between Thanksgiving and Christmas each year; and a breast cancer awareness group soliciting donations, passing out literature and selling items on one occasion. She also recalled a church group (Victory) collecting donations to assist the homeless and battered women and leaving flyers on cars on an almost daily basis during the summer time. Edwards admitted that she did not know whether or not Respondent granted any of these groups permission to be on the property. (Tr. 77–87, 89–91.)

Another long time former Kroger 538 employee (for over 16 years prior to the store closing in April), Laverne Wrenn (Wrenn),[11] testified that she witnessed the Girl Scouts selling cookies annually; the Boy Scouts asking for donations on one occasion; the Lions Club soliciting donations, and selling items such as brooms and/or collecting old eyeglasses, on several occasions; a breast cancer awareness group selling trinkets and baked goods about twice each year; and the Salvation Army collecting donations for several weeks during the Thanksgiving and Christmas holidays. Wrenn also recalled that on one occasion about 4–5 years before, Respondent had permitted the American Red Cross to run its mobile blood drive in the parking lot of Kroger 538. She testified that store management even posted flyers about and encouraged employees to participate in this event. (Tr. 92–108.) Wrenn also observed college students selling encyclopedias in the store parking lot on multiple days over several summers and recalled buying a set for her niece. In addition, she saw members of the Victory church group soliciting for donations, as well as local dance club promoters placing flyers on cars in the Kroger 538 parking lot and other of the shopping center's tenants leaving flyers which advertised their businesses (a Chinese restaurant and a chiropractor). (Id.) Like Edwards, Wrenn had no idea whether or not Respondent had granted any of these groups permission to solicit or distribute on its premises or had prohibited them from doing so.

Respondent sought to challenge Wrenn's credibility by pointing out that she had been a Union steward and now worked directly for the Union; that she never mentioned the boy scouts or the American Red Cross in her Board affidavit; and that her affidavit testimony, about how she had communicated customer complaints about the church group to management, was inconsistent with her hearing testimony. At the hearing, it was pointed out that in Wrenn's Board affidavit, she stated that "[a]bout a year ago, a customer named Annemarie mentioned to [her] that a church group was soliciting in the parking lot and [she] said [she] had already reported it to management." (Tr. 114–116.) At hearing, she testified that she informed High, in 2015, and another manager in 2014, that customers had complained about the church group soliciting in the parking lot, but that High just shrugged his shoulders and the other manager walked off. (Tr. 105–107.) On the other hand, High denied that Wrenn had reported any customer complaints about soliciting. Without rehashing the lengthy testimony regarding the discrepancy, I find that Wrenn's testimony on this point was confusing and inconsistent with her statements during the Board investigation. However, I also find that her relevant testimony regarding the organizations that came onto Respondent's property to solicit donations, sell items, or pass out information is credible, and generally consistent with Edward's testimony and that of Respondent's own management witnesses (see below).

High, who managed Kroger 538 from June 2014 until it closed, and thereafter became an associate manager of the new Portsmouth marketplace store, testified that while manager of Kroger 538, he based his standards for allowing organizations to solicit on what he had seen at other stores. He described them as "anything civic like the local fire department, military, veterans, the Lion's Club, those were typically the criteria for any just available dates because you don't want to over-swarm the customers." High did not recall seeing the Girl Scouts selling cookies, or a breast awareness group, but remembered the Salvation Army collecting donations, and Respondent's policy to support

[10] Edwards testified that she transferred to the Yorktown store. (Tr. 89.)

[11] After Kroger 538 closed in April, Wrenn took a leave of absence and accepted a position with the Union as one of its business agents. While working for Respondent, she served as the Union's shop steward for Kroger store 538, as well as for stores 555 and 532. (Tr. 107–108.)

and encourage donations to the Salvation Army.[12] He also authorized the Lion's Club asking for donations and the local firefighters collecting donations during their boot drive in the Kroger 538 parking lot. (Tr. 157–158, 164–165.) At first, he testified that these authorized groups solicited at the store every month or two, but when asked on cross examination, he attempted to downplay the amount of times he approved solicitation requests by stating that "[m]y understanding that question was I got requests about that often. I didn't always agree to the request." (Tr. 159.)

High did not recall club promoters handling out leaflets in the parking lot or putting them on cars, nor the college students wearing backpacks and selling encyclopedias. He insisted that groups not authorized by him were not permitted on the property, and that prior to April 2, if he became aware of unauthorized groups approaching customers in the parking lot, he always told them to leave. He did recall the church group whom he told to leave the store parking lot on several occasions. He explained that they would leave once he advised them of the no- solicitation policy but continuously returned on multiple occasions such that he had to tell them to leave each time. However, he never called the police to have them removed or showed them the letter from the landlord. Nor did he seek advice from Duran or the district manager about what to do. Interestingly, High could not recall who told him about customers complaining about the church group in the parking lot but knew that it was not Wrenn. (Tr. 149–150, 158–159.)

Prior to High, Timothy Lynch (Lynch) was the store manager at Kroger 538, for about 10 months up until June 2014. Before then, he was an associate store manager at the store for 3–4 years. During his tenure as manager, he required organizations to request permission to solicit on their (the organizations') letterhead. Then, he would notify the organization with his decision to approve or disapprove the request to solicit and/or distribute on Kroger 538 property. Lynch was not aware of any written or formal no solicitation/distribution Kroger policy, but implemented his own requirement that the organization be nonprofit. He believed, however, that "it was Kroger standards not to do anything that had to do with religious groups or political groups or anything like that. It was more or less the Boy Scouts, the Girl Scouts, veterans, disabled veterans' funds, not much more than that." Lynch was somewhat equivocal about what he believed Respondent's unofficial policy to be, later stating that it referred to ". . . anybody going through and soliciting, stopping flow of traffic, soliciting something that is unwanted or unwarranted as far as what my customers may have perceived, something that was promoting an outside business that had no correlation and/or function to do with Kroger, those kinds of things." (Tr. 169–70, 179.) Lynch specifically recalled seeing the Boy Scouts selling crafts and asking for donations in front of the store on an annual basis; the Salvation Army bell ringers on a daily basis, all day, between Thanksgiving and Christmas each year; college students selling books during summer break on numerous occasions; and veterans groups soliciting in front of the store. (Tr. 173–177) Like High, he also insisted that during the times that individuals were on the premises without permission, he would "immediately go out" and tell them to "cease and desist." However, he recalled telling the college students, whom he had seen a "couple of times," to leave only once. (Tr. 173.) Lynch was the only management official who remembered actually seeing the March 2014 landlord letter in 2014. He testified that he believed that it had issued in response to the Union wanting to solicit at the store.[13]

Finally, Raymond Helvie (Helvie), former co-manager/assistant manager for Kroger 538 from June/July 2013 until the store closed in April, testified that he referred solicitation requests from groups such as the Girl Scouts (who came out multiple times each year) or Lion's Club (came out every year) to his manager, High. He recalled other groups who were permitted to solicit outside the store on a regular basis, including the Salvation Army. He understood the store policy was to tell unauthorized individuals to leave, and that if they did not, "we'd call the police and they'd see it from there." However, I discredit his testimony that on one occasion, he actually called the police after an individual asking people for money in the parking lot refused to leave when he asked him to do so. This was not substantiated by High and Lynch, who did not recall ever having the police called prior to April 2, and, Helvie testified on direct examination that he was never forced to call the police when he told unauthorized individuals to leave. It is unbelievable that Helvie would have called the police without his former store managers' permission, or without them being told about it after the fact. (Tr. 181–186, 190–191.)

In sum, I find that Respondent regularly, and sometimes for extended periods each year, allowed other nonemployee organizations to solicit for money outright or by selling goods, and to distribute information to individuals on its sidewalks on either side of the entrance to Kroger 538. In addition, Respondent permitted at least two groups to solicit for donations (American Red Cross mobile blood drive and the local firefighters' boot drive) in their parking lot in front of Kroger 538. Respondent did not want or permit union representatives to solicit on its property.

III. DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including, but not limited to, the context of the witness' testimony, the witness' demeanor, weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 355 NLRB 621, 633 (2010), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, and it is more common than not in all kinds of judicial decisions to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* supra at 622. Indeed, in this

[12] High could not, however, deny that these charitable groups were permitted to solicit at Kroger 538. (Tr. 164.)

[13] Lynch first testified that he had seen this letter in about March 2014. Then, he said that he first saw it the day before the hearing, but when asked again, admitted that he had seen the landlord's letter to Respondent in 2014. (Tr. 175–176.)

case, I have believed witnesses on some points, but not on others. If there is any evidence not recited herein that might seem to impact the credited facts previously set forth and set forth below, I have not ignored such evidence, but considered it and determined it is not essential in deciding the issues, or I have rejected or discredited it as not reliable or trustworthy.

As previously discussed, I have credited Wrenn's testimony about which groups she observed soliciting on Respondent's premises, but not her testimony regarding how High or another manager at Kroger 538 responded to customer complaints. I do not credit High's testimony that he only allowed charitable groups to solicit sporadically. (Tr. 152.) First, it is inconsistent with his testimony as to how often these organizations solicited during his tenure at Kroger 538, and it is unsubstantiated by the testimony of Lynch, Helvie, Edwards, and Wrenn. Second, his credibility was further undermined when he backtracked on how many groups he permitted to solicit each month or two, and indicated that he thought he was asked how many requests he received (rather than those he actually approved). Thus, I find that High intentionally tried to downplay the number of times that he authorized groups to solicit.

Rather, on multiple occasions throughout each year, many charitable groups were permitted to solicit and distribute, and as with the Girl Scouts and the Salvation Army, did so for several weeks at a time.

B. Respondent Violated the Act by Excluding the Union from its Property

The General Counsel, relying on Supreme Court and Board precedent, alleges that Respondent violated the Act by discriminatorily prohibiting union representatives from soliciting for signatures on its petition while allowing other organizations to engage in solicitation activity on its premises. Respondent, on the other hand, relies on Circuit Court interpretation of Supreme Court and Board decisions, and argues that it lawfully excluded the Union's agents from its property because it did not engage in prohibited discrimination.

1. The Union engaged in protected activity

Initially, and contrary to Respondent's argument, I find that the Union's activity of soliciting signatures for the petition in support of its affected member employees was protected under the Act. It is well established that union representatives have a statutorily protected right to engage in peaceful handbilling. This is the case when the handbill is a form of communicating consumer information about a union's dispute with an employer, consumer boycotting, or even in the form of secondary handbilling. No matter which of these forms it might take, it is clearly protected under Section 7 of the Act. *Glendale Associates, Ltd.,* 335 NLRB 27 (2001), citing *Oakland Mall*, 316 NLRB 1160, 1163 fn. 14 (1995), enfd. 74 F.3d 292 (D.C. Cir. 1996). Here, Forester, a nonemployee union representative, solicited potential customers of Respondent in the shopping center parking lot. There is no doubt that Forester did so on behalf of the Union, and the employees it represented, in protest of Respondent's decision not to transfer Kroger 538 employees to the new Kroger Marketplace stores, and to garner support for the Union's efforts in that regard. Therefore, I find that the Union's activity in this case constituted protected activity under the Act.

2. Respondent's discriminatory actions violated the Act

The Supreme Court has long held that an employee may limit nonemployee distribution of union literature so long as it does not discriminate against unions by allowing others to do so. *Lechmere, Inc., v. NLRB,* 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956). Following these decisions, the Board has consistently concluded that an employer that denies a union access to solicit and distribute on its property while regularly allowing nonunion organizations to do so unlawfully discriminates against union solicitation. *Salmon Run Shopping Center,* 348 NLRB 658, 662 (2006), enf. denied in relevant part 534 F.3d 108 (2008). See also *Big Y Foods,* 315 NLRB 1083 (1994); *Victory Markets,* 322 NLRB 17 (1996).[14]

Besides discrimination, the Court in *Babcock & Wilcox* also established another exception to an employer's ability to limit nonemployee union distribution of literature on its premises: if the union has no other available reasonable channels of communication that will enable the union to reach employees with its message. See *Babcock & Wilcox*, supra at 112. However, since that exception has not been raised in this case, the only issue before me is whether or not Respondent discriminated against the Union when it excluded it from soliciting and distributing on its premises while allowing other groups to do so.

I agree with the General Counsel that the controlling case here is *Sandusky Mall Co.,* 329 NLRB 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001). In *Sandusky Mall*, union representatives engaged in peaceful handbilling at a store entrance, asking the public not to patronize the store because of its use of a nonunion contractor on a construction project. In response, mall security guards asked the handbillers to leave on two occasions and, when they refused to do so, they called the police and charged the union representatives with trespass. The evidence showed that before and after that incident, mall owners had authorized solicitation and/handbilling inside the mall by charitable, civic and other types of groups. Consequently, the Board determined that the mall owners' authorization of solicitation by those other groups, while selectively excluding the union agents, constituted sufficient evidence of disparate treatment and violation of the Act. 329 NLRB at 618–619, 621.

The facts in this case are essentially indistinguishable from those in *Sandusky Mall*. The Union's organizer, Forester, had been peacefully soliciting potential customers to sign a petition in protest of Respondent's refusal to allow affected unit employees to transfer to Kroger Marketplace stores nearby. When he refused to cease this protected activity and leave the shopping center parking lot after Duran and High asked him to do so (and threatened to call the police), Duran and High called the police, and had them remove Forester from the premises. Moreover, the evidence shows that Respondent permitted solicitation on its property by other groups on a regular, extensive and annual basis

[14] This precedent presupposes that the employer must have a property interest which entitles it to exclude individuals from the property. However, as previously stated, it is undisputed that the General Counsel conceded, and the parties agreed, that Respondent possessed such an interest in this case.

throughout the year, including, but not limited to, the Girl Scouts, the Salvation Army, Lion's Club, local firefighters and Boy Scouts. In doing so, I find, as the Board did in *Sandusky Mall*, that Respondent discriminatorily enforced its no-solicitation policy against the Union, and therefore violated the Act.

Respondent's managers denied that they permitted noncharitable groups to solicit in Kroger 538's parking lot. They testified that they always told unauthorized groups and individuals to leave, and that the groups or individuals left without necessitating a call to the police. High further testified that even though the groups and individuals left each time he asked them to do so, one of the local church groups returned on multiple occasions. However, High admitted that when they returned, he never showed them the landlord's no-solicitation/no-loitering letter or called the police as he did with the union representatives. I find that Respondent's unprecedented act of calling the police to remove the union representatives, while failing to do so with the same church group members who ignored him and repeatedly returned to solicit donations on Kroger 538 premises, also constitutes evidence of discriminatory conduct on Respondent's part.

3. Respondent's defenses fail

Respondent argues that it did not violate the Act because it "consistently enforced the policy prohibiting solicitation, loitering, handbilling, and picketing contained in its lease for Store 538" by also denying access to other unauthorized groups. (R. Br. at 3.) In support of this argument, Respondent points to the testimony of High and other former Kroger 538 managers that whenever they were made aware of any impermissible solicitation, they took immediate action to stop it by advising groups and/or individuals of the policy prohibiting solicitation and loitering and asking them to cease activity and vacate the premises. This "effective [policing of] unauthorized solicitation at Store 538" argument fails, however. (R. Br. at 16.) According to *Sandusky Mall*, supra, it matters not that Respondent may have taken action, through its various managers, to deny or exclude other unauthorized groups or individuals, whose messages it deemed to be undesirable or potentially offensive to customers (for example, church groups soliciting for donations). 329 NLRB at 622. The Act does not protect such nonunion activity. Rather, it protects union solicitation and distribution of information, when employers, at the same time, permit other charitable, civic, or promotional activities. Therefore, Respondent still violates the Act under these circumstances, even if it also denies other unions or groups that it does not want on its premises.

I note here that Respondent not only discriminatorily enforced the neutral no solicitation policy in its lease, and the not so neutral March 2014 landlord letter, but also in effect adopted, implemented and enforced its own unofficial discriminatory policy of permitting certain charitable organizations to solicit donations, sell items, and distribute literature. According to the relevant lease language, the common facilities, including the parking areas, "shall be subject to a uniform 'no solicitation/no loitering' rule, pursuant to which all soliciting, loitering, handbilling and picketing for any cause or purpose whatsoever shall be prohibited." While the lease provided Respondent with sufficient property interest and authorization to uniformly enforce this policy, the lease forbade all solicitation, loitering, handbilling, distribution, or any such activity by any groups or individuals, charitable or otherwise. On the other hand, the tenor of the March 2014 landlord letter, on which Duran and High relied to have Forester removed, was not so neutral. I find that it clearly targeted unions and other groups that wanted or tried to protest, demonstrate, picket, handbill, or otherwise engage in what was considered to be "related disruptive activities on the premises."[15] Therefore, Respondent in its reliance on this letter and its own unwritten practice and policy, discriminated against the Union, and violated the Act. (Jt. Exh. 2; R. Exh. 1.)

Respondent also argues that it should prevail since the Circuit Courts of Appeal have adopted a consensus position regarding "occasional charitable solicitation." Respondent points to Circuit Courts that have "repeatedly rejected" Board decisions "interpreting the 'discrimination' exception to be implicated by the act of permitting occasional civic or charitable solicitation activities." (citing *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997); *Sandusky Mall Co. v. NLRB,* 242 F.3d 682 (6th Cir. 2001)). As noted by Respondent, the 4th Circuit in *Be-Lo Stores* rejected the Board's finding that "apparent acquiescence" in solicitation by certain religious and charitable groups over the course of several years prevented the employer from enforcing a nonsolicitation policy to union organizers. In that case, the 4th Circuit stated that:

> To affirm the Board's contrary finding on this record would be tantamount to a holding that if an employer ever allows the distribution of literature on any of its property, then it must open its property to paid nonemployee union picketers. We are confident that the Supreme Court never intended such a result.

Be-Lo Stores, 126 F.3d at 285.

Similarly, the 6th Circuit also rejected the Board's interpretation of the discriminatory exception in *Sandusky Mall Co. v. N.L.R.B.*, supra. In doing so, the 6th Circuit relied on one of its prior decision which interpreted the term "discrimination" as used in *Babcock & Wilcox*, supra, to mean "favoring one union over another, or allowing employer-related information while barring similar union-related information." *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996).

I am mindful of the Courts' reasoning, in *Sandusky Mall Co. v. NLRB*, for rejecting the Board's determination. See also *Salmon Run Shopping Center v. NLRB*, 534 F.3d 108, 116 (2d Cir. 2008). However, where there is a conflict between court and Board law, the Board's duty to apply uniform policies under the Act, as well as the Act's venue provisions for review of Board decisions, preclude the Board from acquiescing in contrary decisions by the courts of appeals. *Tim Foley Plumbing Service, Inc.,* 337 NLRB 328 fn. 5 (2001). Moreover, I am bound by Board law which has not been overturned by the Supreme Court. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); *Waco, Inc.,* 273 NLRB 746 fn. 14 (1984). Therefore, the Board's decision in

[15] No one disputed Lynch's testimony that this letter issued in response to the Union's desire to solicit at Kroger 534.

Sandusky Mall and its progeny remains and is applicable here.

Likewise, I am even more mindful that in its *Sandusky Mall* decision, the Board fully addressed and the 6th Circuit's rejection of the Board's *Babcock & Wilcox* interpretation of "discrimination." The Board did so in its *Sandusky Mall* discussion of *Cleveland Real Estate Partners*, supra. In *Cleveland Real Estate Partners*, supra, the Board adopted the administrative law judge's finding that the employer discriminatorily prohibited nonemployee union representatives from distributing handbills to shoppers in order to discourage them from patronizing a nonunion retailer since the employer had allowed non labor related handbilling and solicitations by others in the mall. The Board "respectfully [disagreed] with the Sixth Circuit's conclusion and [adhered] to [its] view that an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation." *Sandusky Mall*, supra at 620.

Respondent admitted that "[a]s part of its community outreach efforts, Kroger 538 'occasionally' permitted charitable groups such as the Salvation Army to solicit donations in front of the store." (R. Br.) Respondent argues, however, that the instances when it permitted charitable groups access to solicit were 'sporadic based upon request' and that the requests, not always granted, totaled only about one occasion every month or two. Thus, Respondent also asserts that it meets the narrow exception set forth by the Board in *Hammary Mft. Corp*., 265 NLRB 57 fn. 4 (1982). (Tr. 152, 159; R. Br.) In *Hammary Mfg. Corp.*, the Board acknowledged that "an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule. Id., citing *Serv-Air, Inc. v. NLRB*, 395 F.2d 557 (10th Cir. 1968), on remand 175 NLRB 801 (1969); *Emerson Elecric Co., U.S. Electrical Motors Division*, 187 NLRB 294 (1970). The Board further noted that "[t]hus, rather than finding an exception for charities to be a per se violation of the Act, the Board has evaluated the "quantum of…incidents' involved to determine whether unlawful discrimination has occurred. *Hammary Mfg. Corp.*, supra, citing *Serv-Air, Inc.*, 175 NLRB 801 (1969); *Saint Vincent's Hospital*, 265 NLRB 38 (1982).

In *Albertson's Inc.*, 332 NLRB 1132, 1135–1136 (2000), the respondent excluded union representatives, as well as certain other groups such as political organizations and unknown charities, from soliciting and distributing information on the premises of its grocery stores. At the same time, the respondent permitted other organizations such as the Salvation Army bell ringers soliciting donations for about a month each year between Thanksgiving and Christmas; Camp Fire Boys; Boys and Girls Clubs; Boy Scouts; Brownies; various veterans' groups and other youth and school organizations to do so immediately outside the entrance of its stores. The Board in *Albertson's Inc.* relied on *Sandusky Mall*, supra at 622 (quoting Reisbeck Markets, 315 NLRB 940, 942 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996) (unpublished decision)., stating that "such a policy 'amounts to little more than an employer permitting on its property solicitation that it likes and forbidding solicitation that it dislikes.'" *Albertson's Inc.*, 332 NLRB 1132, 1135–1136.[16] Thus, the Board refused to expand this narrow exception to hold that an employer may lawfully restrict union solicitation if it allows only charitable organizations. (Id at 1136.) Rather, it found that "the solicitation permitted by the Respondent in the immediate exterior of its store exceeds the small number of isolated beneficent acts that the Board regards as a narrow exception to an otherwise valid, nondiscriminatory no-solicitation policy." Id., citing *Sandusky Mall*, supra, slip op. at 4 and fn. 14 (citing *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982).

In *Wild Oats Community Markets*, 336 NLRB 179 (2001), the respondent natural foods grocery store attempted to cause the removal of union representatives engaged in both handbilling and picketing in a parking lot in front of respondent's market. The Board majority not only found that such activity was protected, but also found that "[a]ssuming that proof of discrimination is necessary for the establishment of a violation in this case, the nonunion-concerned solicitations that Respondent did permit were hardly isolated, and they were not all 'beneficent'." (Id. at 179, 190.) Similarly, I find that the solicitation and distribution that Respondent did permit, even if once or twice a month, exceeded the isolated beneficent acts that the Board allowed in its narrow exception set forth in *Hammary Mft. Corp.,* supra. In this case, as shown, when Respondent allowed access to the Girl Scouts and Salvation Army in particular, they permitted them to solicit for donations and sell items for weeks at a time each year. This does not even include the other months throughout the year that Respondent authorized many other groups to solicit each month or so.

In further support of its "isolated beneficent acts" argument, Respondent sought to have me discredit testimony of witnesses Edwards and Wrenn regarding organizations that it permitted to solicit and distribute on its premises. Although I discredited Wrenn's testimony regarding management's reaction to customer complaints about a religious group asking for donations in the shopping center parking lot, I credited testimony regarding the various groups such as the Girl Scouts (several weeks/weekends each year) and the Salvation Army (several weeks each year between Thanksgiving and Christmas), who even according to Respondent's witnesses, were permitted to solicit for weeks as a time on an annual basis. (Tr. 73–91.) In sum, the credible evidence shows that throughout the years prior to April 2 and the closing of Kroger 538, Respondent has allowed many charitable organizations to set up displays, distribute literature and solicit donations on either side of the entrance into the store. And as previously stated, on at least two occasions, permitted two of these groups, the American Red Cross (blood donation mobile) and the local fire department (boot drive), to extend their activities into the parking lot in front of the store.

There is no distinction before the Board between union activity and beneficent acts, and clearly Respondent's acceptance of charitable and civic solicitation activity from several organizations, days and sometimes weeks at a time on an annual basis, goes beyond occasional or isolated instances. In consideration of Respondent's activities, and in light of the Board law

[16] *Albertson's Inc.*, 332 NLRB 1132 (2000), enf. denied, *Albertson's Inc. v. NLRB*, 301 F.3d 441 (6th Cir. 2002).

discussed above, I conclude that Respondent has indeed violated the Act as alleged in the complaint by excluding union solicitation on its premises while at the same time favoring and permitting charitable and civic solicitation activity.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discriminatorily enforcing a no-solicitation policy by prohibiting representatives of the Union from soliciting and distributing petitions and information on Respondent's premises, by demanding that they leave, threatening to call the police and by calling the police to remove them, or in any other way interfering with them, Respondent violated Section 8(a)(1) of the Act.
4. The above violations are unfair labor practices within the meaning of the Act, and by engaging in them, Respondent violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Kroger Limited Partnership I Mid-Atlantic, Portsmouth, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily enforcing a no-solicitation policy by prohibiting and excluding the Union, United Food and Commercial Workers Union, Local 400, from soliciting or distributing information on the premises of its stores.

(b) Discriminatorily threatening to call the police and calling the police to have representatives of the Union removed from its premises.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post in English and other languages, as needed, and at its own expense, on its intranet copies of the attached notice marked "Appendix,"[18] if the Respondent customarily communicates with its employees by such means. Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted in this manner and maintained for 60 consecutive days from the date it was originally posted. In addition to electronically posting on its intranet or intranet site, the Respondent shall distribute the notices, at its own expense, electronically by email in English and additional languages, as needed, to all employees who were employed at Kroger 538, located in Portsmouth, Virginia, in April 2015 and until the completion of those employees' work at that job site. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at Kroger 538 any time since April 2, 2015.

Dated, Washington, D.C., September 9, 2016.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enforce no-solicitation policies in a discriminatory manner by prohibiting or excluding representatives of United Food and Commercial Workers Union, Local 400 from soliciting signatures, or otherwise engaging in lawful solicitation and distribution on our premises, or by threatening to call the police or by calling the police to remove them or in any other way interfering with them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

KROGER LIMITED PARTNERSHIP I MID-ATLANTIC

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-155160 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.