Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts *and* Local 23, American Federation of Musicians. Case 16–CA–193636

December 16, 2022

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, RING, WILCOX, AND PROUTY

This case is before the National Labor Relations Board on remand from the United States Court of Appeals for the District of Columbia Circuit.[1] The principal issue is whether the Board should retain the revised access standard for off-duty employees of an onsite contractor adopted in the underlying decision in this case, reported at 368 NLRB No. 46 (2019) (*Bexar County I*), modify it, or abandon it altogether. Having accepted the court's opinion as the law of the case, we have concluded, in balancing the competing rights and interests at stake, that the policies and purposes of the Act would be best effectuated by abandoning the revised access standard adopted in *Bexar County I* and by returning to our previous court-approved test announced in *New York New York Hotel & Casino*, 356 NLRB 907 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 568 U.S. 1244 (2013).[2] Under the *New York New York* test, a property owner may lawfully exclude from its property off-duty employees who regularly work on the property for an onsite contractor and who seek to engage in Section 7 activity on the property only where the property owner is able to demonstrate that the contractor employees' Section 7 activity significantly interferes with the use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline.[3] Accordingly, having returned to the test set forth in *New York New York*, and for the reasons discussed below, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by barring the off-duty San Antonio Symphony employees from accessing the Respondent's property to engage in Section 7 activity.[4]

I. INTRODUCTION

The right of employees to engage in Section 7 activity *at their workplace* is critical for them to realize the protections afforded under the Act. The workplace is where they see their coworkers. It is where they are most affected by their employer's decisions. It is where they are most likely to be both motivated to and able to effectively participate in concerted actions designed to improve their working conditions. The Act's promise to employees that they are entitled to organize, bargain collectively, and engage in other concerted activities for their mutual aid or protection rings hollow if employees—while off the clock—cannot engage in protected conduct at the very place where they and their coworkers work. A law designed to empower employees to improve working conditions at their workplaces must provide employees with rights at those workplaces.

The Board in *Bexar County I* essentially stripped off-duty contractor employees whose employer does not own the property where they work from having Section 7 rights at their workplace. This is despite the seemingly large and increasing percentage of employees in the American workforce employed by onsite contractors.[5] And yet without the opportunity to exercise their Section 7 rights at their workplace, the Act's promise will be an empty one for the many contractor employees who work at a property not owned by their employer.

On review, the D.C. Circuit held that components of the revised access standard in *Bexar County I* were arbitrary and other aspects of it were arbitrarily applied. The court remanded the case to the Board, noting that it could

[1] *Local 23, American Federation of Musicians v. NLRB,* 12 F.4th 778 (D.C. Cir. 2021).

[2] For that reason, as explained in detail below, we reverse the Board's underlying decision in this case in *Bexar County I* and its overruling of *New York New York, Simon DeBartolo Group,* 357 NLRB 1887 (2011), and *Nova Southeastern University*, 357 NLRB 760 (2011), enfd. 807 F.3d 308 (D.C. Cir. 2015).

[3] *New York New York*, 356 NLRB at 918-919.

[4] On December 5, 2017, Administrative Law Judge Arthur J. Amchan issued his decision in this case. In adopting a new access standard, which it applied retroactively, the Board in *Bexar County I* reversed the judge's 8(a)(1) violation finding and dismissed the complaint. As discussed below, upon accepting the court's remand, the Board solicited and received statements of position from the General Counsel, the Charging Party Local 23, American Federation of Musicians (the Union), and the Respondent. On remand, the Board has decided to affirm the judge's rulings, findings, and conclusions and to adopt the judge's recommended Order as modified and set forth in full below. We shall substitute a new notice to conform to the Order as modified.

[5] See, e.g., Annette Bernhardt, Rosemary Batt, Susan Houseman & Eileen Appelbaum, *Domestic Outsourcing in the United States: A Research Agenda to Assess Trends and Effects on Job Quality*, 11, 25-29 (Ctr. for Econ. & Policy Research, Working Paper, 2016), https://cepr.net/images/stories/reports/working-paper-domestic-outsourcing-2016-03.pdf; Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research*, 9-10 (Inst. for Research on Labor & Emp't, UC Berkeley, Working Paper No. 100-14, 2014), https://irle.berkeley.edu/files/2014/Labor-Standards-and-the-Reorganization-of-Work.pdf.

proceed with a version of the access standard the Board sought to apply in *Bexar County I* or develop a new test.

For the reasons explained below, we see no reason to attempt to rehabilitate a standard that fundamentally fails off-duty contractor employees by almost always denying them their right to engage in Section 7 activities at their workplace. Instead, we choose to return to the court-approved *New York New York* test that properly accommodates contractor employees' rights under federal labor law with a property owner's state law property rights and legitimate managerial interests.

II. FACTS[6]

The San Antonio Symphony leases performance space from the Tobin Center for the Performing Arts (the Tobin Center), which is owned and operated by the Respondent. The Symphony, along with Ballet San Antonio and Opera San Antonio, are the Tobin Center's three principal resident companies. The Symphony uses the Tobin Center pursuant to a "Use Agreement," by which it has a licensor-licensee relationship with the Respondent. Section 4(1) of the Use Agreement's Terms and Conditions provides that the Symphony is required to cause its employees "to abide by all rules and regulations" that may be adopted by the Respondent and Section 4(5) permits the Respondent "to refuse admission to or cause to be removed" from its property "any disorderly or undesirable person" as determined by the Respondent in its reasonable discretion. The Use Agreement also specifies that, in return for the use fee that it pays the Respondent, the Symphony has the right to use the Tobin Center for 22 weeks each year for performances and rehearsals.

The Symphony is also a party to a collective-bargaining agreement with the Union. Under the collective-bargaining agreement, the Symphony employees are employed for 30 weeks within a 39-week performance season from September to June, except for when their work is reduced by forced furloughs. Because the Symphony employees only use the Tobin Center for 22 of their 30 workweeks each year, the Symphony employees also occasionally perform at other venues around San Antonio. Nonetheless, seventy-nine percent of the Symphony employees' rehearsals and performances during the 2016–2017 performance season were at the Tobin Center. During the performance season, the Symphony employees also use the Tobin Center's break room for breaks, lunches, and union meetings. Some Symphony employees store large instruments at the Tobin Center. In addition, the Symphony maintains a library at the Tobin Center, which is staffed by a union member.

On the evening of February 17, 2017, about a dozen Symphony employees sought to peacefully leaflet on the sidewalk in front of the main entrance to the Tobin Center. The Symphony employees had been distressed to learn that Ballet San Antonio had opted to use recorded music, rather than live music, for its production of Tchaikovsky's *Sleeping Beauty*. The use of recorded music denies the Symphony employees the opportunity to work at the performance by playing the score. Because of financial difficulties, the Symphony had already had to furlough the Symphony employees for 3 weeks during the 2016–2017 season.

To raise awareness among Ballet San Antonio's patrons about the use of recorded instead of live music, the Union decided to leaflet before the performances. The leaflet stated:

> You will not hear a live orchestra performing with the professional dancers of Ballet San Antonio. Instead, Ballet San Antonio will waste the world class acoustics of the Tobin Center by playing a recording of Tchaikovsky's score over loudspeakers. You've paid full price for half of the product. San Antonio deserves better! DEMAND LIVE MUSIC!

Although there is no plausible claim, and no evidence, that the Symphony employees were or would have been in any way disruptive or harassing to Ballet San Antonio's patrons, the Respondent's event staff and San Antonio police officers at the Respondent's direction immediately informed the Symphony employees that they could not distribute the leaflets anywhere on the Respondent's property, including the sidewalks. The Symphony employees were forced to relocate across the street off the Tobin Center grounds onto a public sidewalk where there were fewer patrons.

III. PRIOR BOARD AND COURT PROCEEDINGS

A. The Board's 2011 New York New York *Decision*

In 2011, the Board in *New York New York* considered whether off-duty food service employees had the right to engage in organizational leafleting of customers outside their employer's place of business—not on their employer's property, but in the public areas of a hotel-casino for which they and their employer provided services integral to the property owner's business.[7] Informed by amicus

[6] We briefly recount the facts that have previously been summarized in the Board's underlying decision and the judge's decision.

[7] 356 NLRB 907 (2011). The case was before the Board on remand from the D.C. Circuit. In the original decisions, the Board, applying its then-current precedent, had treated contractor employees as identical to the property owner's own employees for purposes of Sec. 7. *New York New York Hotel & Casino*, 334 NLRB 772 (2001); *New York New York Hotel & Casino*, 334 NLRB 762 (2001). The D.C. Circuit rejected that

briefing, oral argument, and court guidance, the *New York New York* Board acknowledged that the case could not be decided by rote application of *Republic Aviation*, in which the Supreme Court recognized the statutory right of employees to engage in non-disruptive Section 7 activity at work on property owned by their employer.[8] In evaluating the issue in light of principles set by the Supreme Court, the Board also noted the Court's observation that "the Act 'confers rights only on *employees*, not on unions or their nonemployee organizers,' whose rights are derived from the right of employees to learn about the advantages of self-organization from others" and thus are given limited accommodation.[9]

The Board concluded that the contractor employees plainly fell into a different category than union organizers because "[i]n distributing handbills to support their own organizing efforts, [the employees]—who indisputably are covered by the Act, as protected employees under Section 2(3)—were exercising their own Section 7 rights."[10] Further, unlike union organizers, the contractor employees were not strangers to the property because they worked there regularly.[11] The Board thus concluded "that the statutorily-recognized interests of the [contractor] employees . . . are much more closely aligned to those of [the property owner's] own employees" than to the interests of nonemployee union organizers.[12]

At the same time, the Board recognized that the contractor employees' lack of a direct employment relationship with the property owner could necessitate a different accommodation than for the property owner's own off-duty employees.[13] The Board noted that the property owner had the right to control access to and use of its property.[14] The Board also observed that the employees' "handbilling did *not* interfere with operations or discipline [nor] adversely affect the ability of customers to enter, leave, or fully use the facility . . . ."[15] The Board then considered whether there were any ways in which the "*absence* of an employment relationship" affected the evaluation of the property owner's interests.[16] It found that "the property owner generally has the legal right and practical ability to fully protect its interests through its contractual and working relationship with the contractor,"[17] and would have "anticipated" the possibility that regularly-present contractor employees might choose the property as a venue for Section 7 activity;[18] "but the contractors' employees have no parallel ability to protect their statutory rights and legitimate interests in and around their workplace without [the Board's] intervention."[19]

The *New York New York* Board "address[ed] only the situation where . . . a property owner seeks to exclude, from nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner."[20] It concluded that, in those circumstances:

> [T]he property owner may lawfully exclude [contractor] employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law).[21]

position and remanded the cases to the Board for further consideration. *New York New York, LLC v. NLRB,* 313 F.3d 585, 590-591 (D.C. Cir. 2002). The court noted that the issue was not controlled by Supreme Court precedent:

> No Supreme Court case decides whether the term 'employee' extends to the relationship between an employer and the employees of a contractor working on its property. No Supreme Court case decides whether a contractor's employees have rights equivalent to the property owner's employees—that is, Republic Aviation rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property owner – because their work site, although on the premises of another employer, is their sole place of employment.

Id. at 590. The court held that "[i]t is up to the Board to [decide the nature and scope of Sec. 7 rights of these employees] not only by applying whatever principles it can derive from the Supreme Court's decisions, but also by considering the policy implications of any accommodation between the § 7 rights of [the contractor's] employees and the rights of [property owner New York New York] to control the use of its premises, and to manage its business and property." Id.

[8] 356 NLRB at 913 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

[9] Id. at 914 (quoting *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992)).

[10] Id.

[11] Id. at 916

[12] Id. at 915–916.

[13] Id. at 916.

[14] Id.

[15] Id. at 916–917 (emphasis in original).

[16] Id. at 917 (emphasis in original).

[17] Id. at 918. The Board cited numerous Board cases that showed how the contractor relationship—unlike where nonemployees are involved—provides property owners the opportunity to exert authority over contractor employees. Id. at 917–918 fns. 41–44.

[18] Id. at 917.

[19] Id. at 918.

[20] Id. at 918.

[21] Id. at 918–919.

B. The D.C. Circuit's Approval of New York New York

The D.C. Circuit enforced the Board's *New York New York* decision, noting that "the governing statute and Supreme Court precedent grant the Board discretion over how to treat employees of onsite contractors for [Section 7] purposes."[22] The court found that the *New York New York* Board had "adequately considered and weighed the respective interests based on the principles from the Supreme Court's decisions" as well as "the policy implications of any accommodation between the § 7 rights of [the contractor's] employees and the rights of [the property owner] to control the use of its premises, and to manage its business and property."[23] The court also explicitly agreed with the Board that employee communications directed at customers were entitled to the same protections under Section 7 as communications aimed at fellow employees.[24]

Until *Bexar County I*, the Board had consistently followed its *New York New York* precedent.[25] No intervening decision of the D.C. Circuit has cast doubt on its decision upholding the Board,[26] nor has any federal appellate court rejected the Board's view.

C. The Board's Decision in Bexar County I

In *Bexar County I*, the Board acknowledged that the *New York New York* test—which had been approved by the D.C. Circuit—controlled this case.[27] Nonetheless, the Board overruled *New York New York* and announced a new standard to govern off-duty contractor employees' access to the property where they regularly work (but that is not owned by their employer) to engage in Section 7 activity.[28] The Board asserted—contrary to the D.C. Circuit's opinion upholding the Board's decision—that the *New York New York* Board impermissibly gave too little weight to the property owner's property rights and too much weight to the Section 7 rights of the employees.[29] The Board accused the *New York New York* Board of "merely paying lip service" to the judicially-required distinction, which the Supreme Court had described as being one "of substance," "between the access rights of employees and those of nonemployees."[30] From this premise, the Board concluded that: (1) "[o]ff-duty employees of a contractor are trespassers"; and (2) therefore, they "are entitled to access for Section 7 purposes only if the property owner cannot show that they have one or more reasonable alternative nontrespassory channels of communicating with their target audience."[31]

The *Bexar County I* Board went on to describe a two-step standard.[32] Under the first step, only contractor employees who work both "regularly" and "exclusively" on the property are deemed to have a sufficient connection to the property to be afforded greater Section 7 access rights than nonemployees.[33] As to regularity, the Board determined that contractor employees work "regularly" on the property owner's property only if the contractor regularly conducts business or performs services there.[34] The Board gave the example of a contactor employee who stocked vending machines once a week on a property as working "regularly" on the property.[35] On the other hand, seasonal contractor employees who work only part of the year on the property would potentially lack the necessary regularity.[36] In addition, any work that contractor employees perform for that contractor must be exclusively on that property—that is, they cannot work elsewhere for the contractor that employs them on that property.[37]

In addition, under the second step of the *Bexar County I* standard, even if contractor employees work both regularly and exclusively on the property, the property owner is free to exclude them—even from areas open to the public—if it can show that the contractor employees "have one or more reasonable nontrespassory alternative means to communicate their message."[38] This does *not* require showing that an "alternative means" is substantially equivalent to the means denied to employees, as measured by cost (in time and money) to the contactor employees and by effectiveness (the likelihood of reaching the actual target audience, in a meaningful way, at a meaningful time).[39] Moreover, the property owner is not required to prove that *permitting* the contractor employees to engage in Section 7 activity on the property would

[22] *New York-New York*, 676 F.3d at 196.
[23] Id. at 196 fn. 2 (quotations omitted).
[24] Id. at 196–197 (quoting *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003)).
[25] See *Simon DeBartolo Group*, 357 NLRB at 1888 & fn. 8 (finding protected, under *New York New York*, organizational handbilling by off-duty employees of a shopping mall maintenance contractor who worked at the mall regularly but not necessarily exclusively); *Nova Southeastern Univ*., 357 NLRB 760 (2011) (finding protected, under *New York New York*, organizational handbilling by off-duty employee of a university maintenance contractor who worked at the university regularly and exclusively), enfd. 807 F.3d 308 (D.C. Cir. 2015).
[26] See *Nova Southeastern Univ. v. NLRB*, 807 F.3d 308, 312-13 (D.C. Cir. 2015).
[27] 368 NLRB No. 46, slip op. at 1–2.
[28] Id., slip op. at 2.
[29] Id., slip op. at 7.
[30] Id., slip op. at 2 fn. 14.
[31] Id., slip op. at 2.
[32] Id., slip op. at 2-3.
[33] Id., slip op. at 2-3, 8.
[34] Id., slip op. at 3, 8.
[35] Id., slip op. at 7 fn. 56.
[36] Id., slip op. at 2, 10–11.
[37] Id., slip op. at 3, 8.
[38] Id., slip op. at 3, 8–10.
[39] Id., slip op. at 8–10.

interfere, in any way, with its or the contractor's use of the property or that *excluding* the contractor employees is justified by a legitimate business reason, such as the need to maintain production and discipline.[40]

In dissent, then-Member McFerran argued that, in contravention of Supreme Court and D.C. Circuit decisions, the Board's new standard placed a property owner's right to exclude above the labor law rights of employees in all but the rarest circumstances, which removes important Section 7 rights from a segment of the workforce that may need them the most.[41] She asserted that the Board failed to offer an adequate rationale for adopting such a restrictive standard that essentially grants off-duty contractor employees the minimal access rights afforded to union organizers and strips important labor-law rights from a significant segment of American workers who work on property owned by someone other than their employer.[42]

About four months after the issuance of its *Bexar County I* decision, the Board denied the Union's motion for reconsideration, rejecting the Union's contention that the Board's new access standard is "legally infirm" by barring many off-duty contractor employees from exercising their Section 7 rights.[43] In dissent, then-Member McFerran stated that, for the reasons explained in her dissent from the *Bexar County I* decision, she believed that the Union had demonstrated "material error" and would have granted the Union's motion for reconsideration.[44]

D. The D.C. Circuit's Grant of Review of Bexar County I

In granting the Union's petition for review, the D.C. Circuit held that the first step of the Board's new access standard was arbitrary and that the Board's application of the second step was also arbitrary.[45] As to the first step of the new access standard, the court recognized that the Board, as a conceptual matter, properly sought to identify those contractor employees with a sufficiently strong connection to the property to be granted off-duty access rights.[46] However, the court determined that the Board's implementation of that inquiry was arbitrary.[47] The court noted that the Board essentially measured regularity by the frequency an employee works on a property but then failed to explain its contention that a vending machine stocker who worked at the property less frequently than the Symphony employees would still satisfy the regularity requirement.[48] In addition, the court stated that the Board failed to explain how working exclusively on a property is necessary to show a sufficient connection to the property to gain access rights.[49] The court reasoned that the Board's exclusivity requirement would permit denial of access rights to contractor employees who have a substantial presence on the property but occasionally work at another site for the same contractor, and yet, conversely, require access for contractor employees who work only marginally, but exclusively for one contractor, on the property owner's property.[50] Thus, the court found the implementation of the Board's exclusivity and regularity conditions to be arbitrary, and, accordingly, rejected the first step of the Board's test.

The court also rejected the Board's application of the second step of its new access standard.[51] The court recognized that the Board purportedly placed the burden on the property owner to show that the contractor employees had a reasonable alternative nontrespassory means of communication in order to differentiate their access rights from those of nonemployees.[52] The court found, however, that the Board failed to apply this burden shifting in its decision.[53] The court noted that, because this step of the new access standard did not exist when the case was originally before the administrative law judge and the Board did not remand the case, neither the Symphony employees nor the Union had an opportunity to develop arguments or evidence as to whether the Respondent satisfied its burden of showing the reasonableness of any alternative means.[54] In striking down parts of the new access standard and finding it arbitrarily applied, the court permitted the Board on remand to "decide whether to proceed with a version of the test it announced and sought to apply in this case or to develop a new test altogether."[55]

IV. THE POSITIONS OF THE PARTIES

Subsequent to the D.C. Circuit's opinion, the Board notified the parties to this proceeding that it had accepted the court's remand and invited them to file statements of position. As discussed below, the General Counsel, the Union, and the Respondent each filed statements of position.

[40] Id.
[41] Id., slip op. at 18, 24.
[42] Id., slip op. at 23–24.
[43] *Bexar County Performing Arts Center*, 16-CA-193636, 2019 NLRB LEXIS 696 (Dec. 11, 2019).
[44] Id.
[45] *Local 23, American Federation of Musicians,* 12 F.4th at 780.
[46] Id. at 783.
[47] Id.
[48] Id. at 783–784.
[49] Id. at 784–785.
[50] Id.
[51] Id. at 785–786.
[52] Id. at 786.
[53] Id. at 786.
[54] Id. at 786–787.
[55] Id. at 788.

A. The General Counsel

The General Counsel urges the Board to return to the *New York New York* test for determining the Section 7 access rights of off-duty contractor employees and find that the Respondent violated Section 8(a)(1) when it denied the Symphony employees access to its property. The General Counsel maintains that *New York New York* appropriately recognized that contractor employees' fundamental Section 7 rights are no less than other statutory employees', and that their regular worksite is the place where they can most effectively communicate their message to fellow employees, their employer, and the general public. The General Counsel asserts that contractor employees are a growing segment of the workforce and yet they are particularly vulnerable to interference with their Section 7 rights and subject to other employment law violations, which means they have an especially strong need to be able to exercise their statutory rights at their workplace. In addition, the General Counsel rejects the relevance of contractor employees working exclusively on the property or having reasonable alternative nontrespassory means of communicating their message.

B. The Union

The Union also urges the Board to return to the *New York New York* test and find that the Respondent violated Section 8(a)(1). The Union notes that the D.C. Circuit in *New York New York* had approved of the Board's consideration and weighing of the respective interests at issue and asserts that the *New York New York* Board properly found that off-duty contractor employees had a sufficient connection to the property owner's property to be afforded Section 7 access rights, without considering whether alternative nontrespassory means of communication existed. The Union argues for the Board to conclude, under the *New York New York* test, that the Respondent unlawfully barred the Symphony employees from leafleting on its property in an area open to the public, which did not significantly interfere with the Respondent's use of its property.

C. The Respondent

The Respondent urges the Board to retain the *Bexar County I* standard and remand the case to the judge so that the Board can apply it properly to the facts of this case. As to the first step of that standard, the Respondent argues that the "regularly and exclusively" requirements are essential to ensure that contractor employees have a strong enough relationship to the property to permit their interference with the property owner's property rights. In particular, the Respondent contends that the Board should find regularity of employment when there is a continuous pattern of work at the property—such as would exist for schoolteachers—because that indicates that the property is where employees commonly meet and interact. The Respondent also claims that, without the exclusivity requirement, a property owner would have to grant access rights to contractor employees without any consideration of the strength of their relationship to the property. The Respondent posits that, if the Board modifies the exclusivity requirement in light of the D.C. Circuit decision, the Board should still require the contractor employee "to perform substantially all of their work on the property." The Respondent asserts that, if the Board makes any revisions to the first step of the access standard, the Board should remand this case to the judge to apply that revised standard and that, at the very least, the Board should remand this case to allow it to show, under the second step of the access standard, that the Symphony employees had reasonable alternative nontrespassory means of communicating their message to the public.

V. DISCUSSION

As noted above, the D.C. Circuit remanded this case back to the Board because it found the Board's decision in *Bexar County I* arbitrary, both on its own terms and as applied in this case.[56] In evaluating the competing the rights and interests at stake, we agree with the court's assessment.

The Supreme Court has long recognized the statutory right of employees to engage in Section 7 activity at their workplace on property owned by their employer.[57] This is the place where employees see and interact with each other and where they provide their labor for the benefit of their employer. As the Supreme Court has observed, the workplace is "a particularly appropriate place for the distribution of § 7 material, because it 'is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'"[58] Employees are well suited to discuss working conditions while engaged in even the most prosaic of off-duty activities at their workplace, whether walking in a parking lot to their jobsite or eating lunch in an employee cafeteria. We see no reason why contractor employees—just because their employer does not own the property where they regularly work—should not enjoy a similar opportunity to exercise their statutory rights at the place where they regularly work.

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[56] 12 F.4th at 780.

[57] *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803-804 & fn. 10 (1945).

[58] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963)).

The Supreme Court has required the Board to accommodate Section 7 rights with private property rights so that there is "as little destruction of one as is consistent with the maintenance of the other."[59] In other words, the fundamental tenet of property law that property owners have a right to exclude does not exist in a legal vacuum where no other countervailing rights exist. In the context of the Act, Supreme Court precedent recognizes that federal labor law routinely requires employers to yield to some degree their property rights protected under state law.[60] Although property owners have a legal right to protect their property from trespassers, it would be contrary to the Act to permit a property owner's property rights to be used to subvert its own employees' Section 7 activity by denying them access to their workplace while off-duty.[61] Denying other statutory employees who work on that property—even those who are not directly employed by the property owner—from being able to exercise their Section 7 rights at their workplace while off-duty is just as harmful.

A. The Bexar County I *Standard Undermines Contractor Employees' Section 7 Rights*

Initially, we note our agreement with the D.C. Circuit's conclusion that *Bexar County I* "is arbitrary in the way that it implements its new standard for determining when a property owner may prohibit an onsite contractor's employees from conducting labor organizing activity on the premises."[62] It enables property owners to severely restrict off-duty contractor employees' access to its property to engage in Section 7 activity for reasons completely unconnected to the employer's interest in protecting its property.[63] The Board's decision contravenes the explicit rights afforded to employees under Section 7 and could even create a perverse incentive for employers to structure their work relationships to avoid directly hiring the employees who work on its property in order to deny them the opportunity to exercise their statutory rights. It does so without any factual or legal support for its contention that a property owner is effectively powerless to protect its property and operational interests by any means other than excluding off-duty contractor employees from its property. It disregards the numerous Board cases showing how businesses exert authority over contractor employees.[64] And it fails to explain how the restrictions imposed as part of its newly announced test are necessary for reaching a proper accommodation of rights.

Part of the Board's task in devising an access standard for off-duty contractor employees is to ensure that it only reaches those contractor employees with a sufficient connection to the property to merit Section 7 access rights. In *Bexar County I*, the Board limited access not only to those contractor employees who regularly work on the property but also to those who exclusively work there. As the D.C. Circuit observed, even as to the regularity requirement, the Board defined the matter far too narrowly.[65] The Board characterized essentially all sea-

[59] *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (quoting *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956)).

[60] As the Supreme Court has observed, "[t]he right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the [National Labor Relations Act], nothing in the [Act] expressly protects it. To the contrary, this Court consistently has maintained that the [Act] may entitle union employees to obtain access to an employer's property under limited circumstances." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 fn. 21 (1994) (citing *Lechmere* and *Babcock & Wilcox*); see also *NLRB v. Stowe Spinning Co*., 336 U.S. 226, 232 (1949) ("[S]ome dislocation of property rights may be necessary in order to safeguard" employees' statutory rights.) (quoting *Republic Aviation*, 324 U.S. at 802 fn. 8).

[61] For instance, if an employer restricts employee access to its property by requiring that employees not engage in Sec. 7 activity while there, and thereafter the employees exceed the scope of their invitation by engaging in Sec. 7 activity, the employees may technically be trespassers under state common law. See RESTATEMENT (SECOND) OF TORTS § 168 (AM. LAW INST. 1965) ("A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with."). However, the employer would still clearly violate the Act by imposing such a restriction. See *Republic Aviation*, 324 U.S. at 802 fn. 8 (noting that the Board "has held that the employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable to employees effectively to exercise their right to self-organization and collective bargaining, and in those decisions which have reached the courts, the Board's position has been sustained").

[62] 12 F.4th at 781-782.

[63] In broadening the circumstances in which a property owner can prohibit access to contractor employees, the Board pointed to the distinction "of substance" under *Lechmere* between the Sec. 7 access rights of employees and nonemployees. However, the Supreme Court has never decided, including in *Lechmere*, "whether the term 'employee' extends to the relationship between an employer and the employees of a contractor working on its property." *New York-New York*, 676 F.3d at 196 (quoting *New York New York*, 313 F.3d at 590). Moreover, the distinction "of substance" identified by the Supreme Court in *Lechmere* and *Babcock & Wilcox* rests on the Court's conclusion that access rights of nonemployee organizers are not directly protected by Sec. 7, but rather derive from onsite employees' Sec. 7 "right of self-organization [which] depends in some measure on the ability of employees to learn the advantages of self-organization from others." *Babcock & Wilcox*, 351 U.S. at 112-113; see also *Lechmere*, 502 U.S. at 537. As the D.C. Circuit's two decisions in *New York New York*, above, expressly recognize, the Supreme Court's distinction "of substance" between the access rights of onsite employees and of nonemployee organizers clearly does not encompass the situation here, where contractor employees sought to exercise their own Sec. 7 rights at their own workplace, which just happened to be owned by an entity other than their employer.

[64] See *New York New York*, 356 NLRB at 917–918 fns. 41–44 (summarizing cases).

[65] *Local 23, American Federation of Musicians*, 12 F.4th at 783-784.

sonal employees—arguably schoolteachers included—as not working on a property regularly because they are not present for constant or definite intervals.[66] It is axiomatic that some seasonal employees, even if not present at the property throughout the year, are not strangers to the property where they work.[67]

In addition, the D.C. Circuit recognized that the exclusivity requirement adopted in *Bexar County I* is "an ill-suited proxy" for determining whether contractor employees are sufficiently connected to a property.[68] It is simultaneously both over- and underinclusive.[69] It denies access to those who work virtually their entire workweek at a property owner's property yet occasionally work at a different site for the same contractor. At the same time, it would grant access to contractor employees who work only a fraction of their workweek for a particular contractor but all of the work for that contractor occurs on the property.[70] The accommodation of rights reached by the Board in *Bexar County I* was arbitrary because it bears little logical connection to preventing intrusion of the property owner's property rights while failing to maintain Section 7 access rights for a large universe of contractor employees—including those whose connection to the property where they work is self-evident.[71]

Even if the Board finds that contractor employees have a sufficient connection to the property because they work there regularly and exclusively, the Board in *Bexar County I* provided that they could still be denied access if the property owner is able to demonstrate that they have access to a reasonable alternative nontrespassory channel of communication.[72] The question of whether nontrespassory channels of communication exist should not be relevant where the property owner permits—and in fact expects—these same employees to regularly enter its property to work for its contractor. The contractor employees are simply not in the same relationship to the property as trespassers who are strangers or outsiders to it, such as nonemployee union organizers.[73] Moreover, the Board defined alternative nontrespassory channels of communication about as broadly as possible, including the use of social and traditional media.[74] Of course, these outlets are available but provide no guarantee that the contractor employees are able to reach the particular subset of the public they may want to reach, such as the patrons or customers of the property owner.[75] Further, the Board did not require that the property owner show any legitimate business justification for requiring the contractor employees to resort to nontrespassory forums—for example, by showing that the contractor employees' Section 7 activity would interfere with the use of the owner's property—instead of being able to communicate their message at their workplace.

Accordingly, we find the access standard established in *Bexar County I* fails to ensure a proper accommodation between the contractor employees' Section 7 rights and the property owner's property rights.[76] In our

[66] Id. at 784. For instance, in this case, the Board found that the Symphony employees did not work regularly on the Respondent's property because, despite the Symphony's Use Agreement providing it the right to use the Tobin Center for 22 weeks over its 39-week season, "the Symphony itself did not regularly conduct business or perform services there." 368 NLRB No. 46, slip op. at 10–11.

[67] Id. ("We are hard pressed to understand how the schoolteacher could be considered more of a ''stranger[ ]' to or 'outsider[ ]' on the property' than the vending machine operator.").

[68] Id. at 784-785.

[69] Id. at 785.

[70] Id. ("Those results stand significantly at odds with the Board's stated logic for the first step of its test—they fail to exclude workers with only a marginal presence while excluding others with a substantial presence.").

[71] Id. ("The Board's implementation of the exclusivity condition, then—as with its implementation of the regularity condition—is arbitrary. And, because those two conditions make up the first step of the Board's new test for determining when contractor employees have access rights to the premises for organizing activity, the first step of the Board's test cannot be sustained.").

[72] 368 NLRB No. 46, slip op. at 8-10.

[73] In *Bexar County I*, in requiring property owners to grant access only where no reasonable alternative nontrespassory channel exists, the Board relied on *Lechmere* and other Supreme Court precedent that considered alternative means of access by nonemployee union organizers who do not have any nonderivative Sec. 7 rights. As noted, contractor employees seeking to access the property to exercise their own Sec. 7 rights are not in the same category as nonemployees because they are already regularly on the property and their Sec. 7 activities thereon could be anticipated, negating the need to consider the existence of alternative nontrespassory channels of communication. Further, as we explain herein, it would severely undercut employees' nonderivative Sec. 7 rights, which are at the core of statutory protection, to deny such rights in their own workplace, the most natural and potentially most fruitful setting in which to exercise them, and instead force employees to pursue alternative channels.

[74] 368 NLRB No. 46, slip op. at 9–10 (providing that alternative nontrespassory channels of communication "may include newspapers, radio, television, billboards, and other media through which is transmitted 'the ordinary flow of information that characterizes our society.' . . . . In certain instances, such alternative means could include social media, blogs, and websites . . . .") (quoting *Lechmere*, 502 U.S. at 540). As to this case, the Board noted that, in addition to a public sidewalk across the street, "the Symphony employees also had other channels they could have used to convey their message, including newspapers, radio, television, and social media, such as Facebook, Twitter, YouTube, blogs, and websites." Id., slip op. at 11.

[75] See *Bexar County I*, 368 NLRB No. 46, slip op. at 23 (then-Member McFerran, dissenting) ("Even with the broadest outreach, bolstered with unlimited resources, attempting to reach the narrow band of the public who patronizes an establishment—a virtually unknowable subset of the population until they set foot in the employer's business—will be impossible.").

[76] The number of statutory employees deprived of their fundamental Sec. 7 rights under *Bexar County I* are limitless. By way of example,

view—as well as the D.C. Circuit's—it is flawed in multiple ways. The D.C. Circuit directed the Board, on remand, to "proceed with a version of the test it announced and sought to apply in this case or to develop a new test altogether."[77] In light of the D.C. Circuit opinion and our own reevaluation of the issue, we decline to proceed with a version of the test announced in *Bexar County I*.

B. A Proper Accommodation Between Off-Duty Contractor Employees' Section 7 Rights and a Property Owner's Private Property Rights

In 2011, informed by amicus briefing, oral argument, and court guidance, the Board in *New York New York* established a different access standard to accommodate off-duty contractor employees' Section 7 rights and property owners' private property rights.[78] The Board held that a "property owner may lawfully exclude [off-duty contractor] employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law)."[79] As noted above, the D.C. Circuit upheld that test, and no court has questioned it.[80] For the reasons explained below, we agree with the balancing of the respective rights and interests by the *New York New York* Board.[81] Accordingly, we return to the *New York New York* access test for off-duty contractor employees.[82]

custodial or housekeeping employees who work at multiple buildings, none of which are owned by the firm that employs them, will have no right to communicate with the public about their working conditions on any of the building properties. Likewise, food service contractor employees—even those who work exclusively at one location—will be unable to leaflet the public to complain about unfair working conditions at their workplace because they can theoretically use Facebook or billboard ads.

[77] 12 F.4th at 788.

[78] 356 NLRB at 907–908, 918–919.

[79] 356 NLRB at 918-919.

[80] As noted above, prior to the issuance of its 2011 *New York New York* decision, the Board had treated contractor employees working on a property owner's property as identical to the property owner's own employees for purposes of Sec. 7. E.g., *New York New York*, 334 NLRB at 773; *New York New York*, 334 NLRB at 762; *PNEU Electric, Inc.*, 332 NLRB 616, 616 & fn. 1 (2000). On review of the Board's decision in *PNEU Electric*, the Fifth Circuit recognized—as the D.C. Circuit's subsequent review of the Board's first *New York New York* decisions would also reflect—that "[w]hen it is unclear under established law whether a category of workers enjoys free-standing, nonderivative access rights, then a court is obliged to defer to reasonable judgments of the Board in its resolution of cases that have not as yet been resolved by the Supreme Court." *NLRB v. Pneu Electric, Inc*., 309 F.3d 843, 854 (5th Cir. 2002) (quoting *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1003 (D.C. Cir. 2001) (emphasis in original)). In weighing the contractor employees' Sec. 7 access rights, notwithstanding the Supreme Court's *Lechmere* decision, the court noted that "[o]n its face, the situation appears more closely related to that in *Republic Aviation*." Id. at 853. Nonetheless, the court remanded the case to the Board to provide a reasoned analysis in light of *Lechmere* why the contractor employees should be granted access rights like those afforded to the property owner's own employees. Id. at 854–855.

The Board did not issue a further decision in *Pneu Electric*, but, just two months after the Fifth Circuit's opinion, the D.C. Circuit similarly rejected the Board's analysis in its 2001 *New York New York* decisions and remanded those cases to the Board for further consideration. 313 F.3d at 590–591. The court noted its agreement with the Fifth Circuit in *Pneu Electric* that the Board's precedent on this issue had failed to consider what impact, if any, the Supreme Court's *Lechmere* decision has on its accommodation of the competing rights. Id. at 588. Furthermore, the D.C. Circuit pointed out that the issue was not controlled by Supreme Court precedent and left it to the Board to consider and weigh the competing rights that had to be accommodated. Id. at 590. As noted above, the D.C. Circuit subsequently held that the Board had satisfactorily accommodated those competing rights in its 2011 *New York New York* decision and the Supreme Court denied the petition for certiorari seeking review of the D.C. Circuit's opinion approving the Board's analysis. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 568 U.S. 1244 (2013). No court has questioned the Board's analysis in its 2011 *New York New York* decision. See *Nova Southeastern Univ.*, 807 F.3d at 312–313 (approving the Board's application of the *New York New York* test).

[81] Our dissenting colleagues assert that the *New York New York* Board's "conclusion rested solely on a balancing of the property owner's managerial interests against the off-duty contractor employees' Sec. 7 rights," without taking into consideration the property owner's property rights. First, the *New York New York* Board repeatedly recognized that it was balancing both the property owner's property rights and its managerial interests. Id. at 918 ("The Board's task is thus to find an accommodation between the [contractor] employees' Section 7 interests and [the employer's] *property rights* and managerial interests as we have analyzed them.") (emphasis added). The *New York New York* Board explained, in response to a similar assertion by the dissent in that case that it had not adequately considered the property owner's property rights, that "[i]n fact, and in contrast to the dissent, we proceed to carefully analyze [the property owner's property] interest and the legal and practical means available to the owner to protect it in this precise situation." Id. at 916 fn. 36. This analysis included an assessment of whether off-duty contractor employees' access would significantly interfere with the property owner's use of its property. Id. at 918. Second, as to the property owner's right to exclude, which is at the core of the dissent's assertion, we must give and have given substantial weight to such property right. However, the right to exclude standing alone cannot carry the day when we must also consider the countervailing core rights of employees under Sec. 7 that are in direct conflict with the right to exclude here.

[82] The dissent contends that, in returning to the *New York New York* access test, we have "abandoned all effort to reach an appropriate accommodation between the competing Section 7 and property rights at stake in this matter." Yet this ignores that the standard we adopt today is a reasonable accommodation of competing rights. Off-duty contractor employees are not granted the same access rights as employees of the property owner but also are not treated as nonemployees with no connection to the property owner's property. Instead, off-duty contractor employees will only enjoy a Sec. 7 right to access the property at which they regularly work when the property owner fails to demonstrate that the access would significantly interfere with the use of its property or that it had another legitimate business reason for denying them access. Of course, we do not stand alone in finding that this is a reasonable accommodation between the competing rights at issue. The D.C. Circuit has agreed. *New York-New York*, 676 F.3d at 196 fn. 2

An underlying principle central to this case is that Section 7 only confers rights directly to employees, not to unions or their nonemployee organizers.[83] The off-duty employees who work for a contractor of a property owner do not fit neatly into these categories.[84] They are neither employees *of the property owner* nor are they nonemployees with no relationship to the property owner's property where they work.[85] Under the Supreme Court's decision in *Republic Aviation*, an employer cannot bar its own off-duty employees from exercising their Section 7 right to distribute union literature in nonwork areas of its property.[86] Importantly, as noted above, in seeking to engage in Section 7 activity at their workplace, off-duty contractor employees—like the employees in *Republic Aviation*—are exercising their own Section 7 rights, not those derived from other employees.[87] Moreover, contractor employees who work regularly on the property owner's property are anything but strangers or outsiders to that property.[88] Thus, the *New York New York* Board properly determined that the statutorily-recognized rights and interests of contractor employees who regularly work on the property and seek to engage in Section 7 activity while there are much more closely aligned to those of the property owner's own employees than to nonemployee union organizers whose Section 7 access rights derive from the rights of employees who work on the property.[89]

Nonetheless, we recognize that a property owner generally has the right to control access to and use of its property.[90] Because the contractor employees lack a direct employment relationship with the property owner, the property owner's property rights may need to be accommodated differently because it is the employees of a contractor who seek to engage in Section 7 activity on its property rather than its own employees.[91] In contrast to its own direct hires, the property owner may not have invited the contractor employees onto its property and it might not have the same control over the contractor employees' conduct while on its property.[92]

However, contractor employees are not strangers or outsiders to the property like nonemployee union organizers.[93] Through the voluntary and mutually beneficial

("We conclude that the Board in this case adequately considered and weighed the respective interests based on the principles from the Supreme Court's decisions and 'the policy implications of any accommodation between the § 7 rights of [the contractor's] employees and the rights of [the property owner] to control the use of its premises, and to manage its business and property.'") (quoting *New York New York*, 313 F.3d at 590).

[83] *New York New York*, 356 NLRB at 914 (quoting *Lechmere*, 502 U.S. at 532).

[84] In relying on the Supreme Court's *Lechmere* decision, the dissent fails to grasp the critical distinction between contractor employees who regularly work on a property owner's property and the nonemployees who were the focus of *Lechmere*. The former—who regularly work on the property, and do so to the benefit of the property owner—are no strangers or outsiders. Contractor employees may regularly interact with, sometimes even know quite well, the property owner's own employees and customers. They are not only familiar with the property itself, but often just as familiar to those who frequent the property as anyone else. There is no reason to deprive them of their Sec. 7 rights because of the nature of their employment, especially where the property owner cannot provide a legitimate business reason for doing so. Moreover, the D.C. Circuit has already noted that the Supreme Court decision in *Lechmere* does not address the access rights of off-duty contractor employees. *New York New York*, 313 F.3d at 590 ("No Supreme Court case decides whether the term "employee" extends to the relationship between an employer and the employees of a contractor working on its property."). Ten years later, the D.C. Circuit reaffirmed this point. *New York-New York*, 676 F.3d at 196 ("In short, this Court determined that the governing statute and Supreme Court precedent grant the Board discretion over how to treat employees of onsite contractors for these purposes."). The full D.C. Circuit unanimously denied a petition for rehearing en banc. *New York New York, LLC v. NLRB*, 2012 U.S. App. LEXIS 13850 (July 6, 2012) (per curiam). And the Supreme Court denied a petition for writ of certiorari of the D.C. Circuit's *New York-New York* decision. 568 U.S. at 1244. Thus, the dissent's claim that our decision "cannot be reconciled with Supreme Court precedent" is baseless and wholly without merit.

[85] Id. at 912 ("[W]e seek to establish an access standard that reflects the specific status of the [contractor] employees as protected employees who are not employees of the property owner, but who are regularly employed on the property. Neither *Lechmere* nor *Republic Aviation* involved this category of persons.").

[86] Id. at 913 ("Under *Republic Aviation*, it is well established that an employer that operates on property it owns ordinarily violates the Act if it bars its employees from distributing union literature during their nonwork time in nonwork areas of its property.").

[87] Id. at 914 (quoting *Lechmere*, 502 U.S. at 532).

[88] Id. at 916.

[89] Id. at 915-916. In *Simon DeBartolo Group*, the Board applied the *New York New York* test to find that a property owner unlawfully barred the off-duty employees of a maintenance contractor from distributing organizational handbills to the public. 357 NLRB at 1890. The Board relied on the parties' stipulation that the maintenance contractors who sought to distribute the handbills worked regularly on the property owner's property and noted that the nature of the contractor employees' janitorial work made it "more likely than not" that their work on the property "is not so fleeting or occasional" as to take this case outside of *New York New York*. Id. at 1888 fn. 8. The Board rejected the contention that the contractor employees had to work "exclusively" on the property to be afforded Sec. 7 access rights. Id. In *Bexar County I*, the Board also overruled *Simon DeBartolo Group*. 368 NLRB No. 46, slip op. at 2. We share the D.C. Circuit's concerns about limiting Sec. 7 access rights to only those contractor employees who work exclusively for a contractor on the property owner's property. In returning to the *New York New York* test, we only require that contractor employees show a sufficient connection to the property by working there regularly. Although what is considered sufficient regularity will necessarily vary from case to case, the frequency of the contractor employee's work on the property, consistency of work on the property, or a significant amount of time spent working on the property, even if only at certain times of the year, may be sufficient.

[90] *New York New York*, 356 NLRB at 916.

[91] Id.

[92] Id.

[93] Id.

relationship between the property owner and the contractor, the property owner still has the legal right and practical ability to fully protect its interests through its contractual and working relationship with the contractor without barring off-duty contractor employees from accessing the property and depriving them of their Section 7 rights.[94] The property owner can also reasonably expect that contractor employees regularly employed on its property may seek to engage in Section 7 activity at their workplace.[95] Nothing prevents the property owner from negotiating contractual terms sufficient to protect its interests in relation to the contractor employees so that it can quickly and effectively intervene if necessary.[96]

For instance, the contractor could agree to use its employment authority to enforce the property owner's rules to protect against disruptions to the property owner's operations.[97] Moreover, even without an express contractual commitment, the property owner and the contractor share an economic interest in ensuring that the contractor employees do nothing that might interfere with the property owner's operations.[98] Property owners are often able to direct the contractor's managers and supervisors to take action to protect their operational and property interests, such as when they observe misconduct or to direct the removal of unruly employees from the premises.[99] Also available to the property owner—in addition to its property rights—is its right to exercise its legitimate managerial interests in preventing improper interference with the use of its property.[100]

Thus, in contrast to situations where the interests of property owners are infringed by nonemployee trespassers, property owners are able to protect their property and operational interests against improper infringement by contractor employees without having to resort to state trespass laws.[101] The contractor employees, however, have no reasonable alternative for exercising their Section 7 rights at their workplace if the property owner can summarily deny them access while off-duty.[102] There is simply no other place that would be anywhere close to as effective for the contractor employees to engage in Section 7 activity than the place where they and their coworkers work.[103] In fact, the property owner's property may be the only place that the contractor employees can effectively reach a small, specific subset of the general public that patronizes the business where they work, which may be the only people to whom the contractor employees want to share their message about their working conditions.[104]

In accommodating these competing interests, to cause as little destruction to the contractor employees' Section 7 rights as possible, the Board in *New York New York* did not hold that a property owner may never exclude employees who seek to engage in Section 7 activity on its property.[105] It placed a reasonable condition on the property owner's right to exclude.[106] The contractor employees are not in the same position vis-à-vis the property owner as the property owner's own employees.[107] For

[94] Id. at 918.

[95] Id. at 917.

[96] Id. The dissent points to our acknowledgment that a property owner may not have invited the contractor employees onto its property and that the owner may not have the same level of control over contractor employees as it does over its own employees. Notwithstanding, the contractor employees are not strangers or outsiders. They are only on the property because the property owner has contracted with a contractor who has brought its employees there. That contract provides the property owner with the right to impose specific requirements on the contractor in relation to its employees to further protect the property owner's operational and property interests. We agree with the dissent that "the fact that the parties may enter into such a contract does not establish that property owners' rights are in any way diminished in the absence of such a contract." However, just as importantly, the property owner's contractual relationship with the contractor demonstrates the limited impact on property owners of our access test for off-duty contractor employees, even where the property owner cannot show that the contractor employees' access would significantly interfere with the use of its property or that it has another legitimate business reason for denying them access, because the property owner has other means available to protect its interests. The property owner can negotiate for greater control over the contractor employees, so long as any such control is consistent with the contractor employees' Sec. 7 rights.

[97] Id.

[98] Id.

[99] Id. at 917–918.

[100] Id. at 916, 918–919; see also *Hudgens*, 424 U.S. at 521 fn. 10 (distinguishing *Republic Aviation* from *Babcock & Wilcox* by observing that "when the organizational activity was carried on by employees already rightfully on the employer's property, . . . the employer's management interests, rather than his property interests" were involved). The *New York New York* Board explained that "[a]part from its state law property right to exclude, [the property owner] also has a legitimate interest in preventing interference with the use of its property." 356 NLRB at 916.

[101] Id. at 918 & fn. 47.

[102] Id. at 918 ("Careful consideration of the questions asked by the court of appeals, and of our own case law and experience, leads us to conclude that the property owner generally has the legal right and practical ability to fully protect its interests through its contractual and working relationship with the contractor (as this case illustrates), but the contractors' employees have no parallel ability to protect their statutory rights and legitimate interests in and around their workplace without our intervention.").

[103] Id. at 919 ("[T]he workplace 'is a particularly appropriate place for the distribution of § 7 material.'") (quoting *Eastex*, 437 U.S. at 574).

[104] Id. at 915.

[105] Id. at 918–919.

[106] Id.

[107] Id. at 916. The Board in *New York New York* left open—as we do today—"the possibility that in some instances property owners will be

that reason, under the *New York New York* test, the property owner can still exclude off-duty contractor employees from its property where the property owner is able to demonstrate that the contractor employees' Section 7 activity would significantly interfere with its use of the property or where the exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline.[108]

We believe that this accommodation appropriately balances the competing rights at issue here.[109] It ensures that property owners—even after utilizing their contractual and working relationship with the contractor to protect their property rights—do not have to permit significant interference with their property for Section 7 activity.[110] But in the absence of that significant interference, or another legitimate business reason of the property owner, it ensures that off-duty contractor employees—like all other statutory employees—are able to realize the rights granted to them under Section 7 of the Act.[111]

C. Retroactive Application of the Board's Return to the New York New York *Test*

When the Board announces a new standard, a threshold question is whether the new standard may appropriately be applied retroactively, or whether it should be applied only in future cases. In this regard, "[t]he Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever

able to demonstrate that they have a legitimate interest in imposing reasonable, non-discriminatory, narrowly-tailored restrictions on the access of contractors' off-duty employees, greater than those lawfully imposed on its own employees." Id. at 919.

[108] Id. at 918–919. The Board in *New York New York* declined to condition access to the property owner's property on whether the contractor employees had a reasonable alternative means of communicating with their intended audience. The Board determined that such a requirement burdens contractor employees' exercise of their Sec. 7 rights more than is necessary to adequately protect the property owner's rights and interests. Moreover, until the Board issued *Bexar County I*, "[n]either the Board nor any court has ever required employees to prove that they lacked alternative means of communicating with their intended audience as a precondition for recognition of their right, subject to reasonable restrictions, to communicate concerning their own terms and conditions of employment in and around their own workplace." Id. at 919. We agree with the *New York New York* Board that access to alternative means of communicating their message should not be a reason to deny employees the right to engage in Sec. 7 activity at their workplace. First, we are skeptical that any means of communication other than at the place where they work would be a reasonable alternative. The Supreme Court has recognized the unique status of the workplace as a location for Sec. 7 activity. See *Eastex*, 437 U.S. at 574. Second, in the absence of significant interference with its property, any intrusion on the property owner's property rights is minimal enough that it should not require a dislocation of the contractor employees' Sec. 7 rights.

[109] According to the dissent, an accommodation of the competing rights at issue here does not require balancing the off-duty contractor employees' Sec. 7 rights with the property owner's private property rights. Instead, the dissent claims that the off-duty contractor employees' Sec. 7 rights are adequately accommodated if they have a reasonable nontrespassory means to exercise those rights. Of course, this assumes—which we doubt—that reasonable nontrespassory means could exist given how essential the workplace is as a location for employees to engage in Sec. 7 activity. The dissent notes that the Supreme Court in *Lechmere* recognized that reasonable alternative nontrespassory means of communication were sufficient for nonemployee union organizers to exercise their derivative Sec. 7 rights. The reason that the dissent's proposed accommodation does not suffice here is because this case does not concern derivative Sec. 7 rights. It involves contractor employees seeking to exercise their own nonderivative Sec. 7 rights as employees covered under the Act, and to do so in the place they regularly work—the very place that the Supreme Court has identified as "a particularly appropriate place for the distribution of § 7 material." *Eastex*, 437 U.S. at 574. Moreover, there is no reason to relegate employees' Sec. 7 rights to an inferior status to private property rights. After all, if off-duty contractor employees can engage in Sec. 7 activity on the property owner's property without significantly interfering with the owner's use, there is little harm in permitting that accommodation to ensure as little "destruction" to a federally protected right as possible while still respecting the owner's private property rights.

[110] Although the dissent contends that our distinction between the access rights of contractor employees and those of the property owner's own employees is premised on an "abstract, theoretical exception that has never been and will predictably never be found to exist in fact," there is no reason to prejudge what facts may come before the Board in a future case warranting the application of such an exception. Of course, if a property owner cannot show that granting access to its off-duty contractor employees would significantly interfere with the use of its property, or that it has another legitimate business reason for denying them access, it should not be alarmed by the prospects of its contractor employees accessing its property to engage in Sec. 7 activity. For that reason, the dissent's concerns about off-duty contractor employees having the same access rights as the off-duty employees of the property owner under *Tri-County Medical Center, Inc*., 222 NLRB 1089, 1089–1090 (1976), are unfounded. It is only reasonable for off-duty contractor employees to have the same access rights as other off-duty employees when they are also seeking to exercise their own nonderivative Sec. 7 rights, unless the property owner can show that doing so would significantly interfere with its use of its property. Moreover, in dismissing as illusory the property owner's opportunity to show why off-duty contractor employees should not be granted access, the dissent repeats the same claim made by the dissent in *New York New York*, which, at bottom, is "that our decision does not do what it plainly does and does not mean what it plainly says." *New York New York*, 356 NLRB at 920. The *New York New York* Board's apt response then is just as true now: "We can only disagree." Id.

[111] Contractor employees who regularly work on the property owner's property have a sufficiently strong connection to that property to have their Sec. 7 rights accommodated when possible. The dissent contends that, in accommodating conflicting rights, less "destruction" of the property owner's property rights is warranted where contractor employees Sec. 7 rights are involved, instead of the property owner's own employees. However, the accommodation of rights we have arrived at already ensures that there is the least amount of "destruction" to those rights as possible while still preserving off-duty contractor employees' right to engage in Sec. 7 activity at their workplace. Moreover, the dissent is wrong to suggest that we would deprive property owners of their right to exclude nonemployees. Our decision is not about nonemployees; it is about employees, specifically employees who work on the property owner's property.

stage.'"[112] Only when it would create a "manifest injustice" would the Board not apply a new rule retroactively.[113] The Supreme Court has indicated that "the propriety of retroactive application is determined by balancing 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.'"[114]

In order to protect contractor employees' Section 7 rights, we believe that it is appropriate for us to apply the *New York New York* test to this case and to all pending cases. It would cause no "manifest injustice" to the Respondent here. The *New York New York* test had been the current Board case law—and had been enforced by the D.C. Circuit—for several years by the time the Respondent barred the Symphony employees from leafleting on the Respondent's property. There can be no mischief attributed to the Board or surprise to the Respondent for the Board to apply its then-existing precedent to find the Respondent's conduct unlawful. Moreover, because *Bexar County I* denied contractor employees their Section 7 access rights except in the rarest of circumstances, it is unlikely that there are many pending cases alleging a denial-of-access violation because the General Counsel would not have issued a complaint while *Bexar County I* was current Board case law. However, to the extent there are pending cases, as discussed above, it is critical for the Board to analyze those cases under the *New York New York* test to ensure that the Board properly accommodates the competing rights and interests. If it does not significantly interfere with the property owner's use of its property or the property owner does not have another legitimate business reason for doing so, denying off-duty contractor employees access to their workplace to engage in Section 7 activity would impermissibly impede the contractor employees' statutory rights.

D. Application of the New York New York *Test to the Symphony Employees*

Applying the *New York New York* test here, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by excluding the Symphony employees from the Respondent's property to distribute union leaflets to the Respondent's patrons about an issue affecting the Symphony employees' terms and conditions of employment, specifically their number of hours of work. For the reasons stated by the judge, we agree that the Symphony employees worked regularly on the Respondent's property. During the Symphony's 39-week season, the Symphony employees perform most of their performances and rehearsals for their employer at the Tobin Center.[115] The Symphony employees also use the Respondent's property, including its breakroom, to hold breaks and union meetings, to store large instruments, and to house a library staffed by a union member.[116]

In addition, the Respondent has not demonstrated that the leafleting significantly interfered with the Respondent's use of its property or that excluding the Symphony employees was justified by some other legitimate business reason, such as the need to maintain operations or discipline. In fact, the outdoor plaza on the Respondent's property where the Symphony employees sought to leaflet was open to the public at all times and the Symphony employees in no way prevented the Respondent's patrons from also using that space or entering the interior of the Tobin Center. There was no need, as the Respondent claims, to prevent its patrons from having to "wade through" the Symphony employees given the broad expanse of the sidewalk in front of the Tobin Center and limited number of Symphony employees leafleting. The judge also properly rejected the Respondent's contention that the Symphony employees were harming its business operations by advocating a boycott of the Tobin Center. In fact, the Symphony employees were encouraging the Respondent's patrons to demand a better experience so that the Tobin Center and its resident companies would attract more patrons, be more successful, and provide more work opportunities for the Symphony employees. There was also no evidence that the leafleting posed a security threat to the Respondent or created a litter problem on the Tobin Center grounds.

Moreover, as the judge recognized, there is nothing factually that would materially distinguish this case from *New York New York*. First, even though the Symphony—the Symphony employees' employer—was a licensee of the Respondent, not an onsite contractor, the Board in *Bexar County I* properly noted that, "[f]or purposes of an analysis under the Act, a licensee is indistin-

[112] *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co*., 121 NLRB 995, 1006–1007 (1958)).

[113] Id.

[114] Id. (quoting *Sec. & Exch. Comm'n v. Chenery Corp.,* 332 U.S. 194, 203 (1947)).

[115] Our dissenting colleagues quarrel with the D.C. Circuit's analysis that the Board in *Bexar County I* acted arbitrarily by finding that the Symphony employees did not work regularly on the Respondent's property. Without resorting to precise calculations of days per week or weeks per year worked, we find that the Symphony employees work "regularly" on the Respondent's property, as evidenced by the amount of their worktime the Symphony employees spent on the Respondent's property performing or rehearsing during the performance season.

[116] As the D.C. Circuit noted in its decision in this case, an employee can work regularly on the property even though the employee is seasonal or does not constantly work there. 12 F.4th at 784. A schoolteacher, like the Symphony employees, can work long hours on the property with occasional week-long breaks and the summers off yet still have a strong connection to the property. Id.

guishable from an onsite contractor."[117] The critical question, regardless of the employer's precise status as a contractor or a licensor, is whether the contractor or licensor employees have a sufficient connection to a property to afford them off-duty access, despite the potential impact on the property owner's general property right to exclude. Importantly, when the employees work for a contractor or licensor of the Respondent, unlike nonemployees, the property owner has an agreement with the contractor or licensor governing the latter's use of the property, thereby providing the property owner an opportunity to protect its rights and interests. In this case, the Respondent had a Use Agreement with the Symphony under which the Symphony employees had a contractual right to access the Respondent's property while on duty. At the same time, the judge correctly recognized that the Use Agreement also gave the Respondent control over Symphony employees who were on its property even while off duty, which was comparable to the control of the property owner in *New York New York* under its contractual agreement with the contractor.[118] Moreover, in contrast to a stranger trespassing onto its property, the licensing relationship is highly useful to the property owner. Notwithstanding whatever impact it has on its property rights, in the same way that an onsite contractor has a mutually beneficial relationship with a property owner, the Symphony's license with the Respondent provides a distinct value to the Respondent by drawing in patrons to its property—which allows it to fulfill its very purpose as a performing arts venue—and also by the Symphony compensating the Respondent for the use of its facility.

Second, even though the Symphony employees' leafleting was not part of an organizing campaign, they had a Section 7 right to inform the public about Ballet San Antonio's use of recorded instead of live music, which directly affected the Symphony employees' working conditions. The Supreme Court in *Eastex* held that employees can "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship."[119] In fact, the Supreme Court has rejected the argument "that the employees' interest in distributing literature that deals with matters affecting them as employees, but not with self-organization or collective bargaining, is so removed from the central concerns of the Act as to justify application of a different rule than in *Republic Aviation*" (which permits off-duty employees to leaflet on their employer's property).[120] Although the Symphony employees' leafleting was not part of an organizing campaign, unlike the handbilling by the *New York New York* contractor employees, the judge rightfully noted that the Symphony employees' conduct is entitled to just as much protection under Section 7, in accordance with the Supreme Court's *Eastex* decision.

Third, in contrast to the contractor employees in *New York New York* who leafleted the customers of their own employer, the Symphony employees' leafleting was aimed at patrons of the Respondent who were attending a performance by Ballet San Antonio. In *Simon DeBartolo Group*, applying the *New York New York* test, the Board found that a property owner unlawfully barred contractor employees from handbilling directed at the property owner's customers. As the Board noted in *Simon DeBartolo Group*, by quoting from *New York New York*, "what matters here is less the intended audience of the [contractor] employees than that the [contractor] employees were exercising their own rights under Section 7."[121] Furthermore, as the *New York New York* Board explained, having customers as the contactor employees' intended audience for their communications strengthened rather than weakened their statutory claim to access.[122] By

[117] 368 NLRB No. 46, slip op. at 1.

[118] For instance, Sec. 4(1) of the Use Agreement's Terms and Conditions requires the Symphony to cause its servants, agents, employees, etc. to abide by all rules and regulations as may from time to time be adopted by the Respondent. Sec. 4(5) allows the Respondent to refuse admission to or cause to be removed from the property any disorderly or undesirable person—which would reasonably include Symphony employees—as determined by the Respondent in its reasonable discretion. Notwithstanding, the dissent contends that, if the Respondent sought to apply its Use Agreement with the Symphony to remove the leafleting Symphony employees for being "disorderly or undesirable," the Respondent's conduct still would have been unlawful under our decision today. Of course it would have been, given that there is no evidence that the Symphony employees were disorderly or undesirable in any way, and certainly not in any way inconsistent with protected Sec. 7 activity. The Respondent can, as we note, contract to protect its property interests. For instance, a property owner can include in its agreement with its contractor a provision permitting the property owner to exercise some control over disorderly contractor employees, in case the contractor refuses to adequately exercise its managerial interests. The property owner cannot, however, collude with its contractor to contract away the Sec. 7 rights of the contractors' employees.

[119] 437 U.S. at 565; see also *Five Star Transportation, Inc*., 349 NLRB 42, 47 (2007) (school bus drivers engaged in protected Sec. 7 activity by sending a letter to a school committee urging it not to award a school bus contract to another school bus operator prior to it being awarded the contract, which then unlawfully refused to hire the drivers), enfd. 522 F. 3d 46 (1st Cir. 2008).

[120] 437 U.S. at 573-574.

[121] 357 NLRB at 1888 fn. 9 (quoting *New York New York*, 356 NLRB at 915).

[122] 356 NLRB at 915. Moreover, as the D.C. Circuit explained in enforcing the Board's *New York New York* decision, "neither this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees," such as

leafleting at their workplace, the contractor employees "were uniquely able to identify and communicate with the relevant subset of [the property owner's] customers."[123] Here as well, the Symphony employees sought to exercise their Section 7 rights by identifying and communicating with the relevant subset of the Respondent's patrons who they thought would be best positioned to advocate for the change the Symphony employees wanted. The Respondent's patrons who attend Ballet San Antonio performances—either intermittently or as season-ticket holders—would be more likely than other members of the public to find a receptive ear in the Ballet San Antonio's management if they were to urge them to use live music performed by Symphony employees for future productions.

IV. CONCLUSION

Accordingly, we affirm the judge's finding that, under the *New York New York* test, which we return to today as a proper accommodation of off-duty contractor employees' Section 7 rights and a property owner's private property rights, the Respondent violated Section 8(a)(1) by preventing the Symphony employees from distributing flyers on the sidewalk in front of the Tobin Center on the Respondent's property about Ballet San Antonio's use of recorded music, which deprived the Symphony employees of the work of performing that music live. The Symphony employees work regularly at the Tobin Center, and the Respondent has not demonstrated that the leafleting would have significantly interfered with the use of its property or that it had another legitimate business reason for denying them access.

ORDER

The National Labor Relations Board orders that the Respondent, Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts, San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting and/or preventing off-duty employees who are regularly employed at the Tobin Center, including employees of the San Antonio Symphony, from leafleting in nonworking areas open to the public of the Tobin Center property when that leafleting relates to wages, hours, or other terms and conditions of employment.

(b) 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) Post at its San Antonio, Texas facility copies of the attached notice marked "Appendix."[124] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If 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 any time since February 17, 2017.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2022

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Lauren McFerran, Chairman

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Gwynne A. Wilcox, Member

customers. 676 F.3d at 197 (quoting *Stanford Hospital & Clinics,* 325 F.3d at 343).

[123] Id.

[124] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN AND RING, dissenting.

The question presented in this case is the extent to which musicians employed by the San Antonio Symphony were entitled, while off duty, to access the premises of the Respondent Tobin Center for the purpose of leafletting patrons of Ballet San Antonio. In the underlying decision in this case, 368 NLRB No. 46 (2019) (*Bexar I*), the Board found that the Respondent did not violate Section 8(a)(1) of the Act by prohibiting the off-duty Symphony employees from leafletting on its private property under the circumstances of this case.

In addressing this issue, the Board was guided by the Supreme Court's holding in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which reaffirmed the Court's earlier precedent establishing that there was "a distinction 'of substance'" between employees and nonemployees.[1] Based on that distinction, the Court held that whereas the Board acted properly in determining access issues concerning employees by balancing property owners' rights and the rights of their employees to engage in conduct protected by the Act, no such balancing is appropriate where nonemployees are concerned except in "the rare case" where no reasonable alternative means for communication exist.[2]

With the Court's distinction between employees and nonemployees in mind, the Board in *Bexar I* determined that although off-duty employees of onsite contractors, who are not employed by the property owner ("off-duty contractor employees") were not entitled to the same access rights as employees of the property owner, they were also not strangers to the property to the degree that nonemployee union organizers were. Accordingly, the Board concluded that, under *Lechmere*, off-duty contractor employees who had a regular presence on the property, and worked exclusively on the property, would have a sufficient connection to the property to warrant a limited intrusion on property owners' rights. The Board further concluded, however, that even when off-duty contractor employees have a sufficient connection to the property under the "regular and exclusive" test, the property owners' property rights need not give way to the Section 7 access rights of the off-duty contractor employees if the latter have reasonable alternative nontrespassory means of communicating their message.[3] In this regard, the Board placed the burden of proof on the property owner to establish that reasonable alternative means of communication existed for the off-duty contractor employees to exercise their Section 7 rights in order to justify excluding them from the property.[4] In contrast, when "stranger" nonemployees seek access to private property to engage in Section 7 activity, the General Counsel bears the burden of proof to show that no reasonable alternative means of communication exist.

Because the standard adopted in *Bexar I* was at odds with the Board's 2011 decision in *New York New York Hotel & Casino*,[5] the Board overruled that decision. Applying its newly announced standard retroactively, the Board found that employees of the Symphony worked neither regularly nor exclusively on the Tobin Center's property, and even assuming they did, they had reasonable alternative nontrespassory means of communicating their message. Accordingly, the Board concluded that the Tobin Center lawfully excluded from its property Symphony employees who sought access to engage in Section 7 activity.

Upon review, the United States Court of Appeals for the District of Columbia Circuit declined to enforce the Board's decision, finding that the Board had failed to present an adequate explanation for requiring off-duty contractor employees to have a "regular" presence on the property or to work "exclusively" on the property in order to justify interfering with property owners' rights. The court also criticized the Board for failing to require the Respondent to meet its burden to establish that reasonable alternative means of communication were available to the musicians.

The case is now back before the Board. Rather than addressing the court's specific concerns, however, our colleagues have in effect abandoned all effort to reach an appropriate accommodation between the competing Section 7 and property rights at stake in this matter, instead

[1] Id. at 537 (quoting *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 113 (1956)).

[2] Id.

[3] Our colleagues criticize our balancing of the competing rights at issue here by indicating that they "doubt" that reasonable alternate nontrespassory means could exist through which off-duty contractor employees could exercise their rights. In response, we simply note that the Supreme Court did not appear to share that doubt in *Lechmere*. See 502 U.S. at 537 (stating that it would be a "rare case" where reasonable alternate nontrespassory means for communications did not exist). Although that case involved the access of nonemployees, the type of access sought—to employees at their workplace—was the same.

[4] Our colleagues assert that we are taking the position that "an accommodation of the competing rights at issue here does not require balancing the off-duty contractor employees' Sec. 7 rights with the property owner's private property rights." That is simply not so.

[5] 356 NLRB 907 (2011) (*New York New York*), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 568 U.S. 1244 (2013).

definitively prioritizing off-duty contractor employees' Section 7 rights above the rights of property owners. Because our colleagues' new standard fails to reflect a proper mutual accommodation of these rights as the Supreme Court has required, we respectfully dissent.

I. THE SUPREME COURT'S MANDATE IN *LECHMERE*

As recognized by the Board in *Bexar I*, property owners "enjoy certain fundamental property rights derived from the common law and protected by the Fifth and Fourteenth Amendments to the United States Constitution."[6] Among those rights is the right to exclude, which the Supreme Court has characterized as "one of the essential sticks in the bundle of property rights."[7]

Mindful of these inherent rights, the Supreme Court articulated three guiding principles in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), for determining the extent to which property owners are required to permit access to their private property by individuals seeking to engage in Section 7 activity. First, the Court found that employees' Section 7 rights are not absolute. Instead, when Section 7 rights conflict with a property owner's property rights, an accommodation between the two "must be obtained with as little destruction of one as is consistent with the maintenance of the other."[8] Second, in determining that accommodation, the Court drew a distinction "of substance" between the union activities of employees versus those of nonemployees.[9] Third, nonemployees are not entitled to access private property to engage in Section 7 activity unless they have no reasonable alternative means of communicating their message.[10] In other words, where nonemployees are concerned, no invasion of private property rights is required in order to accommodate Section 7 rights except in limited circumstances.

This distinction between employees and nonemployees is clear from the terms of the National Labor Relations Act (NLRA). As the Supreme Court explained in *Lechmere*, Section 7 provides that employees have the right to self-organization, and Section 8(a)(1) makes it an unfair labor practice to infringe on employees' exercise of their Section 7 rights. "By its plain terms," the Court pointed out, "the NLRA confers rights only on *employees*, not on … nonemployee[s]."[11] Such a substantial distinction necessarily places the union activities of employees and nonemployees at opposite ends of a spectrum.[12]

With this distinction in mind, "[i]n cases involving *employee* activities," the Supreme Court has approved the Board's efforts to "'balance the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time, with the employer's right to control the use of his property.'"[13] By contrast, "[i]n cases involving *nonemployee* activities … the Board [i]s not permitted to engage in that same balancing."[14] Rather, as the Supreme Court explained, the matter is "straightforward: § 7 simply does not protect nonemployee union organizers *except* in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'"[15] Indeed, the Court has made clear "that nonemployee organizers cannot claim even a limited right of access to a nonconsenting employer's property until 'after the requisite need for access to the employer's property has been shown.'"[16] Accordingly, although the Court has "'indicate[d] that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule'";[17] it is only in limited circumstances that property rights are "required to yield" to the organizing activities of nonemployees.[18]

We recognize that *Lechmere* does not directly control this case. However, the Board cannot ignore the Supreme Court's holding in *Lechmere* that the Act draws a sharp distinction between the access rights of employees and those of nonemployees and requires that property rights yield to nonemployees' organizing rights only in limited circumstances. The Board must heed the Court's teaching in determining the access rights of off-duty contractor employees, who are not employees of the property owner, even though they are also not utter strangers to the property like nonemployee union organizers. And in all cases involving access issues, the Board must heed

[6] 368 NLRB No. 46, slip op. at 1.

[7] *Pruneyard Shopping Center v.* Robins, 447 U.S. 74, 82 (1980).

[8] 502 U.S. at 534 (quoting *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956)).

[9] Id. at 537 (quoting *Babcock*, 351 U.S. at 113).

[10] Id. at 538.

[11] Id. at 531–532.

[12] Id. at 538.

[13] Id. at 537 (quoting *Babcock,* 351 U.S. at 109–110).

[14] Id.

[15] Id. The Court made clear that it was not endorsing the view that the Act protects "'reasonable' trespasses" by nonemployees, but rather was recognizing "that unions need not engage in extraordinary feats to communicate with inaccessible employees." Id. at 537.

[16] Id. at 534 (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972)); see also *Babcock & Wilcox*, 351 U.S. at 114 (concluding that, as to nonemployees, Sec. 7 "does not require that the employer permit the use of its facilities for organization when other means are readily available").

[17] Id. at 535 (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978)).

[18] Id. at 534 (quoting *Babcock*, 351 U.S. at 112).

the Supreme Court's "admonition that accommodation between employees' § 7 rights and employers' property rights 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.'"[19]

Consistent with these principles, less "destruction" of the property owner's rights is warranted under *Lechmere* for off-duty contractor employees than for the property owner's own employees by virtue of the former's status as nonemployees of the property owner. This was the principle guiding our decision in *Bexar I* and, although the D.C. Circuit took issue with the adequacy of the Board's justification in *Bexar I* for the specific standard set forth therein, it did not disagree with that fundamental principle.[20]

II. THE MAJORITY'S POSITION IGNORES THE FUNDAMENTAL LOLDING IN *LECHMERE*

Today, as it did in 2011, the Board majority contravenes *Lechmere*'s guiding principles as to the Section 7 rights of nonemployees of a property owner in its treatment of off-duty employees of an onsite contractor. The majority returns to *New York New York*, supra, where the Board held that off-duty contractor employees who worked regularly in a restaurant on the hotel and casino's property had the right to access the owner's property to engage in Section 7 activity unless the property owner could show that such activity would significantly interfere with the use of its property or could be restricted for another legitimate business reason, "including, but not limited to, the need to maintain production and discipline."[21] The *New York New York* Board acknowledged that the off-duty contractor employees were equivalent neither to the property owner's own employees nor to nonemployee union organizers, and claimed to be "mindful of the Supreme Court's admonition that the 'distinction between rules of law applicable to employees and those applicable to nonemployees' is 'one of substance.'"[22] Nevertheless, the Board granted these nonemployees of the property owner the same Section 7 access rights as the property owner's own employees, subject to a nominal, and thus meaningless, exception.[23]

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[19] Id.

[20] We decline to address the court's specific criticisms of the standard set forth in *Bexar I* here; because the majority decision abandons that test in its entirety, the test set forth in *Bexar I* will not be at issue in any further review of this decision. Having said that, we note that we disagree with certain assertions set forth in the court's decision.

For example, in finding that the Board's requirement that an employee work "regularly" on the property owner's property was arbitrary—a requirement, we note, under the majority's standard as well—the court put significant weight on a footnote in the *Bexar I* decision stating that "a contractor employee who stocks vending machines once a week at the property owner's facility works 'regularly' on the property . . . ." 368 No. 46, slip op. at 7 fn. 56. But the Court ignored the second half of the quoted sentence, which stated that such an employee "is essentially a stranger to the property for purposes of off-duty access." Id. Indeed, the footnote was included in a section of the decision in which the Board was criticizing the *New York New York* decision's sole requirement of working "regularly" on the property as overbroad, noting that simple regularity was not sufficient to establish a significant work connection to the property owner's property. Id., slip op. at 7. Accordingly, it is clear that the Board was not taking the position that the vending-machine stocker would be entitled to enhanced access rights but the Symphony employees would not.

The court then compounded its error by engaging in faulty "back-of-the-envelope arithmetic" calculations. *Local 23, American Federation of Musicians v. NLRB*, 12 F.4th 778, 784 (D.C. Cir. 2021). The court reasoned that the Board's decision was arbitrary because "working once a week (1/7) cannot count as regular presence if working 22 weeks of the year (22/52) does not." Id. This analysis, however, compared apples to oranges: there can be no meaningful comparison of days in a week to weeks in a year. Taking the court's example but correcting for the faulty comparison, if a nonemployee of the Tobin Center works on its property one day each week of the year (52/52), their presence would be more regular than would that of Symphony employees, who work onsite 22 weeks of the year (22/52). Accordingly, using "weeks working" as the measure, it would not be arbitrary to conclude that contractor employees working onsite once each week are present more regularly than those working onsite 22 weeks per year. Alternatively, the court could have compared the number of days worked per year. The court suggests that "[i]n a typical performance week," the Symphony employees were onsite a total of 6 days; our review of the record suggests that it was more typical for the employees to be onsite 5 days each week that the Symphony was performing at the Tobin Center. But just for illustrative purposes, we will assume that the employees work onsite 6 days a week for 22 weeks, in which case they would be onsite 132 days each year (132/365), whereas the vending-machine attendant works onsite 52 days of the year (52/365). Hourly comparisons, in turn, could produce closer results. In any event, the salient point is that the flawed arithmetic analysis relied on by the court does not support the court's finding that the Board's standard was arbitrary.

[21] 356 NLRB at 918–919. Although our discussion in this dissent is focused on *New York New York*, we agree with *Bexar I* that the Board's subsequent decisions in *Simon DeBartolo Group*, 357 NLRB 1887 (2011), and *Nova Southeastern University*, 357 NLRB 760 (2011), similarly failed to adequately consider the owner's property rights.

[22] 356 NLRB at 913–914.

[23] We emphasize that although the *New York New York* Board stated that it was accommodating the property owner's managerial interests and property rights against the Sec. 7 rights of the off-duty contractor employees, its conclusion rested solely on a balancing of the property owner's managerial interests against the off-duty contractor employees' Sec. 7 rights. See id. at 918–919 (balancing the contractor employees' Sec[.] 7 access rights against the property owner's "need to maintain production and discipline" and interest in being free from "significant[] interfere[nce] with the use of his property").

Further, it is abundantly clear that the *New York New York* majority was merely paying lip service to the distinction of substance that the Supreme Court requires be drawn between the access rights of employees and those of nonemployees. We need look no further than the majority's acknowledgment that it was granting off-duty contractor employees the same rights of access as the property owner's own employees, subject to an abstract, theoretical exception that has never been and will predictably never be found to exist in fact. See id. at 919 ("We leave open the possibility that in some instances property owners will be able to demonstrate that they have a legitimate interest in imposing reasonable, non-discriminatory, narrowly-tailored restrictions on the

Today, the majority continues to recognize the substantial distinction between these individuals in name only.

Simply put, the majority's decision cannot be reconciled with Supreme Court precedent. The Court has recognized that "'[t]he locus of the accommodation [between § 7 rights and private property rights] may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.'"[24] However, it is not the case that such an accommodation requires a balancing of Section 7 rights and private property rights. Based on the distinction of substance between employees and nonemployees, the Court in *Lechmere* held that "[s]o long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to … balanc[e] the employees' and employers' rights."[25] Although we agree with *Bexar I* that under certain circumstances, contractor employees have greater Section 7 access rights than do nonemployee union organizers, it is still the case that they are nonemployees of the property owner, and their Section 7 access rights are weaker than those of the property owner's own employees. Under *Lechmere*, then, the *Bexar I* Board reasonably concluded that "the requisite accommodation" of contractor employees' Section 7 rights "has taken place" if reasonable nontrespassory means are available to them for the exercise of those rights, and where that is the case, no invasion of private property rights is necessary to achieve the requisite accommodation.[26] In any event, because the "nature and strength" of the contractor employees' Section 7 rights are diminished when they seek access to premises that their employer does not own, the extent to which the contractor employees must be permitted to infringe upon private property rights is inherently more restricted.[27] By returning to *New York New York*, however, the majority effectively gives contractor employees the same rights as the property owners' own employees and, more problematically here, ignores the Court's directive that the yielding of private property rights to accommodate nonemployees is only necessary in certain contexts. By effectively equating contractor employees with property owners' employees, the majority wrongfully promotes the near total deprivation of private property owners' right to exclude nonemployees.[28]

III. THE MAJORITY'S ARGUMENTS THAT THEIR DECISION IS NOT IN CONFLICT WITH *LECHMERE* ARE UNAVAILING

It is clear that the standard espoused today fails to apply the Supreme Court's mandate that property owners' rights and Section 7 rights must both be accommodated,[29] despite our colleagues' assertions to the contrary. For example, the majority asserts that contractor employees' rights are "much more closely aligned to those of the

access of contractors' off-duty employees, greater than those lawfully imposed on its own employees.") (emphasis added).

Our colleagues pay the same lip service today. Although they claim not to "prejudge what facts may come before the Board in a future case warranting the application of [this] exception," they immediately thereafter alert property owners that they "should not be alarmed by the prospects of" off-duty contractor employees accessing their property for Sec. 7 activity. We consider such "prospects" to be a proxy for the majority's normalization of infringing on private property rights. Moreover, their claim that they have given "substantial weight" to private property rights is as unconvincing as their claim that our dissent automatically allows property rights to "carry the day" is inaccurate. As we have detailed herein, the *Bexar I* burden to show nontrespassory alternative means to communicate rests with the property owner and, as the D.C. Circuit emphasized, this burden is not automatically met; the property owner must develop the record to meet this burden.

[24] *Lechmere*, above, 502 U.S. at 538 (quoting *Hudgens*, above, 424 U.S. at 522).

[25] Id.

[26] The D.C. Circuit did not reject the *Bexar I* Board's position in this regard. It merely found that the Board failed to require the Respondent to meet its burden of proving that the Symphony employees had reasonable alternative nontrespassory means of communicating their message.

[27] See generally id.

Contrary to the majority, our reliance on *Lechmere* is neither "baseless" nor "wholly without merit." As we have made clear, *Lechmere* does not control off-duty contractor employees' property access rights. Rather, the *Bexar I* test accords appropriate weight to *Lechmere*'s fundamental principle that Sec. 7 rights may need to yield to private property rights under certain circumstances.

[28] The Board has long held that an employer's own off-duty employees cannot be barred from exterior nonworking areas, such as the private sidewalks at issue here, "except where justified by business reasons." *Tri-County Medical Center, Inc*., 222 NLRB 1089, 1089–1090 (1976). We do not see how this standard differs meaningfully from the majority's holding today that "off-duty contractor employees will only enjoy a Sec. 7 right to access the property at which they regularly work when the property owner fails to demonstrate that the access would significantly interfere with the use of its property or that it had another legitimate business reason for denying them access." Accordingly, the majority's return to *New York New York* makes off-duty contractor employees, for all intents and purposes, equivalent to a property owner's own employees. To the extent their holding does differ from *Tri-County*'s standard governing off-duty employees' access to exterior nonworking areas, we doubt that the majority would ever find the "legitimate business reason" exception met. We hope they prove us wrong.

Additionally, we emphasize the limited nature of today's decision—i.e., it applies only to off-duty contractor employees' access to nonworking areas open to the public. A broader holding, coupled with *Tri-County*, would give off-duty contractor employees a greater right to access an employer's property than its own off-duty employees have. See *Tri-County*, supra (holding that an employer may exclude its own off-duty employees from interior areas and exterior working areas as long as the employer has clearly disseminated a nondiscriminatory no-access rule).

[29] *New York New York*, 356 NLRB at 913.

property owner's own employees than to nonemployee union organizers whose Section 7 access rights derive from the rights of employees who work on the property." But even assuming that this is so, it is equally true that the property owner's interest in excluding off-duty contractor employees is more similar to property owners' interests in excluding nonemployees than to its interests relative to its own employees. As we detailed in *Bexar I*, the property owner

> may not have the same confidence in the integrity and self-discipline of contractor employees that it has in its own employees, and it may reasonably be concerned about the security of its property and the safety of persons rightfully thereon when contractor employees are off duty and not being supervised by the onsite contractor. Indeed, the property owner may have little, if any, idea who the contractor employees are. Although contractor employees, unlike nonemployees, are not complete strangers to the property, their diminished contact with the owner and its property should reasonably correspond to lesser rights of access to the property when off duty than the property owner's own employees enjoy.[30]

Indeed, our colleagues acknowledge, as they must, that the property owner "may not have invited the contractor employees onto its property and . . . might not have the same control over the contractor employees' conduct while on its property" as compared to the owner's own employees. Nevertheless, they conclude that, for all intents and purposes, property owners do not have any greater right to exclude contractor employees than their own employees.

Our colleagues attempt to minimize this significant fact by asserting that, "[t]hrough the voluntary and mutually beneficial relationship between the property owner and the contractor, the property owner still has the legal right and practical ability to fully protect its interests through its contractual and working relationship with the contractor."[31] But, of course, the fact that the parties *may* enter into such a contract does not establish that property owners' rights are in any way diminished in the absence of such a contract. Moreover, any contractual provision regulating off-duty access by employees of the contractor, and the exercise of any right by the property owner under such provisions, presumably must conform to the standards set forth in the majority opinion. As shown, those standards effectively grant off-duty contractor employees the same rights as employees of the property owner.

CONCLUSION

In *Bexar I*, the Board recognized that the reasoning behind the holding in *New York New York* and *Simon DeBartolo* did not properly balance off-duty contractor employees' Section 7 access rights with the rights of private property and did not constitute "an accommodation that causes as little destruction to private property rights as is consistent with maintaining employees' Section 7 rights."[32] Although the D.C. Circuit did not enforce that decision, the court acknowledged that, "[a]s a conceptual matter," the Board had properly sought "to identify those contractor employees with a *sufficiently strong connection to the property* to warrant the grant of [off-duty] access rights."[33] And, in remanding the case, the court recognized the viability of the *Bexar I* test and left open the possibility that the defects with its terms and application were curable. Our colleagues, however, claim that "*Bexar I* essentially stripped off-duty contractor employees whose employer does not own the property where they work from having Section 7 rights at their workplace" and, accordingly, abandon the test in its entirety. These accusations are wholly unfounded and somewhat ironic considering the extent to which our colleagues are willing to strip property owners of their rights today. Their decision does not reasonably accommodate the competing rights at issue as is required by the Supreme Court. Instead, they swing the pendulum so far to the other side as to preclude property owners from exercising any real control over their property as it pertains to off-duty individuals whom they do not employ. Because their decision today fails to give any real

[30] 368 NLRB No. 46, slip op. at 8. We recognize that the off-duty contractor employees have their own Sec. 7 rights but emphasize that, if their employer, the contractor, did not have access to the property owner's property, "it is axiomatic that neither would the contractor's employees. The off-duty contractor employees were not hired by the property owner. Their only claim to access the property derives from the owner's contract with a third-party contractor that employs them, independent of any decision made by the property owner." Id., slip op. at 12.

[31] Further, our colleagues' citation to the contract between the Respondent and the Symphony in this case undermines their point. As they point out, the parties' agreement "allows the Respondent to refuse admission or cause to be removed from the property 'any disorderly or undesirable person,'" giving the Respondent rather broad authority to act to protect its property rights. (Emphasis added.) They also assert that this agreement would include Symphony employees. However, if the Respondent were to judge off-duty contractor employees as "disorderly or undesirable" and attempt to enforce that provision by removing those off-duty contractor employees from its property, our colleagues would certainly find enforcement of that provision to be unlawful. In fact, they do so today.

[32] 368 NLRB No. 46, slip op. at 7.

[33] *Local 23, American Federation of Musicians,* 12 F.4th at 783 (emphasis added).

acknowledgement of the rights of property owners, we dissent and decline to apply it here.[34]

Dated, Washington, D.C. December 16, 2022

Marvin E. Kaplan, Member

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

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 prohibit and/or prevent you, including San Antonio Symphony employees, when off-duty from leafleting in nonworking areas open to the public of the Tobin Center property when that leafleting relates to wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

BEXAR COUNTY PERFORMING ARTS CENTER FOUNDATION D/B/A TOBIN CENTER FOR THE PERFORMING ARTS

The Board's decision can be found at www.nlrb.gov/case/16-CA-193636 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.

[34] Accordingly, absent an appropriate access standard to apply in light of the D.C. Circuit's criticisms of the standard set forth in *Bexar I*, we decline to find that the General Counsel established a violation here.