UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK LLC, d/b/a NEW YORK NEW YORK HOTEL & CASINO, *Respondent,* and LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165, affiliated with UNITE HERE, *Charging Party.*	CASE NOS. 28-CA-14519 & 28-CA-15148

PRE-ARGUMENT BRIEF OF *AMICUS* VENETIAN CASINO RESORT, LLC IN SUPPORT OF POSITION OF RESPONDENT NEW YORK NEW YORK LLC, d/b/a NEW YORK NEW YORK HOTEL AND CASINO; REQUEST TO PARTICIPATE AT ORAL ARGUMENT

BALLARD, ROSENBERG, GOLPER & SAVITT LLP
RICHARD S. ROSENBERG
JOHN J. MANIER
10 UNIVERSAL CITY PLAZA, 16TH FLOOR
UNIVERSAL CITY, CALIFORNIA 91608-1097
TELEPHONE: 818-508-3700
FACSIMILE: 818-506-4827
E-MAIL: rrosenberg@brgslaw.com, jmanier@brgslaw.com

Attorneys for *Amicus*
VENETIAN CASINO RESORT, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

INTRODUCTION

Venetian Casino Resort, LLC ("Venetian") submits this *amicus* brief in support of the position of New York New York LLC, d/b/a New York New York Hotel & Casino ("NYNY"), in these consolidated cases. Venetian owns and operates a luxury hotel and casino resort on the "Strip" in Las Vegas, Nevada, in close proximity to NYNY. Venetian leases space on its property to independently-owned restaurants, retail stores and other businesses, just as NYNY leases portions of its complex to Ark Las Vegas Restaurant Corporation ("Ark"), which operates multiple restaurants and fast food outlets in NYNY's food court. The Board's decision in this matter will have a significant impact on the property rights of Venetian and other hotel and casino resort owners – all of whom have a legitimate interest in preserving the atmosphere, integrity and security of their facilities, and in protecting their private property not only against handbillers, but also from persons such as smut peddlers, prostitutes, panhandlers, vagrants, loiterers, salespeople, political demonstrators and protesters of any kind. We hope this *amicus* brief will further assist the Board in deciding this important matter.

In our view, the result in this matter is controlled by the Supreme Court's decisions in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). NYNY sought to protect its private property rights by taking measures permitted under Nevada state law to preclude off-duty Ark employees from distributing union handbills to guests and customers on portions of NYNY's complex that are outside of Ark's leasehold. There is no suggestion that the handbillers were trying to communicate with other Ark employees, or that their only means of conveying their message was by trespassing on NYNY's private property. The handbillers were not NYNY employees, and NYNY evidently had no lawful means of exercising control over the handbillers independent of its private property rights.

Under these facts, the handbillers did not have the right under Section 7 of the Act and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), to conduct their union activities on portions of NYNY's private property outside of Ark's leasehold. Instead, under *Babcock* and *Lechmere*, NYNY's property right to exclude nonemployees from its premises must prevail.

A decision finding NYNY in violation of Section 8(a)(1) would impermissibly contradict the distinction between employees and nonemployees recognized in *Babcock* and resoundingly reaffirmed in *Lechmere*. It also would raise the specter of hotel and casino owners being required to allow all kinds of nonemployee handbillers into their lobbies, walkways and other areas of their private property where guests and customers congregate. Although the Board has previously deemed such areas of hotels and casinos to be "non-work" areas for purposes of analyzing *Republic Aviation* rights, it nevertheless would be substantially disruptive to hotel and casino employees – as well as guests, customers and prospective customers – if nonemployee handbillers were given unfettered access to such areas. It also would drastically limit, if not eliminate, the only lawful means hotel and casino owners have of controlling the activities of such nonemployees on their premises. These are among the important policy considerations that we respectfully submit the Board should consider in reaching its decision in this matter.

ARGUMENT

ARK EMPLOYEES DO NOT SHARE THE SAME SECTION 7 RIGHTS AS NYNY EMPLOYEES WHEN THEY DISTRIBUTE LITERATURE ON NYNY'S PREMISES OUTSIDE ARK'S LEASEHOLD, AND INSTEAD THEY SHOULD BE CONSIDERED THE SAME AS ANY OTHER NONEMPLOYEES.

A. NYNY Plainly Had The Right Under Nevada Law To Have Trespass Citations Issued To The Off-Duty Ark Employees After They Refused To Stop Handbilling On NYNY's Private Property.

As the D.C. Circuit has observed, it has long been "black-letter labor law that the Board cannot order employers to grant nonemployee union organizers access to company property

absent a showing that on-site employees are otherwise inaccessible through reasonable efforts." *ITT Industries v. NLRB*, 251 F.3d 995, 999 (D.C. Cir. 2001) ("*ITT Industries I*") (citing, *inter alia*, *Babcock*, 351 U.S. at 112, and *Lechmere*, 502 U.S. at 534). The "inaccessibility exception" to this general rule is "narrow" and applies only when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Babcock*, 351 U.S. at 112-13, *quoted in UFCW Local No. 880 v. NLRB*, 74 F.3d 292, 293 (D.C. Cir.), *cert. denied*, 519 U.S. 809 (1996).

Under this standard, "*the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists*" in order to gain access to the employer's private property, or that the employer's access rules discriminate against union solicitation. *Lechmere*, 502 U.S. at 535 (italics in original) (quoting *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)). The Ninth Circuit has held that given *Lechmere*'s "narrow construction of the exception to the employer's private property rights," the "inaccessibility exception" applies only "when the nonemployee picketers are trying to reach *employees*, not *customers*." *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 997-98 (9th Cir. 1992) (emphasis in original); *see* pp. 9-11, below.

The union's burden of proving this narrow inaccessibility exception is "heavy" and "rarely" satisfied. *Lechmere*, 502 U.S. at 535, 539. For example, in *Lechmere*, nonemployee union representatives attempted to organize employees at a retail store owned by Lechmere, Inc. *Id.* at 529. Because the targeted employees did not reside on Lechmere's property, the Supreme Court concluded that they were "presumptively not 'beyond the reach' ... of the union's message." *Id.* at 540 (citing *Babcock*, 351 U.S. at 113). To the contrary, the Court found that numerous "other alternative means of communication were readily available," including

"mailings, phone calls, ... home visits ... , ... signs or advertising." *Id.* "Because the union in [*Lechmere*] failed to establish the existence of any 'unique obstacles'" to communicating its message to employees, the Court held that "the Board erred in concluding that Lechmere committed an unfair labor practice by barring the nonemployee organizers from its property." *Id.* at 541 (quoting *Sears*, 436 U.S. at 205-06 n.41).

Likewise, in *Sparks Nugget*, the Ninth Circuit held that even if the inaccessibility exception could apply to activities directed at customers, the nonemployees in that case did not have a Section 7 right to picket or handbill on a hotel's private driveway around the back entrance that many customers used to enter the facility. As the court noted:

> ... [T]he intended audience – the general public – could be reached in other ways. The hotel is not the equivalent of an isolated mining camp – the picketers could stand at the front entrance and the perimeter of the property, they could communicate through advertisements or by sending mailings to tour companies, or they could communicate through billboarding. As in *Lechmere*, we must hold that because the targets of the union protest "do not reside on [the employer's] property, they are presumptively not beyond the reach of the union's message." ...

Sparks Nugget, 968 F.2d at 998.

The Board has repeatedly looked to state trespass laws in determining whether – and to what extent – the employer had a property interest that entitled it under *Lechmere* to exclude nonemployees from the property. *See, e.g.*, *Indio Grocery Outlet*, 323 N.L.R.B. 1138 (1997) (employer violated Section 7 where it had no property right under California law to prohibit nonemployee organizers from picketing and handbilling on its premises), *enf'd sub nom. NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999); *Bristol Farms*, 311 N.L.R.B. 437 (1993).

The instant case is governed by Nevada law, which gives property owners, including hotels and casinos such as NYNY, the express right to prohibit trespassers from picketing on their private property in the absence of a contrary order from a federal court or agency. NEV. REV. STAT. § 614.160. The Ninth Circuit in *Calkins* expressly noted that "Nevada state law

restricts [trespassory] picketing during the pendency of a labor dispute ... unlike California law, which recognizes a labor exception to California's criminal trespass laws." *Calkins*, 187 F.3d at 1094 n.8 (citations omitted). In addition, it is a misdemeanor under applicable Nevada law for any person to willfully go or remain "upon any land or in any building after having been warned by the owner or occupant thereof not to trespass." NEV. REV. STAT. § 207.200(1).

There is no dispute that the handbilling activities in this case occurred on NYNY's private property, and were undertaken by off-duty Ark employees in areas of the hotel-casino that were not leased to Ark – *i.e.*, the porte-cochere area in front of the complex, and outside of two of Ark's restaurants. The handbillers refused to leave after being warned by NYNY personnel that they were trespassing and were not allowed to distribute literature on NYNY's property. *New York New York Hotel & Casino*, 334 N.L.R.B. 762, 767-68 (2001) ("*New York New York I*"); *New York New York Hotel & Casino*, 334 N.L.R.B. 772 (2001) ("*New York New York II*"). In so doing, the off-duty Ark employees plainly violated Nevada trespass law, and NYNY indisputably had the right under Nevada law to exclude these Ark employees from its premises. *See S.O.C., Inc. v. The Mirage Casino-Hotel*, 23 P.3d 243, 246-51 (Nev. 2001) (hotel-casino acted lawfully in excluding commercial handbillers from its privately-owned sidewalk).

Accordingly, the off-duty Ark employees had no Section 7 right to distribute handbills on areas of NYNY's private property outside Ark's leasehold unless they could satisfy the "inaccessibility exception" under *Babcock* and *Lechmere*. But that exception is *per se* inapplicable here because the handbilling was directed at guests and customers, not Ark employees. *Sparks Nugget*, 968 F.2d at 997-98; *see* pp. 9-11, below. In any event, the Charging Party apparently has not attempted to come within the inaccessibility exception. Although the Union presumably determined that its organizing activities would be more effective if conducted

on NYNY property outside the complex's main entrance or in front of Ark's restaurants, the inaccessibility exception simply "does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective." *Lechmere*, 502 U.S. at 539.

There also appears to be no reason for the Board to accept the General Counsel's suggestion that it remand the case to the Administrative Law Judge for further evidence on the inaccessibility issue. Long before the handbilling activities in this case occurred, it was well-established as "black-letter labor law" that the Union bore a heavy burden of proving that the narrow inaccessibility exception under *Babcock* and *Lechmere* applies here. *ITT Industries I*, 251 F.3d at 999. The Union evidently failed to meet this burden, nor could it have done so pursuant to *Sparks Nugget*, 968 F.2d at 997-98.

B. The Fact That Ark Employees Work In Certain Portions Of NYNY's Premises, Without More, Does Not Make Them Employees Of NYNY Or Otherwise Give Them *Republic Aviation* Rights In Areas of The Hotel And Casino Outside Ark's Leasehold.

As the D.C. Circuit recognized, "a 'wholly different balance [is] struck when the organizational activity [is] carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests [are] there involved.'" *New York New York, LLC*, 313 F.3d at 587-88 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521-22 n.10 (1976)). "This difference is 'one of substance.'" *Hudgens*, 424 U.S. at 522 n.10 (quoting *Babcock*, 351 U.S. at 113, and citing *Republic Aviation*, 324 U.S. 793).

In *Republic Aviation*, the Supreme Court upheld the Board's finding that the employer violated Section 8(a)(1) by discharging an employee for organizational activities he conducted on the employer's property during lunch periods. The Court specifically approved the standard the Board had established for balancing employees' rights to self-organization against employers' rights to maintain workplace discipline and productivity, under which employees

may be precluded from organizing activities during work hours, but have the right to engage in such activities on their own time, including when they are in non-work areas on company property. *Republic Aviation*, 324 U.S. at 803 n.10. But in *Babcock*, the Court flatly held that *nonemployee* organizers are owed "no such obligation" and have no right to conduct organizing activities on the employer's property, except for the rare cases in which the narrow inaccessibility exception applies. *Babcock*, 351 U.S. at 113.

Although the General Counsel maintains that Ark's employees have *Republic Aviation* rights in those portions of NYNY leased by their employer, Ark (Gen. Counsel Posn. Stmt. at 25), that issue is irrelevant here because none of the handbilling occurred in such areas. Conversely, in order for Ark employees to have *Republic Aviation* rights in areas of the hotel and casino outside of Ark's leasehold, they would have to be deemed *employees of NYNY*. Such a conclusion is *precluded* by the express factual findings in both of the instant charges before the Board. *New York New York I*, 334 N.L.R.B. at 767 ("All employees working within Ark's restaurants are employed exclusively by Ark ...."); *New York New York II*, 334 N.L.R.B. at 772 (handbillers "were employed by Ark and not by the Respondent").

It is beside the point for Charging Party to note that NYNY is an "employer" within the meaning of Section 2(2) of the Act, and that there may be circumstances under which "a statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own." *Hudgens*, 424 U.S. at 510 n.3 (cited in Posn. Stmt. of Ch. Party at 14). For example, an employer may violate the Act by interfering with organizing activities of nonemployees that occur on property the employer does not own or lease, *UFCW Local 400 v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000), or where state law does not give the employer the right to exclude nonemployee organizers from the employer's private property. *Indio Grocery Outlet*, 323

N.L.R.B. at 1138 (California law). But where, as in Nevada, employers such as NYNY have a state-law right to exclude nonemployee organizers from the employer's property, nonemployees do not have Section 7 rights *on the employer's property*, pursuant to *Lechmere* and *Babcock*. Because Ark's employees are plainly "nonemployees" with respect to those areas of NYNY outside of Ark's leasehold, they quite simply do not have *Republic Aviation* rights in such areas.

C. As To Areas Of The Hotel-Casino Outside Ark's Leasehold, Ark Employees Are Invitees With Rights Inferior To Those Of NYNY Employees And The Public In General.

One of the questions the D.C. Circuit posed for the Board is whether Ark employees are "invitees of some sort but with rights inferior to those of NYNY's employees?" *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002). At least with respect to those portions of NYNY premises outside Ark's leasehold – *i.e.*, where all of the handbilling in this case took place – Ark employees' rights are manifestly inferior not only to those of NYNY employees, but also to those of the general public.

NYNY expressly permits Ark employees to patronize the complex's casino and restaurants and use its public entrances, just like other members of the general public. Ark employees also are subject to NYNY's policy against solicitation of any kind on NYNY property. But Ark employees are under *two additional restrictions* – they may not wear their work uniforms during off-duty visits, and they are categorically prohibited at all times from patronizing NYNY's bars. *New York New York I*, 334 N.L.R.B. at 767-68. Presumably, neither of these two restrictions applies to the public at large.

Thus, not only do Ark employees work exclusively in those areas of NYNY that are leased by Ark, but NYNY has exercised its rights as a property owner to impose more restrictions on the access of Ark employees to NYNY's casino and restaurant facilities than those

that apply to the general public – including, hypothetically, any potential union organizers who are not employed by Ark or NYNY. Since such nonemployees have no Section 7 rights on NYNY's property outside Ark's leasehold under *Babcock* and *Lechmere*, it would be anomalous to find that Ark employees' rights are somehow superior in this respect.

D. The Fact That Ark's Employees Were Off-Duty And Directed Their Handbilling At Guests And Customers, Not Other Employees, Further Confirms That They Had No Section 7 Right To Conduct The Handbilling In Areas of NYNY Outside Of Ark's Leasehold.

The D.C. Circuit suggested that the Board compare the instant case on remand to *UFCW Local No. 880*, 74 F.3d at 298, in which the D.C. Circuit upheld the Board's ruling that property owners lawfully restricted access to nonemployee union representatives who sought to distribute literature to prospective customers of the property owners' stores. The unions in that case sought to distinguish *Babcock* and *Lechmere* on the grounds that the nonemployees in those cases were attempting to organize employees, rather than communicate with customers. *UFCW Local No. 880*, 74 F.3d at 293. But the D.C. Circuit found that this distinction only detracted from the unions' position, and construed Supreme Court precedent as "clearly establish[ing] that, as against the private property interest of an employer, union activities directed at consumers represent *weaker interests under the NLRA* than activities directed at organizing employees." *Id.* (emphasis added), *cited in New York New York, LLC*, 313 F.3d at 590.

The D.C. Circuit specifically quoted the Supreme Court's observation that "[s]everal factors make the argument for protection of trespassory area-standards picketing as a category of conduct less compelling than that for trespassory organizational solicitation...." *UFCW Local No. 880*, 74 F.3d at 298 n.5 (quoting *Sears*, 436 U.S. at 206 n.42). The D.C. Circuit also quoted the Supreme Court's holding that "the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is

both *temporary and minimal*." *Id.* (emphasis added) (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972)). The D.C. Circuit's holding in *UFCW Local No. 880* is in accord with the Ninth Circuit's holding that *Babcock*'s inaccessibility exception does not apply to picketing targeted at customers, rather than employees. *Sparks Nugget*, 968 F.2d at 997-98.

In the instant case, although the Union was in the process of attempting to organize Ark employees working on NYNY property, none of the activities in question actually involved communications with other Ark employees – which is not surprising, given that none of the handbilling took place within Ark's leasehold.[1] Instead, the handbills "bore an area standards message" and were directed at guests and customers entering NYNY through the porte-cochere and in front of two Ark restaurants on NYNY premises. *New York New York I*, 334 N.L.R.B. at 762; *New York New York II*, 334 N.L.R.B. at 772. Moreover, all of the handbillers were off-duty Ark employees, and most or all were dressed in street clothes rather than work uniforms – thus suggesting that they came to NYNY for the specific and sole purpose of distributing handbills to customers. *New York New York I*, 334 N.L.R.B. at 768. Thus, in both their physical appearance

---

[1] For this reason, the General Counsel's assertion "that Ark employees have *Republic Aviation* rights to engage in organizing activities *among themselves* while they are on NYNY property" (Gen. Counsel Posn. Stmt. at 18) has nothing to do with the facts of this case, since no such activities are at issue here. In any event, this proposition is not supported by the case the General Counsel cites in this respect, *Fabric Services*, 190 N.L.R.B. 540 (1971). The Board in *Fabric Services* found that a cotton manufacturing company violated Section 8(a)(1) by demanding that a telephone repairman remove a union insignia as a condition of working on the company's property. But the Board's Trial Examiner opined that his view of the case "*would have been different had it involved a prohibition against employee solicitation or other organizational activity*, instead of a prohibition against the wearing of union insignia," because the latter may not be regulated absent special circumstances. *Fabric Services*, 190 N.L.R.B. at 543 n.11 (emphasis added). Although the Trial Examiner specifically noted that the property owner could have lawfully ordered the repairman to refrain from organizing the owner's own employees, *id.*, there was no occasion for the Trial Examiner to discuss the scenario of the repairman organizing other telephone company employees, because the repairman was the only such employee on site on the day in question. *Id.* at 541. Thus, *Fabric Services* is factually and legally inapposite to the issues presented here –especially with respect to whether Ark employees have any *Republic Aviation* rights in areas of NYNY premises *outside Ark's leasehold.*

and their reason for being on NYNY's premises, these off-duty Ark employees were materially indistinguishable from other nonemployees visiting NYNY's complex.

These facts further illustrate why Ark's employees' Section 7 rights are not superior to those of other nonemployees of NYNY with respect to handbilling on NYNY's premises directed at guests and customers. As *UFCW Local No. 880*, *Sparks Nugget*, *Sears* and *Central Hardware* make clear, the Section 7 issues in this case are governed by *Babcock* and *Lechmere*, not *Republic Aviation*.

E. The Instant Case Is Distinguishable From *ITT Industries II* And *Hillhaven*, Neither Of Which Involved Nonemployees Of The Property Owner.

In a letter to the Board dated July 6, 2005, the Union loosely suggests that this case should be controlled by *ITT Industries v. NLRB*, 413 F.3d 64 (D.C. Cir. 2005) ("*ITT Industries II*"), where the D.C. Circuit enforced the Board's order on remand from *ITT Industries I* which found that the employer, ITT, violated Section 8(a)(1) by refusing to permit employees from one ITT plant to distribute pro-union handbills in the parking lot of another ITT facility. But *ITT Industries II* is factually dissimilar to the instant matter, as is the Board's decision in *Hillhaven Highland House*, 336 N.L.R.B. 646 (2001), which was discussed extensively in *ITT Industries II*.

It is true that the D.C. Circuit found that its decision in *ITT Industries I* "control[led] the outcome" of NYNY's petition for review of the Board's initial orders in the instant matter. *New York New York, LLC*, 313 F.3d at 586. But that was because the Board's decisions in both cases suffered from *a similar analytical flaw* – they failed to sufficiently account for the Supreme Court's holding in *Lechmere* which reaffirmed the principle that "employers may restrict nonemployees' organizing activities on employer property." *New York New York, LLC*, 313 F.3d at 588 (citing *ITT Industries I*, 251 F.3d at 1002-03).

In contrast to the instant matter, the handbillers in the *ITT Industries* matter were employed by the property owner, although they did not work on the same site where they conducted their handbilling activities. The D.C. Circuit held that "the Supreme Court's access cases" required the Board to "take account of an offsite employee's trespasser status" in determining whether Section 7 gives "off-site employees some measure of free-standing, nonderivative organizational access rights." *ITT Industries I*, 251 F.3d at 997. On remand, the Board again found that the off-site employees had Section 7 rights on ITT's property, and the D.C. Circuit held that the Board reasonably interpreted the Act in its remand decision, which incorporated its earlier decision in *Hillhaven* involving similar issues pertaining to off-site employees. *ITT Industries II*, 413 F.3d at 70.

But the D.C. Circuit in *ITT Industries II* repeatedly emphasized the differences between off-site employees and nonemployees. It explained that "the 'distinction "of substance"' discerned in *Lechmere* and *Babcock* was 'between the union activities of employees and nonemployees,' *Lechmere*, 502 U.S. at 537, not between those of on- and off-site employees[.]" *ITT Industries II*, 413 F.3d at 69. The court also quoted the Board's observation in *Hillhaven* that off-site employees are "... employees of the employer who would exclude them from its property," and thus "are different in important respects from persons who themselves have no employment relationship with the particular employer." *Hillhaven*, 336 N.L.R.B. at 648, *quoted in ITT Industries II*, 413 F.3d at 70. The court made clear that these distinctions were critical to its determination that the Board's application of the Act to off-site employees was reasonable:

> ... "The existence of an employment relationship," the Board said, "means that *the employer has a lawful means of exercising control over the offsite employee* (even regarded as trespasser), *independent of its property rights.*" ... That ability to exercise control provides a reasonable basis for the Board's conclusion that *permitting access by off-site employees trenches less seriously on the employer's property interests than would permitting access by nonemployees.* As the Board

> explained: "Surely it is easier for an employer to regulate the conduct of an employee – as a legal and a practical matter – than it is for an employer to control a complete stranger's infringement on its property interests. The employer, after all, controls the employee's livelihood...."

ITT Industries II, 413 F.3d at 73 (emphasis added) (quoting *Hillhaven*, 336 N.L.R.B. at 649).

By comparison, NYNY's *only* apparent means of exercising control over Ark employees is by virtue of its property rights in general, and its lease relationship with Ark in particular. The record reflects that NYNY cannot hire, promote, discharge or discipline Ark employees. Instead, when Ark employees conducted handbilling on NYNY's premises in violation of NYNY's non-solicitation policy, NYNY's *only recourse* was the same as it would have been for any other nonemployee trespassers – summon the police to escort the handbillers from the premises and issue trespass citations. *New York New York I*, 334 N.L.R.B. at 768; *New York New York II*, 334 N.L.R.B. at 777. If NYNY is found to have violated Section 8(a)(1) under these facts, hotel and casino owners would be left with little or no legal recourse to control the activities of nonemployees in such cases. We respectfully submit that this is not the law, nor should it be.

F. The Property Rights Of Hotel And Casino Owners Could Be Severely Diminished, And Their Operations Unduly Disrupted, If They Are Forced To Allow Nonemployee Handbillers On Their Premises.

The Board previously found that the porte-cochere and the areas in front of the restaurants were "nonwork" areas where NYNY could not lawfully prohibit the Ark employees from engaging in handbilling. *New York New York I*, 334 N.L.R.B. at 763; *New York New York II*, 334 N.L.R.B. at 774. The D.C. Circuit did not specifically direct the Board to reconsider the "nonwork" area issue. *See New York New York, LLC*, 313 F.3d at 590. Although we assume for purposes of this *amicus* brief that the Board will not reconsider the "nonwork" area issue, we respectfully submit that the Board should nevertheless consider the disruptive and adverse impact on the business of NYNY and other hotels and casinos that would result if NYNY is

compelled to allow handbilling in its front entrance and in the walkways near its restaurants, not to mention other public areas of the hotel-casino.

Among other things, a Board decision giving Ark employees the right to conduct handbilling throughout "nonwork" areas of the hotel-casino could well lead to demands for similar access by other types of solicitors and protesters – including political demonstrators, salespeople, panhandlers and smut peddlers. The property owner could hardly defend itself against such demands by arguing that union organizers have special property access rights. To the contrary, the Supreme Court and D.C. Circuit have recognized that labor picketing exceptions to general laws against picketing constitute "*content discrimination in violation of the First Amendment.*" *Waremart Foods v. NLRB*, 354 F.3d 870, 875 (D.C. Cir. 2004) (emphasis added) (construing California law as allowing labor organizing on private property "only to the extent that California permits other expressive activity to be conducted on private property"); *see Carey v. Brown*, 447 U.S. 455, 466 (1980) (labor exception to state law prohibiting picketing of residences was unconstitutional); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (same result as to local ordinance prohibiting picketing near schools during school hours). It is not difficult to imagine the devastating affects on the atmosphere, integrity and security of hotels and casinos throughout the nation that would result if these properties were required to grant access to countless solicitors and protesters representing a broad array of causes.

These important policy considerations further demonstrate why NYNY's property rights in the instant matter should be dispositive under *Babcock* and *Lechmere*, and that persons not employed by NYNY – including Ark employees – do not have the right to conduct union handbilling on NYNY's private property, particularly in areas outside Ark's leasehold.

CONCLUSION

Venetian fully supports NYNY's position in these consolidated cases. Under *Babcock* and *Lechmere*, NYNY did not violate the Act by taking measures permitted under Nevada state law to preclude off-duty Ark employees from distributing union handbills to guests and customers on portions of NYNY's complex that are outside of Ark's leasehold. A contrary decision would severely infringe upon the private property rights of NYNY and other hotels and casinos, most notably by drastically limiting their property-based means of exercising control over nonemployee handbillers in similar cases. This is contrary to the balance between private property rights and Section 7 rights that the Supreme Court clearly delineated in *Babcock* and *Lechmere*. Accordingly, the Complaints in these consolidated cases should be dismissed.

DATED: October 2, 2007.

Respectfully submitted,

BALLARD, ROSENBERG,
GOLPER & SAVITT LLP
Richard S. Rosenberg
John J. Manier
10 Universal City Plaza, Sixteenth Floor
Universal City, California 91608-1097
Tel: (818) 508-3700 • Fax: (818) 506-4827
E-Mail: rrosenberg@brgslaw.com,
jmanier@brgslaw.com

By _____
John J. Manier
Attorneys for Amicus
VENETIAN CASINO RESORT, LLC

REQUEST TO PARTICIPATE AT ORAL ARGUMENT

Counsel for *Amicus* Venetian Casino Resort, LLC hereby respectfully asks the Board for permission to participate at the Oral Argument in this matter, scheduled for November 9, 2007.

DATED: October 2, 2007.

Respectfully submitted,

BALLARD, ROSENBERG,
GOLPER & SAVITT LLP
Richard S. Rosenberg
John J. Manier
10 Universal City Plaza, Sixteenth Floor
Universal City, California 91608-1097
Tel: (818) 508-3700 • Fax: (818) 506-4827
E-Mail: rrosenberg@brgslaw.com,
jmanier@brgslaw.com

By _____
John J. Manier
Attorneys for Amicus
VENETIAN CASINO RESORT, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 2, 2007, I served a copy of the foregoing **PRE-ARGUMENT BRIEF OF AMICUS VENETIAN CASINO RESORT, LLC IN SUPPORT OF POSITION OF RESPONDENT NEW YORK NEW YORK LLC, d/b/a NEW YORK NEW YORK HOTEL AND CASINO; REQUEST TO PARTICIPATE AT ORAL ARGUMENT** by making arrangements with each party to deliver a true and correct copy by the next business day as follows:

Counsel for the Respondent (Employer)

Gary C. Moss, Esq.
DLA Piper USLLP
3960 Howard Hughes Pkwy, Suite 400
Las Vegas, Nevada 89169
Via Facsimile: 702-737-1612

Counsel for Charging Party

Michael T. Anderson, Esq.
Davis, Cowell & Bowe, LLP
8 Beacon Street, 4th Floor
Boston, Massachusetts 02108
Via E-Mail (PDF Version): michael.t.anderson@verizon.net

General Counsel for the NLRB

Michael J. Karlson, Regional Attorney
Region 28, National Labor Relations Board
2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Via Facsimile: 602-640-2178
Via E-Mail (PDF Version): michael.karlson@nlrb.gov

Karen J. Thomson

Karen J. Thomson