No. 12-451

IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK, NEW YORK, LLC DBA NEW YORK NEW YORK HOTEL & CASINO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION, LOCAL 165,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The D.C. Circuit

BRIEF OF *AMICI CURIAE* AMERICAN HOTEL & LODGING ASSOCIATION AND THE COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF THE PETITION

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INTERESTS OF THE *AMICUS* [1]

The American Hotel & Lodging Association (AHLA) is the sole national association representing all sectors and stakeholders in the lodging industry, including more than 11,000 individual hotel property members, hotel companies, student and faculty members, and industry suppliers. AHLA provides members with national advocacy on Capitol Hill, public relations and image management, education, research and information and other value-added services to ensure a positive business climate for the lodging industry.

The Coalition for a Democratic Workplace ("CDW") consists of over 600 member organizations and employers, who in turn represent millions of additional employers, and gives its members a voice on a number of labor issues. These issues include the protection of private property rights of employers in response to demands for access to such property by non-employees. The vast majority of CDW's

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[1] Pursuant to Supreme Court Rule 37.2, the *Amici* state that all parties have consented to the filing of this brief, and letters evidencing such consent are being filed with the Court. Counsel of record for all parties have also consented to waive the requirement of receiving notice at least 10 days prior to the due date for this brief, and neither party has been prejudiced thereby. Pursuant to Supreme Court Rule 37.6, the *Amici* further state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

members are covered by the NLRA or represent organizations covered by the NLRA.

The *Amici* are filing this brief in support of the Petition in order to alert the Court to the serious disruptive impact of the decisions of the Board and the Court of Appeals on the right of employers to protect their private property against intrusions by non-employees. As explained in the Petition, the decisions of the Board and the Court of Appeals are directly in conflict with this Court's holdings denying non-employee access rights to private property under the Act. *Lechmere, Inc. v. NLRB*, 502 U.S. 537 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Absent restoration of the *Lechmere* standard, employers in the hotel industry and in many other industries will no longer be able to control access to their own property, to their considerable detriment.

SUMMARY OF ARGUMENT

The Board's new standard granting non-employees (*i.e.*, subcontractors' employees) access rights to private property has greatly diminished the protections of this Court's *Lechmere* holding, depriving employers throughout the country of their previously settled rights to prevent trespasses by non-employees. The practical implications of this change are enormous, affecting many industries, employers, and non-employees. As a result of the Board's decision and its progeny, the Court's "bright line" *Lechmere* test has become riddled with

exceptions that are swallowing the rule of non-employee trespass.

Both the Board and the Court of Appeals in this case have acted under the false premise that this Court's holdings in *Lechmere* and *Babcock & Wilcox* left open the possibility that some non-employees (those who work for subcontractors) should have greater access rights to private property than other non-employees. In reality, this Court could not have been more clear in its holding that non-employees have *no* access rights to private property owned by someone other than their own employers, absent proof of inaccessibility not involved in this case.

Just as was the case prior to *Lechmere*, the Board has devised a balancing test in which employer property rights are effectively "balanced" out of existence, in favor of granting access to non-employees. It is therefore necessary for this Court to reaffirm its previous holding that non-employees have no rights to trespass on private property belonging to employers other than their own. For these reasons, the *Amici* ask the Court to grant the Petition and reverse the decisions of the D.C. Circuit and the Board.

REASONS FOR GRANTING THE PETITION

I. THE CONFLICT BETWEEN THE BOARD'S NEW ACCESS STANDARD AND THIS COURT'S HOLDING IN *LECHMERE* PRESENTS AN ISSUE OF GREAT IMPORTANCE.

A. The Board's New Access Standard Greatly Diminishes The Property Rights Of Enormous Numbers Of Businesses Across Many Industries, In Direct Conflict With This Court's Prior Holdings.

The issues presented by the Petition affect countless numbers of employers in virtually every industry in the nation, many of whom are represented by the *Amici*. A significant majority of businesses are based on relationships between employers who own property, on the one hand, and independent subcontractors or tenants who only enter that property subject to the primary owner's conditions. Under such circumstances, it is well settled that employees of independent subcontractors or tenants are not the employees of the property owner. Until recently, it was also well settled that subcontractor/tenant employees had no greater rights to trespass on a property owner's private premises than any other non-employees.

All that has changed as a result of the Board's decision in this case and other recent similar

holdings.[2] While expressly acknowledging that the handbillers in this case were at no time employed by the Petitioner hotel/casino, the Board nevertheless declared that these non-employees were entitled to trespass on the Petitioner's private property under a "balancing" test highly reminiscent of the standard that this Court rejected in *Lechmere*.[3] The *Amici* fully support the Petitioners' legal arguments against the Board's new standard; but the *Amici* are submitting this brief primarily in order to make the Court aware of the immense practical implications of the Board's decision and just how thoroughly the new standard eviscerates *Lechmere*'s holding.

At the outset, it must be recognized that this decision affects not only hotel/casinos, and not only most of the other types of hotels and resorts who are represented by *Amicus* AHLA, but also shopping malls, restaurants, theaters, retail stores, and other places of public accommodation who frequently enter into access agreements with subcontractors and subtenants. Beyond that, the construction industry functions almost exclusively through networks of agreements between property owners, general contractors and subcontractors, each of whom has long been considered to be independent of the other with respect to their employees. Many other industries represented by *Amicus* CDW likewise feature large numbers of subcontractors who may

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[2] See, e.g., *Reliant Energy*, 357 NLRB No. 172 (Dec. 30, 2011); *Simon DeBartolo Group*, 357 NLRB No. 157 (Dec. 30, 2011); *Nova Southeastern University*, 357 NLRB No. 74 (Aug. 26, 2011).

[3] *See Jean Country*, 291 NLRB 11 (1988), overruled by *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537-8 (1992).

enter onto an owner's private property for limited purposes, such as cleaning and maintenance contractors, security contractors, marine contractors, food service concessionaires, and temporary agencies of all kinds.

Many of the property owners in the industries described above seek to create a controlled environment on their property for the benefit of their intended customers and guests. Maintaining the right to control the use of their property by invitees, including tenants and subcontractors' employees, is essential to the owners' businesses and has long been recognized as their common law right. *See* Thompson on Real Property ¶ 64.04(a) (1994) (recognizing the settled principles of property owners' right of control over invitees under the common law). Yet such control cannot be maintained if every employee of a tenant or subcontractor becomes vested with rights of access to the property of someone other than their own employer, to which they have become entitled under the Board's holdings.

Under the Board's new standard, any property owner who agrees to lease out space, or who agrees to entry by independent contractors, loses the right to control the limits of such agreements with regard to the use of the owner's property. In particular, the employees of the tenants or subcontractors, even though they are not the employees of the property owner, are now given access by the Board to the owner's property in most circumstances, over the owner's objection. As further shown below, no fair

reading of this Court's decisions in *Lechmere* and *Babcock & Wilcox* allows for this result.

B. The Board Acted Beyond The Scope Of Its Authority By Carving Out An Exemption From This Court's *Lechmere* Standard.

The Board and the Court of Appeals in this case acted under the false premise that the *Lechmere* opinion somehow left open the possibility that some non-employees (those who work for subcontractors) could have greater access rights to private property than other non-employees. The Board and the appeals court's reading of *Lechmere* cannot be squared with the language of the opinion itself. In reality, this Court did not leave any room for the Board to differentiate between categories of non-employees. The Court could not have been more clear in its holding that non-employees have *no* access rights to private property owned by someone other than their own employers, absent proof of inaccessibility not involved in this case. *See* 502 U.S. at 537 (holding that the NLRA "confers rights upon employees, not nonemployees, and … employers may restrict nonemployees' organizing activities on employer property.").

The Board's error was built on another false premise adopted by the Court of Appeals in its 2002 remand decision, *i.e.*, that the question of whether any categories of non-employees should have access rights in spite of *Lechmere*'s holding remained within the discretion of the Board to decide. *See New York New York Hotel & Casino v. NLRB (NYNY I),*

313 F. 3d 585, 588 (D.C. Cir. 2002). In truth, once the appeals court found in *NYNY I* that the handbillers were not employees of the Casino, which they obviously were not, then the case should have ended at that point under the plain holding of *Lechmere*. No proper purpose was served by remanding to the Board over a decade ago for any further determination.[4]

As the Petitioner has correctly argued, because *Lechmere* was decided under *Chevron* Step I, this Court's decision left no room for agency discretion to reinterpret Section 7 of the NLRA with regard to non-employee access. *See* Petition at 12. As the Court held in *Lechmere* in reference to the previous *Babcock & Wilcox* decision: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Citing Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).[5]

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[4] The D.C. Circuit's remand was based on a clearly erroneous finding that "no Supreme Court case" had decided whether "the term 'employee' extends to the relationship between an employer and the employees of a contractor working on its property." *Id.* at 590. In fact, the Supreme Court long ago settled this issue in the case of *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 690 (1951)(finding it "well established" that the relationship between subcontractors and those parties with whom they subcontract does not "make employees of one the employees of the other.").

[5] See also *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("[A] court's interpretation of a statute trumps an agency's under the doctrine of *stare decisis* … if the prior court holding 'determined

The present case mirrors the situation that faced the Court in *Lechmere*, and the same result (reversal of the Board) should occur.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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a statute's clear meaning.'" (*Citing* both *Maislin Industries* and *Lechmere*).