UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S INC.,	)	
and	)	CASE 30-CA-17185
MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO	)	

BRIEF OF *AMICI CURIAE* AMERICAN HOSPITAL ASSOCIATION AND AMERICAN SOCIETY FOR HEALTHCARE HUMAN RESOURCES ADMINISTRATION IN SUPPORT OF THE RESPONDENT EMPLOYER

Melinda Reid Hatton
Lawrence Hughes
AMERICAN HOSPITAL ASSOCIATION
Liberty Place, Suite 700
325 Seventh Street, N.W.
Washington, DC 20004
Telephone: (202) 626-2346
Facsimile: (202) 626-2255

F. Curt Kirschner, Jr. (counsel of record)
G. Roger King
Christopher T. Scanlan
Ritu Kaur Singh
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

In response to the Board's Notice and Invitation to File Briefs dated November 12, 2010, the American Hospital Association ("AHA") and the American Society for Healthcare Human Resources Administration respectfully submit this brief as *amici curiae* in support of Respondent.

STATEMENT OF INTEREST

The AHA is a national not-for-profit association that represents the interests of approximately 5,000 hospitals, health care systems, networks, and other health care providers, as well as 37,000 individual members. It is the largest organization representing the interests of the Nation's hospitals. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed.

The American Society for Healthcare Human Resources Administration ("ASHHRA") of the AHA is the Nation's only membership organization exclusively dedicated to meeting the professional needs of human resources leaders in health care. Founded in 1964, ASHHRA represents more than 3,400 human resources professionals across the nation. ASHHRA is governed by a 13-member board of directors, four standing committees, and more than 45 affiliated chapters who are all committed to enhancing the profession and moving forward toward one common goal – excellence in health care human resources.

Most of the hospitals that belong to the AHA are employers subject to the National Labor Relations Act (the "Act").[1] Many member hospitals interact frequently with organized labor, in circumstances that range from long-standing collective bargaining relationships to initial organizing campaigns. In addition, third-party work at hospital campuses (such as construction)

[1] Approximately 22 percent of the AHA's member hospitals are government-owned and are therefore covered by separate labor relations laws.

sometimes attracts union secondary activity, which can include boycott appeals and derogatory statements about the care delivered in the targeted hospital.

The AHA, ASHHRA and their members share the same general interest that all employers have in protecting their property rights, but hospitals also have a special concern with legal developments that permit nonemployee trespassing. Hospitals attempt to maintain a tranquil environment that promotes healing by patients. Disruptions to that tranquility affect patients and may upset the patients' families and visitors. They may even interrupt the delivery of care. Thus, America's hospitals are especially interested in the potential impact that the Board's interpretation of the Act may have on employers' ability to limit access to their premises by nonemployee union representatives.

Hospitals also have expanded their roles beyond traditional delivery of care to patients to encompass broader initiatives that, consistent with their mission, promote health and wellness and other important benefits in their communities. Hospitals frequently provide space for activities – either under their own initiative or in partnership with community groups – that promote health and wellness, including hosting support groups and raising funds for health-related causes. Naturally *amici* and their members are concerned about any interpretation of the Act that could discourage these activities, such as by equating them with nonemployee union trespassing.

SUMMARY OF ARGUMENT

The AHA and ASHHRA oppose as unworkable the broad definition of property access "discrimination" stated in *Sandusky Mall Co.*, 329 NLRB 618, 623 (1999), *enf. denied*, 242 F.3d 682 (6th Cir. 2001). Instead, the more appropriate standard is that articulated in *Register Guard*, 351 NLRB 1110 (2007), *enf. den'd on other grounds*, 571 F.3d 53 (D.C. Cir. 2009).

In addition to general concerns about the *Sandusky Mall* standard applicable to all employers, it is uniquely impracticable for hospitals, for at least two reasons.

First, hospitals have long been recognized by both the Board and the courts to have a special patient-care mission that can be harmed by unchecked solicitation and distribution. Most notably, the Supreme Court has affirmed the importance of a tranquil environment in a hospital and the need to avoid unnecessary disruptions caused by organizational activities. To that end, the Court has upheld restrictions on solicitations and distribution – *even among hospital employees* – and has further stated that rules restricting appeals to patients and visitors would be justified by patient care concerns. To the extent that *Sandusky Mall* requires hospitals to "open the door" to trespassory union activities without regard to its impact on patient care, it conflicts with binding precedent.

Second, the *Sandusky Mall* analysis assumes that an employer is free to permit or prohibit any and all solicitation and distribution by outsiders and, therefore, must assume the risk of opening the door to organizational activities if it permits any third-party solicitation or distribution. Whatever the truth of this view as applied to other business sectors, it has no bearing on healthcare institutions. Hospitals' mission of providing health care long ago expanded beyond direct patient service to a variety of activities that promote health and well-being in the community. Unfortunately, the *Sandusky Mall* test would appear to give little to no attention to the *criteria* an employer (such as a hospital) applies in permitting third-party groups to solicit and distribute on its premises, and whether those criteria – rather than a blanket assumption of arbitrariness or anti-union animus – might explain why a hospital would choose to open its doors to those activities. And, if permitting charitable solicitations for health causes or allowing support groups to meet on campus is viewed as "opening the door" to union canvassing,

then hospitals are faced with a dilemma: either close their doors to important activities that benefit their communities, or permit unfettered union access to their campuses. By contrast, a *Register Guard* analysis would allow hospitals to distinguish between the activities, and, accordingly, is much more appropriate in analyzing claims relating to nonemployee union access.

Finally, we urge the Board, regardless of its holding in the instant case, to reaffirm its prior precedent recognizing that certain healthcare-related activities at hospitals do not open the door to union organizational activities.

ARGUMENT

I. THE DISCRIMINATION TEST OUTLINED IN THE *REGISTER GUARD* DECISION IS THE APPROPRIATE TEST TO APPLY IN THIS CASE

The AHA and ASHHRA urge that the Board adopt, for nonemployee property access discrimination claims, the same analysis as it adopted in *Register Guard* for claims of unlawful discrimination in accessing employer property. Under that analysis, an employer is permitted to exclude nonemployee union trespassers unless the employer engages in "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Id.* at 1119. Thus, an employer would not be prohibited "from drawing lines on a non-Section 7 basis" that regulate access by nonemployees. *Id.*

We fully concur with the legal analysis provided by the HR Policy Association ("HRPA") and the Society for Human Resources Manamagent ("SHRM") in support of this standard, and therefore will not repeat that analysis here. Instead, we will now turn to the reasons why adherence to the *Sandusky Mall* standard is especially harmful to hospitals, and why the *Register Guard* standard would better fit the special needs of hospitals.

II. SPECIAL CONSIDERATIONS APPLY TO ORGANIZATIONAL ACTIVITY IN HOSPITALS

As the U.S. Supreme Court, other federal courts, and the Board itself have long recognized, hospitals have a compelling interest in providing patients, their families, and friends with an environment conducive to the highest quality of medical care. Because of hospitals' patient-care mission, the law is clear that even organizational activity among employees themselves is presumptively harmful and may be completely banned in areas of a hospital where patients are most likely to witness such activities. It necessarily follows that solicitation conducted by nonemployees – particularly solicitation directed at hospital patients – should enjoy even less protection under the Act.

A. Protection Of Patient Care Has Long Served To Justify Special Restrictions On Organizational Activity In A Hospital Setting

Twenty-five years ago, the Supreme Court recognized that "'the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function.'" *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 495 (1978) (quoting *St. John's Hosp. and School of Nursing, Inc.*, 222 NLRB 1150, 1150 (1976)). That is so because:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activities, and where the patient and his family – irrespective of whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783 n.12 (1979) (quoting *Beth Israel*, 437 U.S. at 509 (Blackmun, J., concurring in judgment)).

In *Beth Israel*, the Court concluded that hospitals' focus on patient care justified the adoption of a unique set of rules to govern employee solicitation and distribution policies in

healthcare settings. Under these rules, a hospital may ban all solicitation in "strictly patient care areas" – even employee-to-employee communications – because any solicitation or distribution in those areas is presumptively unsettling to patients. In all other areas the hospital must show that the solicitation or distribution is likely to disrupt patient care or disturb patients. *Beth Israel*, 437 U.S. at 495. In reversing the Board in the later *Baptist Hospital* case, the Supreme Court held that "immediate patient care areas" must be deemed to include not only patient rooms and treatment or procedure areas, but also corridors and sitting rooms on patient floors. 442 U.S. at 789-90.

The Court advised in *Beth Israel* – and repeated verbatim in *Baptist Hospital* – that still other restrictions on "organizational activities" also might be appropriate: "Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar." *Beth Israel*, 437 U.S. at 508, *quoted in Baptist Hospital,* 442 U.S. at 790. To that end, the Court urged the Board to consider the needs of patients when assessing other restrictions on organizational activity. *Id.*

Indeed, in *Beth Israel*, the Court noted two types of additional rules that could survive scrutiny under the Act, since they would be narrowly tailored to avoid disturbance of patients. First, a policy forbidding employee solicitation of and distribution to *nonemployees* could be permissible, regardless of where those activities occur on a hospital's premises. *See id.* at 503 & n.23 (stating that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients" and suggesting such a rule might be permitted even in areas where employees could not be restricted from soliciting each other for purposes of union organizing). Similarly, a rule prohibiting leaving organizational

literature on a table could be justified, since it would accommodate a hospital's "legitimate desire to avoid having potentially upsetting literature read by patients." *Id.*[2]

B. The Risk That Union Activities May Disturb Patients Justifies Restrictions On Solicitation And Distribution, Particularly Solicitation And Distribution Conducted By And Directed At Nonemployees

It is because of hospitals' patient-care mission that the NLRB's rules governing hospital solicitation and distribution policies are already different from those governing other employers. The Board has determined – with the Supreme Court's approval – that hospitals can forbid employees from soliciting or distributing to other employees in patient-care areas because of the likelihood that merely witnessing such activity "'might be upsetting to the patients.'" *Beth Israel*, 437 U.S. at 495 (quoting *St. John's Hosp.*, 222 NLRB at 1150). It necessarily follows from this reasoning that hospitals should also be able to prohibit solicitation or distribution of materials to patients and their families and visitors – by definition a far more intrusive experience than witnessing employee-to-employee solicitation. This is clearly why the *Beth Israel* Court endorsed "a rule forbidding any distribution to or solicitation of nonemployees" as a "less restrictive" means of balancing patients' privacy and employees' speech interests in a nonpatient-care setting, where all solicitation and distribution activities are not automatically prohibited. Id. at 503 n.23; s*ee also Brockton Hosp. v. NLRB*, 294 F.3d 100, 104 (D.C. Cir. 2002) (citing footnote 23 with approval); *A.W Schlesinger Geriatric Ctr., Inc.*, 263 NLRB 1337, 1341 (1982) (same).

---

[2] The passage of time has also brought increased attention to other reasons why hospitals must control access to their premises. To take one example, Congress has, since *Beth Israel*, passed the Health Insurance Portability and Accountability Act (HIPAA), which directed the implementation of the HIPAA Privacy Rule. Under the Privacy Rule, hospitals are require to adopt and implement policies and procedures to protect patient protected health information from any intentional or unintentional use or disclosure. 45 C.F.R. § 164.530(i)(1). Specifically, they must implement "appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information." 45 C.F.R. § 164.530(c)(1). With respect to electronic health records, the HIPAA Security regulations require covered hospitals to "implement policies and procedures to safeguard the facility and the equipment therein from unauthorized physical access, tampering, and theft." 45 C.F.R. § 164.310(a)(2)(ii).

Prohibiting nonemployee solicitation and distribution – particularly activities directed at patients, families and other visitors while they are in a hospital – interferes only minimally with employees' Section 7 rights. Those same patients, families and visitors can be reached through alternative means when they are outside the hospital setting, making solicitation on a hospital campus unnecessary. For example, unions can publicize their causes through the Internet, news media publicity, and demonstrations on public property. Given these alternative avenues of communication, a prohibition on organizational activities by nonemployees in a hospital setting is not an unreasonable restriction on employees' Section 7 rights. *See Beth Israel*, 437 U.S. at 505 ("availability of alternative means of communication" may be important factor in hospital solicitation cases).

Accordingly, to apply the ALJ's holding below (concerning a grocery-store setting) to a hospital, and thereby permit nonemployees to solicit hospital patients and their loved ones while on hospital property, permits an outcome that the Supreme Court found unacceptable in *Beth Israel*.

The Board also should consider the types of messages that trespassing nonemployees are likely to disseminate. While "area standards" picketing and other types of communications directed at business patrons might sound innocuous enough, as if they raise only pedestrian concerns about prevailing wages or project labor agreements, the reality is much different, especially when directed at hospitals. Even without enhanced property access rights, unions targeting hospitals have not hesitated to play directly to the fears of patients. *See Sheet Metal Workers' Local 15 v. NLRB*, 491 F.3d 429, 438 (D.C. Cir. 2007) (union conducted "mock funeral" procession at neutral hospital, complete with "grim reaper" costumes, advising public that patronizing hospital would be "grave" mistake; union also distributed handbills alleging

medical malpractice by hospital); *St. Luke's Episcopal Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575, 578, 580-581 (8th Cir. 2001) (false and unprotected statements that hospital was "jeopardizing the health of mothers and babies" by delivering inadequate maternity care); *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir.1997) (bannering outside of hospital directed at construction contractor maliciously and falsely communicated that hospital was infested with rats); *Sutter Health v. UNITE HERE*, 113 Cal. Rptr. 3d 132 (Cal. Ct. App. 2010) (as part of secondary dispute, union distributed communications alleging that neutral hospitals used linens contaminated with "blood, feces, and harmful pathogens;" state court of appeals found sufficient evidence to justify claim for libel against union, even under demanding "actual malice" standard).[3] The *Sandusky Mall* test does not appear to give hospitals a meaningful ability to prevent such disturbing messages from being delivered on their own property.

No employer should be required to permit such disparagement of its products and services on its own property – even if it has previously allowed the sale of Girl Scout cookies or permitted fundraising to benefit the homeless or fight disease.[4] Hospitals, however, are uniquely

[3] Although these cases did not involve trespassing on an employer's property, there is no reason to believe that nonemployee union representatives, if permitted access to a hospital's property, would communicate any different message. Nor is there limiting language in *Sandusky Mall* that would permit an employer to make content-based decisions when deciding whether to permit trespassory union activities. In any event, there could be significant practical difficulties in enforcing such restrictions against trespassers, particularly if local law enforcement believes (correctly or not) that Board law would generally permit the trespassers to access the property and distribute literature.

[4] A rule compelling a property owner to provide a forum for such speech raises serious constitutional concerns. *See, e.g., Hurley v. Irish-American Gay Group*, 515 U.S. 557, 566 (1995) (holding that requiring a private parade organizer to include a group with whose message the parade organizer disagreed violated the First and Fourteenth Amendments); *Carey v. Brown*, 447 U.S. 455 (1980) (holding that a picketing law that selectively permitted labor picketing near a public school violated both the First and Fourteenth Amendments); *see also Ralph's Grocery Co. v. UFCW Local* 8, 113 Cal. Rptr. 3d 88 (Cal. 2010) (granting review to and depublishing lower-court decision regarding First Amendment bar to statute limiting remedies against union trespassing). When faced with such substantial constitutional questions, the Board should adopt a construction of the Act that avoids them. *See Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (Aug. 27, 2010) (reaffirming Board's adherence to canon of avoiding serious constitutional questions).

vulnerable to such disparagement because they risk disturbing patient care. *See Beth Israel*, 437 U.S. at n.23 (recognizing that a hospital might lawfully prohibit even the leaving of union literature on a table because visitors might see it). And it would be especially inappropriate to read into the Act an expansive right to trespass and engage in such activities, considering that nonemployee union organizers do not, on their own behalf, have any Section 7 rights at all. *See Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 206 n. 42 (1978) ("*Babcock* makes clear that the interests being protected by according limited-access rights to nonemployee, union organizers are not those of the organizers but of the employees located on the employer's property."). Accordingly, the Board should adopt a *Register Guard* analysis for claims of nonemployee access discrimination, which better respects the legitimate interests of hospitals and other employers.

C. Hospitals Should Not Be Discouraged By Board Law From Opening Their Doors To Third-Party Community Groups When Public Policy Favors The Provision Of Health And Wellness Benefits To The Communities That Hospitals Serve

The *Sandusky Mall* test is also ill-suited to the healthcare setting because it appears to assume that an employer (presumably including a hospital) would permit outside groups to access its facilities purely as a matter of grace or ideological preference. Under this view, an employer's subsequent decision to deny access to nonemployee union organizers would never be viewed as a legitimate restriction on union activity.

In the case of hospitals, however, there are significant and legitimate business reasons for permitting certain third-party groups or individuals access to their property. Most notably, the Nation's hospitals offer health and wellness benefits to the communities they serve. These programs frequently include offering space to host the meetings of various health-related organizations, and other activities on behalf of community groups. Representative examples include:

- Providing space for meetings of "12-step" groups such as Narcotics Anonymous and Alcoholics Anonymous;
- Hosting blood drives by the American Red Cross and other organizations;
- Providing space for CPR and Emergency Cardiovascular Care trainings conducted by the American Heart Association;
- Providing space for American Cancer Society "Look Good . . . Feel Better" workshops to cope with appearance-related side effects from chemotherapy and radiation treatments;
- Providing space for smoking cessation workshops sponsored by the American Cancer Society and other organizations;
- Providing space for Alzheimer's Association support groups;
- Hosting fundraisers for health-related causes ranging from disease prevention groups to summer camps for sick children; and
- Hosting community groups holding cultural heritage months, to facilitate health messaging to disadvantaged and medically underserved groups.

These are just examples of activities that take place at our Nation's hospitals every day, and which directly and legitimately support hospitals' missions to promote health and wellness. Not-for profit and investor-owned hospitals alike provide such benefits to their communities. *See* AHA, *AHA Guidance on Reporting of Community Benefit* 1 (2006), *available at* <http://www.aha.org/aha/content/2006/pdf/061113cbreporting.pdf>; Fed'n Am. Hospitals, Letters to the Honorable Charles E. Grassley, Chairman, dated July 20, 2006 and August 31, 2006, *available at* <http://finance.senate.gov/newsroom/chairman/download/?id=04512e3e-6883-45e0-9b34-298b781b1b75> *and* <http://finance.senate.gov/newsroom/chairman/download/

?id=14c70403-6b15-4d4c-a950-165e9cd82afc>.[5] And the need for such programs increases as obesity and other unhealthy lifestyle factors continue to threaten both individual health and overall community wellness. *See* AHA & Community Connections, *CEO Insight Series—The Importance of Community Partnerships* 16 (Dec. 2010).[6]

The *Sandusky Mall* standard, as applied to hospitals, would theoretically afford no deference to a hospital's decision to open their facilities to community service and health activities. Instead, it threatens to subsume all such activities into the category of "solicitation" or "distribution" activities that are indistinguishable from union organizational activities. As recognized in *Register Guard*, though, such an analysis ignores the many legitimate, non-Section 7 related reasons why organizational activities are analytically distinct from many other activities that might be permitted in the workplace. And such reasons should be given particular deference when the nonemployee union trespassers have no independent Section 7 interests at all.

Hospitals should not be required to choose between engaging third-party community groups or restricting access to nonemployee union representatives. The *Register Guard* test avoids this result and instead focuses – correctly and narrowly – on whether the employee has in fact discriminated along Section 7 lines.

---

[5] Indeed, for non-profit hospitals, engaging with community groups can assist the hospital in supporting its tax-exempt status. *See* Rev. Rul. 69-545, 1969-2 C.B. 117 (requiring non-profit hospitals to provide community benefit). Providing funds and facility space to non-profit and community groups is a recognized form of community benefit. *See* United States Government Accountability Office, *Nonprofit Hospitals-Variation in Standards and Guidance Limits Comparison of How Hospitals Meet Community Benefit Requirements* (hereafter "*How Hospitals Meet Community Benefit Requirements*"), GAO-08-880, at App. II (2008).

[6] <http://www.caringforcommunities.org/caringforcommunities/content/10commconn-partnerships.pdf>.

III. IN NO EVENT SHOULD THE BOARD UNDERMINE ITS EXISTING PRECEDENT PERMITTING CERTAIN TYPES OF MISSION-RELATED SOLICITATION AND DISTRIBUTION ACTIVITIES WITHIN HOSPITALS

As argued above, the Board should adopt a conceptual framework for property-access "discrimination" claims that permits genuine "apples-to-apples" comparisons of the solicitation and distribution activities permitted by employers and the activities in which trespassing nonemployees seek to engage. In the view of the AHA and ASHHRA, the *Register Guard* test provides such a framework.

But even if the Board declines to adopt *Register Guard* as the deciding test in the instant case, we urge the Board not to overrule (through inadvertence or otherwise) its many prior decisions recognizing special considerations for solicitation and distribution in hospitals. As discussed above, the Supreme Court's *Beth Israel* and *Baptist Hospital* cases laid out significantly different rules for solicitation and distribution in hospitals than are permitted in virtually any other workplace.

In addition, and long before the adoption of *Register Guard*, the Board recognized that various types of health-related solicitations and distributions do not require hospitals to provide a forum for nonemployee union solicitation and distribution. In those cases, the Board found that health-related solicitations and distributions comprised an "integral part" of a hospital's necessary functions. *See Lucile Packard Children's Hosp.*, 318 NLRB 433, 433 (1995) (medical textbook sales), *enf'd,* 97 F.3d 583, 587–588 (D.C. Cir. 1996); *Cent. Solano County Hosp. Fdn., Inc.*, 255 NLRB 468 (1981) (solicitations by hospital guilds and philanthropies to solicit for the hospital's benefit); *Rochester Gen. Hosp.*, 234 NLRB 253, 259 (1978) ("Red Cross postering and blood collection in the hospital for the blood bank, postering of sales by a volunteer group which donates all the proceeds to the hospital, displaying of pharmaceutical products that doctors might prescribe and the hospital pharmacy might therefore purchase, and displaying of medical books

of interest to the doctors"); *George Washington Univ. Hosp.*, 227 NLRB 1362, 1374 n.39 (1977) ("white elephant" and Women's Board sales for the benefit of the hospital).

These cases demonstrate that the Board has previously shown special sensitivity to the unique mission and setting of a hospital. We urge the Board to ensure that any test that it adopts in the instant case will not undermine this precedent.

CONCLUSION AND SUMMARY OF RESPONSES TO QUESTIONS

For the reasons discussed above, the AHA and ASHHRA respectfully respond as follows to the questions posed by the Board in its Notice and Invitation to File Briefs:

1. *In cases alleging unlawful employer discrimination in nonemployee access, should the Board continue to apply the standard articulated by the Board majority in* Sandusky Mall Co., *above?*

The AHA and ASHHRA submit that the answer is no.

2. If not, what standard should the Board adopt to define discrimination in this context?

-and-

3. What bearing, if any, does Register Guard, *351 NLRB 1110 (2007), enf. denied in part 571 F.3d 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in nonemployee access cases?*

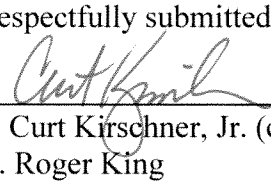
The Board should adopt the test of *Register Guard* in nonemployee access cases alleging "discrimination." As such: (1) employers could lawfully restrict nonemployee access to employer property unless it were established that (i) no reasonable alternative means of access to the employer's employees exist or (ii) the employer's rules discriminate against union-related activities; and (2) restrictions on nonemployee access to private property would violate the Act's non-discrimination rule only if the employer applied non-neutral criteria that resulted in dissimilar treatment for substantially similar nonemployee activities.

As applied to the instant case, the AHA and ASHHRA submit that adoption of the *Register Guard* test would compel dismissal of the complaint as to the remaining charges.

More generally, the AHA and ASHHRA urge the Board to consider the unique needs of healthcare institutions in evaluating claims of nonemployee access discrimination. It is difficult to conceive how the *Sandusky Mall* case can be applied consistent with those unique needs, and the Board should instead adopt a test better suited to the concerns of the Nation's hospitals.

Dated: January 7, 2011.

Respectfully submitted,



F. Curt Kirschner, Jr. (counsel of record)
G. Roger King
Christopher T. Scanlan
Ritu Kaur Singh
JONES DAY

Melinda Reid Hatton
Lawrence Hughes
AMERICAN HOSPITAL ASSOCIATION

Counsel for *Amici Curiae*
American Hospital Association and
American Society for Healthcare Human
Resources Administration

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2011, a copy of the Brief of *Amici Curiae* American Hospital Association and American Society for Healthcare Human Resources Administration was filed electronically.

True and correct copies of the brief were served by both e-mail and overnight Federal Express delivery, addressed as follows:

SCOTT A. GORE, ESQ.
LANER, MUCHIN, DOMBROW, BECKER, LEVIN & TOMINBERG, LTD.
515 NORTH STATE STREET
SUITE 2800
CHICAGO, IL 60654
(312) 494-5318
SGORE@LANERMUCHIN.COM

ANDREW GOLLIN, ESQ.
NATIONAL LABOR RELATIONS BOARD
310 WEST WISCONSIN AVE
SUITE 700
MILWAUKEE, WI 53203
(414) 297-3871
ANDREW.GOLLIN@NLRB.GOV

YINGTAO HO, ESQ.
PREVIANT, GOLDBERG, UELMEN, GRATZ, MILLER & BRUEGGEMANN
1555 NORTH RIVERCENTER DRIVE
SUITE 202
MILWAUKEE, WI 53212
YH@PREVIANT.COM

Christopher T. Scanlan

SFI-655930v9