UPMC and its Subsidiary, UPMC Presbyterian Shadyside, single employer d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital *and* SEIU Healthcare Pennsylvania CTW, CLC. Cases 06–CA–102465, 06–CA–102494, 06–CA–102516, 06–CA–102518, 06–CA–102525, 06–CA–102534, 06–CA–102540, 06–CA–102542, 06–CA–102544, 06–CA–102555, 06–CA–102559, 06–CA−104090, 06–CA–104104, 06–CA–106636, 06–CA–107127, 06–CA–107431, 06–CA–107532, 06–CA–107896, 06–CA–108547, 06–CA–111578, 06–CA–115826

June 14, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN AND EMANUEL

On November 14, 2014, Administrative Law Judge Mark Carissimi issued a decision in this proceeding. The Respondents, UPMC and UPMC Presbyterian Shadyside,[1] each filed exceptions and supporting briefs. The General Counsel and the Charging Party Union, SEIU Healthcare Pennsylvania CTW, CLC, filed briefs in response to the Respondents' exceptions. Respondent UPMC filed a reply. The General Counsel and the Charging Party filed limited exceptions and supporting briefs, and the Respondents each filed a brief in response. The General Counsel filed a reply.

On August 27, 2018, the Board issued a Decision and Order resolving most of the issues in the case. *UPMC,* 366 NLRB No. 185.[2] The Board severed and retained three issues for further consideration: (1) whether the Respondent unlawfully ejected nonemployee union organizers from its hospital cafeteria, (2) whether the Respondent engaged in unlawful surveillance of the employees who were meeting with the organizers in the cafeteria, and (3) whether the Respondent unlawfully required employees who were meeting with the organizers to produce their identification. The Board has considered the judge's decision and the record in light of the exceptions and briefs[3] and has decided to adopt his rulings, findings,[4] and conclusions on those issues only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated the Act as alleged. For the reasons stated by the judge, we agree that the Respondent violated Section 8(a)(1) of the Act by requiring employees who were meeting with nonemployee union organizers to produce identification, but we reverse the judge on the remaining issues. In so doing, we take this opportunity to modify Board law, and to overrule precedent to the extent it conflicts with this decision, regarding access to public restaurants and cafeterias within an employer's private property by nonemployee union representatives.[5]

FACTS

On February 21, 2013, union representatives Sarah Fishbein and Amber Stenman entered the Respondent's cafeteria, which is located on the 11th floor of the Presbyterian Hospital, and met with a group of at least six employees. The nonemployee union representatives sat with the employees at two tables, ate lunch, and discussed union organizational campaign matters, including a recent NLRB settlement. Some other employees stopped at the tables during the time the union represent-

[1] When used in the singular herein, "Respondent" refers to UPMC Presbyterian Shadyside.

[2] Judge Carissimi's decision is attached to that decision and may be accessed there.

[3] The Respondent has requested oral argument, and Respondent UPMC has incorporated the Respondent's exceptions and brief by reference. The request is denied as the record, exceptions, cross-exceptions and briefs adequately present the issues and the positions of the parties.

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, several of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that those contentions are without merit.

[5] In adopting the judge's finding that the Respondent violated the Act by requiring employees who were meeting with the Union in the cafeteria to produce identification, we note that an employer generally has the right to investigate allegations or complaints of unlawful activity on its property, including verifying the identity of the participants. See *International Business Machines Corp.*, 333 NLRB 215, 218−219 (2001) (prior to union organizational meeting, employer's security guards lawfully checked employee identification badges at parking lot entrances), enfd. 31 Fed.Appx. 744 (2d Cir. 2002); *St. Clair Memorial Hospital,* 309 NLRB 738, 738−739 (1992) (employer's security guard lawfully requested employee identification from two women distributing union handbills in employer's parking lot). Here, we find that the Respondent's actions were not necessary to verify whether the participants were employees or nonemployees. Security officer Moran testified that he recognized most of the participants, some of whom were wearing their employee badges. Under these circumstances, we agree with the judge that Moran's request for identification from these employees would reasonably chill the exercise of their lawful right to engage in union solicitation and distribution in the Respondent's cafeteria during nonwork time.

atives were there. Union flyers and pins were displayed on the tables at which the union representatives were sitting. At least one off-duty employee, Albert Turner, who was meeting with the union representatives, passed out some of the flyers to others in the cafeteria.

During this time, Security Operations Manager Gerald Moran received two reports—one from a manager and another from a complaining employee—that nonemployees were soliciting in the cafeteria and that union flyers were being distributed. After speaking with his supervisor, Moran went to the cafeteria and approached the tables where the group was sitting. By this time, the union representatives had been in the cafeteria for over an hour. Moran asked the union representatives, whom he did not recognize as employees, for identification and inquired what they were doing there. Moran also asked employees seated at the tables for their identification. Union Representative Stenman said they were having lunch with some employees and talking about the Union. Moran told Stenman that she and Fishbein had to leave because the cafeteria was only for the use of patients, their families and visitors, and employees. Earlier, Stenman had tried to talk about the Union to a woman sitting behind them, and the woman had said that she was not an employee and was just waiting to have lunch with her friend, who worked there. Stenman asked Moran if that woman would have to leave, too, and Moran said, "Maybe, but I'm dealing with this right now." Stenman and Fishbein refused to leave, and Moran then called 911. Six police officers arrived and escorted the union representatives from the cafeteria.

There is nothing posted either outside or inside the Respondent's cafeteria indicating who may patronize it. The Respondent does not actively monitor who is using the cafeteria, but it responds to reports to the Security Department of solicitation by nonemployees. The unrebutted evidence shows that the Respondent's practice has been to remove nonemployees who are engaged in promotional activity, including soliciting or distributing, in or near the cafeteria. On two occasions, one in 2011 and a second in 2012, the Respondent ejected individuals from the cafeteria after receiving reports that they were soliciting for money. On March 25, 2013, approximately one month after the incident at issue here, Moran received reports that two individuals were distributing literature in front of the cafeteria. The individuals, who were with the spiritual group Falun Gong, were escorted off the property. All of the individuals ejected were either given a trespassing warning or informed that they were not permitted to solicit on the Respondent's property.[6]

DISCUSSION

A. Union Organizer Access to Public Cafeteria

In *NLRB v. Babcock & Wilcox Co.,* the Supreme Court established the standard that governs nonemployee access when an employer's property rights conflict with the right of employees to engage in self-organization. 351 U.S. 105 (1956). The Court emphasized that although no restriction could be placed on the employees' right to discuss self-organization among themselves (absent a demonstration that a restriction was necessary to maintain production or discipline), "no such obligation is owed nonemployee organizers." Id. at 113. In the key passage, the Court stated:

> It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

Id. at 112.[7]

As this passage demonstrates, the Supreme Court recognized that insofar as employees' right of self-organization "depends in some measure on the ability of employees to learn the advantages of self-organization from others," Section 7 of the Act may, in certain circumstances, restrict an employer's right to exclude nonemployee union organizers from its property. *Babcock*, 351 U.S. at 113. Accordingly, the Supreme Court in *Babcock* held that there are two exceptions to the general rule that an employer may deny access to its property by nonemployee union organizers: inaccessibility and discrimination.

Under the *Babcock* "inaccessibility" exception, if the union has no other reasonable means of communicating its message to employees, the employer's property interest must yield to the extent needed to permit communication. Id. at 112. The *Babcock* "discrimination" exception was less well-defined. The Court cited to *Stowe Spinning v. NLRB*, 336 U.S. 226 (1948), in which the Court endorsed the Board's finding of unlawful discrimination where the employer prohibited union organizers

[6] In addition to these incidents, on June 9, 2012, a supervisor reported that an individual he suspected of being a union organizer was approaching employees. The individual learned of the report and left the cafeteria before security arrived.

[7] In *Central Hardware Co. v. NLRB,* 407 U.S. 539 (1972), the Supreme Court effectively extended this principle to nonemployee union solicitation.

from using an employer-owned meeting hall, while permitting its use by all other outside groups who had requested it. The Court also stated that an employer may post its property against nonemployee distribution of union literature if it does not discriminate by allowing "other distribution." Id. Relying on this distinction between union distribution and other distribution, the Board has stated that "a denial of access for Sec. 7 activity may constitute unlawful disparate treatment where by rule or practice a property owner permits similar activity in similar relevant circumstances."[8]

It is clear from subsequent precedent that the Supreme Court views *both* exceptions as narrow ones and that the union's burden of proof to establish that one or the other exception applies is a heavy one. "To gain access" to an employer's property, the Court stated,

> the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.

Sears Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 205 (1978) (footnotes omitted).

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court reaffirmed and elaborated on its holding in *Babcock.* It held that the employer did not violate the Act by restricting nonemployee union access to an employee parking lot on the employer's property. 502 U.S. at 541. The Court strengthened *Babcock*'s general prohibition on nonemployee access, emphasizing that the *Babcock* inaccessibility exception would apply only in "rare case[s]" and that only where "such access is infeasible" would it become necessary to accommodate employees' Section 7 rights and employers' property rights. Id. at 537, 538. Outside those rare cases, "Section 7 simply does not protect nonemployee union organizers . . . ." Id. at 537. [9]

Although the Board has generally applied the *Babcock* standard, with its inaccessibility and activity-based discrimination exceptions, in deciding cases where nonemployee union organizers seek access to private property, the Board has created an additional exception where nonemployee union organizers seek access to a portion of the employer's private property that is open to the public, such as a cafeteria or restaurant. In *Ameron Automotive Centers*, the Board stated that in such cases the "*Babcock & Wilcox* criteria need not be met, since nonemployees cannot in any event lawfully be barred from patronizing the restaurant as a general member of the public." 265 NLRB 511, 512 (1982). Accordingly, the Board has held that nonemployee union organizers cannot be denied access to cafeterias and restaurants open to the public if the organizers use the facility in a manner consistent with its intended use and are not disruptive. See *Montgomery Ward & Co.,*256 NLRB 800, 801 (1981), enfd. 692 F.2d 1115 (7th Cir. 1982). Applying this rule, the Board has consistently found that employers violate Section 8(a)(1) of the Act when they restrict public-cafeteria access for nonemployee union organizers who engage in solicitation and other promotional activities but are not "disruptive." See *Oakwood Hospital*, 305 NLRB 680 (1991), enf. denied 983 F.2d 698 (6th Cir. 1993); *Baptist Medical System*, 288 NLRB 882 (1988), enf. denied 876 F.2d 661(8th Cir. 1989); *Southern Maryland Hospital Center*, 276 NLRB 1349 (1985), enf. denied in relevant part 801 F.2d 666 (4th Cir. 1986)*; Ameron Automotive Centers,* 265 NLRB at 512; *Montgomery Ward & Co.,* 263 NLRB 233 (1982), enfd. as modified 728 F.2d 389 (6th Cir. 1984).[10] In effect, this precedent eliminated altogether the applicability of *Babcock*'s general rule limiting nonemployee union access to private property and found discrimination based solely on the fact that nonemployee union organizers were excluded, without regard to whether the employer permitted any other nonemployees to engage in the same solicitation or promotional activities engaged in by the union organizers in the public cafeteria area.

The Board's approach has been soundly rejected by multiple circuit courts. See *Oakwood Hospital v. NLRB*, 983 F.2d 698 (6th Cir. 1993); *NLRB v. Southern Maryland Hospital Center,* 916 F.2d 932 (4th Cir. 1990), revg. in relevant part 293 NLRB 1209 (1989); *Baptist Medical Systems v. NLRB,* 876 F.2d 661(8th Cir. 1989). Although the courts recognized that the Board has the primary responsibility for making the accommodation between Section 7 and private property rights, they found

[8] *Jean Country*, 291 NLRB 11, 12 fn. 3 (1988), cited with approval in *Lucile Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996).

[9] While the *Lechmere* Court expressly overruled the Board's balancing test in *Jean Country* as an impermissible interpretation of the *Babcock* inaccessibility exception, it did not disturb or alter the *Babcock* discrimination exception, implicitly including the activity-based definition of *Babcock* discrimination set forth in *Jean Country*, quoted above, and relied on by the District of Columbia Circuit in *Lucile Salter Packard Children's Hospital*, supra. See *Davis Supermarkets, Inc.*, 306 NLRB 426 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993).

[10] Notably, each of these Board decisions predated *Lechmere*.

that the Board erred by ignoring the principles of *Babcock*. In *Baptist Medical Systems,* the Eighth Circuit held that "[b]y inviting the public to use an area of its property, the employer does not surrender its right to control the uses to which that area is put." 876 F.2d at 664. The court refused to enforce the Board's order and held that the employer did not violate the Act by restricting access to its public cafeteria by nonemployee union organizers who were not disruptive but who were engaged in "blatant promotional activity." Id. at 665. Similarly, the courts in *Oakwood Hospital* and *Southern Maryland Hospital* criticized the Board's failure to consider the principles set forth in *Babcock* and found that absent evidence of inaccessibility or discriminatory enforcement of the employer's no-solicitation policy, the employer could prohibit solicitation by nonemployee union organizers in its cafeteria. In *Oakwood Hospital*—the only one of these three court decisions to issue after *Lechmere*—the court further stated that "the logic of *Baptist Medical* and *Southern Maryland Hospital Center* appears unassailable in light of" *Lechmere*.[11] 983 F.2d at 702.

When courts have affirmed the Board's finding of a violation, they have done so applying the *Babcock* discrimination exception. Most recently, in *North Memorial Health Care v. NLRB*, the court adopted the Board's finding that the employer had discriminated against union representatives by denying them access to a public cafeteria based on the content of their conversation. 860 F.3d 639 (8th Cir. 2017), enfg. 364 NLRB No. 61 (2016). The court relied on testimony from at least three employees that until the events in the case, the hospital had never interfered with any of their prior conversations in the cafeteria. Id. at 646−647. The court also relied on the employer's own statement to the union representatives--that they could "talk about the Twins" with off-duty employees in the cafeteria but they could not "talk about union business." Id. at 647.[12] See also *Lucile Salter Packard Children's Hospital at Stanford v. NLRB,* supra (finding that employer discriminated against union organizers where it previously granted access to vendors); *Montgomery Ward & Co., Inc. v. NLRB*, 692 F.2d 1115 (7th Cir. 1982) (affirming the Board's finding that employer violated the Act by granting access to commercial solicitors while denying access to nonemployee organizers).

We agree with the judicial criticism of extant Board precedent permitting nonemployee union representatives to gain access to public areas on private property in contravention of *Babcock*'s principles. Those principles apply to nonemployee union access regardless of whether the area on the employer's private property in which the union wishes to conduct business is closed or open to the public. As the Sixth Circuit held in *Oakwood Hospital*, "[i]f the owner of an outdoor parking lot can bar nonemployee union organizers, it follows *a fortiori* that the owner of an indoor cafeteria can do so." 983 F.2d at 703. And as the Eighth Circuit stated in *Baptist Medical System*, "when an employer has chosen not to allow any solicitation or promotional activity by nonemployees in its public facility and union organizers attempt to use that facility for promotional or solicitation purposes, we believe that *Babcock* contemplates that such activity may validly be prohibited, even where the organizers' activity is not actually disruptive." 876 F.2d at 664.

Therefore, to the extent that Board law created a "public space" exception that requires employers to permit nonemployees to engage in promotional or organizational activity in public cafeterias or restaurants absent evidence of inaccessibility or activity-based discrimination, we overrule those decisions.[13] As the Supreme Court has stated, "[t]he Act requires only that the employer refrain from interference, discrimination, restraint, or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facility for organization when other means are readily available." *Babcock*, 351 U.S. at 113−114. Accordingly, we find that an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizational activity. The fact that a cafeteria located on the employer's private property is open to the public does not mean that an employer must allow any nonemployee access for any purpose. Absent discrimination between nonemployee union representatives and other nonemployees—i.e., "disparate treatment where by rule or practice a property owner" bars access by nonemployee union representatives seeking to engage in certain activity while "permit[ting] similar activity in similar relevant circumstances" by other nonemployees[14]—the employer

[11] The court in *Oakwood* overruled its decision in *Montgomery Ward*, holding that it did not survive *Lechmere*. 983 F.2d at 703.

[12] For the reasons explained below, we overrule the Board's decision in *North Memorial Health Care* to the extent that it relies on the principles set forth in *Montgomery Ward*, 256 NLRB 800. We also overrule the decision to the extent the Board adopted the judge's finding that under *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978), nonemployee union organizers have a presumptive right of access to an employer's property. Clearly, as found by the court, *Beth Israel* applies only to employees and not nonemployee union representatives. 860 F.3d at 646; see also *Babcock*, 351 U.S. at 112.

[13] Specifically, we overrule *Ameron Automotive Centers,* supra, *Montgomery Ward,* supra, and their progeny to the extent they conflict with our holding in this case.

[14] *Jean Country*, 291 NLRB at 12 fn. 3.

may decide what types of activities, if any, it will allow by nonemployees on its property.

Retroactive Application of the New Standard

"The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006−1007 (1958)). Under Supreme Court precedent, "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.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

We do not envision that any ill effects will be wrought by applying the standard we announce herein to this case and to all pending cases. A general no-solicitation / no-distribution practice applicable to all third parties that is valid under prior Board law will also be valid under our new standard. Thus, no party that has acted in reliance on the Board's previous standard will be found to have violated the Act as a result of the retroactive application of the standard announced in this decision. On the other hand, failing to apply the new standard retroactively would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, 332 U.S. at 203. As we have explained above, requiring employers to permit promotional or organizational activity on their property absent either inaccessibility or discrimination is irreconcilable with well-established Supreme Court precedent set forth in *Babcock*, supra. Accordingly, we find that application of our new standard in this and all pending cases will not work a "manifest injustice." *SNE Enterprises*, 344 NLRB at 673.

Application of New Standard to Facts

Here, the Respondent's employees were not inaccessible by reasonable nontrespassory means, so we deal only with the *Babcock* discrimination exception. As discussed below, we find no violation based on this exception because there is no evidence that the Respondent permitted *any* solicitation or promotional activity in its cafeteria.[15] Indeed, the Respondent had a practice of removing nonemployees who engaged in promotional activities, including solicitation and distribution, in or near the cafeteria.

In support of a discrimination claim, the General Counsel cites evidence that other nonemployees use the cafeteria, and on the day that the union representatives were removed, there was at least one other nonemployee eating in the cafeteria who was not removed. In other words, the General Counsel's position is that the Board need not consider the activity engaged in (unless it is disruptive), but should find prohibiting nonemployee union representatives to be present in the cafeteria while permitting other nonemployees to be present is per se unlawful discrimination under the Act. We disagree. As the court in *Southern Maryland Hospital* observed, there is a difference between admitting friends or relatives of employees for meals and permitting outside entities to seek money or memberships. 916 F.2d at 937. In this regard, the nonemployee union representatives, who were meeting with a group of employees and displaying, on cafeteria tables, union materials that were being distributed to others in the cafeteria, were treated no differently than other third parties who were reported to be soliciting or distributing in the hospital cafeteria. There is no evidence that the Respondent has knowingly allowed any other promotional or organizational activity by nonemployees on its premises. In fact, the evidence shows the opposite: the Respondent has removed nonemployees when informed that they were engaged in solicitation or promotion of their organizations in the cafeteria. On one occasion in 2011 and another in 2012, the Respondent removed from the cafeteria individuals who were soliciting cafeteria patrons to give them money. In March 2013, the Respondent removed individuals who were handing out literature for Falun Gong in front of the cafeteria. The Respondent informed them that they were not permitted to solicit on the property and they were escorted from the facility.[16]

In sum, we overrule Board precedent holding that discrimination can be established merely by showing that nonemployee union representatives were denied access to a public area within private property, without the Board considering the kind of "nondisruptive" activity they were engaged in and whether the employer had permitted similar activity by other nonemployees. Consequently, we find the General Counsel has clearly failed to meet the heavy burden of proving discrimination under the *Babcock* exception. It has not shown that the Respondent has denied access for Section 7 solicitation

[15] We do not address here whether Board precedent has properly defined what constitutes similar activity in similar relevant circumstances for purposes of applying the *Babcock* discrimination exception in any other context.

[16] In each instance, the Respondent was notified of the activity in the cafeteria and, after investigating, removed the third parties who were engaged in promotional activity. The union organizers here were treated no differently. The Respondent was notified of their conduct in the cafeteria, and upon finding them engaged in promotional activity, the Respondent asked them to leave.

or promotional activities in the cafeteria while permitting similar activity by other nonemployees. Accordingly, we find that the Respondent did not violate the Act by ejecting union organizers who were using the cafeteria to engage in this unpermitted activity.

Response to Dissent

As an initial matter, our dissenting colleague appears to concede that the "public space" exception created in *Montgomery Ward & Co.*, supra, and *Ameron Automotive Centers*, supra, was inconsistent with the Supreme Court's holding that there are only two narrow exceptions—inaccessibility and discrimination—to the general rule that an employer may deny nonemployee union organizers access to its property. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 105. Nevertheless, our dissenting colleague argues that we improperly interpret and apply the discrimination exception. In support, the dissent relies heavily on *NLRB v. Stowe Spinning* Co., 336 U.S. at 226, and *North Memorial Health Care*, 364 NLRB No. 61 (2016), enfd. 860 F.3d 639 (8th Cir. 2017). In addition, citing the District of Columbia Circuit Court's decision in *United Food & Commercial Workers, Local 400 v. NLRB*, the dissent argues that we improperly reach out to overturn *Montgomery Ward* and its progeny.[17] We respectfully disagree, and we address each of the dissent's arguments in turn.

To begin, in dismissing the unfair labor practice allegations here, we rely on the *conduct* of the nonemployee organizers and the evidence that the Respondent prohibited all third parties from engaging in similar conduct in the cafeteria. Thus, contrary to the dissent's repeated arguments otherwise, our decision here is consistent with the discrimination standard applied by the Court in *Stowe Spinning*, supra, cited in *Babcock*, because in *Stowe Spinning,* union representatives were excluded based on their *identity* as such, not on their conduct. In *Stowe Spinning*, the Supreme Court upheld the Board's finding that the employer had unlawfully refused to allow the union to use the only available meeting hall in a company town. Id. at 227. The union had requested to use a meeting hall in the company-owned post office building; most of the building had been built by the employer for use by the Patriotic Order Sons of America. Id. at 228. The president of the Patriotic Order initially granted the union's request, but subsequently the employer denied the request because it had come from "a textile organizer." Id. at 229. The record showed that the Patriotic Order had allowed third parties to use the hall in the past and that the employer had never interfered with the Patriotic Order's use or rental of the hall to third parties. Ibid. Thus, the Court upheld the Board's finding that the denial constituted "unlawful disparity of treatment and discrimination against the union" because the denial was based solely on the organizer's affiliation with the union. Ibid.[18] Our decision today, which turns on the conduct of the union organizers, in no way conflicts with the Supreme Court's well-established prohibition against discrimination based solely on union affiliation.

Similarly, the circuit court's holding in *North Memorial,* 860 F.3d at 639, is consistent with our holding here. As explained above, the court's holding in *North Memorial* is limited to the application of the *Babcock* discrimination standard, and contrary to the dissent's insistence otherwise, there are significant factual differences between *North Memorial* and this case. In *North Memorial,* the unions represented several bargaining units at the hospital. Union representatives routinely used the hospital cafeteria for informal meetings with unit employees, and hospital officials were aware that they did so. Id. at 642−643. But when union representatives entered the cafeteria the day before a planned informational picketing event, they were denied access. Moreover, a hospital official told a union representative that he could "talk about the Twins" (baseball team) with off-duty employees but could not "talk about union business." Id. at 647. Thus, the court upheld the Board's finding of discrimination because the evidence showed that the employer had allowed similar activity in the cafeteria—informal conversations between union representatives and off-duty employees—but suddenly denied the union access to engage in the same conduct and told the union it was the content of the representatives' conversation, not their activity, that was prohibited. Thus, the court found that the employer discriminated by banning union talk in the cafeteria but allowing other nonwork talk. Here, in contrast, the Respondent denied the Union access based on the union organizers' conduct in the cafeteria, and the evidence shows that similar conduct was prohibited for all nonemployees.[19] Thus, the Respondent did not treat the union organizers disparately.

[17] 222 F.3d 1030, 1033 (D.C. Cir. 2000), reversing and remanding *Farm Fresh, Inc.*, 326 NLRB 997 (1998).

[18] Furthermore, neither the Board nor the Court in *Stowe* appeared to rely on discrimination alone. See id. at 233 (noting that the Board "found that the refusal [of access] by these respondents was unreasonable because the hall had been given freely to others, *and because no other halls were available for organization*") (emphasis supplied); 230 ("We cannot equate a company-dominated North Carolina mill town with the vast metropolitan centers where a number of halls are available within easy reach of prospective union members."). Thus, the Court's decision also implicates the inaccessibility exception to nonemployee access to an employer's property.

[19] Contrary to our dissenting colleague's attempts to downplay the organizers' conduct here, it was their conduct in the cafeteria, not the content of their conversation, that triggered the attention of a manager

Our dissenting colleague, like the General Counsel, argues that a finding of discrimination is warranted because the correct comparator is the nonemployee who was in the cafeteria eating lunch with a friend, not third parties who were removed from the cafeteria for soliciting or distributing. As explained above, we disagree. The union organizers here sought to use the hospital cafeteria in a manner that went beyond simply eating lunch with a few friends. Instead, they held an informational meeting with a group of off-duty employees; the organizers attempted to talk to, perhaps solicit,[20] at least one other person about the union organizing drive but were informed that the person was not an employee at the hospital; and the Union provided and displayed flyers and other materials for distribution, some of which were distributed by off-duty employees and some of which were picked up by employees passing by the table. The dissent cannot reasonably argue that union organizers sitting at tables displaying union organizational flyers and union pins, and discussing union organizing with off-duty employees, are using the cafeteria in a manner consistent with the conduct of other cafeteria patrons.

Moreover, the General Counsel has failed to show that the Respondent allowed any other such promotional activity in the cafeteria. In fact, the evidence shows that the Respondent prohibited other similar types of promotional activities. Based on the clear difference between the conduct of the nonemployee eating lunch and the extensive promotional activities of the union representatives, we disagree with our dissenting colleague that our definition of discrimination is impermissibly narrow and runs afoul of the Supreme Court's holding in *Stowe Spinning* or *Babcock.*[21]

Finally, we disagree with our colleague that our decision impermissibly reaches out to overturn Board law. Our dissenting colleague, citing *United Food & Commercial Workers, Local 400 v. NLRB*, supra, 222 F.3d at 1033, argues that the Board is prohibited from reaching the "public space" exception in *Montgomery Ward,* supra, because there is no evidence that the Respondent applied a formal rule when asking the union organizers to leave the cafeteria. Although we agree with the dissent, despite her protestations to the contrary, that the Respondent did not apply its written no- solicitation policy when removing the organizers from the cafeteria, that fact is irrelevant to our decision to overrule *Montgomery Ward.* And we disagree that the court's decision in *UFCW* precludes the Board from reaching the broader question here of whether the Respondent acted in a discriminatory manner by removing the union organizers when the Respondent had a general practice of prohibiting third-party promotional activity in the cafeteria.

In *UFCW*, the court found that the employer did not generally prohibit union or other third-party solicitation in the public snack bar, so the ejection of the union organizers was an exception to the employer's "general hands-off approach to nondisruptive organizational conduct." Ibid. In fact, the employer conceded it did not have a policy or practice of prohibiting such activity, but instead admitted that it had previously permitted union organizers to solicit in its snack bars, and that it had ejected the two union organizers involved in the case because there were outstanding trespass warrants against them. Id. at 1033. In these circumstances, the court found that the "public space" exception under *Montgomery Ward* was not at issue. Id. at 1032−1033.

Here, in contrast, neither *Babcock* exception applies, and the union organizers' only right to access the Respondent's cafeteria for union business would be based on the *Montgomery Ward* exception, so that exception is squarely at issue.[22] The Respondent's practice has been to prohibit nonemployees from engaging in promotional activities, including solicitation and distribution, in its public cafeteria. As set forth above, although the Respondent did not police the cafeteria for nonemployees, it did respond to reports of promotional activity in the cafeteria, and if upon investigation such conduct was occurring, the Respondent would ask the nonemployee to leave the cafeteria. Under *Montgomery Ward* and similar Board precedent, an employer could prohibit union promotional activity in a public cafeteria only if the union was not using the cafeteria for its intended purpose and the activity was disruptive. 256 NLRB at 800−801. Although the Union's conduct here would arguably not meet the criteria for access under the *Montgomery Ward* exception, we need not reach that issue because today we

and an employee. The manager and the employee, separately, then reported the organizers' conduct—characterizing it as solicitation and distribution—to security. Based on those reports, a security guard was dispatched to investigate the activity in the cafeteria. As result of the investigation, he discovered the organizers engaged in promotional activity and asked them to leave the cafeteria.

[20] The dissent cites a narrow definition of "solicitation" found in *Wal-Mart Stores*, 340 NLRB 637, 638 (2003), enf. denied in relevant part 400 F.3d 1093 (8th Cir. 2005). As she concedes, *Wal-Mart* involved activity between employees. Because our decision here does not turn on whether the union organizers were "soliciting," we need not address whether *Wal-Mart* and similar cases were correctly decided.

[21] See *Baptist Medical System*, supra, 876 F.2d at 664 ("[W]hen an employer has chosen not to allow any solicitation or promotional activity by nonemployees in its public facility and union organizers attempt to use that facility for promotional or solicitation purposes, we believe that *Babcock* contemplates that such activity may validly be prohibited . . . .").

[22] Under *Lechmere,* supra, the nonemployee union organizers would have no right to access the hospital's property.

overrule the "public space" exception created by *Montgomery Ward.* We therefore hold that an employer may prohibit nonemployee union representatives from engaging in promotional activity, including solicitation or distribution, in its public cafeteria so long as it applies the practice in a nondiscriminatory manner by prohibiting other nonemployees from engaging in similar activity.

B. Surveillance in Cafeteria

The General Counsel also alleges and the judge found that the Respondent violated the Act by engaging in surveillance of the union organizers and employees in the cafeteria. We disagree and reverse.

The judge relied on *Southern Maryland Hospital*, 293 NLRB 1209 (1989), and *Oakwood Hospital*, supra, 305 NLRB 680. We find the facts of this case substantially distinguishable from both of those decisions. In *Southern Maryland Hospital,* the Board found that the acts of the employer were "designed to inhibit employee contact with the organizers," and the employer agent had "no legitimate reason for even going to the cafeteria." 293 NLRB at 1217. Similarly, in *Oakwood*, the Board found that the employer engaged in unlawful surveillance when the employer's agent intentionally remained in close proximity to employees who were engaged in union activity in the cafeteria. 305 NLRB at 688-689. Here, in contrast, there is no evidence that security personnel stayed in close proximity to the employees in the cafeteria. Although Moran waited in or near the cafeteria for law enforcement to arrive, there is no evidence that he stood near the tables where the organizers and employees were located. Moreover, unlike the cited cases, security here was alerted to the union presence and promotional activity in the cafeteria through other hospital personnel—a manager and a complaining employee. The Board has recognized that "management officials may observe public union activity, particularly where such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary." *Metal Industries Inc.*, 251 NLRB 1523 (1980). We do not find that the Respondent's observation of the employees' activities was out of the ordinary.

Accordingly, we dismiss the complaint allegation.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, UPMC Presbyterian Shadyside Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

Coercing employees who were engaged in union activity by requiring them to provide identification to security personnel.

AMENDED REMEDY

Having found that the Respondent engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) of the Act, we shall order the Respondent to post an appropriate notice to employees.

ORDER

The National Labor Relations Board orders the Respondent, UPMC Presbyterian Shadyside Hospital, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercing employees in the exercise of their rights under the Act by requiring employees who were engaged in union activity to show identification to security personnel.

(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) Within 14 days after service by the Region, post at its facilities in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 6, 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent 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

[23] 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."

all current employees and former employees employed by the Respondent at any time since February 21, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 6 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.

IT IS FURTHER ORDERED that the remainder of the complaint is dismissed insofar as it alleges violations of the Act not specifically found here or previously in 366 NLRB No. 185 (2018).

Dated, Washington, D.C. June 14, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.

Since at least the 1940's, the National Labor Relations Act has been interpreted, by the Board and by the Supreme Court, to prohibit employers from discriminatorily denying union organizers access to their property. Today, abruptly reversing judicially-approved Board precedent that it misreads, the majority throws that longstanding principle into doubt, by permitting the employer here to expel union representatives from a hospital cafeteria that is open to the public, based entirely on their union affiliation. This was discrimination in its clearest form, and the Board has never before tolerated anything like it. The majority's holding is not only contrary to decisions now overruled, it also cannot be reconciled with the understanding of discrimination reflected in the Supreme Court's *Stowe Spinning* decision[1]—which the Board is not free to overrule.

Moreover, "[i]n its eagerness to address the . . . issue" it reaches, the majority "has conjured a factual situation as to which there is no substantial evidence," i.e., that the union representatives were expelled for violating a no-solicitation rule that was never actually invoked against them (and that could not have been applied to them in any case, as they were merely sitting with hospital employees at lunch, discussing union matters).[2] Today's decision, in short, is "unsupported by substantial evidence," as well as "not in accordance with law," in the words of the Administrative Procedure Act.[3]

I.

The legal principles that should govern this case are well established, but the majority's opinion presents an incomplete picture of Supreme Court precedent, which obviously must guide the Board today. The majority also misreads the Board decisions that it overrules, in order to find some supposed inconsistency with Supreme Court precedent. Before turning to the undisputed facts of this case – which are crucial to the proper outcome here – it is helpful to examine the applicable law.

We all agree that Supreme Court's 1956 decision in *Babcock & Wilcox*[4] sets out the general framework to determine whether an employer has unlawfully excluded non-employee union representatives from its property in violation of Section 8(a)(1) of the Act.[5] There, in a case where union organizers had been barred from distributing literature, the Court explained that:

> [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other channels of communication will enable it to reach the employees with its message and *if the employer's notice or order does not discriminate against the union by allowing other distribution.*

351 U.S. at 112 (emphasis added). *Babcock & Wilcox* thus creates a general rule permitting employers to exclude

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

[2] *United Food & Commercial Workers, Local 400 v. NLRB*, 222 F.3d 1030, 1033 (D.C. Cir. 2000), reversing and remanding *Farm Fresh, Inc.*, 326 NLRB 997 (1998). There, the District of Columbia Circuit reversed and remanded a Board decision that overruled *Montgomery Ward & Co.*, 288 NLRB 126 (1988), a decision also effectively overruled here. On remand, the Board vacated its first decision, agreeing with the original dissenters that the issue first reached was not, in fact, presented. *Farm Fresh, Inc.*, 332 NLRB 1424 (2000).

[3] 5 U.S.C. §706(2)(A). See *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (explaining that Board adjudication is subject to Administrative Procedure Act requirements). Under Sec.10(e) of the National Labor Relations Act, meanwhile, the Board's factual findings must be "supported by substantial evidence on the record considered as a whole." 29 U.S.C. §160(e).

I join the majority, however, in adopting the judge's finding that the Respondent unlawfully required employees to produce identification and in reversing the judge's finding that the Respondent engaged in unlawful surveillance.

[4] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

[5] Sec. 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7," which include the "right to … form, join, or assist labor organizations." 29 U.S.C. §158(a)(1); 29 U.S.C. §157.

nonemployees, with two exceptions: (1) if employees are inaccessible to the union; *or* (2) if the employer "discriminate[s] against the union." Id.

Babcock & Wilcox, however, did not involve a claim of employer discrimination. It turned instead on the question of employee inaccessibility. The discrimination exception originated not in *Babcock & Wilcox*, but rather in an earlier Supreme Court decision, *Stowe Spinning* (decided in 1949), which had approved the Board's approach in that area. The *Babcock & Wilcox* Court cited *Stowe Spinning* in a footnote, pointing out the "element of discrimination" that existed there and citing Board property-access cases involving discrimination. 351 U.S. at 111 fn. 4.[6]

In *Stowe Spinning*, the Court endorsed the Board's holding that an employer violated Section 8(a)(1) of the Act by permitting outside community groups to use an employer-owned meeting hall, while prohibiting its use by union organizers. The prohibition, the Board had found, "constituted unlawful disparity of treatment and discrimination."[7] The Court agreed, observing that the meeting hall "had been given freely to others" and that "[w]hat the Board found . . . is discrimination."[8] It held that the proper remedy was not to require the employer to "permit unions to use the hall at all times," but rather to order the employer "to refrain from any activity which would cause a union's application [to use the hall] to be treated on a different basis than those of others similarly situated."[9] Notably, the Court rejected the argument that the employer's actions were a legitimate exercise of its property rights that could not be redressed by the Board, observing that "[i]t is not 'every interference with property rights that is within the Fifth Amendment [and] [i]nconvenience or even some dislocation of property rights may be necessary in order to safeguard the right to collective bargaining.'"[10]

After 70 years, *Stowe Spinning* remains the only Supreme Court decision that turns on the application of the discrimination exception that governs this case. In *Lechmere*, decided in 1991, the Court reaffirmed the framework announced in *Babcock & Wilcox*—including the discrimination exception—but that case, too, turned on employee inaccessibility, with the Court rejecting the Board's then-current balancing approach to the inaccessibility issue.[11] Because the Supreme Court has authoritatively construed the Act, of course, the Board is not free to alter the approach to access discrimination exemplified in *Stowe Spinning* and approved in *Babcock & Wilcox*. This is the lesson of *Lechmere*, where the Court rejected the Board's approach to access issues not implicating discrimination as inconsistent with *Babcock & Wilcox*.[12]

In the years following *Lechmere*, the Board has continued consistently to apply the discrimination exception in access cases involving nonemployees.[13] A recent example is *North Memorial Health Care*, decided in 2016, which closely resembles this case -- and which the Board should follow here.[14] Adopting the well-reasoned decision of the administrative law judge and citing *Babcock*

[6] The *Babcock & Wilcox* Court cited *Carolina Mills, Inc.*, 92 NLRB 1141 (1951) (with the caveat that, though present, discrimination was "not relied upon" in that case) where the employer had prevented nonemployee union representatives from distributing literature on its property near plant entrances, but had no general rule prohibiting distribution and (after excluding the union) had "permitted the distribution of literature on the [plant] parking lot." 92 NLRB at 1166. See also Note, *"Not as a Stranger": Non-Employee Union Organizers Soliciting on Company Property*, 65 Yale L. J. 423, 423 & fn. 4, 425 & fn. 21 (1956) (cited in *Babcock & Wilcox* for its collection of cases and itself citing, in turn, cases involving the discriminatory denial of access to nonemployee union organizers, such as *United Aircraft Corp.*, 67 NLRB 594, 603−604 (1946)).

[7] *Stowe Spinning Co.*, 70 NLRB 614, 622 (1946). The Board emphasized the "arbitrariness . . . of [the] decision" denying access "which resulted in the discriminatory treatment of the [u]nion," and it cited earlier Board decisions in which similar discriminatory denials of access to union representatives had been found unlawful. Id. at 622 & fn. 9, 624, citing, inter alia, *Weyerhauser Timber Co.*, 31 NLRB 258, 263 (1941). The Board's decision explained that the meeting hall had been opened to the Patriotic Order Sons of America (a fraternal group), to churches, to "Ladies Aid" societies, to a school, and to employees attending a "safety school." 70 NLRB at 621.

[8] 336 U.S. at 233.

[9] Id. at 232−233.

[10] Id. at 232, quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 (1945).

[11] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). No issue of discrimination was involved there. As the *Lechmere* Court observed, the employer's prohibition against solicitation and distribution on its property had been "consistently enforced ... inside the store as well as on the parking lot (against, among others, the Salvation Army and the Girl Scouts)." 502 U.S. at 530 fn. 1.

The majority cites *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), but that case has no bearing here. In *Sears, Roebuck*, the Supreme Court considered *Babcock & Wilcox* in addressing whether a state-court trespass lawsuit directed against union area standards picketing was preempted by the Act. The Court described *Babcock & Wilcox* as holding that "[t]o gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists *or that the employer's access rules discriminate against union solicitation*." 436 U.S. at 205 (emphasis added).

[12] *Lechmere*, supra, 502 U.S. at 536−538 (rejecting Board's analysis in *Jean Country*, 291 NLRB 11 (1988), and explaining that agency's interpretation of statute must be judged against Court's prior determination of statute's clear meaning).

[13] Soon after *Lechmere* was decided, the Board applied the discrimination exception recognized in *Babcock & Wilcox*, correctly observing that it had not been disturbed by *Lechmere*. See *Davis Supermarkets, Inc.*, 306 NLRB 426, 426−427 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993); *New Jersey Bell Telephone Co.*, 308 NLRB 277, 281 (1992).

[14] *North Memorial Health Care*, 364 NLRB No. 61 (2016), enfd. 860 F.3d 639 (8th Cir. 2017).

& Wilcox, the Board found that the hospital employer unlawfully prohibited non-employee union representatives from discussing union matters with employees in the cafeteria, which was open to the general public. The Board observed that the "union representatives were using the cafeteria in an orderly, non-disruptive manner," by "sitting at tables conversing with small groups of off-duty employees."[15] The employer's objection to the presence of the union representatives, the Board found, was based not on their conduct, but rather "on the union content of the conversations."[16] "[N]othing distinguished the small, orderly conversations between union representatives and [bargaining] unit members … from other gatherings of cafeteria visitors except for the fact that the [employer] knew that union representatives were present and union topics would likely be discussed."[17] Indeed, the employer "did not show it had ever prohibited an orderly, non-disruptive, cafeteria gathering of any size where such gathering did not include a union representative."[18] The exclusion of the union representatives from the cafeteria was thus discriminatory and therefore unlawful.[19]

This result is perfectly consistent with the understanding of access discrimination applied by the Supreme Court in *Stowe Spinning* and then endorsed in *Babcock & Wilcox*. Just as union representatives were discriminatorily denied the use of the employer's meeting hall in *Stowe Spinning* because of who they were and what they planned to discuss, so the union representatives in *North Memorial* were discriminatorily excluded from the hospital cafeteria based on their status and the content of their conversations with employees (as opposed to some conduct that was uniformly prohibited for all cafeteria patrons, regardless of identity). On review, notably, the Eighth Circuit affirmed the Board's violation findings.[20]

North Memorial is the latest in a long line of Board cases (decided both before and after *Lechmere*) that involve the discriminatory exclusion of nonemployee union representatives from employer cafeterias otherwise open to the public. As the Board explained in *North Memorial*, insofar as those decisions stand for the proposition that an employer may not exclude a union representative based simply on his status and on the union-related content of his conversations with employees, they "squarely rest on the nondiscrimination rule that the Supreme Court set forth in *Babcock & Wilcox*."[21]

Today, the majority nevertheless overrules some, and perhaps all, of these cafeteria-access decisions and then uses the reversal of precedent as the basis for finding no violation of the Act here. As I will explain, there is no good reason for either step. If the Board had ever held that an employer was required to provide access to its property to a non-employee union representative on some ground *other* than the two exceptions recognized in *Babcock & Wilcox* (the inaccessibility of employees or discrimination against the union and its message), then that particular decision could not stand, particularly after *Lechmere* reaffirmed *Babcock & Wilcox*. But insofar as they *do* rely on the discrimination exception acknowledged in *Babcock & Wilcox* (and exemplified by *Stowe Spinning*), the Board's cafeteria-access decisions are entirely consistent with Supreme Court precedent. *North Memorial*, the Board's most recent decision in this area, is certainly a proper application of the discrimination exception. It controls this case, as I will explain.

II.

Perhaps the most important fact to understand about this case is that it demonstrably does *not* involve an employer's non-discriminatory application of a no-solicitation/no-distribution rule on property open to the public.[22] The credited evidence shows that the nonemployee union representatives did not engage in solicitation or distribution in the cafeteria and it is clear that the Respondent's security official did not expel them on that basis. Moreover, they were expelled from the cafeteria, while another nonemployee at the next table engaged in similar conduct (i.e., dining with employees and with no "hospital business") was permitted to remain. The majority's discussion of the facts is accurate and fairly

[15] 364 NLRB No. 61, slip op. at 20.

[16] Id. at 21.

[17] Id.

[18] Id.

[19] Id. at 21–22. Employing the same analysis, the Board found an additional violation involving the later exclusion of another union representative. Id. at 33 (finding that employer violated Act by preventing union representative "from participating in orderly, non-disruptive gatherings in a cafeteria that was open to the general public, while permitting comparable gatherings in the same location so long as union representatives and union subjects were not involved").

[20] *North Memorial Health Care v. NLRB*, 860 F.3d 639, 646−647 (8th Cir. 2017).

[21] 364 NLRB No. 61, slip op. at 21, citing *Baptist Medical System*, 288 NLRB 882 (1988), enf. denied 876 F.2d 661 (8th Cir. 1989), and *Montgomery Ward & Co.*, 256 NLRB 800 (1981), enfd. 692 F.2d 1115 (7th Cir. 1982).

[22] Notably, the Board recently found that, as applicable to employees, the Respondent's solicitation and distribution policy was unlawfully overbroad because it prohibited off-duty employees permissibly on the property from engaging in activity protected by the Act. *UPMC*, 366 NLRB No. 142, slip op. at 1 (2018). As the Board explained, the Respondent "permitted off-duty employees access to the cafeteria but prohibited them from soliciting (or being solicited by) employees on nonworking time, both in the cafeteria and in other nonworking and no-patient care areas of the hospitals." Id. "Having granted off-duty employees access to the hospital cafeteria, the Respondent[] could not at the same time prohibit such employees from soliciting other employees in the cafeteria who were on non-working time." Id., slip op. at 2.

comprehensive. But my colleagues fail to grasp the significance of the facts they see, which prevents them from reaching the correct result in this case.

A.

The Respondent owns and operates a cafeteria inside one of its hospitals, which was patronized by both employees and nonemployees. It did not normally monitor who was present in the cafeteria. Nothing was posted either inside or outside the cafeteria indicating who could patronize it.

Here, as the majority explains, two union representatives sat with employees at two tables in the cafeteria, ate lunch, and discussed the union's organizing campaign. Union flyers and union pins (but no authorization cards) were on the tables.[23] There is no evidence that either union representative distributed the flyers and pins to anyone,[24] and no evidence that either representative solicited any employees to join or support the union. While the union representatives and the employees were sitting at their tables, they were approached by the Respondent's security manager, Gerald Moran. Moran had observed neither solicitation, nor distribution, although he was responding to unverified reports of such conduct.

Moran asked one of the nonemployee union representatives what she was doing there. The union representatives admitted they were nonemployees; one of them stated that they were talking about the union and that they were allowed to be present. Moran stated to the group that he was responding to a complaint about "unauthorized" individuals in the cafeteria. He told the group that only patients, patient visitors, and employees were allowed in the cafeteria. Moran then told the group that the union representatives, along with two employees who did not furnish identification to prove they were employees, would have to leave because they did not have "any hospital business." When one of the union representatives asked Moran if a nearby patron who was there only as the guest of an employee (and so, under the purported rule barring guests of employees, was not entitled to use the cafeteria) would also be asked to leave, Moran said "maybe," but that he was dealing with them first.

Ultimately, Moran called the Pittsburgh police, and six city and university officers arrived. An officer said to the group, in Moran's presence, that he had received a call regarding unauthorized persons and that anyone who was not an employee would have to leave. At that time, the two nonemployee union representatives were escorted from the cafeteria. The employees who were with them left as well. (The other "unauthorized" guest of an employee present in the cafeteria at the time was not escorted off the premises by police.) The Respondent's internal report of the incident indicated that Moran had discovered four "unknown" persons at a table with union material, who were asked to leave because they had no "hospital business" in the cafeteria.[25] The internal report did not refer to a violation of any policy against solicitation or distribution.

Ultimately, unfair labor practice charges were filed with the Board, the General Counsel issued a complaint, and an administrative law judge found that the Respondent violated Section 8(a)(1). He observed that "the Respondent instructed the union representatives to leave the cafeteria and caused the police to remove them because they were discussing union related matters with employees." "Under existing Board precedent," the judge continued, "to exclude the union representatives on this basis treats them in a disparate and discriminatory basis from the other members of the public patronizing the cafeteria." The judge's 2014 decision was issued well before the Board's 2016 decision in *North Memorial*, which should guide the Board here, but his conclusion was nevertheless correct.

B.

In light of the basic anti-discrimination principles of *Babcock & Wilcox* and *Stowe Spinning*, the record evidence here establishes that the Respondent unlawfully excluded the union representatives from its cafeteria based on their union status and on the union-related content of their conversation with employees—and *not* on their violation of any neutral rule applied nondiscriminatorily to all cafeteria patrons. This case is indistinguishable from the Board's recent decision in *North*

[23] The Board recently found that the Respondent's "unwritten rule prohibit[ing] employees from leaving nonwork-related materials in nonworking areas" was an unlawfully overbroad restriction on distribution. *UPMC*, supra, 366 NLRB No. 142, slip op. at 2.

[24] There is evidence in the record that there had been distribution of flyers in the cafeteria, by off-duty employees earlier that day and during the prior few months. The Respondent could not lawfully have prohibited this conduct—on non-work time, in a nonwork area—as a recent Board decision involving the Respondent's unfair labor practices demonstrates. *UPMC*, supra, 366 NLRB No. 142, slip op. at 1 (finding that the Respondent's solicitation and distribution policy was unlawfully overbroad and that the Respondent unlawfully applied its policy to an off-duty employee engaged in union solicitation in the cafeteria).

[25] There would seem to be a serious question as to whether the expulsion of the union representatives was proper under Pennsylvania criminal trespass law. Under that law, it is a defense to prosecution that "the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises." 18 Pa. C.S.A. §3503(c)(2). Here, of course, the cafeteria was "open to members of the public" and the conditions effectively imposed by the Respondent on "access to or remaining in the premises" were not "lawful" under the National Labor Relations Act.

Memorial, supra, which was enforced by the Eighth Circuit.

As explained, the essential facts are simple and undisputed: The cafeteria was open to the public. The nonemployee union representatives ate lunch with employees there and talked about union topics. There is no evidence that the nonemployee representatives engaged in solicitation or distribution. The Respondent's security manager did not invoke or apply any policy against solicitation or distribution, but instead instructed them to leave solely because they did not have any "hospital business." He then called the police to eject the representatives, which they did. Meanwhile, the security manager did not similarly eject another patron, although she, too, had no "hospital business" supposedly entitling her to use the cafeteria.[26] Indeed, nothing distinguished the union representatives from any other nonemployee patron of the cafeteria except their status, and nothing about their conduct distinguished them either, except for the union-related content of their conversations with employees. Nevertheless, they were ejected.

If this was not discrimination, then it is hard to know what is. Just like their counterparts in *North Memorial*, the union representatives here "were using the cafeteria in an orderly, non-disruptive manner," by "sitting at tables conversing with small groups of off-duty employees."[27] It is obvious, here, too, that the Respondent's objection to their presence was based not on their conduct, but rather "on the union content of the conversations."[28] There is no evidence, meanwhile, that the Respondent "had ever prohibited an orderly, non-disruptive, cafeteria gathering of any size where such gathering did not include a union representative."[29] The facts here, then, call for application of the long-established principle that an employer is not permitted "to prohibit a union organizer from utilizing its restaurant solely because the organizer was discussing organizational activities" with employees, because such a prohibition "flies in the face of the Supreme Court's admonition against discrimination on this basis when determining the propriety of access restrictions."[30] If the Respondent was free to exclude the union representatives from its cafeteria, then the employer in *Stowe Spinning* should have been permitted to deny the union access to its meeting hall, while granting access to other groups – but that is not what the Supreme Court held, of course.[31]

[26] The majority claims that the union representatives' lunchtime conversation, because it may have involved promoting the union, was distinguishable from the conduct of this patron who was allowed to remain. The union content of the representatives' conversation surely cannot be a legitimate basis for distinguishing it from the conversations of other cafeteria patrons. But in any case, the Respondent's stated basis for ejecting the union representatives had nothing to do with their conduct. The Respondent's security manager plainly stated that its reason for expelling the union representatives was that they, like the other patron, were "unauthorized persons" who "lacked hospital business," and not that they were engaged in any form of proscribed conduct. Thus, with respect to the Respondent's stated basis for removing the union representatives, i.e., their lack of hospital business, the other patron was indistinguishable from them.

The majority suggests that the union representatives may have "perhaps solicit[ed]" this patron to support the union. There is no support in the record for this speculation. And again, in any event, the Respondent's security manager did not base his removal of the union representatives on their conduct, nor did he observe them engaging in solicitation.

[27] *North Memorial,* supra, 364 NLRB No. 61, slip op. at 20.

[28] Id. at 21. While the majority acknowledges that the Eighth Circuit's *North Memorial* decision (upholding the Board) was consistent with *Babcock*, in finding that the content of the union representatives' conversation was a discriminatory basis on which to exclude them from the cafeteria, the majority ignores that this is almost exactly what happened here.

[29] Id. The two prior instances in the record where the Respondent removed nonemployees from the cafeteria for violations of its rules involved solicitation of money. According to an incident report, on October 21, 2011, an individual who had engaged in solicitation was found "wandering around the rear of the cafeteria," and was subsequently removed. On June 13, 2012, a person was confronted and "denied soliciting money," but was escorted out, as he had previously been barred from the cafeteria due to prior solicitation of money. In an event just after security manager's Moran's February 21, 2013 removal of the union representatives, on March 25, 2013, Moran himself responded to a distribution report in the cafeteria. The accused individuals admitted "that they were handing out literature for the Falun Gong Transplants," and Moran "advised them that they were not permitted to solicit on UPMC premises." Thus, in every incident, the Respondent investigated the circumstances and generally ascertained a violation of its cafeteria rules. Here, by contrast, Moran confirmed that there was *no* distribution by nonemployees, nor any conduct falling within its solicitation rule, and he did not cite any rule of cafeteria conduct in expelling the union representatives.

[30] *Baptist Medical System*, 288 NLRB 882, 882 (1988) (emphasis added), enf. denied 876 F.2d 661 (8th Cir. 1989). The Board made the same observation in its 1988 *Montgomery Ward* decision. *Montgomery Ward*, supra, 288 NLRB at 127.

[31] The majority insists that its "decision today, which turns on the conduct of the union organizers, in no way conflicts with the Supreme Court's well-established prohibition against discrimination based solely on union affiliation." The majority's contention starts from a false premise: that the union representatives here were ejected from the cafeteria because of their conduct—conduct that the Respondent uniformly prohibited in the cafeteria—rather than because of their union affiliation. The record refutes the majority's premise. As explained, the union organizers were ejected because they had no "hospital business" in the cafeteria—but other persons without "hospital business" were permitted to patronize the cafeteria just as the organizers did (by having lunch and talking at the table). To be sure, the majority calls what the organizers did "promotional activity," but that post-hoc categorization cannot license discrimination. Indeed, the unstated premise of the majority's position seems to be that the mere presence of the union representatives in the cafeteria (the only "conduct" that was relied on by the Respondent in ejecting them) per se constitutes "promotional activity"—in other words, merely by *being* union representatives they were inherently doing something "promotional" that could lawfully be restricted. But that result is inconsistent with *Stowe Spin-*

III.

The Board should follow *North Memorial* here. Instead, the majority aims to evade that decision, while reversing a long line of Board cases.[32]. "[W]e take this opportunity," the majority recites, "to modify Board law, and to overrule precedent." The dilemma, however, is that this case does not present a legitimate opportunity to overrule Board precedent. In my colleagues' own words, they purport to be overruling decisions that "require[] employers to permit nonemployees to engage in promotional or organizational activity in public cafeterias or restaurants *absent evidence of inaccessibility or activity-based discrimination*." However, this case does not fall within the targeted category because on the facts here there plainly *was* "activity-based discrimination"—if we focus on the actually-relevant activity here: not solicitation or distribution (which the union representative did not engage in), but rather patronizing the cafeteria by sitting at a table and engaging in conversation. The Respondent treated members of the public patronizing the cafeteria differently, only ejecting those persons who were union representatives and who engaged in union-related conversations in the cafeteria, while permitting others to remain.[33]

Indeed, the majority's overreach is precisely the maneuver that the District of Columbia Circuit rejected in *United Food & Commercial Workers*, supra, where an earlier Board majority sought to reverse the same line of precedent, without a proper factual predicate for doing so. This case simply does not implicate the issue that the majority reaches out to resolve by reversing precedent. Nor is there any proper connection between the reversal of precedent and the outcome of this case, which should be entirely unaffected, because it does not turn on the neutral application of a conduct-based rule like a no-solicitation policy. As we have seen, the union representatives here were ejected for their status, not their conduct, and the Respondent did not even purport to apply a no-solicitation policy to them.

United Food & Commercial Workers (known as *Farm Fresh* at the Board) involved the exclusion of two union organizers from an employer's store snack bar. A divided Board held that the exclusion was lawful, as based on the employer's application of an "across-the-board policy banning solicitation by any outsider at the facility."[34] According to the Board majority, such a policy would have been unlawful under existing Board precedent—*Montgomery Ward & Co.*, 288 NLRB 126 (1988)—but that decision was overruled by the Board majority as inconsistent with the Supreme Court's intervening decision in *Lechmere*.[35] On review, the District of Columbia Circuit agreed with the Board dissenters[36] that "*Montgomery Ward* was not at issue in this case because the union organizers had not been ejected on the basis of a no-solicitation policy, but rather because there were outstanding trespass warrants against them."[37] Accordingly, the court reversed the Board's decision and remanded the case, explaining that "[b]ecause there is no substantial evidence to support the Board's factual finding, its ultimate disposition cannot stand."[38] The same is true here.[39]

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ning, which makes clear that discrimination based solely on union affiliation—however it is disguised or characterized—is not lawful.

The majority apparently seeks to diminish the force of *Stowe Spinning* by arguing that in addition to discrimination, the inaccessibility of other venues for the union to meet (given the setting of a relatively isolated company town) was also relied upon by the *Stowe* Court in finding that the employer unlawfully excluded the union organizers. But the Court focused its analysis on the question of discrimination and noted the relative isolation of the company town where the meeting hall was located only to respond to the argument that "the Board is now invading private property unconnected with the plant, for a private purpose." *Stowe Spinning*, supra, 336 U.S. at 229. In any case, of course, the *Babcock* Court cited *Stowe* as illustrating the discrimination exception recognized by the Court.

[32] The majority says that it "overrule[s] the Board's decision in *North Memorial* . . . to the extent that it relies on the principles set forth in *Montgomery Ward*, 246 NLRB 800," and "to the extent that the Board adopted the judge's finding that under *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978), nonemployee union organizers have a presumptive right of access to an employer's property." This limited overruling leaves the essential rationale of *North Memorial* intact, however, and the majority does *not* say that the result reached in *North Memorial* was incorrect on its facts. Thus, the Board here is obliged to follow *North Memorial* or to distinguish it. See, e.g., *Manhattan Center Studios, Inc. v. NLRB*, 452 F.3d 813, 816 (D.C. Cir. 2006). As explained, *North Memorial* cannot be meaningfully distinguished on its facts, and it compels finding a violation in this case.

[33] Thus, discrimination here is clearly established if we look to the proper comparators for the union representatives: not persons ejected for soliciting money in the cafeteria, but rather persons who patronized the cafeteria as the union representatives did, sitting and talking despite having no "hospital business." The majority, as I will explain, improperly treats the union representatives as similarly situated to the ejected solicitors, equating a conversation about the union with soliciting for money by deeming the union representatives to have engaged in "promotional activity" that is the equivalent of solicitation. This amounts to permitting discrimination based on the union representatives' status—but the Supreme Court's decisions make clear that an employer may not exclude a person from property open to other non-employees based simply on her union affiliation or union activity.

[34] 222 F.3d at 1032.

[35] *Farm Fresh*, supra, 326 NLRB at 999−1001.

[36] Member Fox and Member Liebman.

[37] 222 F.3d at 1032.

[38] Id. at 1034.

[39] My colleagues' attempt to distinguish *United Food & Commercial Workers*—on the basis that the employer there "admitted" the expulsion of the union organizers was based on trespass warrants and not solicitation—is premised on the same misreading of the facts here that runs through their entire analysis. The record establishes that the Respondent's basis for ejecting the union representatives was not solicitation, nor promotional activity, nor conduct-based at all. Rather, con-

In addition to its lack of a factual predicate, the majority's decision today also misconstrues the line of Board precedent it purports to overrule. According to the majority, "although the Board has generally applied the *Babcock* standard, with its inaccessibility and activity-based discrimination exceptions, in deciding cases where nonemployee union organizers seek access to private property, the Board has refused to apply it where nonemployee union organizers seek access to a portion of the employer's private property that is open to the public, such as a cafeteria or restaurant." As to *North Memorial*, the recent decision closely on point here, the majority's statement is simply wrong—as any fair reading of the case demonstrates. *North Memorial* explicitly and correctly applied the *Babcock & Wilcox* discrimination exception to find a violation of the Act.[40] On that basis, the Eighth Circuit enforced the Board's decision, noting its reliance on *Babcock & Wilcox* and explaining that the Board "applied the discrimination rule to the instant facts and determined that the hospital had 'violated the Act by discriminating against the union-related conversations that non-employee union representatives' had been attempting to have in the cafeteria."[41]

The majority's extended discussion of old Board decisions (pre-dating both *Lechmere* and *North Memorial*) as representing the "Board's approach," as well as its invocation of court of appeals decisions reversing certain of those decisions, are entirely beside the point here. *Lechmere*, of course, swept away the Board's pre-1991 balancing-test approach to access cases, but left the *Babcock & Wilcox* discrimination exception in place. *North Memorial*, in turn, made clear that the Board's *current* approach in this area rests on the discrimination principle. Here, finally, the application of the *Babcock & Wilcox* standard to the record evidence compels finding a violation of the Act (as already shown).

Insofar as the Board's old cases could fairly be interpreted as finding a nonemployee access-related violation involving *neither* prong of *Babcock & Wilcox*—i.e., neither the inaccessibility of employees, nor discrimination against the union—the Board today could properly explain that the earlier decisions are no longer good law. *Whether* one, some, or all of those decisions are actually susceptible to such an interpretation is another matter.[42] For purposes of deciding *this* case correctly, the issue is largely academic.

The Eighth Circuit's decision in *North Memorial* neatly illustrates this point. As explained, the court enforced the Board's decision finding that the hospital employer had discriminatorily excluded nonemployee representatives from its cafeteria. It distinguished cases—including an earlier Eighth Circuit decision, cited by the majority today, reversing the Board—where the exclusion of union representatives was based on a "generally applicable no solicitation policy" that had not been "prove[d] [to be] enforced in a discriminatory manner."[43] Here, to repeat, the record evidence establishes that the exclusion of the union representatives was *not* based on a no-solicitation policy, and there is no evidence that they engaged in solicitation.

IV.

The majority concludes its review of Board precedent by asserting that:

> Absent discrimination between nonemployee union representatives and other nonemployees—i.e., "disparate treatment where by rule or practice a property owner" bars access by nonemployee union representatives seeking to engage in certain activity while "permit[ting] similar activity in similar relevant circumstances" by other nonemployees"—the employer may decide what types of activities, if any, it will allow by nonemployees on its property. [brackets in original]

This standard has no clear origin in Board case law involving access to employer property by nonemployee union representatives. On its face it would seem to com-

temporaneous evidence shows that the Respondent acted based on the union representatives' union status and the union-related content of their conversations. Any other characterization is simply a post hoc rationale. Thus here, as in *United Food & Commercial Workers*, the majority has analyzed the case and overruled precedent based on a factual premise—that the Respondent acted based on the union representatives' conduct in the cafeteria – not substantiated by the record.

[40] 364 NLRB No. 61, slip op. at 20.

[41] *North Memorial*, supra, 860 F.3d at 646 (quoting the Board's decision at 364 NLRB No. 61, slip op. at 20).

[42] The Board did explicitly base violation findings on employer discrimination in some cases at the very least. See *Southern Maryland Hospital Center*, 276 NLRB 1349, 1349 fn. 2 (1985) (adopting judge's finding that hospital employer unlawfully excluded union organizers from cafeteria but relying solely on judge's "finding that [employer] was motivated by discriminatory considerations"), enfd. 801 F.2d 866 (4th Cir. 1986). See also *Oakwood Hospital*, 305 NLRB 680, 687 (1991) (because hospital excluded union organizer from cafeteria "for discriminatory reasons," case was "governed by *Southern Maryland*," supra, where Board "held that a hospital may not discriminatorily exclude union organizers from its cafeteria, where the cafeteria is generally open to visitors"), enf. denied 983 F.3d 698 (6th Cir. 1993). Other pre-*Lechmere* cases, to be sure, disavow a discrimination analysis, and so are of dubious validity today. See *Ameron Automotive Centers*, 265 NLRB 511, 511−512 (1982) (employer rule prohibiting solicitation by nonemployees was unlawfully overbroad because it covered employer's restaurant, which was open to the public); *Montgomery Ward & Co., Inc.*, 256 NLRB 800, 800 (1981) (finding that employer discriminatorily applied no-solicitation rule to union organizers but holding that even non-discriminatory application of rule would have been unlawful).

[43] *North Memorial*, supra, 860 F.3d at 647, citing (inter alia) *Baptist Medical Systems v. NLRB*, 876 F.2d 661, 664 (8th Cir. 1989).

pel the majority to find a violation here, given the clear presence of discrimination: other members of the public were permitted to patronize the cafeteria and engage in conversation with employees. However, the majority's application of this principle to these facts reveals that the majority's definition of "discrimination" is actually impermissibly narrower than the Board's traditional, broad understanding of the principle—which was endorsed by the Supreme Court in *Stowe Spinning*.[44] The result is an outcome that is unsupported by the record evidence and contrary to the law that the Board is bound to apply.

A.

The Board has long recognized that *Stowe Spinning* and *Babcock & Wilcox* stand for the proposition that "where it is shown that restrictive [access] rules . . . flow not from the employer's right to protect his legitimate property interests, but rather from his desire to obstruct his employees' statutory right of self-organization, the immunity otherwise accorded him in this regard is forfeited."[45] Put somewhat differently, where an employer has opened its property to the public, mere opposition to statutorily-protected activity cannot be a legitimate reason for exercising a property owner's right to exclude an unwelcome person. That is the core insight, applicable to this case, of at least some of the earlier Board cafeteria-access cases that the majority overrules today.[46]

As explained, *Stowe Spinning* endorsed and embodied the Board's already well-established approach to access discrimination. And by the time of the Supreme Court's 1956 decision in *Babcock & Wilcox*, Board decisions had found that an employer violated the Act by denying access to nonemployee union organizers where it had previously admitted teachers and entertainers,[47] vendors,[48] and religious organizations and social societies.[49] The admitted groups can hardly be described as "similar" to union organizers, but excluding union organizers while admitting such other persons was nevertheless deemed discriminatory. *Phillips Petroleum Co.*, 92 NLRB 1344, 1346 (1951), provides one illustrative example. There, the Board found that an employer unlawfully discriminated against union organizers by prohibiting them from using a meeting hall that had been previously used for social gatherings, safety meetings, and church services. The Board observed:

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

Id. at 1349 (emphasis added). *Phillips Petroleum*, of course, is completely congruent with *Stowe Spinning.*

B.

Purporting to apply its new standard, the majority finds no violation of the Act here "because there is no evidence that the Respondent permitted any solicitation or promotional activity [sic] in its cafeteria." According to the majority, the expelled union representatives "were treated no differently than other third parties who were reported to

be soliciting or distributing in the hospital cafeteria."[50] It should be clear by now that the majority's position

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[44] The majority quotes footnote dicta from the Board's 1988 decision in *Jean Country*, supra, 291 NLRB at 12 fn. 3, a decision (as already noted) that was repudiated by the Supreme Court in *Lechmere* and that did not involve the discrimination exception of *Babcock & Wilcox*. Notably, the *Jean Country* footnote cites as its only authority another Board decision—*Providence Hospital*, 285 NLRB 320 (1987),—which also did not involve *Babcock & Wilcox*.

In *Providence Hospital*, the Board found that an employer unlawfully prohibited off-duty *employees* (not nonemployees) from handbilling at the main entrance of the employer's hospital. The Board explained that the employer had no "general rule restricting" such distribution by employees during nonworking time and no "general rule" prohibiting off-duty employees from entering or remaining on the employer's property. 285 NLRB at 322−323. "Under these circumstances," the Board found, the "ad hoc adoption of a special rule to prohibit handbilling on its property by employees . . . constitutes *disparate treatment of union activities* in violation of Section 8(a)(1) of the Act." Id. at 323 (emphasis added). Thus "disparate treatment" clearly had a broader meaning that the majority's definition of discrimination here.

[45] *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 fn. 8 (1962).

[46] For example, in *Baptist Medical Center*, decided in 1988, the Board observed that: an employer was not permitted "to prohibit a union organizer from utilizing its restaurant *solely because the organizer was discussing organizational activities*" with employees, because such a prohibition "flies in the face of the Supreme Court's admonition [in *Babcock & Wilcox*] against discrimination on this basis when determining the propriety of access restrictions." *Baptist Medical System*, 288 NLRB 882, 882 (1988) (emphasis added), enf. denied 876 F.2d 661 (8th Cir. 1989). The Board made the same observation in its 1988 *Montgomery Ward* decision. *Montgomery Ward*, supra, 288 NLRB at 127.

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

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

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

[50] The majority cites two instances that might be relevant, because they preceded (rather than post-dated) the events of this case. But both involved persons ejected from the cafeteria because they were or had been soliciting for money. See fn. 29, supra. Nothing of the sort happened here, obviously. It is telling, meanwhile, that in an incident that occurred after the events of this case, the Respondent's security manager told persons admittedly distributing literature that they were not permitted to solicit on the premises. The union representatives here were given no such admonition—obviously because they had not engaged in solicitation and distribution. Had the representatives simply

distorts this case, factually and legally, beyond recognition.[51]

The record evidence establishes that when it expelled the union representatives, the Respondent never purported to apply a prohibition against solicitation or distribution—or even a prohibition against "promotional activity," a newly-invented category of conduct that, as used by the majority, seems coextensive with union activity of the sort protected by the Act.[52] The record further establishes that the union representatives never engaged in solicitation or distribution. In short, this case simply does not involve the non-discriminatory application of a no-solicitation/no-distribution policy to conduct that actually falls within the policy.[53]

That fact does not trouble the majority, and it seems clear why. Under the majority's view, the mere maintenance of an employer's no-solicitation/no-distribution policy will *always* permit an employer to bar union representatives from access to property that is otherwise open to the public—regardless of whether the employer even purports to apply the policy when it excludes a representative and regardless of whether the representative actually engages in (or intends to engage in) solicitation.[54] The majority apparently believes that by virtue of her identity, a union representative's contact with employees necessarily constitutes solicitation—or at least prohibitable "promotional activity"—even if (as here) it amounted to no more than a conversation about union-related matters with off-duty employees seated together at a table over lunch. Board law has never defined solicitation—a term of art in labor law for many decades -- so

been told that (under the Respondent's rule) they could not engage in solicitation and distribution in the cafeteria, this case might never have arisen. Instead, the representatives were ejected with the help of several policemen.

[51] If the majority means to imply that an employer can be guilty of discrimination only if it discriminates between different types of Sec. 7 activity—e.g., permitting access by one union's organizers while excluding another's or permitting antiunion activity while prohibiting prounion activity by nonemployees—then its position was rejected by the Supreme Court in *Stowe Spinning*, supra.

There, the Court rejected the dissenting view of Justice Jackson that "discrimination . . . could hardly occur unless some other *union* had been allowed to use the hall." 336 U.S. at 235 (dissent) (emphasis added). A version of the dissenting view had been taken by the court below, the Fourth Circuit, whose decision the Court reversed. *NLRB v. Stowe Spinning Co.*, 165 F.2d 609 (4th Cir. 1947). In denying enforcement to the Board's order, the Fourth Circuit had opined that "[t]here is no general provision of the Act which requires an employer to treat a labor union in the same manner as it treats other persons or organizations which are not concerned with the interests or activities of labor." 165 F.2d at 611.

[52] The majority contends that it is "the Respondent's practice … to remove nonemployees who are engaged in promotional activity." However, the hospital rule at issue does not purport to cover "promotional" activity, and the Respondent never cited "promotional" activity when it ejected the union representatives. Specifically, the rule states: "Non-staff members may not solicit, distribute or post material at any time on UPMC premises." Further, security manager Moran was asked to investigate based on alleged staff-level sightings of solicitation and distribution (which ultimately were found not to implicate the nonemployee union representatives)—and not "promotional activity". And Moran's own report indicated he was investigating reports of "soliciting" and "passing out union literature" (neither of which he found evidence of). The report never used the word "promotional," nor suggested that the Respondent's rule covered more than soliciting and distributing. As previously stated (fn. 29, supra), the prior and or relatively contemporaneous instances of removal of other nonemployees from the cafeteria involved solicitation or distribution, and those incident reports did not cite "promotional" activity. Even in its exceptions brief, the Respondent merely argues, post hoc, that the "promotional" activity justified its actions and *not* that it had any preexisting rule against it. It is arbitrary, then, for the majority to insist that to establish a discrimination-based violation here, the General Counsel was required to show that the Respondent had previously permitted "promotional" activity.

[53] The expressed purpose of the Respondent's policy was "to limit solicitation activities to prevent interference with delivery of patient care, patient recovery, and performance of staff duties and to avoid imposition on any staff member, patient, or visitor." None of the identified concerns was implicated in this case, much less cited by the Respondent contemporaneously. A consensual conversation between union representatives and employees seated at a cafeteria table cannot fairly be called an "imposition" on staff members, patients, or visitors.

[54] The majority here is wrong to accept the Respondent's baseless and post hoc rationalization for excluding the union representatives. In the absence of any other legitimate basis for exclusion supported by the record, the pretextual explanation offered by the Respondent's security manager for demanding that the union representatives leave (that they had no "hospital business" in the cafeteria)— after discovering that the sole conduct they were engaged in was mere talking about the union—compels the conclusion that the Respondent was motivated solely by the representatives' union affiliation. See, e.g., *Southern Maryland Hospital*, supra, 276 NLRB at 1358 (adopting judge's finding of discrimination, which was based on "contradicted" and "gratuitous[]" explanations for expulsion of union representatives, which pointed to purely discriminatory motive). In *Stowe Spinning*, supra, the Court held that "the Board may weigh the employer's expressed motive" to determine whether the exclusion of union representatives from employer property is discriminatory." 336 U.S. at 230. The Respondent's motive in this case is equally clear if not candidly expressed.

Even where an employer *does* invoke a no-solicitation/no-distribution rule to exclude union representative from an area open to the public, of course, it may be engaged in discrimination, as illustrated by the Seventh Circuit decision upholding the Board's 1981 *Montgomery Ward* decision. There, the court found that the employer had discriminatorily enforced its rule, finding that "the context in which [it] was enforced . . . suggests, without more, that its application was almost necessarily discriminatory." *Montgomery Ward & Co., Inc. v. NLRB*, 692 F.2d 1115, 1122 (7th Cir. 1982), enfg 256 NLRB 800 (1981). The facts there, as here, "involve[d] an essentially private conversation in a restaurant open to the public, between off-duty employees and organizers." Id. The employer's representatives "approached the seated group only because they knew in advance that [two persons] were union organizers." Id. The Seventh Circuit "very much doubt[ed]" that the employer would "monitor [the] conversations [of other restaurant patrons] to guard against solicitation," given the offense that patrons would likely take. Id. The evidence before the court, in turn, demonstrated that the employer enforced the rule "not to halt any imminent threat to customer convenience," but only because of the employer's opposition to solicitation for the union. Id. at 1123.

broadly.[55] In effect, then, the majority invites employers to post "No Union Representatives Allowed" signs on property that is open to all other members of the public.

Put another way: while longstanding Board law makes clear that it would be unlawful to bar union organizers from a cafeteria simply for talking about the union, the majority's new conceptualization of the discrimination exception clearly permits such exclusion, because that is precisely what happened here. This result—and this unprecedented narrowing of the discrimination exception—is manifestly inconsistent with Supreme Court precedent and simply cannot stand. It is inconceivable that this is what the Supreme Court in *Stowe Spinning* or *Babcock & Wilcox*—contemplated, much less what Congress intended when it enacted Section 7 of the National Labor Relations Act.

IV.

Today's decision continues an unfortunate trend at the Board. Again, the majority mistakenly reverses precedent—narrowing statutory protections for employees and unions—without first providing notice to the public and inviting briefs, in a case that does not present a proper occasion for reconsidering the law.[56] Abusing the process of administrative decision-making predictably leads to arbitrary results. The result here speaks for itself. Because the majority's decision cannot be reconciled with either the facts of this case or clearly applicable Supreme Court precedent, I dissent.

Dated, Washington, D.C. June 14, 2019

[55] In the context of employer prohibitions against solicitation by employees—which are lawful, if limited to working time—the Board has explained that solicitation "for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad," but rather is conduct, such as the presentation of a union-authorization card for signature, that "prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals involved are supposed to be working." *Wal-Mart Stores*, 340 NLRB 637, 638 (2003), enf. denied in relevant part 400 F.3d 1093 (8th Cir. 2005). Here, of course, the union representatives did not present authorization cards to any employee in the cafeteria—and all the employees sitting with them were off-duty in any case. Nor did the union representatives approach any other persons in the cafeteria, for any purpose.

[56] For other examples of this trend, see, e.g., *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110 (2019) (reversing precedent on proper remedy when successor employer engages in hiring discrimination, while declining to address "perfectly clear successor" theory of liability that would have mooted remedial issue); *Alstate Maintenance*, 367 NLRB No. 68 (2019) (misinterpreting and reversing precedent to narrowing interpretation of concerted activity, while also narrowing interpretation of activity for "mutual aid or protection" under Sec. 7); *Hy-Brand*, 365 NLRB No. 156 (2017) (reversing precedent and adopting new joint-employer standard where liability was established under old standard, new standard, or alternative theory of liability), vacated 366 NLRB No. 26 (2018).

Lauren McFerran, 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 coerce you by requiring employees who are engaged in union activity to show identification to security personnel.

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

UPMC PRESBYTERIAN SHADYSIDE

The Board's decision can be found at www.nlrb.gov/case/06-CA-102465 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.