

# **ACCESS TO OTHERS' PROPERTY FOR UNION COMMUNICATIONS**

**OREGON LABOR LAW CONFERENCE 2020**

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# CONSTITUTIONAL RIGHTS

# PUBLIC FUNCTION

- *Venetian Casino Resort v. Local Joint Executive Board of Las Vegas*, 257 F.3d 937 (9th Cir. 2001) (Las Vegas Strip)
- *First Unitarian Church of Salt Lake City v. Salt Lake City Corporation*, 307 F. 3d 1114 (10th Cir. 2002)(Temple Square)
- *United Church of Christ v. Gateway Economic Development*, 383 F.3d 449 (6th Cir. 2004)(Gateway Complex)

# PUBLIC PROPERTY

- *United States v. Kokinda*, 497 U.S. 720, 727-728 (1990)
- *United States v. Marcavage*, 609 F.3d 264 (3rd Cir. 2010)
- *Hotel Employees and Restaurant Employees Union, Local 100 v. City of New York Department of Parks & Recreation*, 311 F.3d 534 (2nd Cir. 2002)

# ENFORCEMENT

- § 1983
  - Threat of deprivation of federal rights, privileges or immunities
  - Set up correctly to avoid “abstention”
- *Livadas v. Bradshaw*, 512 U.S. 107 (1994)

# NATIONAL LABOR RELATIONS ACT

# PRESUMPTIONS ABOUT ACCESS

- Employees—Yes
  - *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)
- Non-employees—No
  - *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)
  - *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)

# PRESUMPTIONS REBUTTABLE

- Real evidence of unusual circumstances, not speculation
  - *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979)
- Special workplaces
  - *Lechmere*, 502 U.S. at 539-540 (logging and mining camps, mountain resort hotels)
  - *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 338 (D.C. Cir. 2003)(health care)



# “WORK AREA”

- *Marshall Field & Co.*, 98 NLRB 88, 89-90 (1952)
- *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000)

# “ALTERNATIVE MEANS”

- Irrelevant to employee access
  - *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572-73 (1978)
- Relevant (rarely) to non-employee access
  - *Lechmere*

# CUSTOMERS AS WELL AS EMPLOYEES

- *Santa Fe*
- *Stanford Hospitals*

# TENANT AND CONTRACTOR EMPLOYEES

- *Fabric Services*, 190 NLRB 540 (1971)
- *Control Services*, 303 NLRB 481 (1991)
- *Computer Associates Int'l*, 324 NLRB 285 (1997)

# NEW YORK, NEW YORK

- *New York, New York, LLC*, 356 NLRB No. 119 (2011)
- Balancing test, employee v. property rights
- Presumption: tenant/contractor employees same as owner's
- Greater restrictions if owner shows:
  - Legitimate interest
  - Reasonable
  - Non-discriminatory
  - Narrowly-tailored

# APPLICATION OF *NYNY*

- *New York, New York*
- *Nova Southeastern University*, 357 NLRB No. 74 (2011)
- *Simon DeBartolo Group*, 357 NLRB No. 157 (2011)

# BEXAR COUNTY PERFORMING ARTS CENTER FOUNDATION (8/23/19)

- *New York, New York* overruled
- New test for contractor/licensee employees
  - Regularly and exclusively work there
  - No alternative means of communication
- “Alternate means”
  - Sidewalk across the street
  - Social and mass media
- Who is the “property owner?”
  - Business
  - Landowner

# ETHICAL CONSIDERATIONS—TEST CASES

- Consequences to employees
  - Criminal
  - Discipline
- Relationship of lawyer to employees, or union
- Whom to advise of risks?
- How to describe, assess risk?



# INTERFERENCE WITH NON-EMPLOYEE ACCESS

- Property right needed
- Discrimination may not be allowed
- Private property/public function

# PROPERTY RIGHT

- Tenants normally don't have it
  - *Indio Grocery Outlet*, 323 NLRB 1138 (1997)
  - *Roundy's Inc.*, 674 F.3d 638, 649 (7th Cir. 2012)
- State property law governs, and terms of leases
  - *United Food & Commercial Workers, Local 400 v. NLRB (Farm Fresh)*, 222 F.3d 1030 (D.C. Cir. 2000)

# PROTECTED § 7 ACTIVITY

- Area standards
  - *O'Neil's Markets v. NLRB*, 95 F.3d 733, 738-39 (8th Cir. 1996)
- Secondary
  - *Equitable Life Assurance Society*, 343 NLRB 438 (2004)
  - *Macerich Management Company*, 342 NLRB 514 (2005)

# DISCRIMINATION

- *Sandusky Mall Co.*, 329 NLRB 618 (1999)
- *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996)