UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC.,

Employer,

and

Cases 21-CA-095151
21-RC-091531
21-RC-091584

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations files this brief as *amicus curiae* in response to the Board's Notice and Invitation to File Briefs and in support of the request by the General Counsel and the union in this case to overrule the National Labor Relations Board's decision in *Register-Guard*, 351 NLRB 1110 (2007), and to find Purple Communications' policies limiting employee use of the company's e-mail system for Section 7-protected activities unlawful under Section 8(a)(1) of the National Labor Relations Act.

STATEMENT

Respondent Purple Communications, Inc. provides communications services for deaf and hard of hearing individuals, including video relay services. ALJ 2. Employees, known as video relay interpreters, facilitate communication between hearing individuals and individuals who are deaf or hard of hearing by interpreting spoken language into sign

language and sign language into spoken language. *Ibid.* Purple Communications' employees undertake this interpretation via computers at workstations at the employer's various facilities. *Id.* at 3.

Each employee is provided with a company e-mail account, which employees use to communicate with other employees and with company managers. *Ibid.* While at work, employees can access their company e-mail account from their workstation computers as well as from a small number of shared computers located in break rooms in each facility. *Ibid.* In addition, employees are permitted to access their company e-mail accounts from their personal home computers and personal smart phones. *Ibid.*

Purple Communications maintains an employee handbook, which contains an "Internet, Intranet, Voicemail and Electronic Communication Policy" that is relevant to employee use of company e-mail. Joint Ex. 1, at 30-31. The introduction to that policy states generally that:

> "[E]lectronic mail (email) . . . is provided and maintained by the Purple [sic] to facilitate Company business . . . All such equipment and access should be used for business purposes only." *Id.* at 30.

The policy then lists a series of "Prohibited Activities," which include:

> "Employees are strictly prohibited from using the . . . email system[] . . . in connection with any of the following activities: . . .
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business association with the Company. . . .
>
> 5. Sending uninvited e-mail of a personal nature." *Id.* at 30-31.

In 2012, employees at Purple Communication's Corona and Long Beach, California facilities petitioned the NLRB to conduct representation elections. ALJ 1. Elections were scheduled at both facilities for November 28, 2012. *Ibid.*

In the immediate run-up to the elections, employees at the Long Beach facility circulated an e-mail soliciting electronic signatures in support of the following statement: "We, the undersigned employees of Purple-Long Beach, wish to withdraw our request to unionize at this time, thereby canceling the vote that is scheduled to occur on November 28, 2012." Resp. Ex. 8, at unnumbered page 4. Some employees sent and received this e-mail using their company e-mail addresses. *See ibid.* (e-mail sent by Marie Treacy from marie.treacy@purple.us to Renee Souleret at renee.souleret@purple.us authorizing Souleret to include Treacy's name in support of anti-union statement). *See also id.* at unnumbered page 7 (e-mail sent by Mary D'Ettorre from mary.dettorre@purple.us to Renee Souleret at renee.souleret@purple.us authorizing Souleret to include D'Ettorre's name in support of anti-union statement). Purple Communications was aware of this use of its e-mail system by its employees to solicit opposition to the union and, in fact, provided copies of these e-mails to the Administrative Law Judge as an exhibit at the hearing in this case. Tr. 138 & Resp. Ex. 8.

ARGUMENT

It is indisputable that "e-mail has revolutionized communication both within and outside the workplace." *Register-Guard*, 351 NLRB at 1121 (Members Liebman & Walsh, dissenting). Owing to the centrality of e-mail for both personal and work communication, the overwhelming majority of employers expressly permit or at least

tolerate employee use of the employer's e-mail system for employee-to-employee communication unrelated to the employer's production or other business goals, *i.e.*, for personal use. As a result, e-mail has become a natural forum for employee communication about wages, hours, and working conditions in many workplaces. As with other avenues of employee communication at the workplace, under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), where an employer expressly permits or simply tolerates personal use of its e-mail system, a rule prohibiting employees from using company e-mail for Section 7-protected communications is unlawful absent the employer's showing of special circumstances that make the rule necessary to maintain production or discipline.

1. The ubiquity of e-mail as a method for personal and workplace communication is beyond dispute. Indeed, by the time the Board decided *Register-Guard*, "92% of employers *officially* allow[ed] personal use of company e-mail." National Workrights Institute *Amicus* Brief, at 4, filed in *Register-Guard* (citing Survey of Companies' E-Mail and Internet Monitoring, BUSINESS AND SOCIETY REVIEW 108:3 285, 293 (2003)) (emphasis added). And, even those companies that did not expressly permit employees to make personal use of company e-mail typically tolerated such use because employers had already learned that "policies stating that e-mail was exclusively for business use and that personal e-mail was not allowed" "are impractical." *Ibid.* Since the time of *Register-Guard*, the practice of permitting personal communication via the company e-mail system has become, if anything, more common. *See, e.g., Cal. Inst. of Tech. Jet Propulsion Lab.*, 360 NLRB No. 63, slip op. 3 (March 12, 2014) (employer rule allowing

use for "personal, non-business purposes"); *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. 2 n.6 (Sept. 7, 2012) (rule allowing use for "non-job purposes"); *UPMC*, JD-28-13, Case 06-CA-081896, slip op. 6 (April 19, 2013) (rule allowing "personal use").

E-mail is also unique in that, "unlike older communications media, [e-mail systems] accommodate multiple, simultaneous users." *Register-Guard*, 351 NLRB at 1126 (Members Liebman & Walsh, dissenting). Thus, unlike the use of a company bulletin board or telephone for Section 7-protected communications – where employee use could potentially crowd out employer communications – employee use of a company e-mail system for personal communications is highly unlikely to interfere with the simultaneous use of that system for work tasks. *Cf. Intel Corp. v. Hamidi*, 71 P.3d 296, 303-04 (Cal. 2003) ("undisputed evidence revealed . . . no interference with . . . ordinary and intended operation" of employer's e-mail system as a result of multiple messages sent by former employee).

The Supreme Court has explained that "[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency." *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010). As one state supreme court recently observed in discussing the workplace e-mail policies that apply to its own state workforce:

> "As a part of normal workplace operation, many government offices, like many private employers, have chosen to allow their employees to send and receive occasional personal messages on the employer's e-mail system.

> "There are good reasons why employers allow this practice. E-mail can enhance a worker's productivity. It is often the fastest and least disruptive way to do a brief personal communication during the work day, and employees who are forbidden or discouraged from occasional personal use of e-mail may simply need to take more time out of the day to accomplish the same tasks by other means. Reasonable government workplace policies in line with private sector practice help government attract and retain skilled employees." *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177, 182-83 (Wis. 2010).

In many workplaces, the company e-mail system has thus become "a natural gathering place for employees" to communicate concerning wages, hours, and working conditions. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978). In such workplaces, an employer may not lawfully restrict employees from using that "gathering place" to engage in Section 7-protected communications. As the Board has long recognized, "employees cannot realize the benefits of the right to self-organization guaranteed them by the Act unless there are adequate avenues of communication open to them . . . for the interchange of ideas necessary to the exercise of their right to self-organization." *LeTourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944). As a result, "a particular employer restriction" on the use of an otherwise-available means of employee communication at the workplace "is presumptively an unreasonable interference with § 7 rights constituting an unfair labor practice under § 8(a)(1)" "absent special circumstances[.]" *Beth Israel Hosp.*, 437 U.S. at 493 (discussing *Republic Aviation*). As we explain in more detail below, where employees are allowed to communicate with one

another or with others through company e-mail about personal or other non-work matters, under the rule of *Republic Aviation*, the employer may not bar employees from using company e-mail for Section 7-protected communications.

2. The objection raised by the Board majority in *Register-Guard* – that an employer has a "basic property right to regulate and restrict employee use of company property," 351 NLRB at 1114 (quotation marks and citation omitted), such that it can simply prohibit the use of company e-mail for Section 7-protected communications – is easily answered. Where "employees [are] already rightfully on the employer's property" – in this case, by being permitted to use company e-mail system for personal communications– "it is the employer's *management* interests rather than its *property* interests that are primarily implicated." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573 (1975) (quotation marks and brackets omitted) (emphasis added).

The basis for this distinction is straightforward. "Even if the mere distribution by employees of [messages] protected by § 7 can be said to intrude on [the employer]'s property rights in any meaningful sense, the degree of intrusion [on the employer's property rights] does not vary with the content of the material." *Ibid.* So, an e-mail sent from one employee to another via the company's e-mail system regarding an upcoming union meeting does not impact the employer's property rights any more than an employee e-mail concerning an upcoming Girl Scouts meeting.

This is not to gainsay that an employer has a property interest in its e-mail system. The crucial point is that the employer's property interest is required to yield somewhat to employees' Section 7 rights once the employer permits its e-mail system to become "a

natural gathering place for employees." *Beth Israel Hosp.*, 437 U.S. at 490. At that point, it is the employer's management interest, rather than its property interest, that comes to the fore. An employer may thus exercise its managerial prerogative to maintain and enforce rules regarding employee use of its e-mail system, but only insofar as those rules do not interfere with employees' exercise of Section 7 rights or if the employer can show special circumstances making such rules necessary to maintain production or discipline.[1] What an employer cannot do, where it already permits employees to use its e-mail system for personal or other non-work communications, is ban Section 7-protected communications.

If an employer were to take the highly unusual course of maintaining and *actually enforcing* a rule prohibiting *all* employee use of its e-mail system for non-work communication – an approach that would sharply conflict with the "[f]lexible, common-sense workplace policies . . . allow[ing] occasional personal use of e-mail [that] are in line with the mainstream of professional practice," *Schill*, 786 N.W.2d at 197 – that employer, in most cases, would not be required by the NLRA to permit employees to use its e-mail for Section 7-protected communications.[2] By analogy, if an employer

[1] For example, an employer "rule[] limiting nonwork-related e-mails to nonworking time would be presumptively lawful, just as with oral solicitations." *Register-Guard*, 351 NLRB at 1127 (Members Liebman & Walsh, dissenting). "As with oral solicitations, however, if an employer has no rule in place that limits nonwork-related e-mails to nonworking time, the employer must show an actual interference with production or discipline in order to discipline employees for e-mails sent on working time." *Id.* at 1127 n.17.

[2] Unusual circumstances such as "virtual workplaces" in which employees have no means of communicating with each other – not even in face-to-face conversation – might raise other access issues. Such circumstances are not presented by this case.

maintained a meeting room exclusively for work-related functions, employees would have no NLRA-protected right to use that room for union meetings because, unlike an employee break room, the employer had not, by its rules or actions, opened up that room as a forum for employee communication at the workplace. *Cf. Mid-Mountain Foods, Inc.*, 332 NLRB 229 (2000) (refusal to allow employees to show pro-union video on company-owned television lawful where employer did not show or permit to be shown other videos). However, because the overwhelming majority of employers *do* permit employee use of company e-mail for personal communications, it will be only the exceptional case in which an employer can lawfully prohibit employees from using its e-mail system for Section 7-protected communications.

3. The Board majority's conclusion in *Register-Guard* that *Republic Aviation*'s analytical framework does not apply when employees seek "to use an employer's *equipment* or *media* for Section 7 communications," 351 NLRB at 1116 (emphasis added), is erroneous.

As the employer meeting room example illustrates, the relevant distinction for *Republic Aviation* purposes is not "[b]eing rightfully on the [employer's] premises" versus "us[ing] the employer's equipment," *ibid.* – since not all of the employer's premises need be open to employees for Section 7-protected communication – but between employer property used solely for work purposes and property that provides an "avenue[] of communication open to [employees]." *LeTourneau Co.*, 54 NLRB at 1260. Thus, for example, an employer who provides employees with lockers for storing personal items cannot prohibit employees from using this employer equipment as an

avenue to distribute union-related literature to their co-workers despite the fact that the lockers are indisputably the employer's property. *Sprint/United Mgmt. Co.*, 326 NLRB 397 (1998). As the Board explained, unlike the circumstance where "an employer . . . reserve[s] to itself the exclusive use of its [own property][] and [thus may] bar any [communications] by employees," where the employer "has already ceded the locker space to the personal use of the employees to whom the lockers are assigned" it may not bar employees from using those lockers as an avenue for Section 7-protected communication. *Id.* at 399.

The cases relied upon by the *Register-Guard* majority for its conclusion that employees have "no statutory right" to use "employer-owned property – such as bulletin boards, telephones, and televisions – for Section 7 communications," 351 NLRB at 1114 – with one minor exception discussed in the margin – in fact hew to the basic rule that where an employer creates a forum for employee communication by permitting employees to use its equipment for personal communications, it cannot prohibit employees from using that equipment for Section 7-protected communications as well.[3] As those cases make clear:

[3] In addition to the cases discussed in the text, the *Register-Guard* Board relied on *Mid-Mountain Foods*, 332 NLRB 229 (2000) for the proposition that "there is 'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory." *Register-Guard*, 351 NLRB at 1114 (quoting *Mid-Mountain Foods*, 332 NLRB at 230). However, in that case, which concerned an employee's request to show a pro-union video on a company television, "[t]here [wa]s no showing that the Respondent ha[d] permitted other kinds of videos to be shown on its equipment." *Mid-Mountain Foods*, 332 NLRB at 231. Thus, although the Board's conclusion that "the Union's employee supporters do not have a statutory right to show the video . . . since it has not been established that the Respondent permitted employees to show other

> "When an employer singles out union activity as its only restriction on the private use of company [property], it is not acting to preserve the use of the [property] for company business. It is interfering with union activity, and such interference constitutes a violation of Section 8(a)(1) of the Act." *Churchill's Supermarkets, Inc.*, 285 NLRB 138, 156 (1987).

Indeed, the cases cited by the *Register-Guard* majority demonstrate that the Board has applied *Republic Aviation*'s analytical framework to employee use of a wide range of employer equipment for Section 7-protected communications, including bulletin boards, *Eaton Tech., Inc.*, 322 NLRB 848, 853 (1997) ("when an employer permits . . . employees . . . to post personal . . . notices on its bulletin boards, the employees' . . . right to use the bulletin boards receives the protection of the Act" (quoting *Container Corp. of Am.*, 244 NLRB 318, 318 n.2 (1979)), telephones, *Union Carbide Corp.*, 259 NLRB 974,

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videos," *id.* at 230, was correct, it does not support the *Register-Guard* majority's conclusion that an employer can prohibit employees from using employer equipment for Section 7-protected communications while permitting employees to use such equipment for other non-work communications. In fact, the reasoning of *Mid-Mountain Foods* suggests the opposite.

The final decision cited by the *Register-Guard* majority, albeit with a *cf.* signal, was *Heath Co.*, 196 NLRB 134, 135 (1972), an objections case in which the Board found that an employer did not engage in conduct sufficiently objectionable to overturn an election when it permitted an employee to make an anti-union speech over the plant public address system but denied a request by pro-union employees to do the same. The Board reasoned that because the speech was "of less than a minute's duration" and the employer "approved the prounion employees' request to use the plant cafeteria during lunchtime to present their views," the antiunion speech "had a *de minimis* impact upon the election and does not constitute grounds for setting it aside." *Ibid. Heath Co.* is distinguishable from the cases cited in the text – as the *Register-Guard* majority recognized with the *cf.* signal – on the grounds that the employer did not routinely permit non-work use of the public address system, there was a rough equivalence between what the employer permitted anti- and pro-union workers to do, and it was an objections case.

980 (1981) ("once [the employer] grants the employees the privilege of occasional personal use of the telephone during work time, . . . it could not lawfully exclude the Union as a subject of discussion"), *see also Churchill's Supermarkets*, 285 NLRB at 155-56 (same), and photocopy machines, *Champion Int'l Corp.*, 303 NLRB 102, 109 (1991) ("An employer may not invoke rules designed to protect its property from unwarranted use in furtherance of pro union activities while, at the same time, freely permit such use for non business related reasons.").[4] It is thus fully consistent with precedent for the Board to apply *Republic Aviation*'s analytical framework to employee use of a company e-mail system for Section 7-protected communications.

4. What is at issue here, and what was at issue in *Republic Aviation* itself, are employer rules that interfere with employees' exercise of their Section 7 rights, not discrimination in the sense of "disparate treatment" – *i.e.*, of treating similar things differently without legal justification – that is used in interpreting Title VII of the Civil Rights Act of 1964 and similar anti-discrimination statutes. Because the Board's invocation of the principle of discrimination in cases applying *Republic Aviation*'s analytical framework to employee communications has met with significant resistance in

[4] Some of the cases cited refer to employer discrimination in stating the basic *Eastex* rule. *See, e.g.*, *Champion Int'l Corp.*, 303 NLRB at 109 ("an employer may not use that basic right [to regulate and restrict employee use of company property] to discriminatorily restrict pro-union activities"). However, it is clear from the context of these statements that the Board does not refer to discrimination in the sense of treating union-related communications differently than other similar personal communications, but rather, as in *Republic Aviation* itself, to discrimination in the sense of an "unreasonable impediment to self-organization." 324 U.S. at 803 n.10. As we explain in the text of the section that follows, we strongly suggest that the Board avoid this use of the term "discrimination" in deciding this and future cases that rest on the rationale set forth in *Republic Aviation* and its progeny.

the courts of appeals, *see, e.g., Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 320 (7th Cir. 1995), the Board should use this case as an opportunity to clarify that the essence of the matter is whether the employer's "*nondiscriminatory* regulation of solicitation in the workplace . . . diminish[es] to an unacceptable degree employees' ability to communicate with each other about organization," *id.* at 322 (discussing *Republic Aviation*) (emphasis added), *not* whether the employer's rule is discriminatory.

The courts of appeals have recognized that "[p]erhaps 'discrimination'" ought to have a special meaning under the NLRA[.]" *Id.* at 320. That is because, in cases applying *Republic Aviation*'s analytical framework to employee communications, the Board has used the term "discrimination" in a different sense than used in *Perry Education Association v. Perry Local Education Association*, 460 U.S. 37 (1983). In that case, the Supreme Court found lawful under the First Amendment a public school system's decision to open its mail facilities to use by the union that represented the school system's teachers and "[l]ocal parochial schools, church groups, YMCA's, and Cub Scout units," *id.* at 39 n.2, while denying similar access to a different teachers' union. The Court explained that allowing access to only the incumbent union did not constitute unlawful discrimination because that union, unlike the outside union, had "obligations as exclusive representative of . . . Perry Township teachers." *Id.* at 51. Nor did providing access to the other groups prove discrimination, because the outside union, "which is concerned with the terms and conditions of teacher employment," is not an "entit[y] of similar character" to "the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students[.]"

Id. at 48. Lower courts have thus held, applying *Perry*'s discrimination analysis, that an employer rule "[d]istinguishing between for-sale notices and announcements of all meetings, of all organizations, does not discriminate against the employees' right of self-organization" under the NLRA. *Guardian Indus.*, 49 F.3d at 321-22.

In contrast to the meaning of "discrimination" set forth in *Perry*, the *Republic Aviation* Court used the term in the sense that employer rules limiting employee communication in the workplace constitute an "unreasonable impediment[s] to self-organization *and therefore [are] discriminatory*." 324 U.S. at 793 n.10 (emphasis added).[5] To establish that this sort of rule violates Section 8(a)(1), it is not necessary to prove disparate treatment – that the rule permits employee communications that are similar to union-related communications while banning their Section 7-protected equivalents – but rather only that the rule unnecessarily "imped[es] . . . self-organization." *Republic Aviation*, 324 U.S. at 793 n.10.

The distinction between the *Republic Aviation* and *Perry* modes of analysis is usefully illustrated by the Supreme Court's discussion in *Beth Israel Hospital* of that employer's rule banning employee solicitation and distribution in the hospital cafeteria. In that case, the Board's General Counsel contended that the hospital's maintenance of its rule violated the Act pursuant to the interference analysis of *Republic Aviation*, not because the rule discriminated against union activities. *See* 437 U.S. at 487 (discussing the ALJ's decision). Importantly, the Court viewed the fact that the employer "used and

[5] Of course, an employer's selective enforcement against the union of an otherwise valid rule does constitute discrimination. *See Guard Publ'g Co.v. NLRB*, 571 F.3d 53, 58 (D.C. Cir. 2009). But discrimination of that sort is not at issue in this case.

permitted use of the cafeteria for solicitation and distribution to employees for purposes other than union activity" as evidence *not* of disparate treatment of similar activities – *i.e.*, not as evidence of discrimination – but rather as evidence that "[the employer] itself has recognized that the cafeteria is a natural gathering place for employees on nonworking time," such that, under *Republic Aviation*, the hospital could not prohibit employees from engaging in Section 7-protected communications in the cafeteria absent a showing of special circumstances. 437 U.S. at 490.

A close analysis of the Board's bulletin board cases and other cases involving employee use of company equipment for Section 7-protected communications makes clear that the Board has applied this same analytical approach in that context, albeit at times under the rubric of discrimination. In those cases, the Board routinely holds that:

> "[W]hen an employer permits, by formal rule or otherwise, employees and a union to post personal and official union notices on its bulletin boards, the employees' and union's right to use the bulletin boards receives the protection of the Act to the extent that the employer may not remove notices which the employer finds distasteful." *Eaton Tech.*, 322 NLRB at 853 (quoting *Container Corp.*, 244 NLRB at 318 n.2).

That is nothing more than a restatement of the rule set forth in *Eastex*, that once an employer permits employees to use its property, "the degree of intrusion [on the employer's property right] does not vary with the content of the material." 437 U.S. at 573. Thus, although the Board has at times expressed its rule concerning employee use of company bulletin boards in terms of discrimination – *e.g.*, "[I]f an employer permits

the use of its bulletin boards for nonwork-related messages the employer cannot *discriminate* against the posting of union messages." *Eaton*, 322 NLRB at 853 (emphasis added) – it is clear from the context of those statements that the Board is using the concept of discrimination in the special *Republic Aviation* sense of an "unreasonable impediment to self-organization." 324 U.S. at 803 n.10.

Again, because of the courts of appeals' confusion over the Board's use of the concept of "discrimination" in past *Republic Aviation* cases, we urge the Board to make clear in its decision here that where an employer maintains a rule that permits employees to use its e-mail system for personal communications but prohibits Section 7-protected communications, such a rule is unlawful *not* because it discriminates against NLRA-protected activity but because it interferes with employees' protected exercise of Section 7 rights pursuant to the analysis set forth in *Republic Aviation.*

5. In this case, Purple Communications violated the fundamental principle of federal labor law set forth in *Republic Aviation* and its progeny by creating an avenue for employee communication at the workplace by permitting personal use of its e-mail system while simultaneously maintaining rules that interfered with employee use of that avenue for Section 7-protected communications.

Although Purple Communications' "Internet, Intranet, Voicemail and Electronic Communication Policy Rule" states generally that company e-mail "should be used for business purposes only," the only personal communications that the company's rules list as "Prohibited Activities" are messages "on behalf of organizations or persons with no professional or business affiliation with the Company" and "uninvited email of a personal

nature." Joint Ex. 1, at 30-31. In other words, Purple Communications' rule strongly suggests that personal uses of company e-mail other than these two specific "Prohibited Activities" – *e.g.*, e-mails between co-workers regarding an upcoming birthday party – are permitted.

This conclusion is buttressed by the fact that Purple Communications freely allows employees to access the company e-mail system on non-work time from their personal home computers and personal smart phones and from computers in the company's break rooms. ALJ 3. The company's decision to permit employees to make unsupervised use of company e-mail on non-work time gives rise to an inference that the company does not view its statement that company e-mail "should be used for business purposes only," Joint Ex. 30, as a bar on all personal use, since the only use employees could make of their access to company e-mail on non-work time was personal use. There is no evidence in the record whatsoever that Purple Communications ever sought to stop employees from using its e-mail system for personal use. And, of course, the record clearly shows that Purple Communications knowingly *did* allow use of its e-mail system by employees who opposed the union to solicit support for a statement opposing a union election, Resp. Ex. 8, providing further support for this commonsense interpretation of the company's rule.

Because employees were permitted to use Purple Communications' e-mail system as an avenue of communication for employee-to-employee communication about personal matters, the company's maintenance of rules prohibiting the use of that system for Section 7-protected activity was unlawful. In particular, Purple Communications'

rule strictly prohibiting e-mails "on behalf of organization[s] . . . with no professional or business affiliation with the Company," ALJ 3-4, like the rule at issue in *Register-Guard*, "on its face would prohibit even solicitations [for the union] on nonworking time, without regard to . . . whether the message would actually interfere with production or discipline." 351 NLRB at 1127 (Members Liebman & Walsh, dissenting). On that basis, the rule is unlawful.

A similar analysis applies to Purple Communications' rule strictly barring "uninvited email of a personal nature." ALJ 3-4. Purple Communications' rule prohibits a significant amount of core Section 7-protected communications, such as an uninvited e-mail encouraging a co-worker to sign a union authorization card or to vote "yes" in the upcoming union election. The rule is therefore unlawful in the absence of a showing of special circumstances that make the rule necessary to maintain production or discipline, a showing that Purple Communications has not made in this case.

CONCLUSION

The Board should overrule *Register-Guard* and reverse the ALJ's ruling that Purple Communications' policies restricting employee use of its e-mail system are lawful.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 16, 2014, I caused to be served a copy of the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* by e-mail on the following:

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