

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC.,)	
)	
and)	Case No. 21-CA-095151
)	21-RC-091531
)	21-RC-091584
COMMUNICATIONS WORKERS OF)	
AMERICA, AFL-CIO)	
_____)	

BRIEF OF *AMICUS CURIAE*
ARKANSAS STATE CHAMBER OF COMMERCE
IN SUPPORT OF PURPLE COMMUNICATIONS, INC.

J. Bruce Cross (Ark. Bar No. 74028)
Jess Sweere (Ark. Bar No. 2005285)
CROSS, GUNTER, WITHERSPOON & GALCHUS, P.C.
500 President Clinton Avenue, Suite 200
Little Rock, Arkansas 72201
Attorneys for Amicus Curiae
June 16, 2014

I. TABLE OF CONTENTS

I.	TABLE OF CONTENTS	ii
II.	TABLE OF AUTHORITIES	iii
III.	INTEREST OF AMICUS CURIAE	1
IV.	ISSUES PRESENTED.....	1
V.	ARGUMENT	2
A.	The Board should NOT reconsider its conclusion in <i>Register Guard</i> because employees do not have a statutory right to an employer’s property.	3
1.	Email systems are equivalent to other employer communication systems that can be restricted to business use only.	4
a.	Board precedent on this is clear.	4
b.	E-mails are not the equivalent of “water cooler” discussions.	6
2.	A company’s significant property interest in its email system is sufficient to limit its usage for Section 7 purposes	7
3.	The Dissent’s reasoning that Republic Aviation Corp. has not been applied this way is mistaken.	10
a.	<i>Republic Aviation Corp.</i> is distinguishable.....	10
b.	The facts since <i>Register Guard</i> have changed.....	11
c.	E-mail has become just another piece of employer “equipment.”.....	14
B.	<i>Register Guard</i> should NOT be overruled because an employer should be able to limit access to its communication systems for non-work-related activities from a productivity perspective.	15
1.	Without policies limiting electronic communication, workplace productivity will be negatively impacted.....	16
2.	The availability of personal electronic devices, social media accounts, and personal email accounts strikes the proper balance between employers’ rights and employees’ Section 7 rights to communicate about work-related matters under current Board standards.	18
VI.	CONCLUSION.....	20

II. TABLE OF AUTHORITIES

Cases

<i>Beth Israel Hosp. v. N.L.R.B.</i> , 437 U.S. 483 (1978)	7
<i>Churchill's Supermarkets</i> , 285 N.L.R.B. 138 (1987)	4
<i>Cintas Corp.</i> , 353 N.L.R.B. 752 (2009)	6
<i>Hispanics United of Buffalo, Inc.</i> , 359 N.L.R.B. 37 (Dec. 14, 2012).....	14
<i>Honeywell, Inc.</i> , 262 N.L.R.B. 1401 (1982).....	4
<i>In Re the Guard Publ'g Co.</i> , 351 N.L.R.B. 1110 (2007)	passim
<i>Johnson Technology, Inc.</i> , 345 N.L.R.B. 762 (2005).....	12
<i>Mid-Mountain Foods</i> , 332 N.L.R.B. 229 (2000).....	4, 5
<i>Republic Aviation Corp.</i> , 324 U.S. 793 (1945).....	10
<i>The Heath Co.</i> , 196 N.L.R.B. 134 (1972).....	5
<i>Union Carbide Corp. v. N.L.R.B.</i> , 714 F.2d 657 (6th Cir. 1983)	4

Other Authorities

N.L.R.B. General Counsel Operations Memorandum 12-59 (May 30, 2012)	14
Nicole Lindquist, <i>You Can Send This But Not That</i> , 5 SHIDLER J. L. COM. & TECH. 15 (2009)	3

III. INTEREST OF AMICUS CURIAE

The Arkansas State Chamber of Commerce (“ASCC”), in representing the interest of its members, files this *amicus* brief in support of Purple Communications, Inc. (“PCI”). The Amici Curiae agrees with PCI and files this brief for the purpose of informing the National Labor Relations Board (“NLRB” or “the Board”) of the ASCC’s position with respect to the issues brought before the Board in this case in addition to offering practical considerations that favor the current rule as established in *In Re the Guard Publ'g Co.*, 351 N.L.R.B. 1110 (2007) (“*Register Guard*”). The issues raised in this Brief are obviously of paramount importance to the Amici Curiae, as it represents the employers in the State of Arkansas who will inevitably be affected by the outcome of the Board’s decision with respect to the certified questions at issue.

IV. ISSUES PRESENTED

On April 30, 2014, the Board issued a request to interested *amici* to file briefs on the following questions:

1. *Should the Board reconsider its conclusion in Register Guard that employees do not have a statutory right to use an employer’s email system (or other electronic communications systems) for Section 7 purposes?*
2. *If the Board overrules Register Guard, what standard(s) of employee access to the employer’s electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?*

3. *In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?*
4. *Do employee personal electronic devices (e.g. phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?*
5. *Identify any other technological issues concerning email or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since *Register Guard* was decided. How should these affect the Board's decision?*

V. ARGUMENT

“Today’s decision confirms that the NLRB has become the ‘Rip Van Winkle of administrative agencies’...Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace.” *In Re the Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1121 (2007). The decision in *Register Guard* was the correct outcome. That Board’s majority understood the reality of today’s workplace. It realized *Register Guard* annunciated the appropriate position that protected employees’ Section 7 rights under the National Labor Relations Act (“NLRA”), while simultaneously ensuring the preservation of employers’ property rights and productivity in the workplace. Undoubtedly, the impact of the Board’s decision will reach beyond the primary issue of this case: whether an employer may properly limit employee use

of the company's e-mail system for non-work matters. Consequently, the Board should consider these collateral, yet important, concerns.¹

A. The Board should NOT reconsider its conclusion in *Register Guard* because employees do not have a statutory right to an employer's property.

Register Guard should not be overturned because the Board correctly held that employees do not have a statutory right to an employer's property. "The NLRB in *Register Guard* held that employers have property interests in their email systems, thereby defining how Section 7 of the NLRA fits in the modern workplace." Nicole Lindquist, *You Can Send This But Not That*, 5 SHIDLER J. L. COM. & TECH. 15 (2009). *Register Guard* reaffirms established case law that employees do not have a statutory right to their employer's property. *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1114 (citing *Union Carbide Corp. v. N.L.R.B.*, 714 F.2d 657, 663-64 (6th Cir. 1983)). It is a well-settled principle that an employee has "no statutory [right] . . . to use an employer's equipment or media," as long as the restrictions are nondiscriminatory." *Id.* (quoting *Mid-Mountain Foods*, 332 N.L.R.B. 229, 230 (2000)). The dissent in *Register Guard* claims the majority approach is flawed because: (1) e-mail systems are different than other communication devices; (2) property interest is insufficient to exclude Section 7 e-mails; and (3) *Republic Aviation Corp.* applies in this case. *Id.* at 1125. It is the

¹ These issues include, but are not limited to, system security and employee productivity.

strong position of this *Amici Curiae* that the majority's position was not only appropriate then, but even more so in today's workplace.

1. *Email systems are equivalent to other employer communication systems that can be restricted to business use only.*
 - a. Board precedent on this is clear.

The NLRB has held that employee usage of employer-owned telephones, bulletin boards, and public address systems may be limited by the employer. *Churchill's Supermarkets*, 285 N.L.R.B. 138, 155 (1987) (an employer may "restrict the use of company telephones to business-related conversations"); *Honeywell, Inc.*, 262 N.L.R.B. 1401, 1402 (1982) ("there is no statutory right of employees or a union to use an employer's bulletin board"); *Union Carbide Corp. v. N.L.R.B.*, 714 F.2d 657, 663 (6th Cir. 1983) ("employer could *unquestionably* bar its telephones to any personal use by employees"); *The Heath Co.*, 196 N.L.R.B. 134, 135 (1972) ("employer did not engage in objectionable" conduct by denying pro-union employees the right to reply to anti-union testimonials over the public address system). These past decisions were decided on established principles that employees had no statutory right to use an employer's property, e.g. telephones, bulletin boards, etc., for non-business purposes. *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1115.

Based upon the above precedent, an employer's prohibition of its employees' use of company property for non-business purposes is an appropriate

employment practice. The Board has consistently held that non-discriminatory employer restrictions of employee use of bulletin boards, telephones, public address systems, and even televisions are permissible limitations, even though Section 7 rights are affected. *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1114 (citing *Mid-Mountain Foods*, 332 N.L.R.B. at 230 (“no statutory right to use the television in the respondent’s break room to show a prounion campaign video”)). These protections are a fair balance of employees’ Section 7 rights and employers’ property interest rights.

E-mail systems are comparable to all of those forms of communication because each has been found to be employer-owned property, just like its e-mail system(s). Modern communications systems, such as e-mail, are more expensive than telephones and bulletin boards, but they still serve the same basic function: a quick and efficient method of communicating workplace information. Because usage of a company’s telephone system and bulletin board, among others, can be lawfully limited by the employer to only work-related matters, it naturally follows that a company’s e-mail system should as well. The foundation of this well-settled principle should not change merely because the technology has evolved. The essential functions of these communication systems have not changed, and current

Board law does not need to change because it already protects employees from any discriminatory treatment by employers.²

b. E-mails are not the equivalent of “water cooler” discussions.

The dissent in *Register Guard* argued that “the discussion by the water cooler is in the process of being replaced by the discussion via e-mail.” See *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1125. While e-mail has become an increasingly useful form of communication, it has not become the natural gathering place for non-work related communication in the workplace itself. See *Beth Israel Hosp. v. N.L.R.B.*, 437 U.S. 483, 505 (1978) (determining that a hospital cafeteria was a natural gathering place for employees because it functions as an employee service area). A “water cooler” conversation is restricted in the amount of time, latitude, and reactionary response generated by conversation. *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1125. This face-to-face conversation is done via a “one-to-one” or small group setting in a natural gathering place. *Beth Israel Hosp.*, 437 U.S. at 486.

E-mail, however, is different. It allows a single individual to reach out and communicate with everyone in the office, surrounding offices, or across a company’s global network in a matter of seconds with one click on an employer-

² See, e.g., *Cintas Corp.*, 353 N.L.R.B. 752 (2009) (“The Respondent clearly discriminated against protected activity in its actions regarding the wearing of union stickers and hats. It allowed employees to wear nonunion adornments to their uniforms while prohibiting only union-related adornments; thus, its restriction on the use of uniforms to display adornments was not ‘nondiscriminatory,’ as required under *Register Guard*. Id. at 1114.”)

owned device. E-mails can be received unilaterally, from any place, and at any time of day, while a “water cooler” conversation occurs only at work, often during work time, and between co-workers. These differences are fundamental, distinguishing, and beyond what the U.S. Supreme Court envisioned when it defined a natural gathering place.³

2. *A company’s significant property interest in its email system is sufficient to limit its usage for Section 7 purposes.*

The dissent’s argument was misguided then, and is still misguided today as to the issue of a company’s property interest in its e-mail system. The dissent in *Register Guard* contended that the Company did not demonstrate “how allowing employee e-mails on Section 7 matters interferes with its alleged property interest.” *In Re the Guard Publ’g Co.*, 351 N.L.R.B. at 1126. In today’s world, the answer to that argument is even clearer than it was seven (7) years ago.

The use of technology undoubtedly grows exponentially each year. That growth has triggered the increased use of e-mail, social media messaging, texting, video messaging, and many more methods of communicating. Forcing the allowance of unsolicited e-mails to a company’s employees will inevitably lead to more “junk mail” or “spam” in the employee’s inbox. According to Merriam-Webster, “spam” is e-mail that is sent to large numbers of people and that consists

³ See discussion in paragraph 3.b of this Section, *infra*.

mostly of advertising.⁴ Increased “spam” messages result in decreased worker productivity.

This is because messages unrelated to work, by their nature, detract from work. After being interrupted by “spam” or other workplace distractions, “it can take some 23 minutes for a worker to return to the original task.”⁵ Estimating that 90 billion “spam” messages are sent each day (a majority targeting the United States) and the average “user’s time is \$25 per hour and each piece of spam takes an average of five seconds to deal with . . . this brings the total worldwide end-user cost of spam to nearly \$14 billion per year.”⁶

Should *Register Guard* be reversed, thus preventing an employer from having a policy against non-business-related e-mail communications, the proverbial e-mail floodgates will open and the torrent of e-mails *not* related to work will cut into workplace productivity by sinking the employee’s inbox and impeding workers’ focus on work-related tasks. *Register Guard* currently helps employers keep the influx of non-business solicitation e-mails out of employees’ company e-mail inboxes, thereby keeping the system from being overwhelmed and employees on task. Employers presently avoid such inefficiencies by creating

⁴ Merriam Webster, <http://www.merriam-webster.com/dictionary/spam>, (last visited June 3, 2014).

⁵ Rachel Emma Silverman, *Workplace distractions: Here’s Why You Won’t Finish This Article*, WALL ST. J., (Dec 11, 2012, 7:34 PM), <http://online.wsj.com/news/articles/SB10001424127887324339204578173252223022388>.

⁶ Justin M. Rao and David H. Reiley, *The Economics of Spam*, JOURNAL OF ECONOMIC PERSPECTIVES, Vol. 26, No. 3, 87, 110, (Summer 2012), <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.26.3.87>.

policies and firewalls that do not allow intra-company personal communiques or outside, third-party groups to access their e-mail accounts.

With *Register Guard* no longer in place, those policies and firewalls that currently exist to protect e-mail systems from being infiltrated with non-business-related e-mails, will be required to be effectively eliminated in order to avoid an unfair labor practice charge alleging that a company was somehow interfering with Section 7 communications from being transmitted and/or received by or among employees. Moreover, if firewalls are adjusted to allow for more outside messages to reach employees, a greater likelihood exists that a computer virus could enter the system, leading to crashes, file corruption, and potentially significant downtime.⁷ Anyone who has ever received an e-mail containing a computer virus knows the potential severity of the damages caused by such viruses. Of course, these avoidable consequences caused by an increase in outside e-mails, will lead to a company's increased costs and expenses in addition to a negative productivity impact! These kinds of catastrophic consequences can and must be avoided. Maintaining the current standard established by *Register Guard* in place will continue to help achieve that objective by allowing employers to protect the integrity of their own e-mail systems without continually operating under the fear that an unfair labor practice charge could be filed at any time.

⁷ MICROSOFT SECURITY INTELLIGENCE REPORT: WORLDWIDE THREAT ASSESSMENT, VOL. 16 (2013), file:///C:/Users/qjw/Downloads/Microsoft_Security_Intelligence_Report_Volume_16_Worldwide_Threat_Assessment_English.pdf.

3. *The Dissent's reasoning that Republic Aviation Corp. has not been applied this way is mistaken.*

a. *Republic Aviation Corp. is distinguishable.*

Republic Aviation Corp. is clearly distinguishable from *Register Guard* because it is not an employer communication property rights case. Instead, it addressed the suspension of employees for violation of an employer's rule prohibiting *any* type of Section 7 activity on the employer's premises at any time. *Republic Aviation Corp.*, 324 U.S. 793, 803 (1945). The Court held there must be a form of "property interests to the extent necessary to ensure that employees will not be 'entirely deprived . . . of their ability to engage in Section 7 communications in the workplace on their own time.'" *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1115; (citing *Republic Aviation Corp.* 324 U.S. at 801). *Register Guard* was not seeking to engage in such an all-encompassing policy. Rather, it was merely restricting Section 7 communications along with all other non-business solicitations from only its e-mail system. Other methods of communication among employees were available; therefore, employees could still engage in Section 7 discussions at work, during non-working time, and on company premises. Those employees were only restricted from doing so via the company's e-mail system.

Further, the cases determining that employees do not have a Section 7 right "to use an employer's equipment," were decided long after *Republic Aviation Corp.* *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1115. Reliance upon *Republic*

Aviation Corp. in this context, therefore, is misplaced because the Supreme Court stated that as long as the employees are not “entirely deprived” of their ability to engage in Section 7 activity, then there is no violation of the NLRA. *Id.*

b. The facts since *Register Guard* have changed.

As employee outlets for communication have expanded through increasing mediums, such as social media, texting, and personal e-mail accounts, the majority’s analysis in *Register Guard* has proven to be correct. The majority understood the precedent set in *Republic Aviation Corp.*, stating that a Section 7 communication “does not require the most convenient or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer’s equipment or device for Section 7 communications.” *In Re the Guard Publ’g Co.*, 351 N.L.R.B. at 1115. As that Board majority pointed out, “it is not unlawful for an employer to caution employees to restrict the use of company property to business purposes.” *Id.* at 1115 n.10 (citing *Johnson Technology, Inc.*, 345 N.L.R.B. 762, 763 (2005)). Finally, as the majority stated, “Being rightfully on the [company’s] premises, however, confers no additional right on employees to use the employer’s equipment for Section 7 purposes *regardless* of whether the employees are authorized to use that equipment for work purposes.” *Id.* at 1116 (alteration and emphasis supplied).

As the majority's opinion has proven correct over time, the dissent's analysis has lost luster in light of the more recent evolution of personal communication technology, as previously discussed. The dissent attempted to argue that e-mail messaging had become the primary, if not the only, form of communication in the workplace. Specifically, the dissent stated, "Even employees who report to fixed locations every day have seen their work environments evolve to a point where they interact to an ever-increasing degree electronically, rather than face-to-face." *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1125. In the seven (7) year period since *Register Guard* was decided, this opinion has become a "blast from the past" rather than an understanding of the practical realities of today's technological devices, including smartphones and social media. Even more, establishing accounts on these sites, or creating a personal e-mail account on a multitude of websites, is completely free.

As noted above, today's employees communicate through many different methods in addition to employer-provided e-mail. The dissent's argument in *Register Guard* was based on the now-debunked premise that e-mail had become the "current day water cooler" for employee communication. To disprove that theory, one need only look at today's communication technology statistics. For example, as of January 2014, approximately 90% of American adults have a mobile phone; 58% of American adults have a smartphone; and 42% of American

adults own a tablet computer.⁸ Notably, mobile phone usage research establishes that 81% of mobile phone users send or receive text messages; 60% access the internet; and 52% send or receive email.⁹

Thus, an employee during his or her non-work time can easily send a quick text message, or make a phone call, or access the internet via smartphone in order to send a message through a social media site and communicate with co-workers. Mass texts, Facebook pages, chat rooms and other means of online communication have become the “chat methods de jour” as opposed to employer-provided e-mail. It is indisputable that ample alternative electronic communication forums exist for employees to use. In addition, use of such forums is available at no cost to employees. All of these forums allow employee communications *without* interfering with employers’ property rights in company property, as recognized by the majority in *Register Guard. In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1114.

Regardless, the Board has taken tremendous steps to ensure that employers may not attempt to restrict employee use of social media for Section 7 purposes. See, e.g., *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. 37 (Dec. 14, 2012). (Comments posted on Facebook about a co-worker’s performance was found to be protected concerted activity). The NLRB’s General Counsel’s office has issued

⁸ PEW RESEARCH INTERNET PROJECT, *Mobile Technology Fact Sheet*, (last visited June 9, 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

⁹ *Id.*

several memoranda on the issue of social media, and even provided policy guidance for employers. See, e.g., N.L.R.B. General Counsel Operations Memorandum 12-59 (May 30, 2012). Thus, as the Board itself has recognized, the explosive growth of social media has changed the way in which individuals, including co-workers, communicate, thereby minimizing the dissent's contention regarding "the unique characteristic of e-mail" that "has transformed modern communication." *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1125. In today's society, e-mail is a dated technology, similar to writing a letter without the "snail mail."

c. E-mail has become just another piece of employer "equipment."

E-mail systems are company equipment. The dissent's opinion in *Register Guard* "would find that banning all non-work-related 'solicitations' is presumptively unlawful without special circumstances," because e-mail was not "just another piece of employer 'equipment.'" *In Re the Guard Publ'g Co.*, 351 N.L.R.B. at 1127. The dissent, therefore, would apply a so-called balancing test requiring an employer to "justify a ban" on non-work-related communication via its e-mail system. *Id.* As stated *supra*, the dissent's entire argument was based on the premise that e-mail had become the primary means of employee communication. Such was not the case then, and such is certainly not the case now.

A blanket ban on non-work-related use of the employer's e-mail system is, therefore, an appropriate means by which an employer can regulate its workplace. As discussed, such policies and firewalls protect company equipment. To require an employer to justify such a ban is an unnecessary regulatory hurdle, which is evident given the vast array of alternative means available for Section 7 communication in today's workplace.¹⁰ Therefore, *Register Guard* need not be overruled because current Board precedent adequately protects employees' Section 7 rights and honors employers' property interests in its own equipment.

B. *Register Guard* should NOT be overruled because an employer should be able to limit access to its communication systems for non-work-related activities from a productivity perspective.

An employer should be able to limit access to its communication systems for non-work-related activities. In *Register Guard*, the dissent argued "the Respondent has shown no special circumstances for its ban on 'non-job-related solicitations,'...whether the message would actually interfere with production or discipline." 351 N.L.R.B. at 1127. As discussed above, the employer should not be forced into proving that each and every communication medium it uses would be affected by the allowance of non-job-related solicitations. Common sense and simple logic dictates such a conclusion.

¹⁰ See discussion in Section B.2, *infra*.

As discussed above, without blanket policies and firewalls limiting access to company e-mail systems, employers will be forced to allow wide latitude for such third-party solicitations and other outside e-mail correspondence. Otherwise, employers must risk being exposed to Section 7 violations, or at a minimum, the foreseeable filing of unfounded unfair labor practice charges, claiming discriminatory treatment. As noted elsewhere in this Brief, disruptions through e-mail communication will clearly increase due to increased volume, which inevitably results in decreased workplace productivity and security threats from outside e-mails containing computer viruses.

1. *Without policies limiting electronic communication, workplace productivity will be negatively impacted.*

Too much e-mail hampers productivity. Employers have a right to ensure productivity. The indisputable intent of paying for and maintaining a company e-mail system is to enhance productivity in the workplace; however, studies show it can cause harm to efficiency. In 2012, when examining workers' time spent on e-mails, "the average interaction worker spends an estimated 28 percent of the workweek managing e-mail."¹¹ When breaking that down per eight-hour day, it

¹¹ Michael Chui, *The Social Economy: Unlocking Value and Productivity Through Social Technologies*, MCKINSEY GLOBAL INSTITUTE, (July 2012), http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_social_economy.

translates to about two hours and fourteen minutes per day spent on e-mail management.¹² This is one entire workday every week spent on e-mails!

Further, a 2008 study showed the United States loses \$650 billion a year in productivity because of “unnecessary interruptions” that deal with “predominately mundane matters.”¹³ “A big chunk of that cost comes from the time it takes people to recover from an interruption and get back to work.”¹⁴ It is clear that productivity is affected by all types of e-mail including business related e-mail, so employers have a keen interest in limiting its usage. It is axiomatic, therefore, that decreased e-mails sent each day leads to increased worker productivity each day.

The dissent in *Register Guard* argued that because individuals were spending more time on e-mail, non-work-related communications should be permissible on work e-mail. This analysis is flawed and illogical. As noted above, because productivity is already affected by business-related e-mail, imagine the impact if access to company email accounts must be opened to unlimited amounts of non-work-related messages. Because some employees spend considerable amounts of time dealing with e-mail, allowing non-work-related communications would only exacerbate an already serious problem.

¹² Todd Wasserman, *Email Takes up 28% of Workers' Time*, MASHABLE, Aug. 1, 2012, <http://mashable.com/2012/08/01/email-workers-time/>

¹³ Matt Richtel, *Lost in E-mail, Tech Firms Face Self-Made Beast*, N.Y. TIMES, June 14, 2008, http://www.nytimes.com/2008/06/14/technology/14email.html?pagewanted=all&_r=0.

¹⁴ *Id.*

Work-related e-mail still produces work output for the employer during the employees' working time. Naturally, if it is work related e-mail then it is part of the employee's job. Outside e-mails are, by definition, not work-related. By allowing outside groups unfettered access and unlimited employee-to-employee, non-work-related communications to be permissible, the Board will increase interruptions during work time and jeopardize the security of employers' property. For the reasons stated, an employer need not provide further justification for a blanket ban of non-work-related use of its e-mail system.

2. *The availability of personal electronic devices, social media accounts, and personal email accounts strikes the proper balance between employers' rights and employees' Section 7 rights to communicate about work-related matters under current Board standards.*

Personal electronic devices and social media are an evolving means of communication pertaining to work-related matters.¹⁵ According to the Pew Research Internet Project, as of September 2013, 73% of online adults use social networking sites.¹⁶ In fact, 71 million Americans check their social media several times a day.¹⁷ These facts show that millions of American workers are online, using social media, and using it frequently. Work e-mail is not social media; rather, a work e-mail system is company equipment, used for a business purpose.

¹⁵ According to Merriam-Webster, "social media" is "forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)".

¹⁶ PEW RESEARCH INTERNET PROJECT, *Social Networking Fact Sheet*, (last visited May 30, 2014), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>.

¹⁷ ARBITRON INC. AND EDISON, *The Infinite Dial 2013: Navigating Digital Platforms*, (2013), http://www.edisonresearch.com/wp-content/uploads/2013/04/Edison_Research_Arbitron_Infinite_Dial_2013.pdf.

When used in a work setting, e-mail is a professionally proper way to formalize an agreement, securely share files and internal correspondence, and conduct sensitive business. A company's e-mail system is not the appropriate place to conduct non-work activities, whereas social media lends itself more to non-work activities because of its personal and informal nature.

As previously discussed, employees already have an abundance of alternative channels of communication beyond employer-provided e-mail available to them to send solicitations and other communications. The modern workplace must incorporate employees' use of personal electronic devices, social media accounts, and personal e-mail accounts into its policy considerations. All of the communication devices affect the proper balance between an employer's right to its property and employees' right to engage in protected concerted activities. As the majority in *Register Guard* correctly pointed out, if other means of communication exist and have not been rendered useless, there is no reason that an employee's use of a business's e-mail for Section 7 purposes must be mandated. 351 N.L.R.B. at 1116. This tenet is truer today than ever before.

Furthermore, employees are not limited to their work e-mail address to communicate by e-mail. There are plenty of *free* email providers, such as Gmail and Yahoo Mail, offering services that can be accessed at the local library or on

their home or personal devices.¹⁸ These personal e-mail platforms have virtually the same ability and functionality as an employer's communication system and can be used for Section 7 purposes without infringing on the employer's rights. The dissent in *Register Guard* was written in 2007 and technology has already dated its arguments. As technology continues to progress, it would be a step backwards to require an employer's property to be used for non-business purposes when so many alternative means exist.

Advancing technology continues to lower cost, thereby making it affordable for every employee. Overturning *Register Guard* does not bring the Board into the now; rather, it allows outside groups to use employer property for free. The principle of what the *Register Guard* majority opinion stands for remains valid considering the rapid evolution of technology. For these reasons, *Register Guard* should not be overturned.

VI. CONCLUSION

For all the reasons outlined in Purple Communication's Brief and the reasons mentioned in this brief, this Board should uphold the *Register Guard* decision.

Respectfully submitted this 16th day of June, 2014.

¹⁸ Michael Muchmore, *The Best Web-Based Email Services*, PC MAG., (August 29, 2012), <http://www.pcmag.com/article2/0,2817,2408983,00.asp>.

/s/ J. Bruce Cross

J. Bruce Cross (Ark. Bar No. 74028)

/s/ J. E. Jess Sweere

J. E. Jess Sweere (Ark. Bar No. 2005285)

CROSS, GUNTER, WITHERSPOON &
GALCHUS, P.C.

500 President Clinton Avenue, Suite 200
Little Rock, Arkansas 72201

Phone: (501) 371-9999

Facsimile: (501) 371-0035

bcross@cgwg.com

jsweere@cgwg.com

CERTIFICATE OF SERVICE

The undersigned hereby certify that this brief was filed electronically with the Board and is therefore serving the following parties electronically in accordance with Section 102.114 of the Board's Rules, this 16th day of June, 2014:

Respondent

(Legal Representative)

Robert J. Kane

STUART KANE

620 Newport Center Dr., Suite 200

Newport Beach, CA 92660

Email: rkane@stuartkane.com

Charging Party Union

(Legal Representative)

David A. Rosenfeld

Weinberg Roger & Rosenfeld

1001 Marina Village Pkwy, Suite 200

Alameda, CA 94501-6430

Email: drosenfeld@unioncounsel.net

(Primary)

John Doran

CWA, District 9, AFL-CIO

2804 Gateway Oaks Dr., Suite 150

Sacramento, CA 95833-4349

Email: jweitkamp@cwa-union.org

(Legal Representative)

Lisl R. Duncan

Weinberg Roger & Rosenfeld

800 Wilshire Blvd., Suite 1320

Los Angeles, CA 90017-2623

Email: lduncan@unioncounsel.net

(Notification)

Mary K. O'Melveny

CWA, AFL-CIO

501 Third Street, NW

Washington, D.C. 20001-2797

Email: maryo@cwaunion.org

(Additional Service)
Laura Reynolds
CWA, AFL-CIO, District 9
12215 Telegraph Rd. Suite 210
Santa Fe Springs, CA 90670-3344
Email: lreynolds@cwa-union.org

(Additional Service)
Judith G. Belsito
CWA, AFL-CIO, District 9
12215 Telegraph Rd. Suite 210
Santa Fe Springs, CA 90670-3344
Email: jbelsito@cwa-union.org

Counsel for the General Counsel, NLRB

Cecelia Valentine
Regional Director, Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017-5449
Email: cecilia.valentine@nlrb.gov
on this 22nd day of May, 2013

/s/ J. Bruce Cross

J. Bruce Cross

/s/ J. E. Jess Sweere

J. E. Jess Sweere