UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC., and COMMUNICATION WORKERS OF AMERICA, AFL-CIO	Case Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584

BRIEF OF *AMICI CURIAE*

COALITION FOR A DEMOCRATIC WORKPLACE, ASSOCIATED BUILDERS AND CONTRACTORS, HR POLICY ASSOCIATION, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, THE NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL COUNCIL OF CHAIN RESTAURANTS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF THE *AMICI*

In this brief, the following *Amici* jointly respond to the Board's invitation seeking *amicus* briefs for the purpose of revisiting the holding of *Register Guard*, 351 NLRB 1110 (2007), *enfd. in part, denied in part* 571 F.3d 53 (D.C. Cir. 2009):

The Coalition for a Democratic Workplace ("CDW") represents hundreds of employer associations, individual employers and other organizations that together represent millions of businesses of all sizes. CDW's members employ tens of millions of individuals working in every industry and every region of the United States. CDW has advocated for its members on a number of NLRB issues including protection of employers' private property rights against non-employee access, the right of employers to be free from compelled communication of speech, unit determination issues, and the recent Proposed Rule regarding election procedures.

Associated Builders and Contractors ("ABC") is a national construction industry trade association representing nearly 21,000 chapter members. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. The vast majority of these contractor members are classified as small businesses. ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

The HR Policy Association is a public policy advocacy organization representing the chief human resource officers of major employers. The HR Policy Association consists of more than 330 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States,

nearly 9 percent of the private sector workforce. Since its founding, one of the HR Policy Association's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry with 58,288 members worldwide, 48,000 in the United States. ICSC has nearly 5,600 retailer members in the United States. Other members include developers, owners, lenders, and others that have a professional interest in the shopping center industry. Shopping centers account for more than $2.3 trillion in retail sales per year and generate $138 billion in state sales tax revenue. More than 12 million people rely on America's shopping center related industries for employment, making shopping centers one of the largest economic forces in the nation.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Association of Wholesaler-Distributors ("NAW") is comprised of direct member companies and a federation of national, regional, state, and local associations and their member firms, which collectively total approximately 40,000 companies with locations in every State in the United States. NAW members are a constituency at the core of our economy—the

link in the marketing chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. Industry firms vary widely in size, employ millions of American workers, and account for over $4 trillion in annual economic activity.

The National Council of Chain Restaurants, a division of the National Retail Federation, is the leading organization exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that serves restaurant businesses and the millions of people they employ. NCCR members include the country's most respected quick-service and table-service chain restaurants.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's *This is Retail* campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

Founded in 1948, the Society for Human Resource Management ("SHRM") is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading

provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management.

The *Amici* will respond to the five questions on which the Board invited responses in its April 30, 2014 Notice and Invitation for Briefs (hereafter the "Notice"), in the order listed by the Board. As further explained below, however, the *Amici* believe that the Board need not and should not proceed beyond its first question, which asks whether the Board should reconsider *Register Guard* at all. The *Amici* strongly urge the Board to reject the General Counsel's proposal to reconsider the holding in *Register Guard.* The Board should instead reaffirm that employees do not have any statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes. The *Amici* will nevertheless respond below to the additional related questions posed by the Board in its Notice. The answers to the Board's questions each support re-affirmance of *Register Guard's* holding.

SUMMARY OF ARGUMENT

It is well established that employers have a basic property right to regulate and restrict employee use of employer-owned property for communications purposes. The Board has until now consistently upheld this property right of employers with regard to every mode of employer communication that has come before the agency over many decades, including employer-owned telephones, bulletin boards, televisions, copy machines, and of course email systems. There is no justifiable basis for creating a new "right" of employees to compel their employers to allow use of company email systems for Section 7 purposes. Overruling *Register Guard* would exceed the scope of the Board's authority under the Act and would also infringe on protected employer rights under Section 8(c) and the First Amendment not to communicate the unwanted messages of others.

Employees have many alternative channels available to them to communicate with one

another in furtherance of their Section 7 rights. Accordingly, denying employees the ability to communicate personal messages on company email systems cannot be said to "entirely deprive" employees of their ability to communicate, as the Board would be required to establish prior to overruling *Register Guard* under longstanding judicial authority. If anything, the Board and Administrative Law Judges have gone too far in applying *Register Guard* in such a way as to prohibit employers from enforcing content-neutral policies.

Reversing *Register Guard* would have a very harmful impact on employers. Employers would to a significant extent lose their ability to ensure that their employees are productive during working time. Employers may also face new liability for employee misuse of employer-provided communication channels, along with increased risks of overloading employers' email systems, diminishing the legitimate business purposes of such email, and exposing the employer's email system to viruses and privacy breaches.

The answers to the Board's additional questions further support re-affirmance of *Register Guard*, and the *Amici* strongly urge the Board to do so. In improperly seeking an alternative standard with which to "balance" employee rights against the property rights of employers, the Board should acknowledge that any such new standard would have to treat email as a form of distribution of literature, rather than as an oral solicitation. Under settled law, therefore, employers would be entitled to prohibit distribution of such materials via email in any "work area," which by definition would include the employer's computer/email system. In addition, the proliferation of personal communications devices among most workers, as well as non-work social media platforms, personal texting, and other newer technologies, has rendered obsolete the claims of the *Register Guard* dissenters that employer-owned email systems are the "present day water cooler," an analogy that was false to begin with. Finally, overruling *Register Guard* will interfere with employer efforts to develop new forms of employer-sponsored electronic communication, to the detriment of business productivity. For all of these reasons, *Register Guard* should remain in effect and should not be reconsidered by the Board.

ARGUMENT

I. In Response to Question 1, The Board Should Not Reconsider Or Overrule *Register Guard*.

The Board's Notice asked as its first question whether the Board should reconsider its conclusion in *Register Guard*. The *Amici* emphatically respond that the Board should not reconsider or overrule *Register Guard's* holding that employees have no statutory right to use their employer's email system for Section 7 purposes. 351 NLRB at 1114-16.

In *Register Guard*, the Board properly recognized the basic property rights of employers with respect to their email systems. The Board relied on decades of precedent holding that employees generally have no right to use employer-owned property, equipment, or materials for purposes of Section 7 communications, as long as the employer's restrictions on such usage are not discriminatory. *Id*. at 1114 citing *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (no statutory right to use the television in the respondent's breakroom to show a pro-union campaign video), *enfd*. 269 F.3d 1075 (D.C.Cir. 2001); *Eaton Technologies*, 322 NLRB 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board."); *Champion International Corp*., 303 NLRB 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property" such as a copy machine); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987) ("[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations. . . ."), *enfd*. 857 F.2d 1474 (6th Cir. 1988), *cert. denied* 490 U.S. 1046 (1989); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981) (employer "could unquestionably bar its telephones to any personal use by employees"), *enfd. in relevant part* 714 F.2d 657 (6th Cir. 1983).

Without so much as mentioning the foregoing line of cases, the General Counsel's Exceptions in the present case contend that the Board should adopt an unprecedented

"presumption" that "a total ban on employees' rights to communicate about non-work matters through using their employer's equipment and/or email system is unlawful." This contention is based on the flawed assumption that *Republic Aviation*, 324 U.S. 793 (1945), and other cases that address employee face-to-face interaction or oral communication, apply in the same manner to employer restrictions on the use of employer-owned equipment. To the contrary, *Republic Aviation* and its progeny ensure only that employees are not "entirely deprived" of their right to communicate with one another in the workplace on their own time. The Supreme Court merely upheld the Board's presumption that a rule banning all solicitation during nonworking time is "an unreasonable impediment to self-organization … [in the absence of special circumstances]." "Otherwise, employees would have no time at the workplace in which to engage in Section 7 communications." Only in those circumstances has the Board or the Supreme Court determined that restrictions on employee solicitation and distribution on employer property impermissibly deprive employees of their Section 7 rights. *See, e.g., Republic Aviation*, 324 U.S. at 802 n. 8. [1]

The Board has never before expanded the reach of *Republic Aviation* to require an employer to make its own equipment and materials available to employees for Section 7 activity. As the majority found in *Register Guard*, 351 NLRB at 1115, the Supreme Court and other courts have rejected such an overbroad reading of *Republic Aviation*. *See NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 363-64 (1958) ("The Act does not command that labor organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications simply because the Employer is using it."). *See also Guardian Industries Corp. v. NLRB*, 49 F. 3d 317, 318 (7th Cir. 1995) ("Section 7 of the Act protects organizational rights

[1] The dissenters in *Register Guard* claimed that email should not be analogized to business telephones, televisions or bulletin boards because email is more "sophisticated," is "multidimensional," and is not as easily "tied up" by personal employee use. 315 NLRB at 1125-26. None of these claimed distinctions are substantive in nature, and they beg the question of whether it is necessary for employees to use the employer's email system in order to communicate at all. Under *Republic Aviation*, that is the sole permissible question for the Board to ask.

… rather than particular means by which employees may seek to communicate."); *NLRB v. Southwire Co*., 801 F. 2d 1252, 1256 (11th Cir. 1986); *Union Carbide Corp. v. NLRB*, 714 F. 2d 657, 663 (6th Cir. 1983). Overruling *Register Guard* would impermissibly extend *Republic Aviation* in a manner inconsistent with settled judicial interpretation of Section 7 of the Act.

The General Counsel's Exceptions offer no support for the contention that e-mail has become the "natural gathering place" or the "present day water cooler" such as to somehow supplant face-to-face interaction as the primary manner in which employees communicate with one another. Employee break rooms, locker rooms, parking lots, and other physical space in non-working areas remain common locations for employees to discuss non-work-related issues. Beyond that, employees now communicate with one another through numerous other personal channels of communication, such as social media, interactive websites (such as blogs or chat rooms), text messaging, personal telephones (including cell phones and smartphones), and free personal email accounts.[2] In light of the proliferation of personal electronic devices in the workplace, the General Counsel cannot possibly meet his burden of establishing that employees who are denied the right to communicate personal messages over employer-owned email systems are "deprived entirely" of their ability to communicate for Section 7 purposes. *Republic Aviation*, 324 U.S. at 801.[3]

Abandoning *Register Guard* would also seemingly require employers to allow their

[2] According to the Pew Research Center's Internet & American Life Project, in June 2013, 91% of the American adult population owns some kind of cell phone. *See* Smartphone Ownership — 2013, http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/ (last visited June 5, 2014). Beyond that, in June 2013, 56% of American adults own smartphones.

[3] The dissenting opinion in *Register Guard* wrongly accused the Board majority of applying an "alternative means of communication" test to employees that is only suitable for non-employee union agents under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). *See* 351 NLRB at 1126. On the contrary, the *Register Guard* majority correctly examined whether face-to-face solicitation and distribution "no longer enable employees to communicate," consistent with the holding of *Republic Aviation*. *Id*. at 1116, n.12. For the same reasons, as noted above, the existence of so many personal electronic devices among the average workforce serves to rebut any claim that denial of access to company email systems will deprive employees of their ability to communicate.

employees to use employer email systems to communicate with third parties while engaged in Section 7 activity. Doing so would necessarily provide third parties access to the employer property – specifically, the electronic communications system. As a matter of law, third parties are not entitled to such access except when "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537-40 (1992), citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Third parties have several alternative means of communicating with employees other than through employer-provided email. Thus, the General Counsel cannot meet the "heavy" burden of proving that absent access to employees through employer-provided email, unions or other third-parties will be unable to communicate with employees regarding the employees' Section 7 rights. *See Lechmere*, 502 U.S. at 540. [4]

In addition to the foregoing statutory concerns, overruling *Register Guard* in favor of the General Counsel's new presumption would violate Section 8(c) of the Act and arguably the First Amendment. This is so because employers would be compelled to allow employees to communicate an unwanted message on the employer's email system, creating the appearance that the employer at issue supports and agrees with the message being disseminated by the employees. As the District of Columbia Circuit recently held in *National Association of Manufacturers v. NLRB*, 717 F. 3d 947, 956 (D.C. Cir. 2013), "the dissemination of messages others have created is entitled to the same level or protection as the creation of messages." The

[4] Since *Register Guard* was decided, the Board and Administrative Law Judges have relied on *Register Guard* to invalidate employer policies that restrict specific conduct relating to employer-provided email. Accordingly, there is no basis for any assertion that *Register Guard* provides employers with excessive latitude to publish or disseminate overbroad and/or discriminatory work rules prohibiting employee use of email for non-work purposes. *See, e.g., UPMC*, 2013 NLRB LEXIS 268 (April 19, 2013) (invalidating policy prohibiting non-work email usage that "may be disruptive"; is "offensive"; "harmful to morale"; or in "support [of] any group or organization [not] sanctioned by . . . management"); *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) (invalidating policy prohibiting electronic communications that "damage the company, defame any individual or damage any person's reputation"); *Weyerhauser Co.*, 359 NLRB No. 138 (2013) (invalidating policy restricting the use of the company's e-mail system by union representatives for union purposes).

court further held that "the right to disseminate another's speech necessarily includes the right to decide not to disseminate it." *Id*. Based upon these principles, the court unanimously struck down the Board's "Notice Posting" rule. The court specifically rejected the Board's defense that the poster in question constituted the Board's own speech and not that of the employer. By requiring employers to post the Board's message on company bulletin boards (and computer systems), the court found, the Board unlawfully "told people what they must say." *Id*.

Here, if the Board overrules *Register Guard*, it will be telling employers that they must allow employees to post and send email messages on the employer's email system conveying messages regarding unions and other workplace complaints that the employer does not wish to convey. Under the plain holding of *NAM v. NLRB*, such a requirement violates Section 8(c) and arguably the First Amendment as well. *See also Wooley v. Maynard*, 430 U.S. 705 (1977) (compulsory statement on license plates unconstitutional); *West Virginia State Bd. Of Ed. v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute unconstitutional); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574-75 (1995) ("[T]he choice of a speaker not to propound a particular point of view, … is presumed to lie beyond the government's power to control"); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 544 (1980).[5]

For each of the above reasons, *Register Guard* must be reaffirmed as a matter of law. Any attempt to overrule Register Guard will violate the Act and conflict with controlling judicial authority.[6]

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[5] Overruling *Register Guard* would also constitute an unconstitutional regulatory taking under the Fifth Amendment. *See Nollan v. California Coalstal Comm'n*, 483 U.S. 825, 831-32 (1987).

[6] In addition to the statutory grounds for reaffirming *Register Guard* set forth above, overruling the holding of that case would cause significant harm to employers. This adverse impact is described in detail in Section III below, in response to the Board's third question ("[T]o what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?")

II. In Response To Question 2, If The Board Decides (Unlawfully) To Overrule *Register Guard*), Then Email Communications Should Be Subject To The Board's Distribution Standards Rather Than Its Solicitation Standards.

The second question in the Board's Notice improperly assumes that the Board will overrule *Register Guard*, and asks what new standard(s) of employee access to the employer's electronic communications systems should be established? The *Amici* reiterate that the question is based on the false premise that the Board will act unlawfully. Be that as it may, the *Amici*'s response is that the standard that the Board should adopt in that eventuality is one which allows employers to prohibit the distribution of personal employee emails in the employer's "work areas" and during working times, as further described below.

If the Board erroneously decides to overrule *Register Guard*, it would be necessary for the Board to confront the additional choice that was not squarely addressed by either the majority or the dissent in *Register Guard* itself. Specifically, the Board would be required to determine whether employee emails sent on an employer's email system constitute a form of "oral solicitation" of the type addressed by the Board in *Republic Aviation*, or a form of "written distribution" of the type addressed by the Board in *Stoddard-Quirk Mfg. Co*., 138 NLRB 615, 621 (1962). The Board has established two different standards for employers to follow in lawfully restricting these two types of employee activities under the Act.

The Board has long held that employers may lawfully restrict the distribution of literature to non-working times and non-working areas. *See, e.g., Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962). By contrast, employers may only lawfully restrict solicitation during "working time" except in the patient care areas of health care facilities. *Id*.; *Our Way, Inc.*, 268 NLRB 394 (1983).[7] The Board permits employers to restrict distribution to non-working areas because: (1) employers have a legitimate business interest in preventing litter from accumulating in work areas, thereby "rais[ing] a hazard to production" regardless of whether it occurs during working

[7] Healthcare facilities may also lawfully restrict both solicitation and distribution to non-patient care areas at any time. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978).

time or non-working time; and (2) literature, unlike oral solicitation, is "of a permanent nature" and is designed to be read at the recipient's convenience. *Stoddard-Quirk*, 138 NLRB at 619-20. Accordingly, the "opportunity for effective distribution" of union literature is more easily afforded than the opportunity for effective oral solicitation, and the intrusion upon the employer's property rights can be correspondingly diminished without substantial prejudice to employee rights. *Id*. at 620-21.

For many obvious reasons, emails are a form of written material that should fall within the standards applicable to other distributions of written material, again assuming *arguendo* that the Board chooses to overrule *Register Guard* in violation of settled law and ignore the employer property rights at issue here. Like the written materials in *Stoddard-Quirk* and subsequent cases, emails are themselves written, not spoken. In addition, electronic communications, like other forms of written materials subject to the distribution rules, take up space on employer property, namely the employer's computer system. Indeed, the accumulation of emails over time can take up significant memory on an employer's computer system. Frequent usage and an abundance of non-work-related emails run the risk of congesting an employer's server and interfering with productivity. The comparison of unwanted email to other forms of litter is a common one and led Congress to enact the CAN-SPAM Act of 2003, 15 U.S.C. 7701. The problem of unwanted email continues unabated, however. It is ironic, therefore, that the Board is considering a proposal to restrict the ability of employers to control the internal dissemination of non-work-related emails on their own email systems.

Moreover, electronic communications, like distributed literature and unlike oral solicitations, are relatively more permanent. The recipient of electronic communications can review the communications at his or her leisure. As long as the communication is received, the purpose of the electronic communication has been satisfied. Therefore, electronic communications are again more similar in nature to literature than to oral forms of solicitations. Accordingly, if the Board finds that employees have a right to use employer electronic

communication systems for Section 7 purposes (which it should not), the Board should apply its distribution standards rather than its solicitation standards.

In accordance with settled Board law, application of the distribution rules to employee emails would mean that employers should be permitted to prohibit distribution of such email solicitations in all work areas of the company. *Stoddard-Quirk*, 138 NLRB at 619-20. The employer's computer system, by definition, is such a work area, as are the computer terminals at work used by any employees who send or receive emails on the company's system. By the Board's own standard, therefore, it should be permissible for employers to prohibit the transmission by employees of solicitation emails anywhere on the employer's email system and/or to prohibit the sending or receiving of such emails on company computers. Thus, even if *Register Guard* is overruled, the net result should be the same for all practical purposes under the Board's longstanding distribution rule. It is worth reiterating, however, that overruling *Register Guard* would violate the Act.[8]

III. In Response To Question 3, The Board Should Give Significant Weight To The Adverse Impact On Employers Of Employees' Use Of Employers' Electronic Communications Technology, Again Compelling Affirmance Of *Register Guard*

The Board's third question asked to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue? The *Amici* respond that overruling *Register Guard* will cause significant harm to employers, a factor which the Board should give significant weight in deciding not to reconsider *Register Guard*.

[8] If the Board chooses to modify *Register Guard*, then it should clarify that content-neutral rules against email misuse that are applied in a nondiscriminatory manner are permissible under the Act. For example, the Board should clarify that employers have the right to implement rules prohibiting employees from using e-mail systems for purposes of harassing others, interfering with employees' ability to perform their jobs, or disrupting operations.

The Board has long recognized that employers have a right to ensure that employees are productive during working time. *See, e.g., Peyton Packing Co., Inc.*, 49 NLRB 828, 843 (1943) By requiring employers to allow employees to use employer-provided electronic communication systems for non-work purposes, however, businesses will be severely hampered in their ability to monitor and ensure employee productivity in the use of company email systems. Unlike distribution of literature or oral solicitations, which are more open and obvious means of engaging in Section 7-protected activity, electronic communications are concealed – unless otherwise closely monitored for quality assurance. If employees are permitted to use employer-provided email for Section 7-protected activity during non-work time, it will be virtually impossible for an employer to determine whether employees are drafting non-work related emails during work time. Allowing employees the ability to use email for Section 7 purposes – even if confined to non-working time – would make employers extremely vulnerable to additional non-productive time.

Furthermore, employers may be liable for employee misuse of email. Employees who send non-work-related emails to third parties or other employees may expose their employer to legal action based on the employer's acts or omissions relating to such misconduct. *See Blakey v. Continental Airlines, Inc.*, 751 A. 2d 538 (N.J. 2000) (finding employer responsibility to correct harassment occurring on electronic bulletin board deemed to be part of the workplace); *see also Amira-Jabbar v. Travel Services, Inc*., 726 F. Supp. 2d 77 (D.P.R. 2010) (considering evidence of social media harassment as part of a hostile work environment claim). Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 Wash. L. Rev. 249, 269-274 (2012). Allowing employees the right to use employer email for non-business-related purposes will limit the ability of employers to monitor and control misuse, for which employers may ultimately be held responsible under federal civil rights laws.[9]

[9] It is well settled that the Board is required to interpret the Act in a way that is consistent with other federal employment laws. *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942) ("[T]he Board has not

As noted above, requiring employers to create an exception for Section 7-protected activity to any prohibition on the use of electronic communications for non-work reasons will compromise employers' ability to monitor employee use of the communication system. It is imperative that employers be permitted to monitor employee email usage in order to ensure that such usage furthers the employers' business interests and otherwise complies with employer policy and other applicable laws. By requiring employers to permit Section 7-activity over the employers' own electronic communications systems, the Board would appear to prohibit employers from effectively monitoring employee use of email, though the General Counsel has offered no guidance on this point.

Furthermore, opening up employer electronic communications systems to Section 7-protected activity undoubtedly will increase the likelihood of those systems becoming vulnerable to overloading, diminished visibility of legitimate business emails, and other complications, such as viruses and privacy breaches. Topics such as organizing, collective bargaining, and concerted action (*e.g.*, a potential strike or a plan to engage in leafleting) often spark passionate debate among those potentially affected. It is reasonable to expect that a single email addressing the mere possibility of employees considering seeking union representation will trigger many emails in response. Over the course of a union organizing campaign, contract negotiations, or a lengthy and contentious grievance or lawsuit, there exists a very real possibility that an employer's employees may share hundreds – if not thousands – of emails among themselves or third parties relating to those subject matters. Regardless of whether the employer's system can handle the increased usage, the reality is that employees will be forced to sift through these unwanted personal messages in order to see the business messages that are the actual purpose of every

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been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). *See also Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 251 (1970); *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 144 (2002).

employer's email system.[10]

The General Counsel's Exceptions provide no guidance as to how the newly proposed presumption against restricting email usage would work in practice. Indeed, the General Counsel's criticism of the Respondent's content-neutral policy in the present case appears to be unwarranted under any credible standard. Likewise, adoption of the *Register Guard* dissent would impose onerous burdens on employers who give employees any access to e-mail in the workplace. Under the dissent, employers would be required to rebut the presumption in favor of unlimited personal email usage by proving that the their interests "justify" a ban. The dissenters gave only three examples of what such justifications might be sufficient for a ban on e-mail usage: (1) limited server space; (2) a proven need to limit large attachments or audio/video segments; and (3) limiting non-work-related emails to nonworking time. These exceptions appear to be arbitrary and unworkable for most employers and offer little guidance to the business community as a whole.[11] Certainly, adoption of the proposed presumption will lead to wasteful and expensive litigation.

The General Counsel's proposed new presumption ignores the significant costs already incurred by employers in implementing and maintaining employer-provided e-mail or other electronic communications systems. Such costs include not only installation costs and regular service fees and charges, but also the cost of information technology support, virus protection and coping with spam. If the Board mandates that employers make their electronic communications systems available to employees for non-business usage, it is highly likely that

[10] Similar concerns over allowing personal employee messages to obscure company postings on employer bulletin boards led the Board to uphold nondiscriminatory employer policies prohibiting such employee postings on the employers' property. *Sprint/United Management Co.*, 326 NLRB 397, 399 (1998); *Container Corp. of America*, 244 NLRB 318 (1979).

[11] Among many dilemmas that the dissenters in *Register Guard* failed to address, enforcement of a "working time" restriction for emails would be much more difficult than for oral solicitations. Unlike oral solicitations, emails may be sent and received at different times by different employees.

employer costs will increase, especially because employers would seemingly lose at least some ability to monitor employee email to ensure proper usage.

IV. In Response To Question 4, The Proliferation Of Personal Electronic Devices, Social Media Accounts, And Personal Email Accounts Further Weighs In Favor Of Upholding The Ruling In *Register Guard*.

The Board's fourth question asked whether employee personal electronic devices, social media accounts, and/or personal email accounts affect the proper balance to be struck between employer's rights and employees' section 7 rights to communicate about work-related matters? As explained in Section I of this brief, at p. 5, the proliferation of personal electronic devices strongly militates against the notion that employees need to be able to use their employer's electronic communication systems in order to engage in Section 7-protected activity.

As noted above, the Pew research study shows that the vast majority of employees now carry their own communication devices with them. Beyond that, in June 2013, 56% of American adults own smartphones, representing a significant increase in smartphone ownership in the past few years.[12] Undoubtedly, smartphone ownership will continue to increase rapidly in the coming years as smartphones become more accessible and the population becomes more dependent on smartphones. The same is true of other mobile devices, such as tablets.

Beyond personal electronic devices, employees now have social media readily available to them. The vast majority of American adults actively participate in some form of online social media. As of September 2013, 73% of online adults use social networking sites. *See* Social Networking Fact Sheet, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/

[12] In February 2012, 46% of adults owned a smartphone; while in May 2011, 35% of the adult population in the United States owned smartphones. *See id.*

(last visited June 5, 2014).[13] This represents a significant growth in the past decade, as less than 10% of online adults utilized social media in 2005. *Id*. Social media can of course be accessed remotely, without need to use an employer's email system. The Pew Research Center study reports that 40% of cell phone owners use a social networking site on their phone, and 28% do so on a typical day. *Id*. Employees can access social media through mobile devices at any time. Given the widespread use of social media, employees have convenient and user-friendly channels of communication available to them, totally independent of the employer's email system.

Understanding the power and reach of social media, labor organizations have utilized social media as a tool for organizing. In fact, several organizations have campaigned through Facebook, YouTube, and Twitter. A 2008 survey by Cornell University's Industrial Labor Relations Program of 59 international unions as well as the two major union federations, the AFL-CIO and Change to Win, showed that 31 unions (54.1% of the population surveyed) use Facebook, 18 unions (31.1% of the population surveyed) use Twitter, and 14 unions (24.6% of the population surveyed) use YouTube. *See* New Approaches to Organizing Women and Young Workers, available at http://www.ilr.cornell.edu/laborprograms/ (last visited June 5, 2014).[14]

In light of the vast growth of personal devices and social media accounts, employees certainly have numerous resources available to them in order to communicate with one another about their wages, hours, and working conditions. It stands to reason that accessibility to such resources will only increase in the coming years. Given the availability of such technology, employees do not need to utilize their employer-provided electronic communications systems to communicate with one another about their wages, hours, and working conditions. In effect,

[13] According to the study, 90% of adults between the ages of 18 and 29 use social media, and 78% of adults between the ages of 30 and 49 use social media.

[14] Those numbers have almost certainly increased in the past six years.

employees have "moved on" from the days when company email systems were the "natural gathering place" at work, if indeed those days ever existed. Thus, whatever may have been the merits of the *Register Guard* dissenters' views on the "unique sophistication" of company email systems in 2007, those views are now technologically obsolete and provide no support for overruling *Register Guard*.

V. In Response To Question 5, The Board Should Consider The Impact Of Its Ruling On Employer Efforts To Use Additional Communications Technologies For Business Purposes, And Should Reaffirm *Register Guard* On This Additional Ground.

The Board's fifth and final question asked the *amici* to identify any other technological issues concerning email or other election systems that the Board should consider, and how such changes should affect the Board's decision. In response, the *Amici* incorporate by reference the previous discussion of personal electronic technology, but add below an additional discussion of the increased number and types of employer platforms that could be affected by any overruling of *Register Guard*.

Any ruling that the Board issues in this case would seemingly apply to all forms of employer-provided electronic communications, including employer-provided social media platforms. Such platforms have expanded in recent years and it is expected that the trend will continue. In a survey of 290 large and midsize organization by global professional services company Towers Watson, 56% of those employers currently use various social media tools as part of their internal communication initiatives to build community. *See* How the Fundamentals Have Evolved and the Best Adapt, http://www.towerswatson.com/en-US/Insights/IC-Types/Survey-Research-Results/2013/12/2013-2014-change-and-communication-roi-study (last visited June 5, 2014). According to information technology research firm Gartner, Inc., 50% of large organizations will have a "Facebook-like" internal network and that 30% of these will be viewed essentially as telephones and emails are today. Gartner – January 29, 2013 Press

Release, http://www.gartner.com/newsroom/id/2319215 (last visited June 5, 2014).

Employers have devoted significant time and resources into developing such platforms. If *Register Guard* is overruled and employers are required to allow employees to utilize employer electronic communication systems to participate in Section 7-protected activity, employers may be compelled to abandon their investments into such platforms or decline to consider such platforms in the first place. Employers that maintain such platforms may not be able to effectively monitor employee non-business use of the platforms because doing so may constitute unlawful surveillance, depending on the Board's final ruling in this case. In light of these factors, many employers would view the costs of platforms being made open to non-business use to outweigh the benefits of such platforms. Reversing *Register Guard* would create a disincentive for creating or maintain such tools, which could otherwise be an effective and productive manner of communication for business purposes. Without such employer-provided resources, employees may choose to use their own devices for business purposes. Such an outcome would post additional difficulties for employers because they cannot monitor employee personal devices to ensure that business communications on those devices are appropriate and consistent with employer goals and policies.

In light of the foregoing, *Register Guard* must stand. Employers have a right to ensure that their electronic communication systems are used solely for business purposes. Requiring employers to permit employees to use employer electronic communication systems for non-business purposes – include Section 7-activity – interferes with employer property rights and will inevitably result in reduced productivity.

CONCLUSION

For the foregoing reasons, the Board should reject the General Counsel's efforts to have *Register Guard* overruled and should instead reaffirm the Board's holding in that case.

Respectfully submitted,

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