UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

PURPLE COMMUNICATIONS, INC.

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Case No. 21-CA-095151
Case No. 21-RC-091531
Case No. 21-RC-091584

BRIEF OF *AMICUS CURIAE*
RETAIL LITIGATION CENTER

Dated: June 16, 2014

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I. INTRODUCTION

Just seven years ago, in *Register-Guard*, 351 NLRB 1110 (2007), the National Labor Relations Board applied longstanding Board precedent regarding the use of employer-owned communications equipment for Section 7 activities to e-mail. That decision, which held that employees do not have a statutory right to use an employer's e-mail system for Section 7 activities, was the natural outgrowth of a long line of cases dating back to the 1970s, in which the Board applied this same rule to every single piece of company-owned communications equipment used in the workplace: bulletin boards, paper, public address systems, copy machines, and telephones. This rule balances the employer's legitimate business interests in controlling the use of its e-mail systems—security, productivity, privacy, and others—with the employee's exercise of Section 7 rights unfettered by a discriminatory employer policy. The decades of Board precedent establishing and reconfirming this rule reflect the Board's "informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." *Atchison, T. & S.F.Ry. Co. v. Wichita Bd. Of Trade*, 412 U.S. 800, 807-808 (1973).

Now the General Counsel urges the Board to deviate from its "well established rule," *see Container Corp. of America*, 244 NLRB 318, 319 n.2 (1979), for evaluating the use of company-owned communication systems and instead apply the Board's standard governing oral solicitations, on the theory that e-mail has now effectively replaced face-to-face communication in the workplace. But we have not come so far—or stooped so low—as a society that e-mail has replaced in-person human interaction. The General Counsel's fictional idea of a virtual world ignores common sense experience and the realities of the workplace. E-mail and face-to-face communications are inherently dissimilar and are used in different ways in the workplace, particularly given the diverse nature and operations of American business. Despite technological advances, human interaction not only still exists in the workplace, but is central to the proper

functioning and success of most businesses, particularly in the retail industry. It would be arbitrary, irrational, and inconsistent with the National Labor Relations Act for the Board to adopt the view of the General Counsel and abandon its "well established" rules regarding employee use of employer-owned communications equipment.

Moreover, overruling *Register-Guard* would have a real and detrimental impact on employers and employees alike. Employers would have to enhance their e-mail system capacity and security to deal with the influx of predominantly outside e-mails, sacrifice employee productivity, and risk liability for employee harassment and illegal conduct, among other concerns, while employees could be subject to unwanted solicitations and possible intrusions on their privacy.

A new rule also is unnecessary. Since *Register-Guard*, the advent and growth of social networking, smartphones, text messaging, and personal e-mail have combined to provide employees with abundant opportunities to engage in easy and inexpensive personal communications with friends, family, and co-workers, *outside of the employer's communications systems*. Unions were quick to employ these efficient means of communicating with and organizing workers, as they were early adopters of many of these technologies. Most unions have multiple websites, Facebook pages, Twitter accounts, YouTube channels, e-mail listservs, blogs, and myriad other social networking tools that they use to communicate with workers on a regular basis.

These alternative means of communication, moreover, are better suited for Section 7 activities than an employer's e-mail system. Not only are personal means of electronic communication more widely available than those in the workplace—this is especially true in the retail industry, where very few covered employees have work e-mail addresses or computer

access in the workplace—but they also give employees a greater sense of privacy in their communications and the ability to prevent unwanted harassment. Furthermore, overruling *Register-Guard* would raise serious constitutional issues regarding employers' First Amendment rights that the Board must avoid in interpreting the Act.

For these and other reasons, the Board should reaffirm its longstanding rule that employees do not have a statutory right to use an employer's communications equipment for Section 7 activities. It would be arbitrary, irrational, and inconsistent with the Act for the Board to jettison over forty years of settled Board precedent governing employee use of an employer's communications equipment in favor of an unnecessary and misplaced new rule that treats e-mail communications differently from other forms of workplace communication.

II. STATEMENT OF INTEREST

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

III. ARGUMENT

A. *Register-Guard* Is Consistent With Longstanding Board Precedent.

1. The Board Has Long Held That Employees Have No Statutory Right To Use Their Employers' Communications Equipment For Section 7 Purposes.

For well over forty years, the Board has held that an employee does not have a statutory right to use an employer's equipment or media to engage in Section 7 communications, so long

as the employer's restrictions on the use of its property are not discriminatory. In *Register-Guard*, the Board drew a straight line from this longstanding precedent to the latest evolution in communications equipment: e-mail. Overturning *Register-Guard* would be an arbitrary left hook in that straight line.

The Board first applied its rule regarding employer-owned communications equipment to an employer's public address system in *The Heath Co.*, 196 NLRB 134, 134-35 (1972), where it permitted an employer to prohibit employees from using the address system for union-related communications. The Board later applied this rule to essentially every piece of communications equipment in use in the workplace: company telephones, copy machines, paper, bulletin boards, and televisions. *See Container Corp. of Am.*, 244 NLRB 318, 319 n.2 (1979) (bulletin boards); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981) (telephones), *enf'd in relevant part* 714 F.2d 657 (6th Cir. 1983); *Honeywell, Inc.*, 262 NLRB 1402 (1982) (bulletin boards), *enf'd* 772 F.2d 405 (8th Cir. 1983); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987) (telephones), *enf'd* 857 F.2d 1474 (6th Cir. 1988); *Champion Int'l Corp.*, 303 NLRB 102, 109 (1991) (copy machine); *Eaton Techs.*, 322 NLRB 848, 853 (1997) (bulletin boards); *Mid-Mountain Foods, Inc.*, 332 NLRB 229, 230 (2000) (break room television); *Johnson Tech., Inc.*, 345 NLRB 762, 763-64 (2005) (unused company paper). As far back as 1979, the Board considered this employer right to be "well established." *Container Corp. of Am.*, 244 NLRB at 319 n.2.

The logic of this longstanding Board precedent is undeniable and has been endorsed by every federal court of appeals to address the issue. Because an employer "may control activities that occur in the workplace, both as a matter of property rights (the employer owns the building) and of contract (employees agree to abide by the employer's rules as a condition of employment)," Section 7 does not protect "the particular means by which employees may seek to

communicate" in exercising their organizational right. *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995); *see also Fleming Cos., Inc. v. NLRB*, 349 F.3d 968, 974-75 (7th Cir. 2003); *J.C. Penney Co., Inc. v. NLRB*, 123 F.3d 988, 998 (7th Cir. 1997); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986); *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 660 (6th Cir. 1983); *NLRB v. Honeywell Inc.*, 722 F.2d 405, 406 (8th Cir. 1983). This reasoning is further rooted in the Supreme Court's longstanding interpretation that 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***." *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 363-64 (1958) (emphasis added).

As the Board properly concluded in *Register-Guard*, this rationale applies equally to electronic communications, and thus *Register-Guard* was the natural—and unremarkable—extension of this settled rule to the newest iteration of workplace communications equipment: e-mail. Any conclusion to the contrary would be arbitrary and irrational. Like the use of telephones, a public-address system, or bulletin boards, the use of company e-mail indisputably requires the use of employer-owned equipment. The employer has a property interest in the equipment that constitutes its e-mail systems—stemming from its common-law property right in that equipment[1]—which includes the "servers that host [an employer's] e-mail system and in the

[1] State and federal courts have expanded the scope of the tort of trespass to chattels to include interference with e-mail systems because of the physical impact of unwanted e-mails. *See, e.g., School of Visual Arts v. Kuprewicz*, 771 N.Y.S.2d 804 (2003) (holding that sending large volumes of unsolicited job applications and pornographic e-mail amounts to trespass to chattels because it "depleted hard disk space, drained processing power, and adversely impacted other system resources on [plaintiff's] computer system"); *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (holding that senders of bulk e-mail committed trespass to chattels); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (1997) (recognizing tort for trespass to chattel under Ohio law for interfering with e-mail systems by sending unwanted spam messages); *see also Matter of Search of Info. Associated with [Redacted]@mac.com that is Stored at Premises Controlled by Apple, Inc.*, No. 14-228, 2014 WL 1377793 at *4-5 & n.9 (D.D.C. Apr. 7, 2014) (discussing the property interest in e-mail); *State Analysis, Inc. v. Am. Fin. Servs. Ass'n*, 621 F. Supp. 2d 309, 319-20 (E.D. Va. 2009) (holding that interference with website is trespass to chattels).

software on which it operates, as well as its computers on which the employees access e-mail." *Register-Guard*, 351 NLRB at 1116 n.11. And the property interest in these systems is significant. Retail employers spend millions of dollars annually on the overhead necessary to maintain and protect their electronic communications system, including the costs of purchasing and maintaining the requisite equipment. For example, one RLC member reports that it uses up to 75 servers for its electronic communications systems. Additional costs incurred by employers include the necessary cyber-security tools to protect their systems from viruses and cyber-attacks, and the labor costs for employees who have responsibility for the system design, functionality, maintenance, and security. The amount of labor costs and number of employees involved will vary according to the size of the employer and the complexity of their electronic communications systems. For some large retail employers, hundreds of employees have shared responsibility for the company's electronic communication systems. Moreover, as the Board recognized in *Register-Guard*, e-mail is similar in many ways to telephone systems: "Both enable virtually instant communication regardless of distance, both are transmitted electronically, usually through wires (sometimes the very same fiber-optic cables) over complex networks, and both require specialized electronic devices for their transmission." *Id*. at 1116. The same is true of other workplace communication systems, such as public address systems, which the Board similarly has permitted an employer to limit access and use by employees.

Register-Guard makes practical sense, because employers have legitimate business reasons for wanting to control the scope and content of e-mail communications. As the General Counsel conceded in *Register-Guard*, an employer has "an interest in limiting employee e-mail to prevent liability for inappropriate content, to protect against system overloads and viruses, to preserve confidentiality, and to maintain productivity." *Register-Guard*, 351 NLRB at 1113.

The practices of RLC members reflect this important employer interest, as they report regulating company e-mail usage for several reasons, including to protect the dissemination of sensitive information, prevent excessive volume, block access to harmful external websites, and avoid the distribution of sexually explicit and vulgar messages.

Contrary to the view of the dissenting Board members in *Register-Guard*, e-mail communications, like traditional methods of workplace communications, do not allow for the limitless and cost-free exchange of messages and information. *See Register-Guard*, 351 NLRB at 1125 (Members Liebman and Walsh dissenting). Just as a bulletin board can only hold so many posters, an e-mail system can transmit or archive only a finite number of messages at a given time. An e-mail system's use of cyberspace is limited by the physical infrastructure an employer chooses to purchase; server size, Internet speed, and various software packages and programming options all depend on hardware and other physical equipment. Collectively these factors dictate the size and number of e-mails that can be sent at a given time or retained for future use. These limitations explain why most employers, including in the retail industry, place a limit on the size of each individual message that can be sent or received on its system and have a maximum capacity for all e-mails that can be transmitted or archived at a given time.

Moreover, employee e-mail use in the retail industry is limited by access to computers in the stores and other workplaces. Not all retail employees—indeed, very few—have regular access to a computer at the retail store in which they work, because the primary function of retail employees is to spend their time out on the retail floor serving customers. Sales associates are trained and instructed to search out customers, provide assistance, and complete the sale. The most important task of every retail employee in a store is to provide a seamless, positive experience to customers interested in purchasing the employer's goods, and the use of e-mail and

other electronic communications in the workplace would interfere with, rather than advance, that goal. For this reason, usually a store needs only one or two computers; for example, one to be used by the store manager and another to be used for employee training. As a result, employees have limited access to computers in the retail workplace, which inherently restricts employees' ability to send and receive e-mails while at work. Just like a bulletin board, public-address system, copy machine, or telephone, if one employee (or the employer) is using the equipment, other employees will have to wait their turn.

Register-Guard—the straightforward application of decades of Board precedent—"embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." *Atchison, T. & S.F.Ry. Co. v. Wichita Bd. Of Trade,* 412 U.S. 800, 807-808 (1973). Given this longstanding Board precedent and the concededly legitimate business reasons an employer has in limiting the use of its own e-mail systems, it would be arbitrary and irrational for the Board to now reverse course. *See Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (Kennedy, J., concurring) ("An agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings . . . An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past."). This is particularly true because *Register-Guard* only provides employers with limited authority to block employee communications from employer-owned e-mail systems. Employers can only maintain restrictions that are not discriminatory on their face or in practice. *See Register-Guard*, 351 NLRB at 1116-20. This exception, central to *Register-Guard*, protects

employees by prohibiting "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Id*. at 1118. Thus, an employee's right to engage in Section 7 activities is fully protected under *Register-Guard*.

2. Electronic Communication Is Inherently Different From Face-To-Face Solicitation And Therefore Does Not Warrant Departing From This Longstanding Precedent.

The General Counsel urges the Board to reverse *Register-Guard* on the ground that electronic communications are akin to face-to-face solicitations and thus governed by *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). According to the General Counsel, given the increased importance and use of e-mail as a means of employee communication, e-mail has replaced face-to-face communication as the primary method of employee-to-employee communication, becoming the new "natural gathering place" for employees to engage in Section 7 activities. *See* Counsel for the General Counsel's Limited Exceptions to the Administrative Law Judge's Decision and Brief In Support of Limited Exceptions ("GC's Exceptions") at 6, *Purple Commc'ns,* Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584 (NLRB Nov. 21, 2013). As a result, the General Counsel asks the Board to apply the standard set forth in *Republic Aviation*, in which the Supreme Court agreed with the Board that a ban on all face-to-face solicitation on company property during nonworking time served as "an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." 324 U.S. at 803 n.10. In *Register-Guard*, the Board correctly concluded that the *Republic Aviation* standard did not apply to e-mail and instead the Board applied its well-settled rule permitting an employer to restrict use of its own equipment. The Board should do so again here.

We have not come so far (or perhaps slipped so low) that e-mail can be considered the equivalent of or replacement for in-person human interaction. The General Counsel's own

examples of purportedly now non-existent meeting areas—break rooms or cafeterias, *see* GC's Exceptions at 6—along with the common sense experience of our own day-to-day lives prove that technology has not eliminated face-to-face interactions in the workplace. Regardless of how easy, efficient, or ubiquitous e-mail use becomes, employees still must eat meals, use the restroom, or take breaks (which are required by law in many states, *see, e.g.*, Cal. Labor Code § 512), all of which are activities that are likely to occur outside an office and away from a desk or computer in areas where other employees congregate and are likely to engage in face-to-face discussions. In fact, many employers, including retailers, mandate that breaks be taken at a location away from the employee's workstation or the retail sales floor and provide communal break rooms where employees can relax and engage with fellow employees. Other employers provide on-site cafeterias, coffee shops, gyms, or outdoor areas for employees to use for socialization. These real "natural gathering places" exist and will continue to exist, regardless of the growth of electronic communications.

Electronic is also a poor substitute for face-to-face communications because the two have critical differences that make it unlikely an employee would permanently abandon face-to-face interactions. Face-to-face conversations provide a more in-depth experience as participants can read facial expressions and gestures that accompany statements as well as hear the vocal tones used in conversation. These allow participants a better opportunity to gauge the truthfulness, commitment, and motivation of the speaker. Face-to-face conversations also maintain a level of spontaneity and efficiency missing in e-mail exchanges. You can get an answer to a question, immediately ask a clarifying follow-up question, or resolve an issue right away instead of waiting for a response to an e-mail.

In contrast, not only does e-mail lack the multi-dimensional immediacy of face-to-face communication, e-mail creates a virtual paper trail that can be shared with others, which employees may want to avoid when they are engaging in private conversations (for example, regarding union support or discussing other employees). Unlike an e-mail, an oral conversation cannot be forwarded around the office with a click of a button, thus transforming a conversation that an employee intended to be private into a public announcement.

Moreover, in many industries face-to-face communication among employees is an operational necessity central to a company's business model. In the retail industry, for example, employees regularly work side-by-side on the retail sales floor or in the warehouse. For employees at retail stores, face-to-face communication with other employees is the overwhelmingly dominant form of communication, while e-mail use is rare or nonexistent for many covered employees. Indeed, retailers usually do not provide company e-mail addresses to the bulk of their employees—e.g., those working on the sales floor, in the warehouse, or as technicians—because, as detailed above, e-mail is unnecessary to their job, and in fact often serves as a distraction.

B. Overruling *Register-Guard* Would Impose Significant Costs On Employers.

Mandating that employers permit employees to use employer-provided e-mail systems for personal activity, including organizing communications, would impose significant costs on employers, in areas such as worker productivity, systems capacity and security, and liability risks.

First, allowing employees to send personal e-mails would reduce worker productivity. Sending and receiving personal e-mails necessarily and proportionately reduces the amount of time an employee spends performing job duties in direct exchange for the time spent on personal e-mail activity. In a retail store, for example, an employee may be reviewing personal e-mails on

one of the store's computers instead of attending to customers on the sales floor. This result could be particularly problematic during busy holiday or back-to-school shopping seasons.

Retail employees with work e-mail accounts will also have to waste working time wading through their work e-mail inboxes at a time when many employees with e-mail accounts are already burdened with full e-mail inboxes.[2] Allowing employees to send and receive personal e-mails on these accounts could overcrowd these inboxes—especially during times of increased activity such as the period leading up to a union activity—to the point where employees are wasting working time checking and sorting through their work e-mail inboxes to separate work related e-mails from personal e-mail. Even if an employer permissibly limits the use of company equipment and systems for personal e-mails to non-working time, it can be difficult and expensive to regulate whether employees are sending these non-work e-mails during working time, particularly for those employers that do not engage in comprehensive monitoring of their e-mail systems.

Second, companies would have to increase capacity and enhance security on their electronic systems in order to deal with the influx of predominantly outside e-mails. Employers in the retail industry, and undoubtedly in other sectors as well, have capacity limits on the number and size of e-mails that can be transmitted and archived on their systems. An increase in the number of messages sent on the system would thus require employers to invest in more servers, software, hardware, and related equipment in order to guarantee adequate capacity and bandwidth to handle the increase in e-mail volume without disruption to normal business activities. More critically, companies will have to invest in improvements to their system

[2] Across all industries, a typical worker already receives a large number of e-mails each day—over 120—and that number is expected to increase to 140 by 2018, even without a Board-mandated change in employer e-mail policies. *See Email Statistics Report, 2014-2018 – Executive Summary*, at 4, THE RADICATI GROUP, INC. (April 2014), *available at* http://www.radicati.com/wp/wp-content/uploads/2014/04/Email-Statistics-Report-2014-2018-Executive-Summary.pdf.

security, because the increased e-mail activity will cause a corresponding increase in the risk of a virus or cyber-attack via outside e-mails, which could paralyze business operations, compromise proprietary business information, and expose personal data belonging to employees and customers. Retailers, in particular, are at significant risk for cyber-attacks because of the significant amount of confidential consumer information that is transmitted over their electronic systems.

Third, permitting employees to send non-work e-mails will increase employers' exposure to legal liability for employee harassment, illegal conduct, and wage and hour violations, among other potential concerns. The elimination of a bright-line rule prohibiting personal e-mails increases the possibility of an employee sending inappropriate e-mails, including harassing e-mails, for which the employer could be liable. Finally, if an employer limits personal e-mail activity on its systems to non-working time, it may raise wage and hour issues as to the time an employee spends checking work e-mail outside of their working—i.e., paid—time.[3]

C. Non-Work Electronic Media—Which Is Growing Exponentially—Provides A Better Forum For Employees' Section 7 Activities.

The last decade has seen a dramatic change in how individuals communicate with each other outside of work, which has resulted in more effective and efficient avenues for employees to engage in personal communications than work e-mail. Social networking, smartphones, texting, blogging, YouTube videos, vines and personal e-mail provide opportunities for quick and inexpensive communications outside of the workplace that were not available even a few years ago. Unions have been early adopters of this technology and have been using the Internet

[3] We note that the Board has not invited the filing of *amicus* briefs on the issues of whether, under the Act, the Board may mandate that employers provide every covered employee with a company e-mail address (and access to a computer) or require the disclosure of employee e-mail addresses to unions, both of which would impose significant costs on employers in the retail industry. As the Board presumably recognizes, these issues are not raised by the facts of this case and, in any event, it would be arbitrary, irrational, and inconsistent with the Act for the Board to impose this affirmative duty on employers.

to organize workers for several years. These non-work forums for employee communication are not only more available and efficient for employees than work e-mail, but they also provide a better forum for Section 7 activities, as they maintain employee confidentiality and provide employees with tools to protect themselves from potential unwanted or harassing communication.

1. Personal E-mail Accounts And Devices For Non-Work Electronic Communications Have Grown Exponentially Since Register-Guard.

The Internet, which provides fast and efficient communication electronically, has had a significant effect on communications "both within and outside the workplace." *Register-Guard*, 351 NLRB at 1121 (Members Liebman and Walsh dissenting). Indeed, in the last several years, these changes in electronic communication have occurred predominantly outside the workplace, with explosive growth in the use of social networking websites, smartphones, texting and personal e-mail accounts. What makes all of this possible—the Internet—is now used more regularly at home than it is used at work: according to a 2014 study, 90% of Internet users accessed the web from home while only 44% did so at work.[4] And home use is increasing—up from 76% in 2000 to 90% in 2014—while use at work is relatively stagnant (41% in 2000 to 44% in 2014).[5] In addition, in the last several years there has been an explosive growth in free Wi-Fi services at locations outside the home and work settings, e.g. libraries, airports, Starbucks, and McDonalds to name a few, enabling easy and free Internet access with wireless devices and laptops. As a result, workers have many ways to access the Internet in order to communicate with their co-workers outside of the workplace, and these means of access are widely available and inexpensive.

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[4] *The Web at 25*, at 19, PEW RESEARCH CENTER (Feb. 2014), *available at* http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf.

[5] *Id.*

In addition, the platforms for communicating electronically over the Internet outside the workplace grow on a near-daily basis. In 2007, when *Register-Guard* was decided, Facebook was just three years old, Twitter was less than a year old, smartphones were not nearly as ubiquitous as they are today, and hardly anyone knew what an "App" was. Fast forward to 2014, and most people have a smartphone with text messaging capabilities and a data plan that allows them to access their e-mail and Facebook accounts, along with multiple other ways to communicate electronically: Twitter, Skype, LinkedIn, Pinterest, Google+, Tumblr, Instagram, Snapchat—the list continues to grow. As of 2013, 72% of U.S. adults used social networking sites, a number that has skyrocketed up from 8% in 2005.[6] Most social networkers use Facebook, but a growing number use LinkedIn, Twitter, and others, and a larger number of people—up to 42%—use multiple platforms.[7] This social networking is primarily performed for non-work reasons: sharing pictures, chatting with friends and family, playing games, expressing personal political views, supporting social causes, and, for some workers, engaging in Section 7 activities.

This growth applies similarly to e-mail accounts, which have become a necessity not just for accessing these social networking sites (typically serving as logins), but also for performing many daily activities.[8] An e-mail account allows people to pay their bills and manage their finances online, apply for jobs, receive information from their children's schools, purchase music

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[6] *72% of Online Adults are Social Networking Site Users*, at 2, PEW RESEARCH CENTER (Aug. 5, 2013), *available at* http://www.pewinternet.org/2013/08/05/72-of-online-adults-are-social-networking-site-users/; *see also Search and email still top the list of most popular online activities*, at 2, PEW RESEARCH CENTER (Aug. 9, 2011) http://www.pewinternet.org/2011/08/09/search-and-email-still-top-the-list-of-most-popular-online-activities/ (showing growth in social networking activity since 2005 relative to other online activities).

[7] *Social Media Update 2013*, at 1-2, PEW RESEARCH CENTER (Dec. 30, 2013), *available at* http://www.pewinternet.org/files/2013/12/PIP_Social-Networking-2013.pdf; *see also 72% of Online Adults*, PEW, *supra* note 6, at 5-6 (showing increase in Twitter use).

[8] "[E]mail is integral to the overall Internet experience as an email account (i.e. email address) is required to sign up to any online activity, including social networking sites, instant messaging and any other kind of account or presence on the Internet." *Email Statistics Report, 2014-2018*, RADICATI, *supra* note 2, at 2.

and movies for download, make travel reservations on the Internet, and communicate with friends and family. It is nearly impossible to function in today's society without an e-mail account.

Employees who do not have an e-mail account provided by their employers (most covered employees in the retail industry) are highly likely to have a personal e-mail account. In fact, approximately three-quarters of all e-mail accounts are personal accounts, not work accounts.[9] In 2012, Gmail, Hotmail, and Yahoo reportedly *each* had approximately 300 million e-mail users.[10] So personal e-mail accounts, not work accounts, are the norm today.[11]

Indeed, even those employees who do have a work e-mail account are likely to have a personal account as well, for numerous reasons. An individual might want to share an e-mail account with a spouse or other family members, keep information private from employers, or just generally prefer to separate work from his or her personal life. Many employees also might not have access to their work accounts outside of work hours, which is typically the case for most hourly employees, because employers prohibit access outside work hours in order to avoid potential liability for unpaid time.

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[9] *Email Statistics Report, 2012-2016 – Executive Summary*, at 2-3, THE RADICATI GROUP, INC. (April 2012), *available at* http://www.radicati.com/wp/wp-content/uploads/2012/04/Email-Statistics-Report-2012-2016-Executive-Summary.pdf.

[10] *Gmail finally blows past Hotmail to become the world's largest e-mail service*, Venturebeat.com (June 28, 2012), http://venturebeat.com/2012/06/28/gmail-hotmail-yahoo-email-users/.

[11] In a 2012 survey, over 80% of adults said that they regularly use a computer for personal e-mail activity, compared to 60% who did so to read or send work e-mails. *Different Priorities in Smartphone vs. Computer Use, But Some Common Ground*, HARRIS INTERACTIVE (Jan. 3, 2013), *available at* http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/1132/Default.aspx. And according to a 2008 survey, over 75% of employed adults had a personal e-mail account, while less than 60% had a work e-mail account. *Networked Workers*, at 21, PEW RESEARCH CENTER (Sept. 24, 2008), *available at* http://www.pewinternet.org/files/old-media//Files/Reports/2008/PIP_Networked_Workers_FINAL.pdf. While more than half of working adults have both a personal and work e-mail account, 22% maintain *only* a personal e-mail address and just 5% say they limit their e-mail use to a work account. *Id*. at 20. Among Blackberry and smartphone users, 44% say that "most or all" of the messages they send on that device are personal, while only 32% say the same for work-related messages. *Id*. Similarly, text messaging is more likely to be personal rather than work-related. Of those workers who own a cell phone or smart phone, nearly half say that "most or all" of their text messaging is personal, while only 2% say the same about work-related use. *Id*. at 23.

2. Unions Have Been Early Adopters Of Personal Electronic Communications For Organizing And Representational Purposes.

Unions and other organizing movements have been quick to take advantage of this growth in electronic communication outside the workplace, and have embraced emerging technologies for all facets of union activity, from initial organizing through ongoing bargaining campaigns. Because the Internet provides an inexpensive, efficient vehicle to communicate with employees, unions were early adopters of online media. By 2005—two years before *Register-Guard*—the AFL-CIO had created an e-mail list of approximately two million employees and organizers, and the President of the SEIU was blogging weekly on the union website to reach members.[12]

With the expansive growth of social media, most unions—districts and locals included—now have one or more Facebook pages, Twitter accounts, and websites, among other social media presences on the Internet.[13] Many of these unions also invite employees or others interested in organizing to sign up for an e-newsletter or other communications using their e-mail address.[14] These accounts allow for not only public postings, but also private, direct messages with other users, as well as the ability to restrict who follows or views postings. Unions have been using these electronic modes of communication—which allow for instantaneous and far-reaching communications without burdening employer communications systems—since the very beginning of the online movement, and they have continued to expand their use as new methods are being developed.

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[12] *See* Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes* 2, Nat'l Bureau of Econ. Research, Working Paper No. 11298 (2005).

[13] *See, e.g.*, www.facebook.com/CWAUnion; www.facebook.com/CWALocal9586; www.facebook.com/CWA9400; www.facebook.com/CWAD9NextGeneration; www.twitter.com/cwaunion; www.twitter.com/cwa9586; www.cwa-union.org/ (linking to Facebook, Twitter, Flickr, YouTube, and Google+ under the "Stay Connected" heading); http://district9.cwa-union.org/; http://cwa9400.com/.

[14] *See, e.g.*, www.cwa-union.org/pages/sign_up_for_email.

3. Personal Accounts And Devices Provide A Better Means For Employees To Engage In Section 7 Activities.

The plethora of non-work electronic communication vehicles—available to everyone, at virtually zero cost—provides employees with multiple options to discuss organizing and other concerted activities with a greater sense of privacy and protection from harassment by co-workers, which is not necessarily the case with employer-provided electronic communication systems.

a. Employees have greater privacy in their personal electronic communications accounts.

Although individuals have a right to privacy in their own e-mail accounts, *see, e.g.*, *United States v. Charbonneau*, 979 F. Supp. 1177 (S.D. Ohio 1997), that right does not extend to their work e-mail accounts, *see, e.g.*, *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996); *see also City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (holding that a public employer did not violate employee's Fourth Amendment rights by examining personal text messages on a government-issued device); *cf. Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 114-15 (3d Cir. 2003) (holding that employers are exempt from the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2701(c)(1), because an employer is a "provider of the [e-mail] 'service'" under the statute, and thus "may do as they wish when it comes to accessing communications in electronic storage.").

Employees therefore run the risk that any e-mail they send or receive on their work e-mail account can be seen by their employer. This could occur even if the employer does not intend to monitor organizing communications. For example, an employer may inadvertently come across e-mails discussing organizing or other concerted activities while reviewing e-mail for a permissible purpose, such as to ensure productivity, maintain security, track illegal activity, or any number of other legitimate business reasons for which an employer may monitor

employees.[15] Personal e-mail accounts and electronic devices, on the other hand, provide a confidential forum for employees to communicate while maintaining their privacy.

b. Employees can better avoid unwanted communications and harassment on their personal electronic communications accounts.

Personal e-mail and social media accounts permit users to block access or messages from others that may be engaged in harassing or otherwise inappropriate or unwanted communications. Employees do not have the same rights and abilities to block harassing or unwanted messages, which may include organizing communications, if they are sent on company e-mail systems. In a work e-mail system, employees typically cannot pick and choose those employees from whom they want to receive e-mail messages, as the ability to "block" co-workers is likely to be against the employer's rules or a function that is disabled on the e-mail system. So when an employee receives unwanted e-mails from a co-worker—whether criticizing the employee for supporting a union or badgering him or her with unwanted pro-union messages—the employee is left without recourse to prevent the harassment. Although an employee can always go to a supervisor to complain about the harassment, if the harassing employee has a Section 7 right to send organizing related e-mails, the supervisor may not be able or willing to take action. Furthermore, requiring the employee to complain to a supervisor about organizing related e-mails may force her to reveal her sentiments for or against unionization, something that she may not be willing to do. This presents the employee with a Hobson's choice.

[15] *Cf. Caterpillar Inc.*, 322 NLRB 674, 683-84 (1996) (employer did not violate the Act by monitoring employees because "he was concerned that they do the work for which they were being paid"); *Lechmere, Inc.*, 295 NLRB 92 (1989) (installation of camera in retail store did not violate the Act where general security purposes justified its presence); *Town & Country Supermarkets*, 340 NLRB 1410 (2004) (photographing picketing employees was not a violation of the Act where the employees were blocking entrances and impeding vehicles).

On the other hand, if the harassing messages are being sent to a personal e-mail address or other electronic communication account, the employee has complete liberty and ability to stop the unwanted messages without involving the employer. The aggrieved employee can mark e-mail from the harasser as spam (causing it to be blocked), unfriend the harasser on Facebook, or block the harasser on Twitter. Likewise, an employee can exercise her right not to participate in organizing activities when they occur on private systems rather than over work e-mail. If some workers use their work e-mail to continuously send e-mails to a company created listserv, or a manually created list of employees' work e-mail addresses, an employee may not be able to opt out of that group communication. But if the communications occur on websites like Facebook, LinkedIn, or a personal e-mail listserv, the employee can choose whether and when to join and whether and when to leave the online group. This choice of whether to participate or not is not necessarily available when communications are sent over work e-mail and the employee may be essentially deprived of his or her Section 7 right *not* to engage in concerted activities.

D. Overruling *Register-Guard* Would Raise Constitutional Issues.

The Board also must affirm *Register-Guard* in order to avoid the First Amendment issues raised by compelling employers to open up their electronic communications systems for employee speech. In exercising its authority to interpret the Act, the Board must interpret the statute in order to avoid raising constitutional infirmities. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (interpreting the Act to avoid First Amendment issues because "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg.*, 485 U.S. 568, 575 (1988); *Jewish Day School of Greater Washington*, 283 NLRB

757, 759-62 (1987). The Board must do so here in order to avoid running afoul of the First Amendment.

Interpreting the Act to mandate that employers allow speech they may disagree with on their communication systems infringes on an employer's First Amendment rights. It is a fundamental principle of the First Amendment that "freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)). In other words, the government cannot compel speech—either by mandating specific messages or by forcing the accommodation of speech by others. *See Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 958 (D.C. Cir. 2013) ("A compelled-speech violation occur[s] when the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate." (internal quotation marks and citations omitted)); *Nat'l Ass'n of Mfrs. v. S.E.C.*, 748 F.3d 359, 370-73 (D.C. Cir. 2014); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573-74 (1995). This principle extends to the compulsion of an individual or entity to make his means of communication available for speech with which the individual or entity may disagree or have contrary interests. For example, the government cannot control the content of messages that a utility company disseminates to its customers. *See Consol. Edison Co. of New York, Inc. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 544 (1980). Nor can it compel a newspaper to publish replies to editorials. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

Here, non-work solicitations—such as union or other organizing solicitations—on employer provided communication systems (or other property) could imply company support for

those messages. Allowing employees to blast out e-mails containing messages with which the company may disagree—or, at a minimum, not support—has the effect of placing the employer's imprimatur on those messages. If an employee receives a significant number of e-mails each day from colleagues soliciting them, the natural impression left with that employee is that the employer endorses—or at a minimum, does not disagree with—those messages. This is precisely the reason why an employer may choose to regulate the dissemination of messages soliciting for religious or political purposes, among others. Overruling *Register-Guard* will place the Board and employers in the midst of this constitutional quagmire.

IV. CONCLUSION

Register-Guard was the logical extension of decades of Board precedent granting an employer the right to regulate the use of its own communications equipment. It balances the employer's legitimate business interest in limiting the use of its e-mail systems while still prohibiting an employer from adopting or enforcing a policy that discriminates on the basis of an employee's exercise of Section 7 rights. Overruling *Register-Guard* would not only abandon longstanding precedent, but also would impose significant costs and risks on employers. Moreover, electronic communication is growing significantly outside of the workplace—social networking, personal e-mail accounts, text messaging, and other media are widespread and provide multiple opportunities for employees to communicate while preserving their privacy and right to be free from harassment. For these and other reasons, the Board should affirm its recent decision in *Register-Guard*; to do otherwise would be arbitrary, irrational, and inconsistent with the Act.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* Retail Litigation Center to be e-filed with the NLRB Executive Secretary and sent via e-mail to the following parties and counsel:

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