UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC.

and

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

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

AMICUS BRIEF OF THE FOOD MARKETING INSTITUTE

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INTEREST OF *AMICUS CURIAE*

The Food Marketing Institute ("FMI") is a national trade association representing large, multi-store food retail and wholesale chains and companies, regional firms and independent operators both in the United States and internationally. FMI conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate over 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly $650 billion. FMI's international membership includes 126 companies from over 65 countries. FMI's nearly 330 associate members include the supplier partners of its retail and wholesale members.

Almost all of the retail and wholesale food companies represented by FMI are employers subject to the NLRA. Further, many, if not all, of its members have policies regarding employee access to e-mail systems or other electronic communications devices for business purposes. The *amicus* thus has a strong interest in how the NLRA is interpreted, particularly regarding employer-provided e-mail systems.

Many of the businesses represented by FMI have policies governing employees' use of company-provided e-mail systems and related electronic communication and information technology to help prevent abuse and protect their investment in computer hardware, servers, networks, software, and the support staff needed to operate e-mail systems. The specifics of these policies vary, but many allow limited personal use of company systems while prohibiting specific categories of communication, such as e-mails over a certain size or to more than a specified number of recipients; and e-mails including solicitations on behalf of outside groups or organizations. To ensure compliance, many employers forewarn employees that the employer may monitor communications on employer-provided, company-owned equipment.

These policies regarding employee usage of business e-mail systems serve legitimate, critical business needs for FMI member companies. They may help curtail commercial solicitations and solicitations for social, political, or religious organizations, which could distract employees from their work during working time and dominate space on e-mail systems, slowing down and crowding out legitimate business e-mails. They limit the risk of liability and embarrassment to employers and employees due to transmission of inappropriate messages or confidential information from company e-mail accounts, such as has been widely reported in the press as occurring recently regarding disclosure of private personal identifiers and company financial information. Also, the policies help control the risk of illegal copyright infringement, and disclosure and misuse of private company information, such as trade secrets, business finances and lists of customers/suppliers/distributors. Such policies are designed to prevent file-downloading of confidential business information using company computers and dissemination by e-mail. They prevent non-business e-mail traffic from reducing network speeds, wasting computer memory, and forcing employees to sort through spam clogging their e-mail. They prevent transmission of material that could be construed as sexual harassment, discrimination, or defamation, or which violate, for example, the privacy regulations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). They prevent the introduction of computer viruses and other security threats onto company networks. All of these are legitimate, non-discriminatory reasons to maintain restrictions on employee's personal use of business-provided e-mail systems at work.

Business policies would be thrown into question, and e-mail usage made more chaotic, if the Board overturns *Register Guard* ruling that employees' personal use of business e-mail systems is a statutory Section 7 right, even if that decision were to acknowledge restrictions to

maintain productivity and discipline. All e-mail policies are designed to maintain productivity and discipline; attempting to parse degrees of such exceptions to a new Board policy which transforms employee use of business e-mail into a Section 7 right would result in uncertainty and a quagmire of future Board litigation.

Finally, FMI members have a growing interest in the Board's regulation of e-mail policies given that global restrictions on personal use of business e-mail and other electronic communication systems are designed to help protect multinational retail food chains, their customers and employees from potential violations of international data privacy laws. Just as electronic communication has changed over the past 20 years, so too have legal and practical concerns about e-mails and other business-provided systems which would run afoul of both national and global standards and regulations. For example, prior to the late 1990s, data privacy was comprehensively regulated by only a few countries. Today, FMI member companies face a huge risk and significant penalties for violations of foreign data privacy laws in virtually every country, and global standards with extraterritorial application, such as the "European Union Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data." [1]Data privacy might be breached by personal use of business e-mail systems at work. Thus, allowing unfettered use of e-mails by employees on company-provided systems for non-business purposes also implicates the foreign data privacy laws, potentially exposing U.S. employers (including FMI's foreign-owned retail food grocery chains) to liability.

[1] EU Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data, 1995 O.J. L 281.

An employer should be permitted to afford employees limited personal use of company e-mail for purposes such as coordinating memorial donations in the event of a death in the family of an associate or scheduling coordination or car pools between associates that do not involve outside material or non-associates entering the system of the employer.

The need to adapt to "changing pattern(s) of industrial life" (see *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 266 (1975)), to which the General Counsel and Charging Party assign such preeminence in advocating overturning *Register Guard,* is equally evident regarding other "changing patterns of industrial life," such as the increasing involvement of global unions in support of organizing by their U.S. union counterparts. Global corporate campaigns are becoming a more prevalent organizing strategy, such as evidenced recently by IG Metal's involvement in the UAW campaign to organize Volkswagen in Chattanooga, TN. It is a distraction and impairs work productivity for employees to be forced to deal with unsolicited e-mail from domestic unions and their domestic supporters (such as religious and community activists) and in-house employee adherents which flood the airwaves with solicitations to join or form a union. But now, the modern phenomenon of adding global union e-mail to solicit employee support would clog the system with a cacophony of e-mail messages.

The communication policies of *amicus* FMI and its member companies are designed to safeguard company property and serve legitimate proprietary business needs, as well as protect the privacy interests of customers and employees. Those legitimate needs cannot be achieved without restrictions on non-business use of company-owned and provided e-mail systems by employees on working time. FMI members thus have a strong interest in the proper resolution of this case, which presents fundamental issues regarding employers' private property rights and the right to control e-mail technology they purchase and maintain for business purposes.

STATEMENT OF THE CASE

On October 24, 2013, ALJ Paul Bogas issued his decision in the above-captioned case dismissing the General Counsel's allegation that Purple Communications, Inc. violated Section 8(a)(1) by maintaining a policy prohibiting personal use of its electronic equipment and systems. Under existing law, "employees have no statutory right to use the employer's e-mail system for Section 7 purposes." *Register Guard*, 351 NLRB 1110 (2007) enf'd in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F3d 53 (D.C. Cir. 2009).

In excepting to the ALJ's decision in *Purple Communications, Inc.,* the General Counsel and Charging Party asked the Board to overrule *Register Guard* and adopt a rule that employees who are permitted to use their employer's e-mail for work purposes have the right to use it for Section 7 activity, subject only to the need to maintain production and discipline.

On April 30, 2014, the Board issued its Notice and Invitation to File Briefs setting forth the following five questions for the parties and interested *amici* to aid it in resolving the aforementioned issue:

1. Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's e-mail system (or other electronic communications systems) for Section 7 purposes?

2. If the Board overrules *Register Guard*, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?

3. In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?

4. Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal e-mail accounts affect the proper balance to be struck

between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?

5. Identify any other technological issues concerning e-mail or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since Register Guard was decided. How should these affect the Board's decision?

INTRODUCTION

At the outset, rather than mechanically answering the questions posed by the Board, it should be noted that there is a broader policy issue at stake in this case than Section 7 rights of employees, as important as those rights are. The policy arguments involve the cutting edge of communication technology – not only e-mail, but the entire universe of electronic communications. The arguments also involve significant risks to fundamental business and economic policy.

A top priority for all retailers is to protect customer relationships. Retailers invest significantly in technology that not only provides value to customers but also protects them from fraud and data theft. New technologies are evolving rapidly, yet extremely sophisticated criminals are able to pose serious threats against grocery chains and other retail businesses at a staggering rate. According to a recent Verizon report, retailers account for less than a quarter of data breach incidents while financial institutions account for more than a third. And U.S. government agencies ranging from the Army to the IRS see more than 60 breach incidents a day, according to the Government Accountability Office. However, data thefts committed against retailers receive the biggest headlines because the public is exposed to well-known retail stores every day. See, "Verizon 2014 Data Breach Investigations Report."

Introduction of a data breach that could be facilitated by an outside group unintentionally or deliberately introducing a virus or other outside content into a supermarket company's computer system could compromise not only personal data of associates, but also payment or personal data of millions of customers. As noted in a recent article, "[r]etailers and banks were on the hook for more than $11 billion in global card fraud in 2012, a 15 percent increase from the previous year." And, more recently, hackers installed malware in Target's security and payments system. As a result, "40 million credit card numbers—and 70 million addresses, phone numbers, and other pieces of personal information—gushed out of its mainframes." See, BloombergBusinessweek: Jordan Robertson, "Why So Many Retail Stores Get Hacked for Credit Card Data" (http://www.businessweek.com/ articles/2014-03-20/ credit-card-data-security-standards-dont-guarantee-security).

Most FMI members are certified for their data security standards by the Payment Card Initiative (PCI). Allowing an outside group access to employer e-mail, would almost certainly compromise the PCI certification causing the FMI member exposure to additional charges and legal responsibility in the event of a breach. "The retail industry is the top target of cyber criminals due to the lure of the large number of customer records, with 96% of the data targeted coming from payment card data, personal identifiable info (PII), e-mail addresses and a well-established underground market place for this stolen information." See, "Trustwave 2013 Global Security Report" (https://www2.trustwave.com/2013GSR.html).

In their Dissent in *Register Guard*, Board Members Liebman and Walsh asserted that the NLRB has become the "Rip Van Winkle" of administrative agencies by ignoring the prevalence of e-mail in society and at work, which in their opinion makes employers' e-mail systems akin to a "gathering place" for employees, such as the "water cooler." *Register Guard*, supra at 1121.

If the Board overturns *Register Guard* and declares use of business-owned and provided e-mail systems at work to be a newly-created Section 7 statutory right, the current Board would indeed be the new Rip Van Winkle of administrative agencies by ignoring the complexities of current industrial life. What's next after e-mail? E-card signing on a company's own business e-mail system to support a requisite showing for an election petition? Access to company owned and provided computers and internet, cell phones, Smartphones, and other electronic notebooks and devices for non-business purposes during working time? Declaring employee use of employer e-mail systems for broad personal use to be a guaranteed and protected Section 7 right would open the floodgates to expansion of the use of business e-mail and other developing electronic communication systems at work.

All of the angst about denying employees effective use of company e-mails for purposes of solicitation is outdated. In fact, there are other alternative and more appropriate means of communication available for employees to exercise their Section 7 rights outside of working time. Today, personal electronic communications devices of all types have become ubiquitous throughout society and many, if not most, employees have their own personal electronic devices (e.g., Smartphones, tablets, iPads, personal computers, cell phones with texting capabilities, etc.). Access to the employer's e-mail system, therefore, is simply outdated and unnecessary in view of widespread use of other available means of communication outside the workplace.

ARGUMENT

A. Answers to the Questions Posed By the Board Must Begin and End with the Clear Recognition of the Primacy of Private Property Rights of Employers in Controlling Usage of Business-Owned E-mail Systems

The burden to justify a reversal of precedent should be on the party seeking the change – in this case the General Counsel and Charging Party. Before the Board overturns the standard regarding control over company-owned property, it should be incumbent on the General Counsel and Charging Party, not the party arguing for *stare decisis*, to establish with empirical evidence that there is a vital, compelling justification necessitating that change in precedent. That is, before the Board reverses *Register Guard* and delimits employers' private property rights regarding its business e-mail systems and other electronic communications networks, and all that that entails, the burden should fall squarely on the General Counsel and Charging Party to prove in the first instance that such a drastic change in employer private property rights is justified.

The General Counsel and Charging Party have failed to meet their burden. The Board in *Register Guard* got it right, as did ALJ Bogas in his decision below in *Purple Communications*. It is well-established Board precedent that company-owned property is for work alone, not for personal solicitations and other personal use. *Register Guard*, supra at 1116. Putting aside the fact that the burden rests with the General Counsel , FMI avers that the Majority in *Register Guard* had it right when it stated that an employer's communications system "including its e-mail system, is [the employer's] property and [is] purchased by the [employer] for use in operating its business." *Register Guard*, supra at 1114. In fact, in *Register Guard*, the General Counsel himself conceded that an employer has a "legitimate interest in maintaining the efficient operation of its e-mail system," and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses,

dissemination of confidential information, and avoiding company liability for inappropriate e-mails. Nonetheless, the General Counsel now urges the Board to find, as the Minority in *Register Guard* advocated, that e-mail systems should not be analyzed under the long-standing precedent that employees have no statutory right to use an employer's equipment or media for Section 7 purposes.

The General Counsel asserts that the traditional standard is not the proper analysis regarding employee use of the employer's e-mail system. This position makes no sense, and, in fact, if adopted would open Pandora's box to all methods of non-business use of workplace electronic communication systems. An e-mail system is not a social "gathering place" akin to the "water cooler" as the Minority contends in *Register Guard. Register Guard, supra* at 1124, 1125. Rather, the employer's e-mail system, like other types of equipment an employer purchases to operate its business more effectively and efficiently, is for business purposes during working time. It is equipment that is part and parcel of the employer's private property. The e-mail system is comprised of hardware (e.g. a computer monitor, keyboard, modem, server, and other parts) that is like other business equipment – not the "water cooler." It is also comprised of software used, for example, to implement filters for more efficiently handling and organizing messages and e-mail folders for creating, sending, receiving and organizing electronic mail. The hardware and software that comprise the e-mail system are very costly and, therefore, are even more valuable, tangible property than employer bulletin boards, fax machines, telephones, etc., all of which the Board has long recognized as not being lawfully subject to employee use for non-business purposes. (See cases cited infra at p. 12)

Many courts have recognized that an employer's e-mail system is private property. For example, courts have routinely found that uninvited, third party bulk e-mailing to employees on

an employer's e-mail system constitutes a trespass to chattel. See, e.g. *America Online, Inc. v. Nat'l Health Care Discount, Inc.*, 121 F.Supp.2d 1255, 1277–78 (N.D.Iowa 2000) (finding that sending bulk e-mail constituted trespass to chattels); *America Online, Inc. v. LCGM, Inc.*, 46 F.Supp.2d 444, 451 (E.D.Va.1998); *America Online v. Prime Data Systems, Inc.*, 1998 WL 34016692 (E.D.Va. Nov. 20, 1998).

The rule at issue in *Purple Communications, Inc.* prohibited all non-business use of the company's e-mail system. There is no evidence that the company made any exceptions to that absolute rule. Thus, the union's argument in *Register Guard*, is inapplicable that the company engaged in discriminatory enforcement of its no-solicitation rule by tolerating some non-business e-mail despite a company policy forbidding all soliciting or proselytizing for commercial venture, religious or political causes, outside organizations, or other non-job related solicitation.

But, even if some personal employee use were permitted by Purple Communications that fact would not violate the well-founded Board standard that "in order to be unlawful, discrimination must be along section 7 lines. Unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Register Guard*, *supra* at 1118 (citing to *Fleming Co.*, 336 NLRB 192 (2001) *enf'd. denied* 349 F. 3d 968, 975 (7th Cir. 2003) (the 7th Circuit deemed non-discriminatory the employer's practice of allowing personal but not organizational postings on company bulletin boards, even though the company's formal policy allowed no non-business postings at all). *See also*, *Adrantz ABB Daimler-Benz Transportation,* 252 F.3d 19 (D.C. Cir. 2001).

As the Supreme Court has long recognized, "[t]he responsibility to adapt [the NLRA] to changing patterns of industrial life is entrusted to the Board." *NLRB v. J. Weingarten, Inc.* 420

U.S. 251, 266 (1975). Just as the General Counsel and Charging Party emphasize the ubiquitous nature of e-mails as part of "changing patterns of industrial life" so, too, the "complexities of industrial life" justifies employer policies and practices granting employees a degree of limited autonomy, allowing them the practical, common-sense usage of company property for limited personal reasons, while also restricting widespread misuse of e-mail that may be particularly damaging to the business. *See*, *Weingarten, Inc. supra* at 266 (quoting *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 236 (1963). Also, without allegations of unlawful surveillance, employers often reserve the right to inspect messages on company e-mail systems which is imperative to ensuring non-abusive use of the company-provided e-mail system and also protecting the legitimate rights of employers, employees and customers.

In that regard, were the Board to overturn *Register Guard* and convert employee use of business e-mail to a new Section 7 statutory right, it would have far-reaching implications that would make illusory any Board assurances permitting employer restrictions on e-mail use that is designed to maintain productivity and discipline. For example, it is a vital business interest for all of the reasons stated above for employers to monitor the use of its e-mail equipment and systems. Yet, if employers discover in the course of monitoring e-mail use at work that their business systems are being used by employees to solicit support among their co-workers for unionization, which presumably would be a new Section 7 right, the employer's monitoring could be deemed unlawful surveillance and any discipline resulting therefrom could be an 8(a)(1) violation of the Act. Thus, employers would be given a Hobson's choice: monitor employees' use of the employer's business e-mail property and potentially be found liable for unlawful surveillance of an employee's Section 7 protected concerted activity, or fail to monitor

and lose control over usage of its business equipment exposing the employer to liability and adverse business consequences as specified above.

The same would be true with regard to employer monitoring of its e-mail system as part of a productivity study or analysis. When such monitoring discloses employees' use of the system for non-business purposes, such as union solicitation – Bingo! – possible unlawful surveillance and an 8(a)(1) violation. Any future discipline of that employee/ those employees thereafter, even for other legitimate reasons, could be considered retaliation and anti-union discrimination under a *Wright Line* analysis. See, *Wright Line*, 251 NLRB 1083 (1980) enf'd 662 F. 2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982). Further, what if those "violations" occurred during the critical period? It's not hard to imagine allegations of "hallmark violations" and the Board issuing Gissel bargaining orders forcing employers to recognize and bargain with a union based on card showing without an election." See, *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

For those reasons, it's hardly comforting for the Board to suggest that it might allow exceptions to a newly-created Section 7 right for employee use of the employer's business e-mail system where it is necessary to maintain productivity and discipline. The exceptions would be illusory.

While e-mail has become widespread at work and outside work, so too have other popular methods of electronic communication and widely-owned personal electronic devices. The General Counsel and Charging Party have failed to establish, nor can they, that as commonplace as personal communication devices have become throughout society, the property rights of employers must be sacrificed to employees' use of company e-mail systems as a Section 7 statutory employee right. The most that the General Counsel and Charging Party can

point to is that e-mail has become omnipresent throughout society. While that is true, it is not enough to overturn clear precedent regarding employer control over employees' use of business-owned e-mail systems. *Id.* The inquiry should end there.

B. Restrictions on the Right of Employees to use Company Owned E-mail Systems during Working Time Do Not Prevent Employees From Exercising Their Section 7 Rights to Communicate

While it is true that that the use of e-mail both at work for business purposes and outside of work for personal use has grown dramatically in recent years, so too has the use of other means of electronic communications which employees may use during their non-working time and outside of work. For example cell phone ownership has increased exponentially among U.S. adults from 53% ownership in 2000 to over 90% ownership today. See, "*The Web at 25 in the U.S., The Overall Verdict: The Internet has been a Plus for Society and an Especially Good Thing for Individual Users.*" (Susannah Fox and Lee Rainie: Pew Research Center Report, February 27, 2014) (http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-u-s/). Moreover, desktop or laptop computer access is no longer a prerequisite for internet or e-mail access as "87% of all adults in the U.S. use the internet, e-mail, or access the internet via personal mobile device." *Id.*

With easy access to ever-increasing communications technology, there simply is no need for employees to rely on the employer's computer equipment and e-mail system at work to communicate with one another about non-business related issues or to solicit for outside organizations during their work time or, using company property, even non-work time.[2]

[2] We recognize that *Lechmere, Inc. v, NLRB*, 502 U.S. 527 (1992) restricts non-employee union organizers access rights to employer property where there are alternative means of solicitation, as opposed to this case which involves employee rights. There, the Court held that an employer who prohibits all non-employee solicitation on its property may lawfully prohibit protected activity by non-employees , such as outside union organizers, on the same property except in the rare case where "the inaccessibility of employees makes ineffective the reasonable

C. Section 7 of the NLRA Does not Guarantee Employees the Right to Use their Employer's E-mail System for Purposes of Protected, Concerted Activity

Purple Communications was free to impose neutral restrictions on use of company communications systems, including e-mail, so long as there was no discrimination against NLRA-protected communications in violation of the Act. *NLRB v. Southwire Co.,* 801 F.2d 1252, 1256 (11th Cir. 1986) (finding a violation of the Act only "when the employer otherwise assents to employee access...and discriminatorily refuses to allow the posting of union notices or messages"); *See also, e.g., Guardian Indus. Corp. v. NLRB,* 49 F.3d 317, 318 (7th Cir. 1995)("We start from the proposition that employers may control activities that occur in the workplace, both as a matter of property rights...and of contract...."); *J.C. Penny Co., v. NLRB,* 123 F.3d 988,997 (7th Cir. 1997) (holding that while "[a]n employer does not have to promote unions by giving them special access" to communications media, the employer "cannot discriminate against a union's organizational efforts"); *Union Carbide Corp. v. NLRB,* 714 F.2d 657, 663-64 (6th Cir. 1983) (employers have a "basic property right" to bar non-business use of employer-owned communications equipment such as telephones, bulletin boards, TV/VCRs, photocopiers – and e-mail). *See also, Mid-Mountain Foods, Inc.* 332 NLRB 229, 230 (2000), *order enforced, Mid-Mountain Foods, Inc. v. NLRB,* 269 F.3d 1075 (D.C. Cir. 2001); *Media Gen. Operations, Inc.,* 346 NLRB 74, 76 (2005), aff'd 225 F.App'x 144, 148 (4th Cir. 2007) (use of e-mail).

In *Purple Communications* there was no evidence that the company permitted any non-business use of its e-mail system. Regardless, as a practical matter, even where an employer

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attempts by nonemployees to communicate with them through the usual channels." Id. However, it is at least worth noting that the Court determined it was only appropriate to balance Section 7 rights and employers' private property rights to deny access when alternative, non-trespassory means of communication are infeasible. As discussed here, even if a *Lechmere* non-employee balancing analysis were applied, employees have a plethora of alternative means of electronic communication that do not involve use of an employer's computer equipment and e-mail system.

grants limited exceptions to its e-mail policy, the Board and the courts have upheld that limited use against charges of discrimination by unions which were denied access. That is, employers may allow some non-business e-mail without opening the door to all non-business e-mail, including union-related e-mail. In *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 807 (D.C. Cir. 1987) an employer was held not to have discriminated in violation of the Act by allowing "spontaneous general social collections" during working time despite disciplining an employee for engaging in systematic union solicitation. As the court explained, the "essence of discrimination" under the NLRA is "treating like cases differently." *Id.* at 807-808. Since the systematic union solicitation substantially differed from the allowed spontaneous social solicitations the court found there was no discrimination under the Act.[3]

Allowing limited exceptions to restrictions on personal e-mail use at work in the face of restrictions on personal use recognizes the practical realities of today's workplace and the complexities of industrial life by allowing individual employees a degree of personal autonomy to use e-mail for everyday exigencies, such as car pool arrangements, lunch or dinner plans or limited charitable solicitations without opening the floodgates of the system to mass solicitations internally and from outside groups which consume substantial network resources and clog the

[3] The same standard should apply in the so-called "bell ringers" cases, where employers make limited exceptions to no-solicitation / no-distribution policies to allow solicitations for Girl Scout cookies, holiday ornaments, and permits the Salvation Army to solicit contribution at store fronts during the holiday season. See 6 West Ltd., Corp. v. NLRB, 237 F.3d 767 (7th Cir. 2001); Sandusky Mall Co. v. NLRB, 242 F.3d 682 (6th Cir. 2001); Cleveland Real Estate Partners v. NLRB, 95 F.3d 457 (6th Cir. 1996); Salmon Run Shopping Ctr. LLC v. NLRB, _F.3d _, 2008 WL 2778847 at *6 (2d Cir. July 18, 2008).It is also noted that In *Roundy's, Inc. v. Milwaukee Building & Construction Trades Council*, Case 30-CA-17185 (Giannasi, ALJ) the Board invited amicus briefs on Nov. 12, 2010 on the issue of whether the Board should adhere to its decision in Sandusky Mall Co., 329 NLRB 618 (1999), enf. denied 242 F.3d 682 (6th Cir. 2001) which held that an employer violated section 8(a)(1) by denying union access to its property while permitting other individuals, groups and organizations to use its premises for various activities. This question is of vital importance to FMI and its member companies which frequently are requested to allow use of an office for charitable or other eleemosynary purposes without exposing its property to all non-business use by individuals, groups or organizations, such as labor unions. FMI joins with other business associations which filed amicus briefs in Roundy's at the Board's request in 2010 and now urges the Board, if and when it decides Roundy's to overturn its decision in Sandusky Mall.

system for legitimate business use. As noted above, the NLRB truly would become the Rip Van Winkle of government agencies if it ignored today's workplace realities by attempting to prohibit such limited personal use of e-mail at work without also requiring open-ended use for non-business purposes.

D. Reversing *Register Guard* Raises Constitutional "Compelled-Speech" Issues under the First Amendment

Union solicitations on employer-owned and employer-provided e-mail equipment also would raise a serious question concerning compelled-speech under the First Amendment, since it could imply company support for those messages or, in effect, require the company to allow the use of its own equipment to advance views for union purposes with which it disagrees. *See, e.g., Boy Scouts of Am. V. Dale*, 530 U.S. 640, 647-48 (2000); *Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 573-74 (1995); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 544 (1980). As the D.C. Circuit stated in *National Association of Manufacturers v. NLRB*, 717 F. 3d 947 (D.C. Cir. 2013), the required posting of a notice explaining how to form or join a union, when an employer opposes unionization, would violate the First Amendment freedom of speech which "includes both the right to speak freely and the right to refrain from speaking at all. *Id.* at 957 (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Or as the Supreme Court stated in *United States v. United Foods, Inc.*, 533 U.S. 405, (2001): "Just as the First Amendment may prevent government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views.."; See also, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (Thomas, J., concurring); *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1211

(D.C.Cir.2012). Further, as the Court said in *Rumsfeld v. Academic & Institutional Rights*, 547 U.S. 47, 63 (2006), compelled speech cases include not only situations in which an organization is compelled to speak against its will, but also where one must "host or accommodate another speaker's message."

CONCLUSION

For the foregoing reasons, FMI urges the Board not to overturn *Register Guard.* As argued, authorizing unfettered employee access to the employer's business e-mail system as a Section 7 right at work as a means to solicit unionization or for other non-business activities would violate an employer's property rights and is unnecessary to protect employees' Section 7 rights. Also, as noted, FMI urges the Board when it decides *Roundy's* to overturn the Board's decision in *Sandusky Mall* and permit reasonable exceptions to a no-solicitation policy to permit limited access to company property by charitable organizations without opening the floodgates for all non-business use.

Respectfully Submitted,

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Date Submitted: June 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this date, June 16, 2014, a true and correct copy of the foregoing Brief of Amicus Curiae The Food Marketing Institute was filed via the NLRB's e-filing system and was served upon the following by e-mail:

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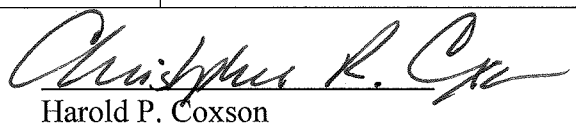

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