PRELIMINARY STATEMENT

The Employers Association of New Jersey ("EANJ")[1] respectfully submits this Letter Brief *amici curiae*, pursuant to the National Labor Relations Board's ("NLRB" or "the Board") Notice and Invitation to File Briefs dated April 30, 2014, to address the proper standard for the Board to apply when determining the balance between Section 7 protected activity and the property interests of employers in regards to permitted use of employer provided electronic communication systems. As we will demonstrate, the Board correctly held in *Guard Publishing Co. d/b/a Register Guard,* 351 NLRB 1110 (2007) that employees have no statutory right to use their employer's email systems for Section 7 purposes and upon reconsideration, *Register Guard* should be re-affirmed in its entirety.

ARGUMENT

At issue in *Register Guard* was the company's email use and solicitation policy. The relevant facts are: Register Guard is a newspaper publisher with approximately 150 employees represented by the Communication Workers of America (CWA) Local 37194. Among other things, the company's email policy prohibited solicitations, stating in relevant part: *"Communication systems are not to be used to solicit or proselytize for commercial ventures,*

[1] As a non-profit organization comprised of more than 1,250 employers within New Jersey and dedicated exclusively to helping employers make responsible employment decisions through education, informed discussion, and training, EANJ appreciates the Board's invitation to submit this *amicus curiae brief.*

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religious or political causes, outside organizations, or other non-job-related solicitations." Although intended for business use only, the company was aware that employees also used email to send and receive personal messages, including baby announcements, party invitations, offers of sports tickets, requests for dog walking services, and similar items. In this regard, the email system was essentially used like the telephone system.

Suze Prozanski, a bargaining unit employee and the union president, sent out two emails concerning union business using the company's email system – the first one addressing misinformation concerning a union rally and the second encouraging employees to wear green in support of the union's position in upcoming negotiations. The first email was composed on her break time but sent from her company provided email account accessed through her workstation. The second email was sent from her company provided email account accessed through the union's office which was located off of the employer's premises. Prozanski was issued written warnings for both violations of the company policy and, subsequently, unfair labor practice charges were filed. In its analysis of the case, the Board concluded that employers "may lawfully bar employees' non-work-related use of its email system, unless [the employer] acts in a manner that discriminates against Section 7 activity."

It is a well established that employers have inherent property rights, including the right to "regulate and restrict employee use of company property" *Union Carbide Corp. v. NLRB,* 714 F.2d 657 (1983). Placing limitations on email systems is no different than restricting the use of any other company owned property and does not restrict employee's ability to communicate through other means, such as with cell phones or through social media. Just as there is no Section 7 right to use an employer's bulletin board, telephone, copy machine, or other

equipment, there is no right to use the employer's email system, provided the rule prohibiting its use is applied in a nondiscriminatory manner.

Unlike the situation presented in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), where it was found that the employer's rule prohibiting all solicitation at any time on the company premises completely deprived employees of their right to communicate in the workplace on their own time, such is not the case when it comes to use of employer email systems. In *Republic Aviation*, the employer's rule completely deprived employees of the ability to engage in Section 7 activity. Despite an employer's policy limiting the use of its email systems, employees are in no way deprived of engaging in traditional, face-to-face solicitation on nonworking time and to distribute literature on nonworking time in non-work areas. Nor would they be prohibited from using personal electronic communications during nonworking time in non-work areas. As the Board correctly reasoned in *Register Guard*, Section 7 "does not require the most convenient or most effective means of conducting...communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications."

According to research from the Pew Research Center, as of January 2014, 90% of American adults have a cell phone and 58% of American adults have a smartphone. Non-business email accounts accounted for 76% of worldwide email accounts in 2013 according to The Radicati Group, Inc. Social networking sites, instant message and text messaging all provide for instantaneous communications. These devices and methods of communication are already in the hands of workers, making access to an employer's systems superfluous. Employees have a plethora of electronic options available for communications, not to mention

face-to-face and other traditional methods of communications, without needing to utilize their employer's systems. In fact, use of the employer's systems would be inconvenient and burdensome.

Employers have a strong interest limiting employee emails in order to prevent liability for the transmission of inappropriate content, protect against viruses, protect proprietary and confidential information and to maintain productivity and monitor quality. To achieve this end, 43% of employers monitor employee email usage according to the *2007 Electronic Monitoring & Surveillance Survey* cosponsored by the American Management Association and the ePolicy Institute. Expressly allowing employees the right to use company email systems for Section 7 activity would compromise the employer's ability to monitor its employee's use of such systems because of the general prohibition on employer surveillance of Section 7 activity. Section 8 (a)(1) of the National Labor Relations Act ("NLRA" or "Act") provides definitive protection of concerted activities for the purpose of mutual aid or protection, amongst other things, by making it an unfair labor practice to "*interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.*" Thus, every time an employer rightly exercised its right to monitor its email systems would give rise to a potential unfair labor charge. The workplace would descend into a counter-productive "cat-and-mouse" game with employers monitoring emails, which they have a right to do, and employees trying not to be caught. In short, reversing *Register Guard* and preventing employers from legally exercising their property right to monitor its email system would turn the very act of monitoring into an unfair labor practice charge.

CONCLUSION

For the forgoing reasons, EANJ respectfully urges the Board not to overrule *Register Guard*.

Respectfully submitted,

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