ORAL ARGUMENT HAS NOT BEEN SCHEDULED
Nos. 07-1528, 08-1006, & 08-1013

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GUARD PUBLISHING COMPANY D/B/A THE REGISTER-GUARD,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

EUGENE NEWSPAPER GUILD, CWA LOCAL 37194, AFL-CIO,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review from the National Labor Relations Board

BRIEF OF AMICI CURIAE HR POLICY ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AND COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF RESPONDENT NATIONAL LABOR RELATIONS BOARD IN CASE NO. 08-1006 ARGUING FOR DENIAL OF THE PETITION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici: All parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Brief for Petitioner Eugene Newspaper Guild and in the Brief for Respondent National Labor Relations Board.

B. Rulings Under Review: References to the rulings at issue appear in the Brief for Petitioner Eugene Newspaper Guild and in the Brief for Respondent National Labor Relations Board.

C. Related Cases: Case No. 08-1006, the case in which amici are participating, has been consolidated with Case Nos. 07-1528 and 08-1013. These cases have not previously been before this Court or any other court. Counsel is aware of no other related cases pending in this Court or any other court.

Zachary S. Price

DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

The HR Policy Association is a trade association organized for the general purpose of ensuring that laws and policies affecting human resources are sound, practical, and responsive to the realities of the modern workplace. The Association does not have any outstanding securities in the hands of the public, and has no parent companies, subsidiaries, or affiliates.

The Chamber of Commerce of the United States of America is a trade association organized for the general purpose of promoting the commercial and legislative interests of its members. The Chamber does not have any outstanding securities in the hands of the public, and has no parent companies, subsidiaries, or affiliates.

The Society for Human Resource Management is a professional association organized for the general purpose of educating human resource professionals and advancing the human resources profession. SHRM does not have any outstanding securities in the hands of the public. SHRM has two for-profit subsidiaries, SHRM Corporation and Strategic Human Resources Management India, Private Ltd., neither of which has any outstanding securities in the hands of the public. SHRM has no other parent companies, subsidiaries, or affiliates.

The Council on Labor Law Equality is a trade association organized for the general purpose of commenting on, and assisting in, the interpretation of the law under the National Labor Relations Act. COLLE does not have any outstanding securities in the hands of the public, and has no parent companies, subsidiaries, or affiliates.

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GLOSSARY

Association	HR Policy Association
Chamber	Chamber of Commerce of the United States of America
COLLE	Council on Labor Law Equality
CSP	Register-Guard Communications Systems Policy
NLRA	National Labor Relations Act
NLRB or Board	National Labor Relations Board
SHRM	Society for Human Resource Management

INTRODUCTION

Many employers allow their employees to send some non-business messages using company email systems but prohibit particularly disruptive, costly, or inappropriate emails, including email solicitations on behalf of outside groups or organizations. Reflecting the practical realities of the modern workplace, these policies and practices grant employees a degree of autonomy while also respecting employers' property interests in their email systems.

In this case, the National Labor Relations Board ("NLRB" or "Board"), recognizing these practical imperatives, construed the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1), (a)(3), to permit policies and practices that draw neutral distinctions between emails and thus allow some but not all non-business communication. Because the Board's ruling is consistent with the Act and appropriately discharges the Board's "responsibility to adapt the [NLRA] to changing patterns of industrial life," *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975), the undersigned amici respectfully urge this Court to deny the petition for review filed by the Eugene Newspaper Guild, CWA Local 37194, AFL-CIO ("the union") in Case No. 08-1006.

STATEMENT OF IDENTITY AND INTEREST

I. Description of Amici

The HR Policy Association ("the Association") is an organization of chief human resource officers dedicated to ensuring that laws and policies affecting

human resources are sound, practical, and responsive to the realities of the modern workplace.

The Chamber of Commerce of the United States of America ("the Chamber") is a business federation representing an underlying membership of over three million businesses and organizations that aims to advance the interests of its members on issues of widespread concern to the nation's business community.

The Society for Human Resource Management ("SHRM") is a professional association representing more than 225,000 human resources professionals.

The Council on Labor Law Equality ("COLLE") is a national association of employers formed to comment on, and assist in, the interpretation of the law under the NLRA.

The Association, the Chamber, and COLLE all participated as amici in the Board proceedings at issue in this case.

II. Amici's Interest in This Case

Many of the businesses represented by amici or amici's members are employers subject to the NLRA. Further, many, if not all, of amici's members or members' employers provide email systems to their employees for business purposes. Amici thus have a strong interest in how the NLRA is interpreted, particularly with respect to employer-provided email systems.

To help prevent abuse and protect their investment in computer hardware, servers, networks, software, and support staff needed to operate email systems, many of the businesses represented by amici or amici's members have policies governing employees' use of company-provided email and related information technology. The specifics of these policies vary, but many allow limited personal use of company systems while prohibiting specific categories of communication, such as emails over a certain size or to more than a specified number of recipients; emails including solicitations on behalf of outside groups or organizations; and emails containing material that could be considered harassing, offensive, defamatory, discriminatory, disruptive, or otherwise illegal, unethical, or inappropriate. To ensure compliance, many employers forewarn employees that the employer may monitor communications on employer-provided equipment.

These policies serve critical business interests for member companies. They curtail commercial solicitations and solicitations on behalf of social, political, or religious organizations, which could distract employees from their work. They limit the risk of liability and embarrassment due to transmission of inappropriate messages or confidential information from company email accounts, as well as the risk of illegal copyright infringement or file-downloading on company computers. They prevent non-business email traffic from reducing network speeds and wasting computer memory. They prevent transmission of material that could be construed

as sexual harassment, discrimination, or defamation. And they prevent the introduction of computer viruses and other security threats onto company networks.

These and other goals for employers represented by amici or employing amici members cannot be achieved without restrictions on non-business use of company email systems. Amici and their members thus have a strong interest in the resolution of this case, which presents fundamental issues regarding employers' right to control email technology that they purchase and maintain for business purposes. Further, three amici—the Association, the Chamber, and COLLE—participated as amici in the Board proceedings; they therefore have an interest in ensuring that this Court's review of the Board's decision is informed by appropriate considerations.

III. Authority To File This Brief

Pursuant to Circuit Rule 29(b), amici filed a motion within 60 days of the docketing of the case indicating that all parties consented to amici's participation in this case, No. 08-1006. This Court accordingly ordered briefing by these amici in its order dated May 2, 2008 establishing a revised briefing schedule for the consolidated cases.

APPLICABLE STATUTES

Applicable statutes are provided in the Statutory Addendum accompanying this brief.

STATEMENT OF THE CASE

I. Factual Background

The email solicitations at issue in this case were sent by a Register-Guard employee who was also president of the Eugene Newspaper Guild, CWA Local 37194 ("the union"), a union representing a bargaining unit of roughly 150 Register-Guard employees. (JA 266-67.) The employee, in her capacity as union president, sent two emails to bargaining-unit employees: one urging employees to wear green on a particular day to show support for the union's position in negotiations with the Register-Guard; and another, sent several days later, encouraging employees to participate in the union's entry in an upcoming town parade. (JA 267.) Though transmitted from an off-site computer at the union's offices, both emails were sent to employees at their work email addresses on the Register-Guard's employer-provided email system. (*Id.*) (An additional email sent by the same employee is addressed in two consolidated cases, Nos. 07-1528 and 08-1013, but not in Case No. 08-1006, the only case in which amici are participating.)

At the time of these transmissions (and during all other relevant periods), the Register-Guard had in effect a "Communications Systems Policy" ("CSP") governing employees' use of the employer's communications systems, including email, telephones, computers, fax machines, and photocopiers. (JA 266, 289.) As relevant here, the policy provided:

> Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of the Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

(JA 266.) According to the policy, "[i]mproper use of Company communication systems will result in discipline, up to and including termination." (JA 289.)

In practice, Register-Guard employees used the employer's company-provided email system during the relevant period to "send and receive personal messages," such as "baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking." (JA 266.) Apart from the union president's emails, however, there is "no evidence" that employees used the employer-provided email system "to solicit support for or participation in any outside cause or organization other than the United Way, for which the [employer] conducted a periodic charitable campaign" (*id.*); nor was

there any evidence that the employer condoned such use of the email system by outside organizations.

In a written warning, the employer advised the union president that her two emails violated the company's policy. (JA 267.) The warning quoted the CSP's express prohibition on "solicit[ing] or proselytiz[ing] for . . . outside organizations." (JA 131.) The union challenged this warning letter, asserting in unfair-labor-practice charges that the discipline imposed on the union president for her emails was unlawful and discriminatory under the NLRA. (JA 105, 268.)

II. The ALJ Decision and Board Order

An administrative law judge found in the union's favor, concluding that the Register-Guard unlawfully discriminated against union solicitation. (JA 291-93.) The NLRB reversed this ruling.

The Board held, first, that the CSP was facially lawful because employers have a "basic property right" to restrict employees' use of company email systems, so long as they do not impermissibly discriminate against NLRA-protected activities. (JA 269, 271.) As to the union's discrimination allegations, the Board held that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." (JA 273.) Applying this standard to the facts of this case, the Board held that the Register-Guard had not discriminated against § 7 activity by

disciplining the union president for the two emails, which lacked a sufficiently "similar" character to the personal non-business communications that the employer had allowed. (JA 272, 274.)

Two of the five NLRB members dissented from this ruling. In Case No. 08-1006, the union has petitioned this Court for review.

SUMMARY OF ARGUMENT

This Court owes "'considerable deference'" to the Board's order. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (quoting *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001)). Because the Board's interpretation and application of the NLRA are "'reasonably defensible,'" *Adtranz*, 253 F.3d at 25 (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)), and supported by substantial evidence, 29 U.S.C. § 160(e); *W&M Props., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008), this Court must deny the union's petition for review.

Indeed, abundant case law supports the Board's conclusion that employers have a broad property right to regulate employees' use of employer-owned equipment. Absent impermissible discrimination against NLRA-protected communications, employees have no right to use employer-owned communications media for non-business purposes. And both case law and practical considerations support the Board's holding that an employer does not unlawfully discriminate by

permitting employees to communicate personal messages but not solicitations on behalf of organizations—the practice the Register-Guard adopted here with respect to email.

ARGUMENT

The union's challenge to the NLRB's ruling should be denied because the Board acted well within its authority in rejecting the charge at issue.

I. This Court Defers to the Board's Legal and Factual Rulings

The Board's legal and factual determinations here "'are entitled to considerable deference.'" *Guardsmark*, 475 F.3d at 374 (quoting *Adtranz*, 253 F.3d at 25).

A. *Chevron* Deference Applies to the Board's Legal Ruling in This Case

With respect to legal questions, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires courts to defer to an agency's interpretation of a statute that the agency administers so long as the interpretation (1) does not violate "the unambiguously expressed intent of Congress" and (2) "is based on a permissible construction of the statute." *Id.* at 842-43; *see also, e.g.*, *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (noting deference owed to NLRB); *Adtranz*, 253 F.3d at 25 (noting deference owed to discrimination-related NLRB ruling).

Here, the statute is "silent or ambiguous with respect to the specific issue[s]," *Chevron*, 467 U.S. at 843, so the Board's interpretation of the NLRA is subject to review under the deferential standards of *Chevron* step two. Under this framework, this Court deems the Board's interpretation "permissible," *id.*, and thus upholds the Board's construction of the statute, so long as the Board's interpretation is "'reasonably defensible.'" *Adtranz*, 253 F.3d at 25 (quoting *Ford Motor*, 441 U.S. at 497); *see also Guardsmark*, 475 F.3d at 374 (similar); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987) ("we have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute").

Hoping to evade these deferential standards, the union erroneously asserts that the Board's discrimination ruling here "is owed no deference" because the Board was "applying judicially developed general principles of federal law." (Union Br. 14.) But even the union concedes that the Board's ruling about the facial legality of the Register-Guard's communications policy is entitled to deference and is "'subject to limited judicial review.'" (Union Br. 13 (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978)).) The Board's discrimination ruling is owed no less deference, because that ruling likewise interpreted the requirements of the NLRA. To be sure, the Board invoked the

"principle"—indeed, the truism—"that discrimination means the unequal treatment of equals." (JA 273.) But it did so only as a means of shedding light on the proper construction of the NLRA, a statute that the Board is charged with administering. As the Board expressly stated, the ruling at issue here addressed what conduct "would violate the Act" due to "discrimination . . . along Section 7 lines." (*Id.*) Moreover, the Board "adopt[ed] the position" of two court of appeals decisions, *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), and *Fleming Cos. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), that themselves interpreted and applied the NLRA—and that themselves, in the course of analogizing to non-NLRA law, *see Guardian Indus.*, 49 F.3d at 319-20, noted the deference due to the Board's interpretations of the Act. *See id.* at 322; *Fleming Cos.*, 349 F.3d at 972-73. (JA 274.) As established by prior decisions reviewing Board discrimination rulings, the Board's order here is entitled to deference. *See, e.g.*, *Adtranz*, 253 F.3d at 25; *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 777 (7th Cir. 2001); *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 692 (6th Cir. 2001).

Neither case cited by the union remotely suggests otherwise. In *IUE v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), the court based its result on evidentiary grounds, expressly declining to consider the "reasonableness" of the Board's statutory construction (which, in any event, involved a union's duty of fair representation, not alleged discrimination). *Id.* at 1537-38. And *NLRB v. U.S.*

Postal Service, 8 F.3d 832 (D.C. Cir. 1993), addressed the Board's "limited role in interpreting contracts," not the construction of the NLRA. *Id.* at 837. Thus, contrary to the union's assertions, this Court should defer to the Board's construction of the NLRA so long as it is "'reasonably defensible.'" *Adtranz*, 253 F.3d at 25 (quoting *Ford Motor*, 441 U.S. at 497).

B. The Substantial Evidence Standard Governs Review of the Board's Factual Conclusions

This Court's review of the Board's factual rulings is likewise "'highly deferential.'" *W&M Props.*, 514 F.3d at 1348 (quoting *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998)). The Board's findings of fact are "'conclusive' if supported by substantial evidence." *Id.* (quoting 29 U.S.C. § 160(e)). And since "substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," this Court "will reverse for lack of substantial evidence only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (internal quotation marks omitted). The Court "will not disturb the Board's reasonably defensible interpretation of the facts, regardless whether [the court] might rule differently de novo." *W&M Props.*, 514 F.3d at 1348 (internal quotation marks and citations omitted).

II. The Board Correctly Upheld the Employer's Right to Discipline the Union President for Her Two Emails

The Board properly construed the NLRA in rejecting the union's challenge to the email-related warning issued to the union president.

A. Absent Impermissible Discrimination, Employers May Freely Restrict Use of Employer-Owned Email Systems

As a threshold matter, the Board was correct to hold—and the union does not dispute in this case (Union Br. 3 n.3, 11-13)—that the NLRA allows employers to restrict use of employer-provided email, so long as they do not discriminate against NLRA-protected activity in violation of the Act.

The Board and reviewing courts have long recognized that "[t]here is no statutory right for an employee or a union to use" communications media owned by the employer. *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986); *see also, e.g.*, *Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 229, 230 (2000), *order enforced*, *Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075 (D.C. Cir. 2001). To the contrary, employers hold a "basic property right," *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983), unaffected by the NLRA, to bar non-business use of employer-owned communications equipment such as telephones, bulletin boards, TV/VCRs, photocopiers—and email. *See, e.g.*, *Media Gen. Operations, Inc.*, 346 N.L.R.B. 74, 76 (2005) (email), *aff'd*, 225 F. App'x 144, 148 (4th Cir. 2007); *Union Carbide Corp.*, 714 F.2d at 663 (telephones); *Southwire*,

801 F.2d at 1256 (bulletin boards); *Fleming Cos.*, 349 F.3d at 974-75 (same); *J.C. Penney Co. v. NLRB*, 123 F.3d 988, 997 (7th Cir. 1997) (same); *Guardian Indus.*, 49 F.3d at 318 (same); *Roadway Express, Inc. v. NLRB*, 831 F.2d 1285, 1290 (6th Cir. 1987) (same); *Mid-Mountain Foods*, 332 N.L.R.B. at 230 (TV/VCR); *Heath Co.*, 196 N.L.R.B. 134, 134-35 (1972) (PA system); *Champion Int'l Corp.*, 303 N.L.R.B. 102, 109 (1991) (photocopier).

Consistent with these principles, the Register-Guard was free to impose neutral restrictions on company communications systems including email. The prohibitions of the Act "come[] into play" only when an employer imposes restrictions that discriminate against NLRA-protected communications in violation of the Act. *Southwire*, 801 F.2d at 1256 (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.*, 49 F.3d at 318 ("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. Penney*, 123 F.3d at 997 (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").

B. Employers May Allow Some Non-Business Email Without Opening the Door to All Non-Business Email

The standard that the Board adopted for evaluating NLRA discrimination claims was at a minimum "'reasonably defensible,'" *Adtranz*, 253 F.3d at 25 (quoting *Ford Motor*, 441 U.S. at 497), and indeed was correct. In the order under review, the Board held that "unlawful discrimination" under the NLRA "consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." (JA 274.) Under this standard, the Board explained, "an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and mere talk, and between business-related use and non-business-related use." (JA 273.) On the facts of this case, moreover, the Board held that the union president's two email solicitations could be restricted because they lacked a sufficiently "similar character," to the non-business emails the employer had allowed, i.e., "jokes, baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking." (JA 272, 274.)

Far from an impermissible interpretation under *Chevron*, the Board's discrimination standard appropriately recognizes that the NLRA should not present employers with an all-or-nothing choice: employers may adopt neutral policies

and practices that allow *some* non-business email without opening their systems to *all* non-business email. Indeed, the Board's view of the statute finds support in this Court's precedent, the precedent of other circuits, the practical realities of email use in the workplace, and principles of constitutional avoidance.

1. This Court's Precedent Requires Approval of the Board's Ruling

This Court has previously construed the statute just as the Board did here—as precluding a finding of discrimination where an employer draws neutral distinctions between categories of communication.

In *Restaurant Corp. of America v. NLRB*, 827 F.2d 799 (D.C. Cir. 1987), a case invoked by the union, this Court concluded that an employer did not discriminate in violation of the Act by allowing "spontaneous general social collections" during work time despite disciplining an employee for engaging in systematic union solicitation. *Id.* at 807. The "essence of discrimination," under the NLRA, the Court explained, is "treating like cases differently." *Id.* at 807-08 (internal quotation marks omitted). Because the union solicitation was substantially more disruptive than the allowed social solicitations, this Court found no discrimination under the Act. *Id.* at 807.

Similarly, in *Adtranz*, this Court upheld an employer's general bans on "abusive or threatening language" and "soliciting and distribution without authorization" in the workplace. 253 F.3d at 25, 28 (internal quotation marks

omitted). Because these policies "applie[d] across the board" to workplace activity, not just to union actions, this Court held that they "cannot be said to discriminate against unionization efforts or other protected activity." *Id.* at 29. *See also ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001) (indicating that an across-the-board policy restricting "*harassing* solicitations" could be employed to restrict § 7 activity); *Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075, 1077 (D.C. Cir. 2001) (expressing doubt that an employer could be held to have discriminated in violation of the NLRA by applying a general cleanup policy to remove union literature from a break room).

The standard the Board adopted here does precisely what this Court required in these precedents: it allows employers to differentiate between communications according to neutral criteria such as abusiveness (*Adtranz*), tendency to harass (*ITT Industries*), or disruptiveness (*Restaurant Corp.*), finding discrimination only where the employer treats "substantially equivalent" communications differently. *Rest. Corp.*, 827 F.2d at 808. Furthermore, just as this Court upheld categorical policies in *Adtranz* and *ITT Industries*, the Board here granted employers the freedom to adopt a wide range of neutral policies and practices that allow some but not all non-business communication—recognizing, for example, that solicitations on behalf of organizations may detract substantially more from productivity than isolated personal communications, *see also infra* at 21-23. Given this Court's prior

decisions mandating this approach, precedent requires the Court to deny the petition for review. *See, e.g., Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning").

2. Other Circuits' Precedent Supports the Board's Ruling

Further supporting the Board's ruling, other circuits have likewise granted employers flexibility to differentiate between communications, restricting some but not all non-business use of employer-owned communications systems. Indeed, as the Board recognized by "adopt[ing] the position" of the Seventh Circuit in *Guardian Industries* and *Fleming Cos.* (JA 274), at least one circuit has approved the very line the Register-Guard drew in this case by allowing personal but not organization-related communication.

In *Guardian Industries*, despite acknowledging that "[t]he Board has a good deal of latitude to adopt rules adjusting the balance between labor and management," the Seventh Circuit held that an employer could not reasonably be held to have discriminated where it allowed "swap and shop" postings (that is, announcements of used cars and similar items for sale) but not union solicitations on a company bulletin board. 49 F.3d at 318, 321-22. Much like the Register-Guard here, the employer in that case uniformly restricted "general announcements of meetings" for organizations. *Id.* at 319. Accordingly, the Seventh Circuit

concluded, the employer could ban union announcements from the bulletin board, notwithstanding its tolerance for other non-business messages. *Id.*

Likewise, in *Fleming Cos.*, the employer had restricted union solicitation on company bulletin boards despite allowing a "wide range of personal postings" in violation of stated company policy limiting the boards to business use. 349 F.3d at 975 (internal quotation marks omitted). The court looked to the employer's "*actual* practice" and determined that the employer there, again like the Register-Guard here, followed the "practice of permitting personal postings, but not organizational ones." *Id.* Accordingly, the Seventh Circuit, though deferring to "reasonable" Board interpretations of the NLRA, concluded that the Board's finding of discrimination on the facts of *Fleming Cos.* lacked any "reasonable basis in the law." *Id.* at 972, 975. *See also, e.g.*, *6 West Ltd.*, 237 F.3d at 780 ("We are of the opinion that solicitations for girl scout cookies, Christmas ornaments, hand-painted bottles, and the other examples listed by the ALJ certainly cannot, under any circumstances, be compared to union solicitation as support for the ALJ's determination that the [employer] engaged in a discriminatory application of its non-solicitation policy.").

The Sixth Circuit has also held that application of neutral distinctions precludes a finding of discrimination, even if some non-business communications are allowed while union solicitations are restricted. In *Sandusky Mall* and

Cleveland Real Estate Partners v. NLRB, 95 F.3d 457 (6th Cir. 1996), the court held that shopping-mall operators did not discriminate against Section 7 activity by restricting union handbilling while allowing limited charitable solicitations. *Sandusky Mall*, 242 F.3d at 692; *Cleveland Real Estate*, 95 F.3d at 462, 464. Union handbilling, the court explained in *Sandusky Mall*, is not "similar conduct to that of civil and charitable organizations who obtained permission . . . to use the mall in a limited way deemed beneficial." *Id.* at 692. In both these cases, the Sixth Circuit construed the NLRA's anti-discrimination rule to prohibit only "favoring one union over another, or allowing employer-related information while barring similar union-related information," *Cleveland Real Estate*, 95 F.3d at 465; *see also Sandusky Mall*, 242 F.3d at 692-93 (quoting *Cleveland Real Estate*), a standard that the Board here described as narrower than the Board's own view (JA 274 n.21).

Similarly, the Second Circuit has held that a mall operator does not discriminate in violation of the NLRA by allowing charitable solicitations but not union advocacy on its premises. *Salmon Run Shopping Ctr. LLC v. NLRB*, __ F.3d __, 2008 WL 2778847, at *6 (2d Cir. July 18, 2008). While acknowledging that the Board's legal rulings must be upheld if "reasonably based," *id.* at *3 (internal quotation marks omitted), the court held, as a matter of law, that "solicitation of Muscular Dystrophy donations by firefighters or the distribution of educational

promotional materials," which the mall operator permitted, do not serve as "valid comparisons" to union advocacy such as "the Carpenters' Union distribution of literature touting the benefits of its apprenticeship programs or decrying the failure of a mall tenant to pay area standard wages." *Id.* at *6.

Given courts' final authority, even under *Chevron*, to determine statutes' plain meaning, *see, e.g.*, *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1091 (D.C. Cir. 1992) (discussing agencies' obligation to acquiesce to judicial authority), these authoritative judicial precedents supporting the Board's interpretation—or even adopting a stricter view of discrimination—reinforce the conclusion that the Board's decision here was proper.

3. The Board's Ruling Appropriately Reflects the Nature of Email and the Realities of the Workplace

Important practical considerations also support the Board's ruling. 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); *see also, e.g.*, *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001) (citing *Weingarten* and upholding Board); *Beth Israel Hosp.*, 437 U.S. at 500-01 ("it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms'" (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)).

Here, the Board properly discharged that responsibility by issuing a ruling appropriate to the nature of email and the realities of the modern workplace.

In practice, although employers often reserve the right to inspect messages on company email systems, many employees use company-provided email for personal correspondence, and many employers tolerate such use, at least within limits, much as the Register-Guard did here. Such policies and practices grant employees a degree of autonomy, allowing them to make responsible use of company property, while also restricting forms of email that may be particularly damaging to the business. Email solicitations of the type at issue here—solicitations urging support for an outside organization such as a church, political party, or union—may trigger passionate debate among employees, clogging the employer's network and distracting employees from their work. Moreover, whereas ordinary personal messages (e.g., lunch invitations, party announcements, and for-sale notices) may pose little burden for employers' computer systems, messages on behalf of organizations with large distribution lists or with large attachments may consume substantial network resources.

Indeed, a single union-related solicitation, sent to hundreds of employees, may spawn extensive back-and-forth messages. As a practical matter, it is virtually impossible for employers to know whether such solicitations are sent, read, or printed during work time or non-work time. And email messages—unlike

oral solicitations, bulletin-board postings, PA announcements, and the like—cannot be readily observed or overheard in the workplace; employers can police email usage only by comprehensively monitoring employees' email messages, a task for which no reliable technology exists. Consequently, requiring employers to permit all solicitations, including union solicitations, on their email networks may lead to extensive debates about activities that are adverse to the employer's interests, that the employer cannot readily detect, and that substantially detract from workplace productivity.

By allowing employers to "draw . . . line[s]" (JA 273) that stop short of a total ban on non-business email, the Board recognized the validity of these practical concerns. The Board's order thus reflects a sound exercise of the NLRB's "'special function of applying the general provisions of the Act to the complexities of industrial life.'" *Weingarten*, 420 U.S. at 266 (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

4. Constitutional Avoidance Supports the Board's Ruling

Finally, the Chamber asserted in its amicus brief before the Board that ruling in the union's favor in this case would raise a serious compelled-speech question under the First Amendment, as union solicitations on employer-provided email systems could imply company support for those messages or require, in effect, the loan of company property for union purposes. *See, e.g.*, *Boy Scouts of Am. v. Dale*,

530 U.S. 640, 647-48 (2000); *Hurley v. 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). Although the Board did not rely on the Chamber's argument, the Board's ruling has appropriately avoided any compelled-speech issue by ruling in the Register-Guard's favor with respect to the union president's two email solicitations. *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-77 (1988) (construing statute to avoid "serious constitutional problems").

C. Substantial Evidence Supports the Board's Application of Its Discrimination Standard in This Case

The Board, having concluded that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status" (JA 273), correctly applied this standard to the facts of this case.

The two emails at issue were solicitations on behalf of an outside organization, i.e., the union: one email urged employees to wear green to show support for the union; the other encouraged them to participate in the union's parade entry. While the Register-Guard had acquiesced to some non-business emails, the Board found "no evidence" that the Register-Guard had allowed email solicitations for other "outside cause[s] or organization[s]" (apart from the company's periodic United Way drives, which fall within the well-established

"beneficent acts" exception to NLRA discrimination, *see, e.g.*, *Hammary Mfg. Corp.*, 265 N.L.R.B. 57, 57 & n.4 (1982); *Serv-Air, Inc. v. NLRB*, 395 F.2d 557, 560 (10th Cir. 1968)). (JA 272, 274.) Moreover, the employer's email policy, in addition to generically restricting "non-job-related solicitations," expressly restricted "solicit[ing] or proselytiz[ing] for . . . outside organizations"—exactly the type of email at issue here. (JA 266.) Substantial evidence thus supports the Board's determination that the Register-Guard disciplined the union president pursuant to a non-discriminatory practice of allowing some non-business email communications but restricting solicitations on behalf of outside organizations.

The Board's order here is "rational[]" and "consisten[t] with the Act," and the Board's application of the rule is "supported by substantial evidence on the record as a whole." *Beth Israel Hosp.*, 437 U.S. at 501. The union's petition for review on the discrimination claim should therefore be denied.

D. The Union's Counterarguments Are Meritless

The union's arguments for overturning the Board's order and mandating a discrimination standard that effectively usurps employers' broad property rights over their computer equipment are unpersuasive.

1. Given the Company's Neutral Practice With Respect To Non-Business Email, the Register-Guard's Failure To Follow the Strict Letter of Its Email Policy Is Legally Irrelevant

The union first suggests that the Board's order should be overturned because the Register-Guard "engaged in discriminatory enforcement of its no-solicitation rule" by tolerating some non-business email despite a company policy forbidding all "solicit[ing] or proselytiz[ing] for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." (Union Br. 16-17; JA 266.) This assertion is misguided.

As the Seventh Circuit explained in *Fleming Cos.*, the NLRA discrimination analysis focuses on the employer's "*actual* practice," not the letter of its policy. 349 F.3d at 975. Thus, in that case, as noted, the court 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. *Id.*; *see also Rest. Corp.*, 827 F.2d at 807-09 (examining employer's actual practice where employer did not enforce stated general no-solicitation policy). By the same token, the Board properly analyzed the Register-Guard's "*actual* practice," *Fleming Cos.*, 349 F.3d at 975, of allowing personal but not organizational emails, notwithstanding the company's stated policy of restricting all "non-job-related solicitations." Were the law otherwise, employers could be penalized for leniency, even where their practices impose no

disadvantage on NLRA-protected communications—a result that would serve the interests of neither employees nor employers.

To the extent the union also disputes the Board's factual conclusions regarding the Register-Guard's email practice (Union Br. 22 n.14), the standard of review forecloses the union's argument. As noted, the Board found "no evidence" that the company allowed email solicitations for "outside cause[s] or organization[s]" apart from the United Way. (JA 272, 274.) All the permitted non-business emails in the record were personal in nature; indeed, the company's director of human resources testified that, "to the best of [her] knowledge," the company had never allowed an employee to use the email system "to solicit support for any outside organization." (JA 1, 66.) Furthermore, although the company's policy broadly restricts all "non-job-related solicitations," it specifically bars "solicit[ing] or proselytiz[ing] for . . . outside organizations," thus indicating the employer's special concern with such communications. (JA 266.) And contrary to the union's assertions (Union Br. 18 n.12), the union, as an entity independent from the employer, clearly is an "outside organization" under the policy.

In sum, the Board's findings regarding the Register-Guard's "*actual* practice," *Fleming Cos.*, 349 F.3d at 975, are supported by substantial evidence; the union has no basis for asserting that the record here is "so compelling that no

reasonable factfinder could fail to find to the contrary," *Highlands Hosp.*, 508 F.3d at 31 (internal quotation marks omitted).

2. Employers May Apply Neutral General Distinctions Between Emails Without Separately Evaluating Each Individual Email for Disruptiveness

The union next asserts that, under *Restaurant Corp.* and *St. Margaret Mercy Healthcare Centers v. NLRB*, 519 F.3d 373 (7th Cir. 2008), the proper discrimination analysis turns on whether the individual permitted and restricted communications were "'substantially equivalent'" "'in terms of the *actual disruption of the workplace*.'" (Union Br. 22 (quoting *Restaurant Corp.*, 827 F.2d at 808).) As the Board explains in its brief (NLRB Br. 35-37), the union has forfeited this argument under § 10(e) of the Act, 29 U.S.C. § 160(e), by failing to present it during the Board proceedings. In any event, this argument, too, is mistaken and imposes an unwarranted burden on employers to justify restrictions on the use of their property.

For multiple reasons, neither case cited by the union prevents employers from adopting a practice, like the Register-Guard's here, of distinguishing generically between personal and organization-related communications without separately evaluating the actual disruptiveness of each individual communication. First, *St. Margaret Mercy* has no bearing on this case because the employer there singled out union solicitations for discipline despite allowing other organizational

solicitations, including solicitations on behalf of the Girl Scouts, the March of Dimes, the United Way, and commercial groups. *St. Margaret Mercy*, 519 F.3d at 375. Besides, *St. Margaret Mercy* did not purport to overrule the prior Seventh Circuit decisions in *Guardian Industries* and *Fleming Cos.*, which specifically approve of practices like the Register-Guard's here.

Second, while this Court in *Restaurant Corp.* found discrimination where an employer enforced a no-solicitation policy against certain union-related communications but permitted "social solicitations for beneficent purposes," 827 F.2d at 804, the Court did not address the legality of a general practice barring organizational but not personal solicitations—the line the Board approved here. To the contrary, *Restaurant Corp.* makes clear that employers have substantial flexibility in setting workplace policies, for in that case this Court upheld an employer's right to discipline employees who engaged in union solicitation that caused greater disruption than permitted non-union solicitations. *Id.* at 807. Moreover, in other cases, as noted, this Court has held that employers may adopt general policies and practices categorically allowing some but not all non-business solicitation. *See, e.g., Adtranz*, 253 F.3d at 25, 28-29; *ITT Indus.*, 251 F.3d at 1006.

Third, the Board-approved line that the Register-Guard drew here—allowing personal emails but not email solicitations for outside groups—is in fact

abundantly justified by "legitimate concerns for workplace efficiency." *Rest. Corp.*, 827 F.2d at 806. As noted earlier, email solicitations for outside groups such as unions, religious organizations, political parties, and even certain charities may engage employees' deeply held beliefs, thus prompting extensive back-and-forth debate and distracting employees from their work. Indeed, emails calling for specific expressive actions by employees—such as the parade participation and wearing of green urged by the emails here—may be particularly likely to prompt discussion regarding the merits of the proposed conduct. Given the difficulty of comprehensive email monitoring, employers may have little opportunity to cut short such exchanges before they have caused substantial disruption. Accordingly, sound business concerns justify categorical restrictions on such emails even where an employer allows other non-business use of employer-provided email and computer systems.

Finally, the union's discussion (Union Br. 23) of the content and relative memory-size of the particular emails at issue in this case is beside the point. Given the risk of workplace disruption posed by organizational solicitations in general, employers may categorically restrict such communications without examining particular emails, just as they may restrict all "abusive or threatening" messages, *Adtranz*, 253 F.3d at 25, 28-29, or all "*harassing* solicitations," *ITT Indus.*, 251 F.3d at 1006. The case-by-case comparisons that the union advocates—examining

whether particular emails invite a response, require significant computer memory, or actually distract employees from their work—would only invite intrusive email monitoring by employers, and could well yield inconsistent results in individual cases. Furthermore, whatever the testimony presented here, non-business computer use certainly may affect network efficiency and security on some employers' systems. The Board was therefore correct to adopt a discrimination standard that grants employers the flexibility to craft email policies and practices that allow certain categories of non-business computer use but not others.

In sum, contrary to the union's arguments, the Board in this case appropriately discharged its "'special function of applying the general provisions of the Act to the complexities of industrial life,'" *Weingarten*, 420 U.S. at 266 (quoting *Erie Resistor*, 373 U.S. at 236), by upholding the Register-Guard's email enforcement practice.

E. The Board's Discrimination Standard Should Not Be Applicable Only to Employer-Equipment Cases

For its part, the Board suggests (NLRB Br. 34-35, 37-40) in its brief that the discrimination standard adopted by the Board here applies only to employer-equipment cases, not oral-solicitation cases. This reading of the Board's order is both too narrow and wrong. To be sure, as the union does not dispute here (Union Br. 13), the Board properly characterized this case as a dispute over use of employer equipment; it thus rejected the application of the *Republic Aviation*

framework, which governs face-to-face solicitation, *see* 324 U.S. at 801-03, to the Register-Guard's restrictions on the company's email system. (JA 270-72.) Yet in addressing the discrimination question—i.e., whether the Register-Guard enforced its email policy in a discriminatory manner in violation of the Act—the Board "modif[ied] Board law concerning discriminatory enforcement" generally, not merely with respect to employer equipment. (JA 272-73.) Indeed, in describing permissible lines that employers may draw, the Board referred to "solicitations" in general, not just email solicitations. (JA 273.) Moreover, in the course of its discussion, the Board addressed cases, including *Cleveland Real Estate* and *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583 (D.C. Cir. 1996), that involved allegedly discriminatory restrictions on oral solicitation, not use of equipment. (JA 273-75 & n.21.) Nothing in the Board's order justifies applying different standards for discrimination in employer-equipment versus oral-solicitation cases. Accordingly, the Board's order, by its terms, should apply equally in future cases involving alleged discriminatory enforcement of facially valid restrictions on oral solicitation.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court DENY the union's petition for review in Case No. 08-1006.

Respectfully submitted,

Dated: August 15, 2008

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STATUTORY ADDENDUM

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CONTENTS

29 U.S.C. § 158(a)(1), (a)(3)

(a) Unfair labor practices by employer.

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that

membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

29 U.S.C. § 160(e)

(e) Petition to court for enforcement of order; proceedings; review of judgment.

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove

provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief of Amici Curiae HR Policy Association, Chamber of Commerce of the United States of America, Society for Human Resource Management, and Council on Labor Law Equality in Support of Respondent National Labor Relations Board in Case No. 08-1006 Arguing for Denial of the Petition complies with the type-volume limitation provided in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i). Excluding exempted portions of the brief, the foregoing brief contains 6,892 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Word 2003.

Dated: August 15, 2008

Zachary S. Price

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2008, I caused two true and correct copies of the foregoing Brief of Amici Curiae HR Policy Association, Chamber of Commerce of the United States of America, Society for Human Resource Management, and Council on Labor Law Equality in Support of Respondent National Labor Relations Board in Case No. 08-1006 Arguing for Denial of the Petition to be sent by overnight UPS delivery to each of the following:

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