UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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| ROUNDY'S, INC., | : | |
| | : | |
| Respondent. | : | CASE NO. 30-CA-17185 |
| | : | |
| and | : | |
| | : | |
| MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, | : | |
| Charging Party. | : | |

BRIEF OF RETAIL LITIGATION CENTER, INC. AS
*AMICUS CURIAE* IN SUPPORT OF RESPONDENT
ROUNDY'S, INC.

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The Retail Litigation Center, Inc., responding to the National Labor Relations Board's Notice and Invitation to File Briefs in the above captioned matter, submits this brief *amicus curiae* in support of Respondent Roundy's, Inc.

The Board has asked for briefs on the following issue:

> What legal standard should the Board apply in determining whether the employer has violated the National Labor Relations Act by denying nonemployee union agents access to its premises while permitting other individuals, groups, and organizations to use its premises for various activities?

See Roundy's, Inc., 356 NLRB No. 27, slip. op. at 1-2 (Nov. 12, 2010). For the reasons discussed below, the Board should: (1) reject the standard adopted by the majority of its members in Sandusky Mall, 329 NLRB 618 (1999), enf. denied, 242 F.3d 682 (6th Cir. 2001) holding if an employer opens its property to third parties for any purpose, then the employer must open its property for every purpose, at least where unions are concerned; and (2) adopt instead the Board's criteria in Register-Guard, 351 NLRB 1110 (2007), enf. denied in part, 571 F.3d 53 (D.C. Cir. 2009), that examines how the employer treats other similar forms of communication, for determining when employer property rights must yield to non-employee access requests.

## STATEMENT OF INTEREST AND INTRODUCTION

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC, whose members include some of the country's largest retailers, was formed to provide courts and agencies with retail industry perspectives on significant legal issues, and to highlight the potential industry-wide consequences of legal principles that may be established in pending cases.

RLC's members employ hundreds of thousands of people in thousands of retail stores across the nation. Members honor and abide by the laws that govern their activities, including laws that prohibit discrimination on the basis of union activity or other protected concerted activity. RLC's members have and enforce policies promoting lawful conduct and positive employment relations.

Retail stores almost always are located on private property. Increasingly, retail stores are located in suburbs surrounded by extensive parking lots and sidewalks as well as in shopping malls. These private premises draw substantial pedestrian and car shopping traffic.

Retailers reasonably expect to invite onto their property those third parties who will further the retailers' own business objectives. They welcome prospective customers. They also welcome charitable individuals and groups who help retailers contribute to their surrounding communities. These guests promote good will and solicit money and support for causes such as medical research, aid for the poor, and victims of disaster. Without access to retailers' premises, some of these worthy charitable causes might even fail.

Retailers also reasonably expect that they may exclude those third party individuals and groups who, for a host of reasons, would harm their businesses. Uninvited outsiders can cause harm because of the intruders' messages, such as seeking a consumer boycott. They also cause harm through the means they use to communicate, such as intrusive handbilling, shouting or using loud speakers or music, blocking entrances and exits, mass picketing, and other demonstrations. Retailers reasonably expect to be able to refuse access to those who use private property to promote or support causes inconsistent with the owners' beliefs and opinions.

The law, properly construed, supports these expectations. The Supreme Court recognizes the importance of property rights in the retail industry, even where labor relations interests are concerned. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). "As a rule . . . an employer cannot be compelled to allow distribution of union literature by non-employee organizers on his property." Id. at 533. In other words, retailers generally can bar non-employee union organizers from the retailers' private property. Id. at 535.

The Board's standard in Sandusky Mall, however, turns Lechmere on its head. It holds that if an employer opens its property to third parties for any purpose, then the employer must open its property for every purpose, at least where unions are concerned. This is wrong. Even the Board itself has recognized this: it offered a legally correct standard that fully complies with Lechmere in Register-Guard. The Register-Guard decision recognizes that retailers have the need and the right to make their property available for activity that fulfills their business, civic, community, charitable and philosophical objectives, without needing to tolerate protests from those who advocate causes inconsistent with the retailers' business interests or that

undermine their enterprise. The Sixth Circuit's opinion in Sandusky Mall addresses this problem by limiting the valid comparisons by which the Board judges discriminatory access cases. If an employer invites or condones third-party solicitations on its property that are unrelated to or inconsistent with its own business interests and property use, it may be said to have crossed a bright line with its eyes open. But that is a far cry from the broad invitation the Board has extended under Sandusky Mall and similar cases. Union protests over failure of a contractor to pay higher wages, and calls for consumer boycotts, are manifestations of commercial solicitations—and not just any commercial solicitations, either. Directly or indirectly, these activities seek to promote competitors at the expense of the retail property owner, using the retailer's own property as a forum for their arguments and inducements. A retailer is not required to tolerate the presence of a competitor on its property to urge its patrons to shop elsewhere or to urge its employees to quit their jobs and work for the competitor. No one that retailers invite onto their property would have the right to do this. Why should uninvited unions have greater rights?

The Board should take this opportunity to correct its standard and restore to its proper place a retailer's right to control its property, as the Supreme Court established in Lechmere. It should adopt the standard announced in Register-Guard as its basis for decision in Roundy's and other cases.

## ARGUMENT

## THE BOARD SHOULD ADOPT THE REGISTER-GUARD STANDARD FOR DETERMINING THE PRIVILEGE OF NON-EMPLOYEE UNION AGENTS TO ENGAGE IN EXPRESSIVE ACTIVITY ON A RETAILER'S PRIVATE PROPERTY

### A. The Supreme Court Recognizes The Importance Of Employer Property Rights Under The NLRA, With Narrowly Defined Exceptions.

"As a rule . . . an employer cannot be compelled to allow distribution of union literature by non-employee organizers on his property." Lechmere, 502 U.S. at 533 (1992). This is so because, "[b]y its plain terms, . . . the NLRA confers rights only on employees, not on unions or their non-employee organizers." Id. at 532 (emphasis in original). Unions share in employee rights and protections only derivatively. As the Supreme Court observed, employees' "'right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others,'. . . §7 of the NLRA may, in certain limited circumstances, restrict an employer's right to exclude non-employee, union organizers from his property." Id. at 532, quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956).

Those limited circumstances have become known as the "inaccessibility" and "discrimination" exceptions to property owners' ability to bar uninvited visitors from their property. See id. at 539. The Babcock & Wilcox rule on "limited circumstances," however, is a narrow one. "[T]he Babcock accommodation principle has rarely been in favor of trespassing organizational activity." Id. at 535. The Court said "an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution." Babcock & Wilcox, 351 U.S. at 112.

### B. The Board Has Taken An Overly Expansive View Of The "Discrimination Exception" To Employer Exclusionary Practices In Earlier Cases.

The Board in the past has taken a broad view of Babcock's "discrimination exception." As the Board stated in Sandusky Mall, "denying union access to its property while permitting other individuals, groups and organizations to use its premises for various activities," violated Section 8(a)(1). 329 NLRB at 620 (footnote and citations omitted). The ALJ in his 2006 decision in Roundy's found this Board standard controlling, and concluded simply that "[unlawful] discrimination is shown by the employer's tolerance of other non-union solicitation on its property." 356 NLRB No. 27, slip op. at 6 (ALJD). Thus, by allowing virtually any solicitation on private property by an individual or group unrelated to unions, the Babcock exception, according to the ALJ, dictates that an employer property owner would be unable lawfully to prohibit solicitation when a union appeared.

The ALJ in Roundy's did not have the benefit of the Board's decision in Register-Guard. Without it, the Board's earlier "discrimination exception" cut too wide a swath. Applying the Board's logic in Register-Guard instead of Sandusky Mall to situations involving non-employee solicitation better captures the competing interests of employers and union supporters.

### C. Application of the Register-Guard Standard To Cases Such As Roundy's Allows Property Owners To Control Access, But Not to Discriminate.

RLC believes that retailers should be able to control access to their property, but not to discriminate against union access or communications if retailers allow other similar groups to access or communicate on their private property. Register-Guard therefore establishes the

appropriate standard for determining whether a retailer has violated the Act because it focuses on disparate treatment of activities or communications of a similar character.

The majority in Register-Guard began its analysis with the proposition that "the Board has consistently held that there is 'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are non-discriminatory." 351 NLRB at 1114 (footnote and citations omitted), quoting Mid-Mountain Foods, 332 NLRB 229, 230 (2000). This standard, the Board said, required actual discrimination. Relying on the Seventh Circuit's analysis in Guardian Industries, Inc. v. NLRB, 49 F.3d 317 (7th Cir. 1995), denying enforcement to 313 NLRB 1275 (1994), and Fleming Cos., Inc. v. NLRB, 349 F.3d 968 (7th Cir. 2003), denying enforcement to 336 NLRB 192 (2001), the Board held:

> We find that the Seventh Circuit's analysis, rather than existing Board precedent, better reflects the principle that discrimination means the unequal treatment of equals. Thus, in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status.

Id. at 1117-18. This view of discrimination as involving "activities or communications of a similar character" is directly relevant to Roundy's, as we discuss below. It supports the retail employer's lawful exclusion of non-employee union protestors under the facts present in Roundy's.

In Register-Guard, the Board sustained an employer e-mail policy limiting employee usage to business related purposes and banning "non job-related solicitations" (but not all non-job related communications). Stating that only "communications of a similar character" could be considered for purposes of its disparate treatment analysis of restrictions on union solicitation, id. at 1118, the majority rejected the then-existing Board standard that if an

employer permitted employee use of its e-mail system for any personal purpose, the employer generally would lose its right to prohibit its use for communicating about unions. Instead, it adopted the standard preferred by the Seventh Circuit. Id. at 1128-29.[1] The Board indicated that this standard would allow an employer to draw numerous distinctions in the use of its e-mail system. Without violating the Act, for example, "an employer may draw a line between charitable solicitations and non-charitable 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 invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use." Id. at 1118.

Applying this standard in Register-Guard, the Board majority held that the employer did not discipline an employee unlawfully for using the e-mail system for union solicitation purposes, even though it "tolerated personal employee e-mail messages concerning social gatherings, jokes, baby announcements and the occasional offer of sports tickets or other similar personal items." The Board emphasized, "there is no evidence that [the newspaper] permitted employees to use e-mail to solicit other employees to support any group or organization." Id. at 1119.[2]

The District of Columbia Circuit on review did not reach the merits of the Board's disparate treatment analysis. Guard Publishing Co. d/b/a Register-Guard v. NLRB, 571 F.3d 53

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[1] See Guardian Indus. Corp. v. NLRB, supra (allowing shopping notices to be posted on its bulletin board while refusing to allow the posting of a notice of union meetings not disparate treatment); Fleming Co. v. NLRB, supra (extending its rationale in Guardian Industries to personal notices, as well as to sale notices). Subsequent to Register-Guard, the Seventh Circuit adhered to its holdings in Guardian Industries and Fleming in another bulletin board case, Loparex LLC v. NLRB, 591 F.3d 540, 545 (7th Cir. 2009), enforcing 353 NLRB 119 (2009) ("[Section 7] does not give employees an unfettered right to use a company's bulletin boards to stir up interest in unionization. . . . The critical question is whether the employer is discriminating against union messages, or if it has a neutral policy of permitting only certain kinds of postings (for example, those related directly to work rules)."

[2] Then-Members Liebman and Walsh dissented, in part. In their view, "banning all nonwork-related 'solicitations' is presumptively unlawful absent special circumstances." 351 NLRB at 1121. Moreover, they found the employer had enforced its policy in a discriminatory manner as to the two e-mails there in issue. Id. at 1131.

(2009). First, even though the union took the position that the company violated §8(a)(1) by maintaining a policy that prohibited e-mail use for all "non job-related solicitations," the union in its petition to the court did not seek review of the Board's decision to the contrary. Id. at 58.

Second, the court found that the employer had failed to raise the policy-based disparate treatment issue in a timely manner. "Whatever the propriety of drawing a line barring access based on organizational status, the problem with relying on that rationale here is that it is a post hoc invention," the court said. Id. at 60. The court explained "the company never invoked it before the General Counsel filed his complaint" and, as the Board acknowledged, "[t]he Communications Systems Policy made no distinction between solicitations for groups and for individuals, mentioning solicitation for 'outside organizations' as just one example of the forbidden category of all 'non-job-related solicitations.'" Id. The court observed further that a disputed disciplinary warning purportedly issued by the company for violating the 'outside organization' solicitation ban "did not invoke the organization-versus-individual line drawn by the Board." Id. In short, it concluded, "neither the company's written policy nor its express enforcement rationale relied on an organizational justification." Id. The court did not reach the issue of the validity of an employer policy distinguishing between employee solicitations for personal items and employee solicitations involving organizations. In sum, the Register-Guard court did not reject the Board's finding that an employer can draw a number of distinctions in the use of its own email system.

Register-Guard is instructive for its more subtle view of "communications of a similar character." The Board requires finer distinctions for §8(a)(1) purposes than it once considered necessary. One cannot look only to whether an employer has permitted the use of its bulletin boards, email systems, or other property for any personal communications by employees

to find the employer has surrendered its right to prevent the use of these instrumentalities for union solicitation. More broadly, Register-Guard correctly resets the guideposts for applying "the principle that discrimination means the unequal treatment of equals." 351 NLRB at 1117. Now, "unlawful discrimination consists of the disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." Id. at 1118 (emphasis added).

The Register-Guard standard would not permit the union in Roundy's to conduct its protest and call for a boycott on the retailer's private property. The union's conduct in that instance is a form of (or at least is closely akin to) commercial solicitation. Its focus is on the economics of business operations. The union seeks to drum up support for its economic position among shoppers, and persuade them to express their displeasure with Roundy's use of a non-union contractor by boycotting the retailer. The evidence in Roundy's suggests nothing of the sort had been permitted on the property before. Instead, Roundy's had permitted solicitations and communications by third parties on its premises to raise money from or persuade shoppers to support activities for a host of reasons—charitable, civic, community, political or environmental – not in competition with or designed to undermine Roundy's primary business activity. No activity appears to have been undertaken by a primarily commercial business enterprise or operation, none had protested the manner in which the property was being used by Roundy's for business purposes, and none had sought to affect adversely Roundy's business as a means of furthering its own ends. No valid precedents existed to which the intruders might point. No "communications of a similar character" had taken place at Roundy's with the retailer's

acquiescence or consent. Therefore, under Register-Guard, the union agents at Roundy's still could be ejected lawfully.[3]

### D. The Sixth Circuit in Sandusky Mall Reached A Proper Outcome. Other Circuit Courts Do Not Agree With The Board's Expansion Of Rights Of Non-Employee Union Protestors To Trespass On Private Property For Non-Organizational Purposes.

The Sixth Circuit's interpretation of the Babcock & Wilcox "discrimination exception" in Sandusky Mall, 242 F.3d 682 (6th Cir. 2001), resolves cases involving uninvited non-employee union agents on private retail property, such as Roundy's. It correctly faults the Board's overbroad standard and narrows the field of comparison for evaluating such disparate treatment cases.

The Sixth Circuit had to decide whether a mall owner "may be compelled to permit non-employee union members to trespass on the mall's property for the purpose of distributing handbills urging mall customers not to patronize non-union employers." Id. at 685. The mall "'admittedly permitted a variety of charitable, civic and even commercial organizations to enter the mall for solicitations, displays and presentations,'" which were related to mall business. Id. at 690 (quoting Member Brame, dissenting, 329 NLRB at 624).[4] In making its decision to permit a particular activity, the mall examined whether the activity would enhance the public image of the mall or provide a public service to the community. It also considered the likelihood of economic benefit (such as rent), "good will," or increased customer traffic, whether

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[3] There also was no showing that the union could not reasonably communicate its message to the public without entering Roundy's property.

[4] Solicitation and other activities were conducted on the property in the form of a United Way Donation Thermometer, Easter Seals cake auction, American Lung Association free car inspection, American Red Cross bloodmobile, a drug awareness display and some apparently commercial activity the mall decided would generate good will or customer traffic, such as an Arthur Murray dance marathon and a Fall crafts show. Sandusky Mall, 329 NLRB at 624 (Member Brame, dissenting).

the activity was consistent with or related to the commercial retail purpose of the mall, whether the activity conflicted with the business of a mall tenant, or whether the activity concerned or would generate controversy. Id. at 619.

Despite the frequency of prior solicitations, the court in Sandusky Mall concluded that the mall had not violated the NLRA by excluding non-employee union handbillers. The court previously had held in Cleveland Real Estate Partners v. NLRB, 95 F.3d 457 (6th Cir. 1996) ("CREP"), that "alleged 'discriminatory' conduct in allowing solicitation on [sic] [should be "or"] handbilling required that 'discrimination be among comparable groups or activities,' and that the activities themselves under consideration must be 'comparable.'" 242 F.3d at 690 (citations omitted). The Court in Sandusky Mall found the Board's rationale under the Babcock "discrimination exception" too expansive. It quoted approvingly from its decision in CREP:

> Babcock and its progeny, which weigh heavily in favor of private property rights, indicate that the Court could not have meant to give the word "discrimination" the impact the Board has chosen to give it. To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so. Cf. Guardian Indus. Corp. v. NLRB, 49 F.3d 317, 320-22 (7th Cir. 1995). Although the Court has never clarified the meaning of the term, and we have found no published court of appeals cases addressing the significance of "discrimination" in this context, we hold that the term 'discrimination" as used in Babcock means favoring one union over another, or allowing employer-related information while barring similar union-related information.

Id. at 686, quoting CREP, 95 F.3d at 464-65. Thus, it held, allowing solicitations by charities and others deemed beneficial to the property-owning mall and its tenants would not prevent the

lawful prohibition of union solicitations. Id. at 689-90.[5] The Sixth Circuit reaffirmed the vitality of its decision in Sandusky Mall (as well as CREP) in Albertson's Inc. v. NLRB, 301 F.3d 441 (6th Cir. 2002). The Second Circuit has adopted the Sixth Circuit standard for discrimination in a wage dispute. See Salmon Run Shopping Center LLC v. NLRB, 534 F.3d 108 (2d Cir. 2008), denying enforcement to 348 NLRB 658 (2006).[6]

The Sixth Circuit's holding dramatically limits the Board's traditional basis for non-employee access cases. If adopted, it would result in the dismissal of the complaint in Roundy's. There is no indication that the retailer allowed another union to enter its premises to engage in similar expressive activity. The decision, therefore, is of apparent benefit to retailers in circumstances like Roundy's.

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[5] The Board's "tolerance of isolated beneficent solicitation" that the Board might regard as narrow exceptions to an otherwise valid, nondiscrimination policy, Sandusky Mall, 329 NLRB at 621, citing Hammary Mfg. Corp., 265 NLRB 57, n.4 (1982), is rendered irrelevant under the Sixth Circuit's rationale.

[6] The Second Circuit in Salmon Run, 534 F.3d at 115, n. 1, noted that the Supreme Court in Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180, 206 n. 42 (1978), viewed as a "serious question" whether an area-standards protest is entitled to the same deference under Babcock as organizational activities. It noted that "several factors make the argument for protection of trespassory area-standards picketing as a category of conduct less compelling than that for trespassory organizational solicitation" Id., quoting 436 U.S. at 206 n. 42. The Second Circuit also cited Be-Lo Stores v. NLRB, 126 F.3d 268, 284 (4th Cir. 1997), where the Fourth Circuit noted: "[W]e seriously doubt, as do our colleagues in other circuits, that the Babcock & Wilcox disparate treatment exception, post Lechmere, applies to non-employees who do not propose to engage in organizational activities." Id. Assuming, however, that Section 7 rights were implicated, the court found no violation in a mall's refusal to allow a union to protest a retail tenant's use of a non-union carpenter during remodeling of its store, concluding:

> To amount to Babcock-type discrimination, the private property owner must treat a non-employee who seeks to communicate on a subject protected by [S]ection 7 less favorably than another person communicating on the same subject. The disparate treatment must be shown between or among those who have chosen to enter the fray by communicating messages on the subject, whether employers or employees.

Id. at 116-17.

Thus, the Sixth and Second Circuit's rulings on access of non-employee union protestors are more in line with the "limited circumstances" exception contemplated by Babcock & Wilcox. There is no substantial legal or policy reason to constrain a retail employer from using its own property for lawful business-related communications and activities. Employers must be free to further their business and property interests without compromising property rights. Register-Guard avoids that unfortunate result, by clarifying that discrimination is narrowly construed to be limited to conduct of a similar nature by other groups.

### E. The Register-Guard Standard Properly Reflects The Substantial Policy Interest In Safeguarding The Retailer's Right To Protect Its Private Property.

Substantial policy considerations also support the application of Register-Guard to cases of non-employee statutory activity on private property. Without unduly inhibiting employer speech, it permits retailers to allow outsiders to communicate and solicit on site, aiding the retailers' business interests. Retailers, especially those located in shopping malls, need outside solicitations. They further the retailers' objectives—commercial, civic and charitable—as discussed earlier. They draw customers, encourage consumer spending and help integrate the business into the community it serves. In a struggling economy where retail sales are a key component of economic growth, it is important to maximize retail employers' business opportunities. Retailers, in turn, stimulate manufacturing and commerce and promote employment. Solicitations and communications by third parties that are consistent with retail ventures help meet these objectives.

Just as important, many charities and other community organizations depend for their contributions and contact with the public on access to private retail property. Volunteers of

America in Santa outfits during the holiday season, the Veterans of Foreign Wars offering Buddy Poppies for Memorial Day, the Boy Scouts and Girl Scouts, the American Cancer Society, school groups, and many others, are all frequent visitors on private retail property. Retailers regard their presence as enhancing their stores' attractiveness, burnishing their public image, and serving a larger good. None of these invitees are commercial business ventures or closely aligned with them. None criticize their hosts to the shopping public, attempt to drive business to competitors, or otherwise conduct themselves adversely to the business purpose of the host property. Many of these groups and individuals would be distressed to learn, however, that they might be barred from entry if as a result of their presence, the retailers thought they would risk the aspersions and boycotts of labor organizations.

What countervailing Section 7 interests might arguably justify these sacrifices and risks, even assuming such interests are properly considered? Few, if any, if Roundy's is illustrative. The intruders included no Roundy's employees; their message was not addressed to Roundy's employees and did not concern their Section 7 rights; the protest message about another (non-retail) employer's alleged failure to adhere to area wage standards, coupled with a plea to consumers to boycott Roundy's, would not have aided Roundy's employees or improved their terms and conditions of employment; and, assuming a Section 7 interest was present, there is no evidence that the non-employee union agents could not have conveyed their message to members of the public without encroaching on the retailer's private property. Section 7 is hardly implicated.

But Section 7 interests, except to the extent they exist at all, are beside the point. The question is whether there has been disparate treatment between or among valid comparators.

Roundy's did not engage in the unequal treatment of equals. The case provides no indication that any individual or group the retailer previously admitted or allowed to remain on its premises acted out of commercial self-interest or sought to act in a manner inconsistent with the purpose of the property and detrimental to the retail business operated there. Roundy's did not commit an unfair labor practice by excluding the non-employee union protestors.

The Board should adopt the standard it set in Register-Guard as the standard for deciding Roundy's, and in applying it, conclude that no violation occurred.

## CONCLUSION

Register-Guard provides a proper standard for deciding non-employee union access cases. It embodies the limited discrimination exception to employer property rights that the Supreme Court contemplated to protect Section 7 rights, while promoting legitimate retail business interests. It should be adopted here.

Dated: January 7, 2011
Melville, New York

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2011 pursuant to Section 102.114(i) of the Board's Rules and Regulations, Brief of Retail Litigation Center as Amicus Curiae was electronically filed in accordance with the Rules on Electronic Service served upon the following parties and via Federal Express:

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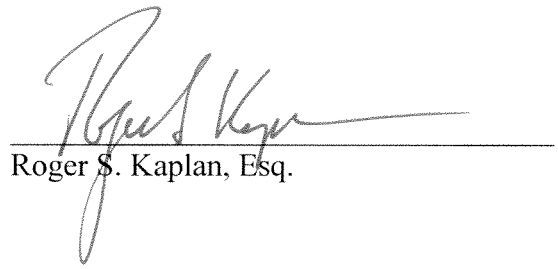

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