UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC.,	)	
and	)	CASES 21-CA-095151 21-RC-091531 21-RC-091584
COMMUNICATION WORKERS OF AMERICA, AFL-CIO	)	

BRIEF OF *AMICUS CURIAE* AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE RESPONDENT EMPLOYER

Lawrence Hughes
AMERICAN HOSPITAL ASSOCIATION
Liberty Place, Suite 700
325 Seventh Street, N.W.
Washington, DC 20004
Telephone: (202) 626-2346
Facsimile: (202) 626-2255

F. Curt Kirschner, Jr. (counsel of record)
Jonathan Sack
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700

TABLE OF CONTENTS

		Page
STATEMENT OF INTEREST		1
SUMMARY OF ARGUMENT		2
ARGUMENT		4
I.	SPECIAL CONSIDERATIONS APPLY TO ANY ORGANIZATIONAL ACTIVITY IN HOSPITALS	4
II.	WITHIN HOSPITALS, EMAIL COMMUNICATIONS ARE OFTEN A CRITICAL COMPONENT OF THE EFFICIENT DELIVERY OF PATIENT CARE	6
III.	HOSPITALS ARE RAPIDLY INTRODUCING TECHNOLOGICAL ADVANCES IN PATIENT CARE THAT OFTEN INCLUDE ELECTRONIC COMMUNICATION SYSTEMS ENABLING ENHANCED COMMUNICATION AMONG CAREGIVERS	7
	A. ECS Are Critical to the Ongoing Development of Safe and Effective Patient Care	8
IV.	THE BOARD SHOULD NOT ADOPT A STANDARD THAT WOULD REQUIRE HOSPITALS TO PROVIDE ACCESS TO EMAIL AND OTHER FORMS OF ECS AND THAT WOULD RISK INTERFERING WITH THEIR CORE PATIENT CARE PURPOSE	14
	A. The General Counsel's Proposed Rule Risks Interference with a Fundamental Purpose of Hospital ECS	14
	B. The General Counsel's Proposed Modified Standard Places At Risk Statutorily Protected Confidential Patient Care Information	15
	C. Expanded Use of ECS Could Impair Functionality of the System or Even Lead to Abuse	16
V.	IN NO EVENT SHOULD THE BOARD UNDERMINE ITS EXISTING PRECEDENT PERMITTING CERTAIN TYPES OF MISSION-RELATED SOLICITATION AND DISTRIBUTION ACTIVITIES WITHIN HOSPITALS	17
VI.	CONCLUSION	19

TABLE OF AUTHORITIES

Cases — Page

Beth Israel Hosp. v. NLRB,
437 U.S. 483 (1978) ..... *passim*

Carey v. Brown,
447 U.S. 455 (1980) 6

Carney Hosp.,
350 NLRB No. 56, slip op. (Aug. 13, 2007) 4

Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.),
355 NLRB No. 159 (Aug. 27, 2010) 6

Cent. Solano County Hosp. Fdn., Inc.,
255 NLRB 468 (1981) 18

George Washington Univ. Hosp.,
227 NLRB 1362 (1977) 18

Hurley v. Irish-American Gay Group,
515 U.S. 557 (1995) 6

Lucile Packard Children's Hosp.,
318 NLRB 433 (1995), enfd., 97 F.3d 583 (D.C. Cir. 1996) 18

NLRB v. Baptist Hosp., Inc.,
442 U.S. 773 (1979) 5

Ralph's Grocery Co. v. UFCW Local 8,
186 Cal. App. 4th 1078 (2010) 6

Register Guard,
351 NLRB 1110 (2007) ..... passim

Rochester Gen. Hosp.,
234 NLRB 253 (1978) 18

Saint John's Health Center,
357 NLRB No. 170, slip op. (Dec. 30, 2011) 4

USC University Hosp.,
358 NLRB No. 132 (Sept. 17, 2012) 4

STATUTES & REGULATIONS

45 CFR § 160, 164 (2007) 16

45 CFR § 164 (2007) 12

45 CFR § 164.310(a)(2)(ii) 11, 16

45 CFR §§ 164.502(b), 164.514(d) 16

45 CFR § 164.530(i)(1) 10, 15

45 CFR § 164.530(c)(1) 11, 15

Cal. Civ. Code § 56.101 ..... 11, 16

Fla. Stat. § 408.062(5) 11

Health Information Technology for Economic and Clinical Health (HITECH) Act, Pub. L. No. 111–5 (2009) 7

Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d *et seq.* ..... *passim*

Va. Code § 32.1-127.1:03 ..... 11, 16

OTHER AUTHORITIES

AMERICAN ACADEMY OF FAMILY PHYSICIANS, http://www.aafp.org/practice-management/health-it/product/intro.html (last visited May 28, 2014) 8

Bob Herman, *EHRs and Health IT Projects: Are They Battering Hospitals' Financial Profiles?*, BECKER'S HOSPITAL CFO (Jan. 6, 2014) available at http://www.beckershospitalreview.com/finance/ehrs-and-health-it-projects-are-they-battering-hospitals-financial-profiles.html 9

Catherine M. DesRoches et al., Adoption Of Electronic Health Records Grows Rapidly, But Fewer Than Half Of US Hospitals Had At Least A Basic System In 2012, HEALTH AFFAIRS (August 2013) 8

Chun-Ju Hsiao and Esther Hing, *Use and Characteristics of Electronic Health Record Systems Among Office-based Physician Practices: United States, 2001-2013* 8

Clinical Messaging, PRACTICE FUSION, https://learn.practicefusion.com/clinical-messaging/. 10

Devin Leonard & John Tozzi, *Why Don't More Hospitals Use Electronic Health Records?*, BLOOMBERGBUSINESSWEEK (June 21, 2012), http://www.businessweek.com/articles/2012-06-21/why-dont-more-hospitals-use-electronic-health-records 9

Enrico Coiera, *Communication Systems in Healthcare*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (May 2006), www.ncbi.nlm.nih.gov/pmc/articles/pmc1579411 12

Erin McCann, *Vendor Market Sees an 'Epic' Takeover*, HEALTH CARE IT NEWS (Jan. 2014), http://www.healthcareitnews.com/news/vendor-market-sees-epic-takeover 6

Forward Advantage Customer Survey, FORWARD ADVANTAGE, http://www.forwardadvantage.com/pdf/customer-story/2011FOX08CS18B-benefis-health-system-customer-story.pdf 7

Fixing Healthcare, KEVIN MD.COM (March 17, 2012), http://www.kevinmd.com/blog/2012/03/care-coordination-key-fixing-health-care.html.....11

How Can Health IT Help To Coordinate Care and Services? US DEPARTMENT OF HEALTH AND HUMAN SERVICES, http://www.hrsa.gov/healthit/toolbox/HIVAIDSCaretoolbox/ImprovingQuality/howcanhithelp.html (last visited May 28, 2014) 9

HHS Press Office, *HHS Announces Next Steps to Promote Use of Electronic Health Records and Health Information Exchange*, HHS.GOV (Aug. 23, 2012), http://www.hhs.gov/news/press/2012pres/08/20120823b.html 7

HHS Press Office, *Doctors and Hospitals' Use of Health IT More Than Doubles Since 2012*, HHS.GOV (May 22, 2013), http://www.hhs.gov/news/press/2013pres/05/20130522a.html 8

Igor Kossov, *HHS Calls for Integrated Health IT in 10 Years*, LAW360 (June 6, 2014), http://www.law360.com/health/articles/545736?nl_pk=c9cf4fd3-ae33-401c-b47f-967e5366ab45&utm_source=newsletter&utm_medium=email&utm_campaign=health **13**

Interbit Data Introduces MOXport for Exporting Data to Windows During Meditech 6.0 Upgrade, MARKET WIRED (Nov. 9, 2011), http://www.marketwired.com/press-release/interbit-data-introduces-moxport-exporting-data-windows-during-meditech-60-upgrade-1584576.html 7

IHI, VOCERA (Feb. 4, 2014), http://www.vocera.com/press-release/digital-patient-discharge-process-recognized-always-event-ihi. 12, 13

Improved Care Coordination, HEALTHIT.GOV, http://www.healthit.gov/providers-professionals/improved-care-coordination (last visited 5/22/14) 9

Incentive Program, CMS.GOV, http://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/index.html?redirect=/ehrincentiveprograms/ (last visited May 28, 2014).....9

Meaningful Use, DARK DAILY (April 10, 2013), http://www.darkdaily.com/big-ehr-companies-like-allscripts-cerner-and-epic-posting-major-gains-in-revenue-and-operating-profit-as-providers-address-stage-two-of-meaningful-use-409#axzz32xy2dv99. 9

Medicine, *Key Capabilities of an Electronic Health Record System* (2003), available at http://www.providersedge.com/ehdocs/ehr_articles/Key_Capabilities_of_an_EHR_System.pdf 8

Mobile Applications and Portals, EPIC, http*://www.epic.com/software-phr.php* 10

Nancy Stafford, *How EHR Systems Build and Strengthen Communication*, EHR INSTITUTE (Aug. 11, 2009), http://www.ehrinstitute.org/articles.lib/items/How-EHR-Systems-Buil; *Care Coordination is Key to Fixing Healthcare* 11

NCHS Data Brief No. 143 (Jan. 2014), *available at* http://www.cdc.gov/nchs/data/databriefs/db143.htm 8

PRACTICE FUSION, www.practicefusion.com (last visited May 28, 2014) 10

Rajiv Leventhal, Green Light on Clinician-to-Clinician Texting, HEALTHCARE INFORMATICS (March 1, 2014), http://mydigimag.rrd.com/article/Mobile+And+Messaging/1658991/0/article.html 12

Robert O'Harrow, Jr., *Health-care Sector Vulnerable to Hackers, researchers say,* WASHINGTON POST (Dec. 25, 2012), http://www.washingtonpost.com/investigations/health-care-sector-vulnerable-to-hackers-researchers-say/2012/12/25/72933598-3e50-11e2-ae43-cf491b837f7b_story.html. 16

Step 5: Achieve Meaningful Stage 2, HEALTHIT.GOV, http://www.healthit.gov/providers-professionals/achieve-meaningful-use/core-measures-2/use-secure-electronic-messaging (last visited May 28, 2014) 11

Steven Eastaugh, *The Total Cost of EHR Ownership*, HFMA.ORG, http://www.hfma.org/Content.aspx?id=15463 9

Thomas Bodenheimer, *Coordinating Care: A Perilous Journey Through the Health Care System*, UCSF SCHOOL OF MEDICINE (Aug. 2007), http://familymedicine.medschool.ucsf.edu/home.aspx 12

Vocera Communication System, VOCERA, http://www.vocera.com/vocera-communication-system (last visited May 28, 2014).....13

Wade Roush, *Doximity: A Mobile Facebook for Doctors, but With Real Privacy Protections*, XCONOMY, (June 21, 2011), http://www.xconomy.com/san-francisco/2011/06/21/doximity-a-mobile-facebook-for-octors-but-with-real-privacy-protections/.....12, 13

Zina Moukheiber, Epic Systems' Tough Billionaire, FORBES (Apr. 8, 2012), http://www.forbes.com/sites/zinamoukheiber/2012/04/18/epic-systems-tough-billionaire/ 10

In response to the Board's Notice and Invitation to File Briefs dated April 30, 2014, the American Hospital Association ("AHA") respectfully submits this brief as *amicus curiae* in support of Respondent.

STATEMENT OF INTEREST

The AHA is a national not-for-profit association that represents the interests of approximately 5,000 hospitals, health care systems, networks, and other health care providers, as well as 37,000 individual members. It is the largest organization representing the interests of the Nation's hospitals. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed.

Most of the hospitals that belong to the AHA are employers subject to the National Labor Relations Act (the "Act").[1] Many member hospitals interact frequently with organized labor, in circumstances that range from long-standing collective bargaining relationships to initial organizing campaigns. In addition, third-party work at hospital campuses (such as construction) sometimes attracts union secondary activity, which can include boycott appeals and derogatory statements about the care delivered in the targeted hospital.

The AHA and its members share the same general interest that all employers have in protecting their property rights, but hospitals also have a special concern with legal developments that may interfere with the delivery of patient care or may result in disruptions in the workplace. The mission of hospitals is to provide quality patient care at the highest level and in the most efficient manner. In addition, hospitals attempt to maintain a tranquil environment

[1] Approximately 22 percent of the AHA's member hospitals are government-owned and are therefore covered by separate labor relations laws.

that promotes healing by patients. Disruptions to that tranquility affect patients and may upset the patients' families and visitors. Thus, America's hospitals are especially interested in the Board's interpretations of the Act that may require hospitals to open up patient care-focused communication platforms to non-patient care uses that could result in increased disruptions in the workplace.

SUMMARY OF ARGUMENT

The AHA strongly supports the retention of the current *Register Guard,* 351 NLRB 1110 (2007), standards for accessing employer-provided email systems. *Register Guard* adequately protects employee Section 7 rights and is consistent with the Board's longstanding rules regarding employee use of employer property. Under *Register Guard*, an employer is permitted to limit employee use of employer-provided work email systems unless the employer engages in "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Id*. at 1119. Thus, an employer would not be prohibited "from drawing lines on a non-Section 7 basis" that regulate access by employees. *Id*. at 1118. Moreover, reversing *Register Guard*, particularly in the manner proposed by the General Counsel and the Charging Party, could cause a retrenchment in the use of employer-provided email systems and is wholly unnecessary in light of the growing prevalence of personal email accounts and personal computers and mobile devices. These arguments are explicated fully in the amici briefs of the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace. The AHA fully supports those amici briefs and, therefore, the AHA will not repeat those arguments here.

The AHA writes separately, in response to Question #5 in the Board's Notice and Invitation to File Briefs in this case, to underscore significant points of special concern for

America's hospitals.[2] In order to protect the purpose, privacy, and functionality of the rapidly growing and evolving body of electronic communication systems ("ECS") used in hospitals that promote patient care by fostering communications among caregivers, the NLRB should maintain the existing standards regarding access to email and other forms of ECS. ECS within hospitals include email, of course, but also encompass an astonishing array of platforms that are promoting efficient and necessary communication among caregivers in ways that advance the delivery of patient care. One critically important technological change within hospitals is the rapid and widespread adoption of Electronic Health Records ("EHR"). Housing the most sensitive of confidential information – a patient's statutorily protected medical records – EHR often include communication platforms enabling caregivers to communicate efficiently about patient care related issues.

The *Register Guard* standard allows these essential and confidential electronic communications among caregivers to continue to develop and to be appropriately protected from interference or disclosure. Any alternative standard, such as that proposed by the General Counsel and the Charging Party in this case, thwarts the development of these critically important advances to the delivery of patient care, places at risk the confidential medical information that is housed within hospital ECS, and threatens the protection of the tranquil healing environment necessary to patient care, as recognized repeatedly by the Board and the U.S. Supreme Court.

[2] Question No. 5 states, "Identify any other technological issues concerning email or other electronic communication systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since Register Guard was decided. How should these affect the Board's decision?"

ARGUMENT

I. SPECIAL CONSIDERATIONS APPLY TO ANY ORGANIZATIONAL ACTIVITY IN HOSPITALS

As a threshold matter when evaluating the appropriate rules of access to ECS within hospitals, the Board needs to remain mindful of the special considerations that apply in hospitals due to their unique work environment. The U.S. Supreme Court, other federal courts, and the Board itself have long recognized that hospitals have a compelling interest in providing patients, their families, and friends with an environment conducive to the highest quality of medical care. Because of hospitals' patient-care mission, the law is clear that organizational activity among employees themselves may be completely banned in areas of a hospital where patients are most likely to witness such activities, such as areas of immediate patient care. See, *e.g. USC University Hosp.*, 358 NLRB No. 132 (Sept. 17, 2012) ("A hospital's prohibition of the wearing of insignia . . . on working and even on nonworking time in immediate patient care areas is presumptively valid.") (quoting *Mesa Vista Hosp.*, 280 NLRB 298, 299 (1986)); *Saint John's Health Center*, 357 NLRB No. 170, slip op. at *1 (Dec. 30, 2011) ("In healthcare facilities, . . . restrictions on wearing insignia in immediate patient care areas are presumptively valid. . . ."). *Carney Hosp.*, 350 NLRB No. 56, slip op. at *18 (Aug. 13, 2007) ("A hospital may prohibit solicitation and distribution at any time in immediate patient care areas (such as patients' rooms, operating rooms, X-ray areas, therapy areas), even during nonworking time.").

More than twenty-five years ago, the Supreme Court recognized that "'the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function.'" *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 495 (1978) (quoting *St. John's Hosp. & School of Nursing, Inc.*, 222 NLRB 1150 (1976)). That is so because:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where

> patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activities, and where the patient and his family – irrespective of whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783 fn. 12 (1979) (quoting *Beth Israel*, 437 U.S. at 509 (Blackmun, J., concurring in judgment)).

In *Beth Israel*, the Court concluded that hospitals' focus on patient care justified the adoption of a unique set of rules to govern employee solicitation and distribution policies in healthcare settings. Under these rules, a hospital may ban all solicitation in "strictly patient care areas" (ibid.) – even employee-to-employee communications – because any solicitation or distribution in those areas is presumptively unsettling to patients. In all other areas the hospital must show that the solicitation or distribution is likely to disrupt patient care or disturb patients. *Beth Israel*, 437 U.S. at 495. In reversing the Board in the later *Baptist Hospital* case, the Supreme Court held that "immediate patient care areas" must be deemed to include not only patient rooms and treatment or procedure areas, but also corridors and sitting rooms on patient floors. 442 U.S. at 789-91.

The Court advised in *Beth Israel* – and repeated verbatim in *Baptist Hospital* – that still other restrictions on "organizational activities" also might be appropriate: "Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar." *Beth Israel*, 437 U.S. at 508, quoted in *Baptist Hosp.*, 442 U.S. at 790. To that end, the Court urged the Board to consider the needs of patients when assessing other restrictions on organizational activity. Ibid.

It is because of hospitals' patient-care mission that the NLRB's rules governing hospital solicitation and distribution policies are already different from those governing other employers. The Board has determined – with the Supreme Court's approval – that hospitals can forbid employees from soliciting or distributing to other employees in patient-care areas because of the likelihood that merely witnessing such activity "'might be unsettling to the patients.'" *Beth Israel*, 437 U.S. at 495 (quoting *St. John's Hosp.*, 222 NLRB at 1150).[3]

II. WITHIN HOSPITALS, EMAIL COMMUNICATIONS ARE OFTEN A CRITICAL COMPONENT OF THE EFFICIENT DELIVERY OF PATIENT CARE

Hospitals that provide email systems for use by their employees do not do so merely to relay general work-related communications among employees. With increasing frequency, email communication systems within hospitals often play a central role in fostering critical communications among caregivers that are necessary to the delivery of safe patient care. For example, Medical Information Technology, Inc. (Meditech) offers a health care technology suite that has been in use in many hospitals.[4] For several years, Meditech's suite provided an integrated messaging service, called "MOX Mail," through which caregivers could communicate securely and efficiently about patient care related matters. Meditech discontinued MOX Mail,

[3] No employer should be required to permit disparagement of its products and services on its own property – even if it has previously allowed communications related to the sale of Girl Scout cookies or permitted its email system to be used for fundraising to benefit the homeless or fight disease. A rule compelling a property owner to provide a forum for such speech raises serious constitutional concerns. See, *e.g.*, *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 566 (1995) (holding that requiring a private parade organizer to include a group with whose message the parade organizer disagreed violated the First and Fourteenth Amendments); *Carey v. Brown*, 447 U.S. 455, 459 (1980) (holding that a picketing law that selectively permitted labor picketing near a public school violated both the First and Fourteenth Amendments*); see also Ralph's Grocery Co. v. UFCW Local 8*, 186 Cal. App. 4th 1078, 1083-84 (2010) (granting review to and depublishing lower-court decision regarding First Amendment bar to statute limiting remedies against union trespassing). When faced with such substantial constitutional questions, the Board should adopt a construction of the Act that avoids them. See *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (Aug. 27, 2010) (reaffirming Board's adherence to canon of avoiding serious constitutional questions).

[4] See Erin McCann, *Vendor Market Sees an 'Epic' Takeover,* HEALTH CARE IT NEWS (Jan. 2014), http://www.healthcareitnews.com/news/vendor-market-sees-epic-takeover.

however, and Meditech users who upgrade to a newer version are transitioning to other email systems such as Outlook.[5] As a result, in Meditech's newest version of its health care suite, critical patient care related communications will likely be relayed through the hospital's email system.[6]

Modifying the Board's *Register Guard* test could require hospitals to open up their email systems to solicitations and other non-work related communications that could interfere with the critical patient care-focused communications that are at the core of hospitals' mission. For the reasons described more fully in briefs of the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace, such a modified standard threatens the efficient communications among caregivers that are vital to the delivery of safe patient care.

III. HOSPITALS ARE RAPIDLY INTRODUCING TECHNOLOGICAL ADVANCES IN PATIENT CARE THAT OFTEN INCLUDE ELECTRONIC COMMUNICATION SYSTEMS ENABLING ENHANCED COMMUNICATION AMONG CAREGIVERS

In their ongoing quest to improve the quality of patient care, hospitals are introducing an astonishing array of technology that is transforming the delivery of patient care. Many of these systems include communication features enabling caregivers to communicate securely and efficiently about patient care issues. Through the Health Information Technology for Economic and Clinical Health (HITECH) Act, Pub. L. No. 111–5 (2009), the Obama Administration is promoting the development and implementation of these communication technologies.[7]

---

[5] See Interbit Data Introduces MOXport for Exporting Data to Windows During Meditech 6.0 Upgrade,MARKET WIRED (Nov. 9, 2011), http://www.marketwired.com/press-release/interbit-data-introduces-moxport-exporting-data-windows-during-meditech-60-upgrade-1584576.html.

[6] *Id.* See also Forward Advantage Customer Survey, FORWARD ADVANTAGE, http://www.forwardadvantage.com/pdf/customer-story/2011FOX08CS18B-benefis-health-system-customer-story.pdf.

[7] See HHS Press Office, HHS Announces Next Steps to Promote Use of Electronic Health Records and Healh Information Exchange, HHS.GOV (Aug. 23, 2012), http://www.hhs.gov/news/press/2012pres/08/20120823b.html.

A. ECS Are Critical to the Ongoing Development of Safe and Effective Patient Care.

Within hospitals, electronic communication systems (or ECS) often go far beyond generalized email systems and include systems, such as electronic health records (or EHR), that are now at the core of the care delivery system. For purposes of this brief, ECS refer to any electronic system which allows direct communication between individuals, including through text messaging. EHR systems, on the other hand, are software platforms that store patient medical records. Like ECS, EHR systems vary greatly. Some merely store medical records, while others provide entire software suites that include a myriad of health care services, such as, among other things, direct electronic communication among caregivers, other hospital personnel, and patients.[8] Because increasing lines of communication among health care providers is important to providing the highest quality care, a growing market exists in the number and type of ECS within hospitals, both as part of EHR platforms and as standalone systems.

The use of EHR systems is rapidly growing among hospitals and other health care providers. In 2008, only 9% of hospitals had adopted EHR systems, but that number is now above 80%.[9] Another study found that in 2001 only 18% of office-based physicians used some form of EHR system, whereas in 2013 that number had climbed to 78%.[10] This growth is based

---

[8] See Committee on Data Standards for Patient Safety, Institute of Medicine, *Key Capabilities of an Electronic Health Record System* (2003), available at http://www.providersedge.com/ehdocs/ehr_articles/Key_Capabilities_of_an_EHR_System.pdf. See generally, *Introduction to Electronic Health Records (EHRs),* AMERICAN ACADEMY OF FAMILY PHYSICIANS, http://www.aafp.org/practice-management/health-it/product/intro.html (last visited May 28, 2014).

[9] See HHS Press Office, Doctors and Hospitals' Use of Health IT More Than Doubles Since 2012, HHS.GOV (May 22, 2013), http://www.hhs.gov/news/press/2013pres/05/20130522a.html.; see also Catherine M. DesRoches et al., Adoption Of Electronic Health Records Grows Rapidly, But Fewer Than Half Of US Hospitals Had At Least A Basic System In 2012, HEALTH AFFAIRS (August 2013), 32:1478-1485; published ahead of print July 9, 2013, doi:10.1377/hlthaff.2013.0308.

[10] Chun-Ju Hsiao and Esther Hing, *Use and Characteristics of Electronic Health Record Systems Among Office-based Physician Practices: United States, 2001-2013*, NCHS Data Brief No. 143 (Jan. 2014), *available at* http://www.cdc.gov/nchs/data/databriefs/db143.htm.

in no small part on federal and state government incentive programs, which are financially encouraging health care providers to adopt and use certified EHR systems.[11] The adoption of EHR and other forms of ECS, while undeniably improving the delivery of patient care, has come at a staggering cost to hospitals. According to a recent set of financial analyses, information technology now accounts for one-fourth to over one-third of capital investments.[12] Hospitals are spending billions of dollars implementing and maintaining EHR systems.[13] Some large health care organizations spend over a billion dollars on a comprehensive EHR.[14] Although all EHR systems do not necessarily have the ability for medical employees to communicate electronically with one another, one of the primary benefits of an EHR system is care coordination among health care professionals and patients.[15] Care coordination, among other things, includes quickly and easily exchanging information among health care providers.[16] Therefore, many EHR systems include communication and information sharing capabilities.

---

[11] See *The Official Website for The Medicare and Medicaid Electronic Health Records (EHR) Incentive Program*, CMS.GOV, http://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/index.html?redirect=/ehrincentiveprograms/ (last visited May 28, 2014); see also, *Big EHR Companies Like Allscripts, Cerner, and Epic Posting Major Gains in Revenue and Operating Profits as Providers Address Stage Two of Meaningful Use*, DARK DAILY (April 10, 2013), http://www.darkdaily.com/big-ehr-companies-like-allscripts-cerner-and-epic-posting-major-gains-in-revenue-and-operating-profit-as-providers-address-stage-two-of-meaningful-use-409#axzz32xy2dv99.

[12] See Bob Herman, EHRs and Health IT Projects: Are They Battering Hospitals' Financial Profiles?, BECKER'S HOSPITAL CFO (Jan. 6, 2014) *available at* http://www.beckershospitalreview.com/finance/ehrs-and-health-it-projects-are-they-battering-hospitals-financial-profiles.html

[13] See Steven Eastaugh, The Total Cost of EHR Ownership, HFMA.ORG, http://www.hfma.org/Content.aspx?id=15463.

[14] See Devin Leonard & John Tozzi, Why Don't More Hospitals Use Electronic Health Records?, BLOOMBERGBUSINESSWEEK (June 21, 2012), http://www.businessweek.com/articles/2012-06-21/why-dont-more-hospitals-use-electronic-health-records

[15] See *Improved Care Coordination*, HEALTHIT.GOV, http://www.healthit.gov/providers-professionals/improved-care-coordination (last visited 5/22/14).

[16] See, *How Can Health IT Help To Coordinate Care and Services?* US DEPARTMENT OF HEALTH AND HUMAN SERVICES, http://www.hrsa.gov/healthit/toolbox/HIVAIDSCaretoolbox/ImprovingQuality/howcanhithelp.html (last visited May 28, 2014).

Two examples help demonstrate the robust development of EHR systems that incorporate communication features in order to advance patient care. For example, Epic is an EHR Software developer with an array of health care software applications. Epic is one of the largest EHR system providers in the U.S., with a projected 40% of the U.S. population's medical information stored in an Epic electronic health record.[17] Epic's EHR Software, which is available on mobile devices, allows for messaging capabilities among caregivers.[18] As another example, Practice Fusion is an EHR software developer that uses cloud-based technology to store health records remotely and allows users to access it through the internet. Practice Fusion's EHR connects over 100,000 medical professionals and over 80,000,000 patients.[19] The platform allows health professionals to communicate among themselves regarding patient care, send referrals, and share electronic health records.[20]

A critically important aspect of these communication systems, either as part of an EHR or as a standalone system, is to protect the extremely confidential information that is the intended subject of the technology, *i.e.*, a patient's medical condition and records. The Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d *et seq.*, directed the implementation of the HIPAA Privacy Rule. Under the Privacy Rule, hospitals are required to adopt and implement policies and procedures to protect patient protected health information from any intentional or unintentional use or disclosure. 45 CFR § 164.530(i)(1). Specifically, hospitals must implement "appropriate administrative, technical, and physical safeguards to

---

[17] See Zina Moukheiber, *Epic Systems' Tough Billionaire*, FORBES (Apr. 8, 2012), http://www.forbes.com/sites/zinamoukheiber/2012/04/18/epic-systems-tough-billionaire/.

[18] See *Mobile Applications and Portals*, EPIC, http*://www.epic.com/software-phr.php* (last visited May 28, 2014).

[19] PRACTICE FUSION, www.practicefusion.com (last visited May 28, 2014).

[20] Ibid. See also *Clinical Messaging*, PRACTICE FUSION, https://learn.practicefusion.com/clinical-messaging/.

protect the privacy of protected health information." 45 CFR § 164.530(c)(1). With respect to electronic health records, the HIPAA Security regulations require covered hospitals to "implement policies and procedures to safeguard the facility and the equipment therein from unauthorized physical access, tampering, and theft." 45 CFR § 164.310(a)(2)(ii). Similar laws exist under many state laws. *E.g.*, Cal. Civ. Code § 56.101 (requiring EHR systems in California to: "[p]rotect and preserve the integrity of electronic medical information"; and to "[a]utomatically record and preserve any change or deletion of any electronically stored medical information. The record of any change or deletion shall include the identity of the person who accessed and changed the medical information, the date and time the medical information was accessed, and the change that was made to the medical information."); Va. Code § 32.1-127.1:03 (establishing presumption in Virginia that health records, including EHR, "shall not be removed from the premises where they are maintained without the approval of the health care entity that maintains such health records"); see also Fla. Stat. § 408.062(5) (requiring Florida's Agency for Health Care Administration to "develop and implement a strategy for the adoption and use of electronic health records").

Given the extremely confidential nature of the underlying information, secure messaging functionality is a key goal of hospitals in implementing ECS and is one of the core components of the Medicaid and Medicare EHR Incentives Program.[21] The ability of doctors and other health care professionals to communicate with each other regarding patient care is of critical importance to the health care community.[22] Particularly with the growth of specialization within

[21] See *Step 5: Achieve Meaningful Stage 2*, HEALTHIT.GOV, http://www.healthit.gov/providers-professionals/achieve-meaningful-use/core-measures-2/use-secure-electronic-messaging (last visited May 28, 2014).

[22] See, *e.g.*, Nancy Stafford, *How EHR Systems Build and Strengthen Communication,* EHR INSTITUTE (Aug. 11, 2009), http://www.ehrinstitute.org/articles.lib/items/How-EHR-Systems-Buil; *Care Coordination is Key to Fixing Healthcare*, KEVIN MD.COM (March 17, 2012), http://www.kevinmd.com/blog/2012/03/care-coordination-key-fixing-health-care.html.

health care, care coordination among multiple health care providers has become increasingly important.[23] And as the amount of necessary communication among practitioners increases,[24] so does the need for electronic communication systems.

The push for greater communication between health professionals as well as the requirement that messages be secured with encryption and other safeguards, 45 CFR § 164 (2007), has created a market for novel communication methods that are HIPAA compliant. Many companies have created technology solutions that allow health care providers to communicate with each other about patients, and share electronic health information securely, such as secure text messaging software,[25] and social media style systems which connect doctors across the country.[26] Secure text messaging is quickly being adopted by hospitals, as a survey from 2012 found that the consensus among IT-decision makers in hospitals was that secure text messaging systems would replace paging in the next three years.[27]

Even beyond EHR, other forms of ECS are transforming the delivery of health care within hospitals. For example, Vocera offers a software application that allows hospital staff and other providers to send secure messages through smart phones.[28] Vocera also developed a

---

[23] See Thomas Bodenheimer, *Coordinating Care: A Perilous Journey Through the Health Care System*, UCSF SCHOOL OF MEDICINE (Aug. 2007), http://familymedicine.medschool.ucsf.edu/home.aspx.

[24] One study found that nearly 90% of all information transactions that occurred in two emergency rooms were between staff. *See* Enrico Coiera, *Communication Systems in Healthcare*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (May 2006), www.ncbi.nlm.nih.gov/pmc/articles/pmc1579411.

[25] There are several secure messaging technologies such as Vocera, (www.vocera.com), Tigertext, (www.tigertext.com), and Amcom (www.amcomsoftware.com) to name a few.

[26] See Wade Roush, *Doximity: A Mobile Facebook for Doctors, but With Real Privacy Protections*, XCONOMY, (June 21, 2011), http://www.xconomy.com/san-francisco/2011/06/21/doximity-a-mobile-facebook-for-octors-but-with-real-privacy-protections/.

[27] See Rajiv Leventhal, *Green Light on Clinician-to-Clinician Texting,* HEALTHCARE INFORMATICS (March 1, 2014), http://mydigimag.rrd.com/article/Mobile+And+Messaging/1658991/0/article.html.

[28] See *Digital Patient Discharge Process Recognized as 'Always Event' by IHI*, VOCERA, (Feb. 4, 2014), http://www.vocera.com/press-release/digital-patient-discharge-process-recognized-always-event-ihi.

physical device -- called the "badge" -- that allows for hands-free secure communication through a voice transmitter which can be worn around the user's neck.[29] Currently, Vocera communication systems are installed in more than 1,000 organizations worldwide.[30]

As another example, Doximity is a company that provides a social-network-style platform for doctors, who can connect with other doctors and health care providers securely. Founded in 2011, Doximity seeks to overcome the difficulties surrounding communication among practitioners in different hospitals.[31] Doximity's platform is available on mobile devices and enables health care providers to communicate through its HIPAA-compliant mobile messaging system. *See ibid.*

As with the growth of technology in other fields, it is virtually impossible to predict in the coming years precisely how technology will affect patient care, including the use of ECS within hospitals. It is all but certain, however, that technology will continue to transform and improve the delivery of patient care, both within hospitals and in non-acute care settings. HHS has announced, for example, a ten year plan for implementing complete interoperability of EHR platforms across all providers, allowing for "secure sharing and aggregation of data" among all practitioners and patients.[32]

---

[29] See *Vocera Communication System,* VOCERA*,* http://www.vocera.com/vocera-communication-system (last visited May 28, 2014).

[30] See *Digital Patient Discharge Process Recognized as 'Always Event' by IHI*, VOCERA, (Feb. 4, 2014), http://www.vocera.com/press-release/digital-patient-discharge-process-recognized-always-event-ihi.

[31] See Wade Roush, *Doximity: A Mobile Facebook for Doctors, but With Real Privacy Protections*, XCONOMY, (June 21, 2011), http://www.xconomy.com/san-francisco/2011/06/21/doximity-a-mobile-facebook-for-octors-but-with-real-privacy-protections/.

[32] See Igor Kossov, HHS Calls for Integrated Health IT in 10 Years, LAW360 (June 6, 2014), http://www.law360.com/health/articles/545736?nl_pk=c9cf4fd3-ae33-401c-b47f-967e5366ab45&utm_source=newsletter&utm_medium=email&utm_campaign=health.

IV. THE BOARD SHOULD NOT ADOPT A STANDARD THAT WOULD REQUIRE HOSPITALS TO PROVIDE ACCESS TO EMAIL AND OTHER FORMS OF ECS AND THAT WOULD RISK INTERFERING WITH THEIR CORE PATIENT CARE PURPOSE

The General Counsel and Charging Party advocate for a revised standard that would allow employees to use their employer's ECS, including email, subject only to the need to maintain production and discipline. If the Board were to adopt this standard, including for hospitals, employees within hospitals presumably would be granted access to hospital-provided ECS, potentially including the caregiver communication features of EHR, subject to only narrow limitations. With any such ruling, the Board effectively would be interfering with the fundamental purpose of hospitals' ECS, *i.e.,* the delivery of safe patient care. Moreover, such a modified rule would place at risk the statutorily protect confidential information accessible through hospital ECS. Finally, expanded use of hospital ECS for non-patient care purposes risks interfering with the functionality of ECS through unintended traffic and potentially even abuse.

A. The General Counsel's Proposed Rule Risks Interference with a Fundamental Purpose of Hospital ECS.

The purpose of hospital-provided ECS, especially EHR, is to promote the safe and efficient delivery of patient care. Maintaining this primary objective is vital to the effective use of these tools, which were not designed nor intended to be used as general purpose communication vehicles. Adoption of a rule that employees would have a right to use a patient care-focused ECS in order to communicate about non-patient care matters, such as solicitations for union organizing, would interfere with the fundamental mission of any hospital. ECS designed and implemented for the purposes of improving the delivery of patient care should not be allowed to be hijacked for other purposes.

Moreover, many types of ECS within hospitals are used throughout immediate patient care areas. Portable computers, handheld devices, and voice transmitting "badges" are becoming

an increasingly common tool used during the treatment of patients. Expanding the right of employees to use hospital ECS in immediate patient care areas, particularly in the manner proposed by the General Counsel and the Charging Party, would contradict the rights of hospital employers to exclude organizing activities in immediate patient care areas. *Beth Israel*, 437 U.S. at 495 (quoting *St. John's Hosp.*, 222 NLRB at 1150) (hospitals can forbid employees from soliciting or distributing to other employees in patient-care areas because of the likelihood that merely witnessing such activity "'might be unsettling to the patients.'").

B. The General Counsel's Proposed Modified Standard Places At Risk Statutorily Protected Confidential Patient Care Information

Expanded access to and use of ECS that are directed toward patient care by employees who are not communicating about patient care matters could violate patients' legitimate privacy expectations and federal and state statutes protecting the privacy of patient care information.

HIPAA directed the implementation of the HIPAA Privacy Rule. Under the Privacy Rule, hospitals are required to adopt and implement policies and procedures to protect patient protected health information from any intentional or unintentional use or disclosure. 45 CFR § 164.530(i)(1). Specifically, hospitals must implement "appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information." 45 CFR § 164.530(c)(1).

Under HIPAA and state medical confidentiality laws, the information contained within EHR and other patient care-focused ECS is placed at risk by expanded access rules. While electronic communications systems benefit care coordination among practitioners, sharing patient health information and communicating electronically regarding patient care pose significant privacy concerns. The Secretary of Health and Human Services' privacy rules under HIPAA require that messages concerning patient health information be secure and confidential.

45 CFR § 160, 164 (2007). Protecting the security of the patient care information housed within the ECS is critical to the safe and effective delivery of patient care. *E.g.*, Cal. Civ. Code § 56.101; Va. Code § 32.1-127.1:03. The issue is not resolved by limiting access to employees only. Patient confidentiality can be violated by other hospital employees accessing, even briefly, the records of patients for whom the employee is not providing care directly. 45 CFR §§ 164.502(b), 164.514(d) (requiring hospitals to keep disclosures and uses of protected health information to the "minimum necessary" to carry out a lawful purpose). Indeed, HIPAA requires a secure platform to protect patient records. Maintaining an EHR system that contains communication features that could be used by non-caregivers to communicate about matters unrelated to that patient could itself constitute a HIPAA violation. See 45 CFR § 164.310(a)(2)(ii) (HIPAA Security rules require covered hospitals to "implement policies and procedures to safeguard the facility and the equipment therein from unauthorized physical access, tampering, and theft.").

C. Expanded Use of ECS Could Impair Functionality of the System or Even Lead to Abuse

Hospital ECS that enable communications to further the delivery of patient care was not created for general purpose communications. Expanding the right to access these communication systems (as proposed by the General Counsel and Charging Party), either by expanding the number of employees allowed to use the ECS or the types of communications for which caregivers may use the ECS, risks impairing the functionality of the system. Like any other software, EHR systems are subject to crashes, overloads, and cyber attacks.[33] And when an EHR system goes down, patients' health is potentially placed at risk as all medical

[33] See Robert O'Harrow, Jr., Health-care Sector Vulnerable to Hackers, researchers say, WASHINGTON POST (Dec. 25, 2012), http://www.washingtonpost.com/investigations/health-care-sector-vulnerable-to-hackers-researchers-say/2012/12/25/72933598-3e50-11e2-ae43-cf491b837f7b_story.html.

information, including medication doses and allergies, may not be available, at least temporarily, to practitioners. Authorizing employee access to a hospital ECS for purposes other than that for which it was intended increases the risk of abuse of the system, such as by deliberately overloading the system during the heat of an organizing campaign or by inappropriate access or distribution of confidential patient medical records.

The *Register Guard* standard provides the surest means of protecting the integrity of hospital ECS and furthering the efficient delivery of safe patient care. The Board should not adopt any rule that would limit the ability of employers to maintain as intended the tools that are designed to advance the delivery of patient care.

V. IN NO EVENT SHOULD THE BOARD UNDERMINE ITS EXISTING PRECEDENT PERMITTING CERTAIN TYPES OF MISSION-RELATED SOLICITATION AND DISTRIBUTION ACTIVITIES WITHIN HOSPITALS

As argued above, the Board should adopt a conceptual framework for property-access "discrimination" claims that permits genuine "apples-to-apples" comparisons of the solicitation and distribution activities permitted by employers and the activities in which trespassing nonemployees seek to engage. In the view of the AHA, the *Register Guard* test provides such a framework.

But even if the Board declines to adopt *Register Guard* as the deciding test in the instant case, we urge the Board not to overrule (through inadvertence or otherwise) its many prior decisions recognizing special considerations for solicitation and distribution in hospitals. As discussed above, the Supreme Court's *Beth Israel* and *Baptist Hospital* cases laid out significantly different rules for solicitation and distribution in hospitals than are permitted in virtually any other workplace.

In addition, and long before the adoption of *Register Guard*, the Board recognized that various types of health-related solicitations and distributions do not require hospitals to provide a

forum for nonemployee union solicitation and distribution. In those cases, the Board found that health-related solicitations and distributions comprised an "integral part" of a hospital's necessary functions. See *Lucile Packard Children's Hosp.*, 318 NLRB 433, 433 (1995) (medical textbook sales), enfd., 97 F.3d 583, 587–588 (D.C. Cir. 1996); *Cent. Solano County Hosp. Fdn., Inc.*, 255 NLRB 468 (1981) (solicitations by hospital guilds and philanthropies to solicit for the hospital's benefit); *Rochester Gen. Hosp.*, 234 NLRB 253, 259 (1978) ("Red Cross postering and blood collection in the hospital for the blood bank, postering of sales by a volunteer group which donates all the proceeds to the hospital, displaying of pharmaceutical products that doctors might prescribe and the hospital pharmacy might therefore purchase, and displaying of medical books of interest to the doctors"); *George Washington Univ. Hosp.*, 227 NLRB 1362, 1374 fn. 39 (1977) ("white elephant" and Women's Board sales for the benefit of the hospital).

These cases demonstrate that the Board has previously shown special sensitivity to the unique mission and setting of a hospital. We urge the Board to ensure that any test that it adopts in the instant case will not undermine this precedent.

CONCLUSION

For the reasons stated above, as well as those stated in the amici briefs of the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace, the AHA respectfully requests that the Board reaffirm the *Register Guard* standard in this case.

Dated: June 16, 2014

Respectfully submitted,

F. Curt Kirschner, Jr. (counsel of record)
Jonathan Sack
JONES DAY

Lawrence Hughes
AMERICAN HOSPITAL ASSOCIATION

Counsel for *Amicus Curiae*
American Hospital Association

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June 2014, a copy of the Brief of *Amicus Curiae* American Hospital Association was filed electronically.

True and correct copies of the brief were served by overnight Federal Express delivery, addressed as follows:

David Rosenfeld WEINBERG ROGER & ROSENFELD 1001 Marina Village Parkway Suite 200 Alameda, California 94501-6430 510.337.1001	Lisl Duncan WEINBERG ROGER & ROSENFELD 800 Wilshire Boulevard Suite 1320 Los Angeles, California 90017-2623 213.380.2344
Mary O'Melveny Communications Workers of America, AFL-CIO 501 Third Street NW Washington, DC 20001-2797 202.434.1234	Robert Kane STUART KANE 620 Newport Center Drive, Suite 200 Newport Beach, California 92660 949.791.5127
Communication Workers of America, AFL-CIO District 9 12215 Telegraph Road, Suite 210 Santa Fe Springs, California 90670-3344 562.944.1300	Purple Communications 595 Menlo Drive Rocklin, California 95765-3708 916.435.8216
Communication Workers of America, AFL-CIO District 9 2804 Gateway Oaks Drive Suite 150 Sacramento, California 95833-4349 916.921.4500	

Marco Place