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Brief to the National Labor Relations Board by Amicus Curiae Professor Jeffrey M. Hirsch

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES HOTEL AND CASINO	)	
and	)	Case 28-CA-060841
INTERNATIONAL UNION OF PAINTERS TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO	)	

BRIEF TO THE NATIONAL LABOR RELATIONS BOARD BY AMICUS CURIAE PROFESSOR JEFFREY M. HIRSCH

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STATEMENT OF INTEREST

My interest in the issues presented in this case stems from my career in labor law, as well as my research that specifically addresses the National Labor Relations Board's (NLRB or Board) regulation of electronic communications. Following four years as an attorney in the NLRB's Appellate Court Branch, I have taught and researched labor and employment law for over fourteen years.

My research includes several pieces related to the questions at issue in this case. I have explored the important role that communications play in ensuring employees' ability to exercise their statutory right to engage in collective action, as well as the potential conflicts between employees' communications and employers' property interests. *See Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091 (2011); *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891 (2006). More specifically, I have written extensively on the NLRB's regulation of electronic communications. *See Worker Collective Action in the Digital Age*, 117 W. VA. L. REV. 921 (2015); *E-Mail and the Rip Van Winkle of Agencies: The NLRB's* Register Guard *Decision*, *in* WORKPLACE PRIVACY: HERE AND ABROAD—PROCEEDINGS OF THE NEW YORK UNIVERSITY 61ST ANNUAL CONFERENCE ON LABOR (Jonathan Nash ed., 2010); *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262 (2008). I also submitted an amicus brief in *Purple Communications, Inc.*, 361 N.L.R.B. 1050 (2014). Much of this brief is derived from the foregoing work.

SUMMARY OF ARGUMENT

Like other government agencies, the National Labor Relations Board is frequently called upon to interpret its governing statute. Especially with a statute as vague as the National Labor Relations Act (NLRA or Act), there is a great deal of leeway to make such interpretations and their accompanying policy judgments. As a result, in the vast majority of NLRB cases, there can be reasonable disagreements about the outcome. This is not one of those cases.

Unlike the usual NLRB policy reversals that occur following a change in the presidential administration, the issue in this case is cabined by clear precedent from the Supreme Court and basic property law. Consequently, although Board Members may have sincere disagreements about what the best outcome should be, the governing law points in only one direction.

In *Purple Communications, Inc.*, 361 NL.R.B. 1050 (2014), the NLRB set forth a new analysis covering employees' use of employer-provided email. Under this analysis, which is based on the Supreme Court's seminal decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Board presumes that employees who have access to their employer's email as part of their work duties can use that email for Section 7 purposes during nonwork time. *Purple Communications*, 361 N.L.R.B. at 1063. The employer can rebut this presumption by showing that special business circumstances justify additional restrictions on employees' email use. *Id.* In contrast to the Board's prior rule, the *Purple Communications* presumption is fully consistent with the NLRA and Supreme Court precedent.

The *Purple Communications* analysis replaced the Board's previous approach to email communications, as set forth in *Guard Publishing Co. (Register Guard)*, 351 N.L.R.B. 1110 (2007), *enforced in part, enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009). This reversal was appropriate and necessary because *Register Guard* was indefensible under current law. By providing employers almost unfettered authority to prohibits employees' use of email for Section

7 purposes, *Register Guard* directly conflicted with *Republic Aviation* and the Court's subsequent decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In its attempt to avoid these holdings, the *Register Guard* majority attempted to differentiate real and personal property, but did so in a manner that defied well-established tenets of property law.

No matter what various parties want the outcome in this case to be, the simple fact remains that the *Purple Communications* analysis is consistent with governing law, while the *Register Guard* is not. In *Republic Aviation*, the Court long ago recognized that employers' real property interests are not absolute and cannot eliminate *employees'* Section 7 right to communicate about matters of mutual aid and protection at the workplace—which stands in contrast to the opposite approach that *Lechmere* requires for *nonemployee* communications. *Republic Aviation* permits employers to implement email usage rules that serve legitimate business purposes, but employers cannot preclude all Section 7 emails. This is true even if employees have other means to communicate. *Republic Aviation* and other precedent establish that employees have a right to engage in any form of Section 7 communications during nonwork time or in nonwork areas, as long as no legitimate business rule is violated. Email is no different. It is merely a modern form of the proverbial water cooler, and the NLRB should treat it as such.

In short, the NLRB should reaffirm its *Purple Communications* approach. It should also extend that analysis to other forms of electronic communications. Texts and other non-email forms of electronic communications have become popular in the workplace and should be treated on the same footing. And that footing should be equivalent to other Section 7 communications that fall under the *Republic Aviation* framework. Indeed, if there are any differences in the Board's governance of the various types of communications, it should provide employees *greater* rights to use electronic communications, which are entitled to less protection under property law and are almost always less intrusive than more traditional means of communication.

ARGUMENT

I. THE *PURPLE COMMUNICATIONS* FRAMEWORK IS CONSISTENT WITH SUPREME COURT PRECEDENT—*REGISTER GUARD* IS NOT

Although email is a more recent method of communication, it is still just that: a method of communication. As a result, this case, as well as *Purple Communications* and *Register Guard*, are covered by well-established Supreme Court precedent. That precedent makes clear that the central question is not the type of communication, but whether the communication is made by an *employee* or a *nonemployee*. Because this case involves an employee communication, a *Republic Aviation* analysis of the sort used in *Purple Communications* is required. *See generally* Hirsch, *Worker Collective Action in the Digital Age*, *supra*, at 926-934 (discussing importance of electronic communications to employees' exercise of their Section 7 rights); Hirsch, *Communication Breakdown*, *supra*, at 1101-11, 1119-24 (same).

A. The Supreme Court's *Republic Aviation* Holding Requires Employers to Permit Employees to Engage in Protected Communications in the Workplace

The Supreme Court's seminal *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) decision directly controls this case. Both this case and *Republic Aviation* involve employee attempts to engage in communications that are protected under Section 7 of the NLRA, 29 U.S.C. § 157. Both this case and *Republic Aviation* involve employer arguments that their property interests should trump employees' NLRA right to communicate. Both this case and *Republic Aviation* should have the same result: employer property interests cannot blindly prevent employees' Section 7 communications.

In *Republic Aviation*, the Court unambiguously held that employers' right to control use of their real property is not absolute. *Id.* at 797-98, 802 n.8. Rather, employers' property interests must be balanced with employees' right to communicate under the NLRA. *Id.* at 803 n.10; *see*

also Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491 (1978); *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974) ("The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. . . . [B]anning [employee solicitations at work] . . . might seriously dilute [Section] 7 rights."). According to the Court, this balance involves a shifting presumption test that protects employees' right to communicate with each other during appropriate times and in appropriate places, while allowing employers to set limits when necessary to fulfill legitimate business needs. *Id.* at 803 n.10.

Contrary to the *Register Guard* majority's statement that "employees had no statutory right to use the [employer's] e-mail system for Section 7 matters," 351 N.L.R.B. at 1114, the Court in *Republic Aviation* was explicit in recognizing employees' right to discuss unionization and other Section 7 matters while using their employer's property. 324 U.S. at 801, 803. The Court acknowledged that employers have relevant property interests, but stressed that such interests must often give way to employees' Section 7 rights. *Id.* at 797-98, 802 n.8

Matters are very different, however, when *nonemployee* communications are at play. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Court held that in contrast to employees' direct Section 7 right to communicate, nonemployees have only an indirect right. *Id.* at 531-32. Thus, employers' property interests hold much greater sway. As a result, employers can prohibit nonemployees from accessing the worksite to communicate with employees unless there are "unique obstacles" to accessing employees or the exclusion is discriminatory. *Id.* at 535, 538, 540-41. According to the Court, the key holding in *Lechmere* was the "distinction 'of substance,' between the union activities of employees and nonemployees." *Id.* at 537 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)). This holding demonstrates the error in *Register*

Guard's conclusion that employees have no Section 7 right at all to communicate by email if they have any other means of communications.[1] That statement is true of *nonemployees*, but unless the Supreme Court reverses *Lechmere* and *Republic Aviation*, the same is not true of *employees*.

The combination of *Lechmere* and *Republic Aviation* establish a long-standing and clear demarcation: the *Republic Aviation* analysis applies to *employee* communications and *Lechmere* applies to *nonemployee* communications. In other words, employers' property interests must typically yield to *employees'* right to communicate, but when *nonemployees* try to communicate on employer property, then Section 7 generally must give way. *See Babcock & Wilcox Co.*, 351 U.S. at 113; *Metro. Dist. Council v. NLRB*, 68 F.3d 61, 75 (3d Cir. 1995); *Leslie Homes, Inc.*, 316

[1] Note that both the majority in *Register Guard* and the General Counsel in his brief in this case misleadingly quote *Republic Aviation* to support the claim that the Supreme Court limited employees' right to use employer's property only to the extent that employees' ability to communicate would otherwise be "entirely deprived." *Register Guard*, 351 N.L.R.B. at 1115 (quoting *Republic Aviation*, 324 U.S. at 801 n.6); Brief for the General Counsel at 6, 11-13, *Rio All-Suites Hotel Casino*, Case 28-CA-060841 (2018). The Court in *Republic Aviation* said nothing of the kind. Instead, the "entirely deprived" language in *Republic Aviation* was a quotation from part of one of the cases under review in which the NLRB described the facts that led it to strike down the no-solicitation rule in that case:

> Thus, under the conditions obtaining in January 1943, the respondent's employees, working long hours in a plant engaged entirely in war production and expanding with extreme rapidity, were entirely deprived of their normal right to "full freedom of association" in the plant on their own time, the very time and place uniquely appropriate and almost solely available to them therefor. The respondent's rule is therefore in clear derogation of the rights of its employees guaranteed by the Act.

Republic Aviation, 324 U.S. at 801 n.6 (quoting *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 1195 (1943). That the Court's holding in *Republic Aviation* was not limited to otherwise "entirely deprived" communications is made clear in the same paragraph, when the Court upheld the NLRB's *Peyton Packing* presumption:

> . . . It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

Id. at 803 n.10 (*quoting Peyton Packing Co., Inc.*, 49 N.L.R.B. 828, 843 (1943)); *see also id.* at 802 n.8 (upholding and quoting same rule in *Letourneau Co. of Georgia*, 54 N.L.R.B. 1253, 1259, 1260 (1944): "[T]he Board has held that, while it was 'within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours,' it was 'not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property,' the latter restriction being deemed an unreasonable impediment to the exercise of the right to self-organization.'"); *Purple Communications*, 361 N.L.R.B. at 1062 (rejecting "entirely deprived" argument).

N.L.R.B. 123, 125, 129 (1995); *see also UFCW v. NLRB* (*Oakland Mall II* & *Loehmann's Plaza II*), 74 F.3d 292, 298-99 (D.C. Cir. 1996). The error of *Register Guard*—or any framework that retains its basic presumption in favor of employer property interests, including those mentioned in the invitation for briefs in this case—is that it directly conflicts with these well-established Supreme Court precedents. And neither the distinction between real and personal property, nor a weak First Amendment argument, undermines that fact.

B. The Personal Property at Issue in Email Cases Strengthens Employees' *Republic Aviation* Right to Communicate

In *Republic Aviation*, the Court was clear in holding that an employer does not have an unfettered right to restrict use of its real property by employees communicating about Section 7 issues. 324 U.S. at 802 (holding that "[i]nconvenience or even some dislocation of property rights[] may be necessary in order to safeguard the right to collective bargaining") (internal quotation marks omitted). Because of this precedent, *Register Guard* was by necessity centered on the claim that a different rule should apply to personal property, in particular that employers can restrict access to electronic and other personal property for any reason at all, except for discrimination along Section 7 lines. *See Register Guard*, 351 N.L.R.B. at 1114 (stating that "there is no statutory right . . . to use an employer's equipment or media as long as the restrictions are nondiscriminatory") (internal quotation marks omitted). But this claim violates a basic tenet of property law.

Electronic communication systems, like other personal property, are considered "chattel." Under property law, an owner's interest in chattel is inferior to an interest in real property. This difference is illustrated by the types of proof required in trespass actions. Although a trespass claim involving real property assumes harm in all instances of trespass, a trespass of chattel claim requires proof that the trespass caused harm. *See Intel Corp. v. Hamidi*, 71 P.3d 296, 302-03 (Cal.

2003) (citing RESTATEMENT (SECOND) OF TORTS § 218, which subjects a trespasser of chattel to liability "only if" the chattel is dispossessed, harmed, or deprived of use for a substantial period of time); PROSSER & KEETON, TORTS 87, 90 (5th ed. 1984)). Moreover, an individual's unauthorized use of another's chattel—such as an employee's improper use of an employer's email system—does not result in liability unless the use was "for a time so substantial that it is possible to estimate the loss caused thereby. A mere momentary or theoretical deprivation of use is not sufficient . . . ." RESTATEMENT (SECOND) OF TORTS § 218, cmt. i. Given the lower protection for personal property, the Court's admonition in *Republic Aviation* that real property must give way to employees' Section 7 interests should, at a minimum, apply to email and other personal property.

Employee communication cases demonstrate why personal property is entitled to less protection than real property. In cases like *Republic Aviation* and *Lechmere*, use of an employer's real property is a physical invasion that necessarily interferes with others' use of the property. *See Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 426, 435 (1982) (holding that even minor physical invasions of property is an unconstitutional deprivation or taking of that property); Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 47-48 (2000) (discussing distinction between in-person solicitations at work and electronic solicitations). Electronic communications, however, are not physical invasions. In addition, use of an email system will almost never interfere with others' use of that system. *Compare Hamidi*, 71 P.3d at 308 (holding that emails at issue did not cause "any physical or functional harm or disruption" to employer's computer system), *with CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1019 (S.D. Ohio 1997) (noting that massive volumes of email could burden network equipment).

In *Register Guard*, the Board ignored this reality and claimed instead that employers needed the ability to restrict employees' email usage to preserve "server space, protect[] against computer viruses and dissemination of confidential information, and avoid[] company liability for employees' inappropriate e-mails." *Register Guard*, 351 N.L.R.B. at 1114. However, neither the Board nor the employer in that case provided any evidence that employees' use of the employer's email system for Section 7 communications impaired business operations. This dearth of evidence is unsurprising given what anyone reading this brief knows: in many workplaces, email is ubiquitous. To be sure, the cumulative effect of a large flow of emails can impact productivity, but despite this fact, we still do not see widespread implementation of rules imposing productivity-based limits on email usage. *Cf.* Jim Harter, *Should Employers Ban Email After Work Hours?*, GALLUP (2014) (noting that 79% employers view employee use of email, including after work hours, as strongly or somewhat positive);[2] Amy Gallo, *Stop Email Overload*, HARVARD BUSINESS REVIEW (2011) (arguing that email overload can be a problem, but is really a symptom of ineffective workplace protocols).[3] And even if email overload were perceived as a bigger problem than it is currently, Section 7 messages typically represent only a tiny portion of this overall email flow. As a result, there is no evidence that Section 7 communications pose problems—particularly ones more serious than those in *Republic Aviation*—that warrant a rule giving employers an unfettered right to limit electronic communications. Far more defensible is a rule that permits employers to restrict such communications only when it can show a valid business justification.

One of the ironies of *Register Guard* was that email is a particularly weak example of personal property that deserves protection. An individual's use of other types of personal property, such as such as telephones, bulletin boards, and photocopiers, can interfere with others' use of

[2] *Available at* https://www.gallup.com/workplace/236519/employers-ban-email-work-hours.aspx.
[3] *Available at* https://hbr.org/2012/02/stop-email-overload-1.

such property. But normal email and other electronic communications usually does not interfere with others' communications at all. Sending or receiving email is commonplace—indeed, it appears to be the most common form of communication at work, *see, e.g.*, Bob O'Donnell, *Workplace of the Future: Progress, But Slowly*, Technalysis Research (2016)[4] (finding that email was top form of workplace communication, followed by telephone, texting, social media, and instant messaging)—and almost never involves additional costs or measurable negative effects on business operations. *See Hamidi*, 71 P.3d at 308 (holding that unauthorized email was not a trespass because, among other reasons, "[t]hese occasional transmissions cannot reasonably be viewed as impairing the quality or value of [the employer's] computer system."). Moreover, under *Purple Communications*, employers are permitted to safeguard against or remedy the rare cases when email does impose significant costs. *See Purple Communications*, 361 N.L.R.B. at 1063 ("An employer may rebut the presumption [that employees can use the employer's email] by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights."); Hirsch, *Workers Collective Action in the Digital Age*, *supra*, at 947, 950-951 (discussing *Purple Communications'* protection of valid business concerns).

In sum, two well-established legal facts require the Board to maintain a *Purple Communications*-type framework and reject that of *Register Guard.* First, in *Republic Aviation*, the Supreme Court unequivocally held that employers' real property must often yield to employees' Section 7 right to communicate. Second, under basic property law, personal property—like electronic communications systems—are entitled to *less* protection than real property. As a result, employees' use of email and other electronic communications for Section 7

[4] *Available at* http://www.technalysisresearch.com/downloads/TECHnalysis%20Research%20Workplace%20of%20the%20Future%20Study%20Highlights.pdf.

purposes are entitled to at least, if not more, protection than traditional communications under the *Republic Aviation* framework.

C. Supreme Court Precedent and Basic Property Law Outweigh the NLRB's Overruled and Flawed Personal Property Precedent

As noted by the Board in *Register Guard*, the legal precedents described in the previous section are countered by various NLRA cases that purport to recognize employers' unfettered right to restrict use of their personal property. 351 N.L.R.B. at 1114 (noting that this "well-settled principle" was "[c]onsistent with a long line of cases governing employee use of employer-owned equipment"). In *Purple Communications*, however, the Board properly recognized these cases for what they really were—a convoluted game of "telephone" that were rooted solely in one line of dicta from an administrative law judge (ALJ). *See* 361 N.L.R.B. at 1058-59 (dismissing most statements as dicta and rejecting all of their applications to email cases). Such dicta is far too weak to overcome the requirements of *Republic Aviation* and the basic tenets of property law.

To be sure, some decisions cited by the Board in *Register Guard* and others supporting its approach include language that seems to permit employers to restrict employees' use of email as they see fit. *See, e.g.*, *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983) (stating that an employer "*unquestionably* had the right to regulate and restrict" employees' use of a bulletin board). But such language is built upon unsupported statements in cases that originally addressed a different issue.

Although the Sixth Circuit in *Union Carbide* stated that employers had an "unquestionable" right to restrict Section 7 uses of their personal property, such a claim was only unquestioned because neither the NLRB nor courts at that time had considered the issue in a meaningful way. Indeed, *every* case the Board in *Register Guard* cited for this proposition failed to substantively examine whether the NLRA allows employers to limit employees' Section 7 use

of employers' personal property.[5] The sole justification for these cases' suggestion that employers have an unencumbered right to control their personal property is ultimately based on one sentence by an ALJ in a case that involved a related, but different, issue.

The first decision to claim that employers can freely prevent employees from using their employers' personal property was, to the best of my knowledge, by an ALJ in *Challenge Cook Brothers of Ohio, Inc.*, 153 N.L.R.B. 92 (1965). In that case, the ALJ stated in dicta that it "had no doubt" that an employer that maintained a practice of preventing employees from using work bulletin boards for personal matters could also prohibit union postings. *Id.* at 99. However, as the ALJ acknowledged, *Challenge Cook* was not such a case because it involved instead an employer that allowed many kinds of personal postings, but not ones related to the union.[6] All of the subsequent cases purporting to recognize a right of employers to exclude use of their personal property cited to *Challenge Cook* or its progeny.

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[5] Based on my review of every relevant case cited in *Register Guard*, and every case cited by those cases or subsequently cited cases prior to *Register Guard*, there has been no substantive examination of this issue. *See Johnson Tech., Inc.*, 345 N.L.R.B. 762, 763 (2005); *Mid-Mountain Foods*, 332 N.L.R.B. 229, 230 (2000), *enforced*, 269 F.3d 1075 (D.C. Cir. 2001); *Eaton Techs.*, 322 N.L.R.B. 848, 853 (1997); *Champion Int'l Corp.*, 303 N.L.R.B. 102, 109 (1991); *Churchill's Supermarke*t, 285 N.L.R.B. 138, 155-56 (1987) *enforced* 857 F.2d 1474 (6th Cir. 1988) (Table); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986); *Honeywell, Inc.*, 262 N.L.R.B. 1402, 1402 (1982), *enforced*, 722 F.2d 405 (8th Cir. 1983); *Allied Stores of New York*, 262 N.L.R.B. 985, 985 n.3 (1982); *Union Carbide Corp.*, 259 N.L.R.B. 974, 980 (1981), *enforced in relevant part*, 714 F.2d 657, 663-664 (6th Cir. 1983); *Axelson, Inc.*, 257 N.L.R.B. 576 (1981); *Arkansas-Best Freight Sys., Inc.*, 257 N.L.R.B. 420 (1981); *Container Corp.*, 244 N.L.R.B. 318, 318 n.2 (1979), *enforced*, 649 F.2d 1213 (6th Cir. 1981) (per curiam); *Group One Broadcasting Co., W.*, 222 N.L.R.B. 993, 998 (1976); *Vincent's Steak House*, 216 N.L.R.B. 647, 647 (1975); *Eastex, Inc.*, 215 N.L.R.B. 271, 272 (1974); *Nugent Serv., Inc.*, 207 N.L.R.B. 158, 161 (1973); *Heath Co.*, 196 N.L.R.B. 134, 135 (1972); *Tempco Mfg. Co., Inc.*, 177 N.L.R.B. 336, 348 (1969); *Challenge Cook Bros. of Ohio, Inc.*, 153 N.L.R.B. 92, 99 (1965); *see generally* Hirsch, *E-mail and the Rip Van Winkle of Agencies*, *supra* (describing research into NLRB personal property precedent).

[6] The ALJ stated in full the following, with no citation or other support:

> I have no doubt that if the Respondent had consistently not allowed its employees to use the bulletin boards to publicize their personal affairs, the Respondent could properly have prohibited the posting of notices of union meetings. But that is not our set of facts. The question, I believe, is whether the Respondent, having made its bulletin boards available to employees for posting of notices relating to social and religious affairs, as well as meetings of charitable organizations, could validly discriminate against notices of union meetings which employees had posted.

153 N.L.R.B. at 99.

In addition to the lack of any meaningful analysis, this line of cases has also deviated significantly from its origins. The earliest cases claiming an expansive rights of employers' to restrict the use of personal property involved claims alleging that employers had discriminatorily restricted access to that property. *See Nugent Serv., Inc.*, 207 N.L.R.B. 158, 161 (1973); *Tempco Mfg. Co., Inc.*, 177 N.L.R.B. 336, 348 (1969); *Challenge Cook Bros. of Ohio, Inc.*, 153 N.L.R.B. 92, 99 (1965). The question of discrimination involves a very different analysis than cases involving employees' basic right to use employer property for Section 7 purposes. Despite this substantial disparity, the Board cited these early discrimination cases to support the very different conclusion that employers can always prohibit employees from using employers' personal property for Section 7 purposes. *See Honeywell, Inc.*, 262 N.L.R.B. 1402 (1982), *enforced*, 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 N.L.R.B. 318 n.2 (1979), *enforced*, 649 F.2d 1213 (6th Cir. 1981) (per curiam). *Register Guard*, in turn, relied on these subsequent cases and their misplaced reliance on discrimination cases.

As demonstrated, this entire line of personal property cases lack any meaningful substantive analysis and, no doubt as a result, conflict with Supreme Court precedent and property law. But even if these cases were on more solid ground, email and other electronic communication systems should be treated differently. Unlike the types of personal property in those cases, use of email almost never infringes on others' use. Moreover, as discussed in Section III of this brief, email and other electronic communications play a far more vital role in the workplace than do other forms of employer personal property. *See also Purple Communications*, 361 N.L.R.B. at 1057-58 (discussing practical differences between email and personal property with more finite usage); Hirsch, *Worker Collective Action in the Digital Age*, *supra*, at 926-934 (stressing value of electronic communications to Section 7 rights). As a result, even if the NLRB were to reaffirm

precedent addressing bulletin boards, printers, and other employer personal property, electronic communications demand a different approach that reflect their importance to employees' Section 7 rights.

The cases cited by *Register Guard* ultimately arose from these discrimination cases and their inapposite citations. The result is a total lack of substantive justification for a rule that abandons *Republic Aviation* and basic property law in order to provide employers more power to restrict use of electronic chattel than real property. As demonstrated above, any differences between the two types of property suggests that employers should have less—not more—authority to restrict use of electronic communications.

II. The *Purple Communications* Framework is Consistent with the First Amendment

A further, constitutional-based objection to the *Purple Communications* framework is best represented by Member Johnson's dissent in that case. *See* 361 N.L.R.B. at 1105-07 (Johnson, Member, dissenting); *see also* Brief for the General Counsel at 7-8, *Rio All-Suites Hotel Casino*, Case 28-CA-060841 (2018). Among other objections, Member Johnson argued that recognizing employees' limited right to use employer's email systems for Section 7 purposes violates the First Amendment and Section 8(c), 29 U.S.C. § 158(c). *See* 361 N.L.R.B. at 1105-07. However, even given the Supreme Court's recently robust view of free speech, *see, e.g., Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463-65 (2018), this argument has no merit.

The thrust of this position is that the *Purple Communications* framework offends the First Amendment by requiring employers to "pay" for speech that is hostile to their positions. One obvious problem with this assertion is that there is no evidence or reason to think that there are any additional costs to the employer that result from Section 7 emails. Except for extraordinarily

large or numerous messages—which employers can already prohibit under *Purple Communications*, 361 N.L.R.B. at 1063-64—the marginal costs of any Section 7 email traffic does not require an employer to pay anything more than it already does to maintain its email system. *Cf. Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 34 (1986) ("[B]ecause the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is *de minimis.*"); *see also* Hirsch, *Communication Breakdown*, *supra*, at 1105, 1122–23. Moreover, contrary to Member Johnson's dissent, employee email under *Purple Communications* does not impose production costs because that case explicitly stated that employers can limit such messaging to nonwork time. *See* 361 N.L.R.B. at 1063 (adopting presumption that employees have right to use employer email for Section purposes "on nonworking time"). Finally, this cost argument not only makes little sense as a factual matter, it also flies in the face of *Republic Aviation*. If allowing employee speech on an email system during nonwork time imposes an unconstitutional "cost," then so too would allowing employee speech during nonwork time in an employer-maintained plant or other real property.

Member Johnson also attempted to tie *Purple Communications* to the Supreme Court's *Harris v. Quinn*, 134 S. Ct. 2618 (2014), decision. *See* 361 N.L.R.B. at 1106 (Johnson, Member, dissenting). But neither *Harris*, nor the more recent *Janus* case, supports his position. The First Amendment problem in those cases was a government requirement that individual employees provide direct, financial support to union positions with which they disagree. *See Janus*, 138 S.Ct. at 2463-64, *Harris*, 134 S. Ct. at 2628–34. In contrast, *Purple Communications* only says that an employer cannot normally prevent Section 7 messages from its employees' already established use

of workplace email. *See* 361 N.L.R.B. at 1063. This is not a free speech issue. It is, instead, a clear *Republic Aviation* situation. In both, employers' ability to control their property—real property in *Republic Aviation* and the weaker personal property in *Purple Communications*—is limited by employees' right to use that property for Section 7 purposes. In other words, if *Purple Communications* violates the First Amendment and Section 8(c), then so too does *Republic Aviation*.

Member Johnson also made a contradictory free speech argument centered on employee confusion. First, he warned that use of company email will confuse employees into thinking that their employer sent the message. *Id.*at 1107 (Johnson, Member, dissenting). But as virtually anyone knows—particularly any employee in a work environment in which email is regularly used—an email addresses' suffix (e.g., gmail.com) has nothing to do with the identity of the sender. The majority in *Purple Communications* put it succinctly: employees "would no more think that an email message sent from a coworker via a work email account speaks for the employer . . . than they would think that a message they receive from a friend on their personal Gmail account speaks for Google." *Id.* at 1065. This is particularly true given Member Johnson's other concern, the potential for messages that are hostile to the employer. *Id.* at 1105 (Johnson, Member, dissenting). Assuming Member Johnson is correct about the tenor of Section 7 emails, how would any employee mistakenly think that the employer authorized an email that is hostile to itself? It strains credulity to think of this ever happening, much less to a degree warranting an infringement on employees' Section 7 rights.

Member Johnson also stressed his concern with employers being forced to subsidize speech they do not like. *Id.* at 1106-07 (Johnson, Member, dissenting). As noted, there really is no subsidy involved given the nonexistent marginal cost of most email traffic. But even if that were not true,

the Board need not consider this issue from scratch, as the Supreme Court has already decided an analogous case that clearly undermines Member Johnson's concern.

At issue in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), was the FCC's "must carry" rule, which requires cable television channels to carry certain local broadcast stations. *See* 47 U.S.C. § 534(b)(1)(B) (2013). Much like the objections here, the cable companies argued that the must carry rule unconstitutionally forced them "to transmit speech not of their choosing." 512 U.S. at 653-56. The Court explicitly rejected that argument, holding that, despite free speech infringements not at play with NLRB email cases, the must carry rule was constitutional. *Id.* at 636-37 (noting First Amendment issues related to fact that the must carry rule reduces the number of channels that cable companies can completely control and makes it more difficult for the companies to compete for channels). Among its justifications for upholding the must carry rule, the Court held that the rule does not force companies "to alter their own messages" and that "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id.* at 655.

The decision in *Turner Broadcasting* sends a clear message: if a cable company can be forced to carry content of a competitor, then surely an employer can be required to allow employees to send Section 7-protected messages as part of their pre-existing access to the company's email system. *Cf.* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARVARD L. REV. (forthcoming 2018) (manuscript at 19) (arguing that compelling employees and other individuals to give money does not restrict or compel speech).[7]

[7] *Available at* https://ssrn.com/abstract=3222222.

III. The NLRB's New Rule Should Apply to all Electronic Communication

Although the NLRB's decision in *Purple Communications* properly balanced employers' valid business concerns with Supreme Court precedent regarded employees Section 7 rights, it should have extended its application to more than just email messages. The legal rationale of the *Purple Communications* approach, as well as the reality of individuals' use of electronic communications, begs for a rule that extends beyond just emails.

Member Johnson was correct when he observed in his *Purple Communications* dissent that the rationale of that decision applies to any type of employer-owned communications system. *See* 361 N.L.R.B. at 1079 (Johnson, Member, dissenting) ("By implication . . . this rationale extends beyond email to any kind of employer communications network (be it instant messaging, internal bulletin boards, broadcast devices, video communication or otherwise) that employees have access to as part of their jobs."). *Republic Aviation* is based on whether an *employee* uses employer property to make Section 7 communications, not on the mode of such communication. *See* 324 U.S. at 797-98, 802 n.8. Thus, no matter whether employees send email, texts, or other types of communication, the *Republic Aviation* analysis applies. As a result, the Board's modern gloss on *Republic Aviation*—either *Purple Communications* or another rule that respects well-established legal precedents—should apply to all forms of electronic communications.

The reality of modern communications also demands a rule that applies to more than just email messages. As psychological research demonstrates, all communication is vital to employees' ability to engage in Section 7 collective activity. *See* Hirsch, *Communication Breakdown*, *supra*, at 1095-1101 (discussing research). Traditionally, electronic communications have not been as effective as in-person discussions, *see id.* at 1107-08, but the explosion in technology has made electronic communications an increasingly important and cost-effective

means of employee communication. *See id.* at 1106, 1119; Hirsch, *Silicon Bullet*, *supra*, at 275-77, 297 (noting growth of electronic communications, increased number of co-workers in different geographic locations, and fact that electronic communications can serve as a substitute for restrictions on unions' and other nonemployees' access to the workplace); William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must be Honest*, 12 EMP. RTS. & EMP. POL'Y J. 49, 97 (2008).

Surveys confirm this extraordinary growth in the use of electronic communications in the United States. Although there is a dearth of current data showing the percentage of employees who use electronic communications at work, past data and analogies to overall increases in Internet use make the obvious point that electronic communications is an essential and growing part of many American workplaces.

Most generally, there has been a rapid increase in the number of people going online, with the percentage of adults in the United States who use the Internet increasing by more than 128% over the past decade. *See* U.S. DEP'T OF COMMERCE, NAT'L TELECOMMUNICATIONS AND INFORMATION ADMIN., *Internet Use at Work* (2018) (survey showing Internet usage by individuals 15 years and older increasing from 34.7% in 1998 to 79.4% in 2017);[8] *see also* Pew Research Center, *Internet/Broadband Fact Sheet* (2018) (survey showing Internet usage rising 71% from 2000 (52% adults use Internet) to 2018 (89% adults use Internet).[9] This growth has been even greater in the workplace, with one government survey showing an increase over the past decade of 204%. *See* U.S. DEP'T OF COMMERCE, NAT'L TELECOMMUNICATIONS AND INFORMATION ADMIN., *Internet Use at Work* (2018) (survey showing usage of Internet at work by individuals 3

[8] *Available at* https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=workInternetUser&disp=map.
[9] *Available at* http://www.pewinternet.org/fact-sheet/internet-broadband/.

years and older,[10] grew from 9.6% in 1998 to 29.2% in 2017);[11] *see also* Pew Research Center, *The Web at 25 in the U.S.* 19, 31-32 (2014) (describing 2014 survey results showing that, among 82% of respondents who used the Internet on a given day, 44% of them went online from work);[12] *cf.* 361 N.L.R.B. at 1067 (Miscimarra, Member, dissenting) (noting importance of Facebook, Twitter, and other social media for various types of collective action). And although email used to be the dominant form of electronic communications, that is no longer the case. For instance, a 2017 government survey found that individuals who use the Internet employ a variety of communication forms: 90.8% use email,[13] 90.2% use texts or instant messaging,[14] and 74.4% use social networks.[15]

This research demonstrates the importance of electronic communications to employee collective action—the core right embodied in the NLRA. It also shows that such communications are no longer limited or dominated by email. Accordingly, the NLRB should reaffirm its approach in *Purple Communications* and apply it to all forms of electronic communications. Such a reaffirmation would remain true to Supreme Court precedent and the basic right of collective action that lies at the heart of the NLRA.

[10] The age in this survey is not a typographical error. Accordingly, the data is intended to demonstrate the *increase* in Internet use at work, rather than a measure of the percentage of employees who use the Internet use at work.
[11] *Available at* https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=workInternetUser&disp=map.
[12] *Available at* http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf.
[13] U.S. DEP'T OF COMMERCE, NAT'L TELECOMMUNICATIONS AND INFORMATION ADMIN., *Using Email* (2018), https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=emailUser&demo=&pc=prop&disp=chart.
[14] *Id.*, *Text Messaging or Instant Messaging*, https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=textIMUser&demo=&pc=prop&disp=chart.
[15] *Id.*, *Using Online Social Networks*, https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=socialNetworkUser&demo=&pc=prop&disp=chart.

CONCLUSION

Email and similar technologies are now common, effective, inexpensive, and unobtrusive forms of communication in modern workplaces. Employers have every right to limit employees' use of electronic communications in the rare instances when they negatively affect legitimate business interests. But when these special circumstances are not present, Supreme Court precedent demands a rule that allows employees to use their pre-existing access to email and other electronic communications for Section 7 purposes.

Employers' property interest in electronic chattel is simply too weak—especially given the imperceptible impact of most electronic communications—to outweigh employees' Section 7 rights to communicate with each other at work. Indeed, employers who treat Section 7 seriously—as opposed to those who merely want to minimize employees' ability to exercise their rights—should welcome the less obtrusive nature of electronic communications. Accordingly, the NLRB should reaffirm the general approach of *Purple Communications* and extend it to all electronic communications.

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September 27th, 2018

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES HOTEL AND CASINO	)	
and	)	Case 28-CA-060841
INTERNATIONAL UNION OF PAINTERS TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO	)	

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