Oral Argument Not Yet Scheduled

Nos. 17-70948, 17-71062, 17-71276

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMUNICATION WORKERS OF AMERICA, AFL-CIO
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PURPLE COMMUNICATIONS, INC.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

COMMUNICATION WORKERS OF AMERICA, AFL-CIO
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before this Court on two petitions for review, and the cross-application for enforcement of the National Labor Relations Board ("the Board"), of the Board's Supplemental Decision and Order, which issued March 24, 2017, and is reported at 365 NLRB No. 50. (ER 1-7.)[1] The Board's 2017 Supplemental Decision and Order came after the Board's remand of the case to an administrative law judge in an earlier Decision and Order, which issued December 11, 2014, and is reported at 361 NLRB 1050. (ER 8-81.) The Board had jurisdiction over the proceeding below pursuant to Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("the Act").

The Communication Workers of America, AFL-CIO ("the Union") filed its petition for review here in the Ninth Circuit, and Purple Communications, Inc. ("Purple") concurrently filed its petition for review in the D.C. Circuit. Venue was resolved by the Judicial Panel for Multidistrict Litigation, which ordered that Purple's petition be transferred to this Court. The Court has jurisdiction over this proceeding because the Board's Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), and venue is proper because the unfair labor

[1] "ER" references are to the Excerpts of Record filed by the Union on August 2, 2017. "SER" references are to the Supplemental Excerpts of Record filed with this brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

practices occurred in California. The petitions and application were timely, as the Act provides no time limits for such filings.

STATEMENT OF THE ISSUES

1. Is the Board's new standard regarding employee use of an employer's email system reasonable and consistent with the Act? If so, whether the Board reasonably found that Purple violated Section 8(a)(1) of the Act by maintaining an overly broad electronic communications policy that unlawfully interferes with employees' use of the employer's email system for Section 7 purposes.

2. Whether the Board acted within its broad remedial discretion when denying the Union's request for a nationwide notice posting.

STATEMENT OF THE CASE

In this unfair labor practice case, the Board invited the parties and interested amici to file briefs on whether the Board should reconsider its prior conclusion that employees do not have a statutory right to use their employer's email system for Section 7 purposes. Thereafter the Board decided to reevaluate its position for those employees who are given access to employer email in the course of their work, in light of the purposes and policies of the Act, including the Board's obligation to accommodate the competing rights of employers and employees. In doing so, the Board affirmed the centrality of employees' workplace communication to their Section 7 rights as supported by Supreme Court and Board

precedent. The Board also reviewed and overruled its decision in *Register Guard*, 351 NLRB 1110 (2007), *enforced in part, sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), which denied employees access to their employer's email system for Section 7 activity, finding that precedent undervalued employees' core Section 7 rights, failed to perceive the significance of email as a means for employees' engagement in protected communication, and placed undue weight on earlier precedent dealing with other types of employer equipment. The Board reasonably determined that employee use of email for statutorily-protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems, unless the employer can demonstrate that special circumstances make the presumption inappropriate in its particular workplace. In establishing a "carefully limited" standard for employee access to an employer's email system for Section 7 communications (ER 8), the Board exercised its duty to develop reasoned policies consistent with the Act and its "responsibility to adapt the Act to changing patterns of industrial life," *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

I. THE BOARD'S FINDINGS OF FACT

Purple provides real-time sign language interpretation during video calls, primarily by employing "video relay interpreters" who provide sign language interpretation between hearing-impaired and hearing persons through video calls.

Purple offers these services 24 hours a day, 7 days a week from 16 call center facilities across the United States. Only two of these facilities—one in Corona, California, and one in Long Beach, California—are involved in this case. (ER 9; 161.)

The interpreters use company-provided workstation computers to access Purple's intranet system and various work programs. These workstation computers have limited, if any, access to the internet and nonwork programs. At the Corona and Long Beach facilities, Purple also maintains a small number of shared computers located in common areas from which employees can access the internet and nonwork programs. (ER 10; SER 2-10.)

Purple assigns an individual email account to each interpreter that can be accessed from the workstation computers as well as from home computers and personal smart phones. Employees use the company email system on a daily basis while at work for communications among themselves as well as with their managers. (ER 10; SER 8-11, 15-16.)

Purple maintains a handbook policy that prohibits employees from using the company email system for nonbusiness purposes. That policy states:

> INTERNET, INTRANET, VOICEMAIL, AND ELECTRONIC COMMUNICATIONS POLICY
>
> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by the [sic] Purple to facilitate Company business. All information and

> messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.
>
> . . .
>
> Prohibited activities
>
> Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:
>
> . . .
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
>
> . . .
>
> 5. Sending uninvited email of a personal nature.

(ER 9-10; 149-50.) Purple may punish an employee's violation of this policy with discipline up to and including termination. (ER 4; 154.)

On November 28, 2012, the Board conducted elections to determine if the interpreters at seven of Purple's call centers, including Corona and Long Beach, wished to be represented by the Union. The Board later set aside those elections. *See Purple Comm'ns*, 361 NLRB 575, 575-76 (2014).

II. PROCEDURAL HISTORY

Acting on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint alleging, in part, that Purple violated Section 8(a)(1) of the Act. 29 U.S.C § 158(a)(1), by maintaining an electronic

communications policy that interfered with employees' rights under Section 7 of the Act, 29 U.S.C. § 157, to engage in protected concerted activity.[2] (ER 68.) The case was heard before an administrative law judge. The General Counsel urged the judge to find that Purple unlawfully prohibited employee use of email for Section 7 purposes and argued that *Register Guard* should be overruled because of the increased importance of email as a means of employee communication in the workplace. The judge, stating that he was "bound to follow Board precedent," dismissed the relevant complaint allegation that Purple violated Section 8(a)(1) of the Act by maintaining rules that prohibit the use of employer equipment for anything but business purposes. (ER 70.)

On review, the Board issued a notice and invitation to the parties and interested amici to file briefs addressing specific questions concerning employee use of their employer's email and other electronic communication systems for the purpose of communicating with other employees about union or other Section 7 matters. The Board requested empirical and other evidence relating to email use. (ER 9.) The General Counsel and the Union filed briefs and response briefs. Purple filed a response brief. Fourteen amici filed briefs.

[2] The unfair-labor-practice case, which included this complaint allegation, as well as an additional alleged rule violation, was consolidated with the representation case involving objections to the union representation elections. The Board severed and resolved those issues separately and they are therefore not before the Court. *See Purple Comm'ns*, 361 NLRB at 575 & n.3.

Thereafter, the Board (then-Chairman Pearce and Members Hirozawa and Schiffer; Members Miscimarra and Johnson dissenting) revisited its precedent on employee email usage "[c]onsistent with the purposes and policies of the Act and [its] obligation to accommodate the competing rights of employers and employees" and issued a "carefully limited" decision overruling its prior analysis in *Register Guard*. (ER 8.) In doing so, the Board rebalanced the rights of employees and employers in light of the changing industrial realities of email usage in the workplace. The Board decided that employers who have given employees access to their email system must permit those employees to use email for statutorily protected communications on nonworking time. (ER 8.) The Board further held that an employer may rebut that presumption by showing that "special circumstances necessary to maintain production or discipline justify restricting its employees' rights." (ER 21.) The Board stated that, if a total ban was not justified, an employer may "apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline." (ER 8.) The Board remanded the case to the judge to allow Purple to introduce evidence relevant to a determination of special circumstances. (ER 24.)

On remand, Purple did not contend that special circumstances exist to justify the breadth of its electronic communications policy. The judge issued a

supplemental decision finding that Purple violated Section 8(a)(1) of the Act by maintaining an overly broad policy that unlawfully restricts employees' use of Purple's email system for Section 7 purposes. (ER 1 n.1, 5.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On March 24, 2017, acting on exceptions and cross-exceptions filed by Purple and the Union, the Board (Members Pearce and McFerran; Acting Chairman Miscimarra dissenting) affirmed the administrative law judge's rulings, findings, and conclusions, and issued a Supplemental Decision and Order. The Board found that Purple violated Section 8(a)(1) of the Act by maintaining an overly broad electronic communications policy that unlawfully restricts employees' use of work email for Section 7 purposes. (ER 1, 5.)

The Board's Order requires that Purple cease and desist from maintaining an overly broad electronic communications policy and, in any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act. Affirmatively, Purple must rescind its overly broad policy. Purple must also furnish employees with inserts for the employee handbook advising them that the unlawful provisions have been rescinded or providing language of lawful provisions. Alternatively, Purple may publish and distribute a revised employee handbook that does not contain the unlawful provisions or provides language of lawful provisions. The Board's Order

also directs Purple to post a remedial notice at its Corona and Long Beach locations. (ER 6.)

STANDARD OF REVIEW

The Board bears "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). *Accord Int'l Chem. Workers Union Council v. NLRB*, 467 F.3d 742, 747 (9th Cir. 2006). If the Board is to fulfill its statutory role, it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978). *Accord Hughes Prop., Inc. v. NLRB*, 758 F.2d 1320, 1322 (9th Cir. 1985) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)).

The Board's interpretation of the Act is subject to the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123-24 (1987). Accordingly, where the plain terms of the Act do not specifically address the precise issue, the courts, under *Chevron*, must defer to the Board's reasonable interpretation. Indeed, the courts must "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'" *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (quoting *Bayside Enters., Inc.*

v. NLRB, 429 U.S. 298, 302, 304 (1977)). Thus, "[t]he judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel*, 437 U.S. at 501. *Accord United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 766 (9th Cir. 2002) (en banc).

As discussed below, Section 7 of the Act grants employees, among other rights, "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The Board's task of defining Section 7 rights often involves the balancing of employees' right to self-organization with the property rights of employers. In such cases, "the task of the Board . . . is to resolve conflicts between [Section] 7 rights and private property rights, 'and to seek a proper accommodation between the two.'" *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (quoting *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972)). The Board's "basic objective" is to fashion an "accommodation of [Section] 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.'" *Hudgens*, 424 U.S. at 522 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Consequently, where the Board engages in this "'difficult and delicate

responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'" *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Truck Drivers Local 449*, 353 US. 87, 96 (1957)). *Accord ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 68 (D.C. Cir. 2005) (ambiguity of Section 7 counsels *Chevron* deference unless courts have settled clear meaning of the statute).

When the Board overrules prior decisions and adopts a revised course, the Court "will not upset its new standard," so long as the Board "provide[s] a reasoned justification for departing from precedent." *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1346-47 (D.C. Cir. 2008); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (explaining that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances," so long as the agency "suppl[ies] a reasoned analysis" (internal quotation marks omitted)). Courts also will "defer to the Board's policy choice[s]" that are based on reasonable interpretations of the Act. *Local 702, IBEW v. NLRB*, 215 F.3d 11, 17 (D.C. Cir. 2000).

The Board's findings of fact "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *East Bay Auto. Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007). The Board's

selection of a remedy is reviewed for "a clear abuse of discretion." *USW v. NLRB*, 482 F.3d 1112, 1116 (9th Cir. 2007); *see also NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969) ("[T]he remedial power of the Board is 'a broad discretionary one, subject to limited judicial review.'" (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)).

SUMMARY OF ARGUMENT

I. Courts and the Board have long recognized the vital importance of effective employee communication in the workplace regarding self-organization and terms and conditions of employment. Consistent with the purposes and policies of the Act, its responsibility to adapt the law to changes in the workplace, and its obligation to accommodate the competing rights of employers and employees, the Board in this case established a carefully limited new standard regarding employee access to an employer's email system. The Board held that, when an employer has already given employees access to email in the course of their work, employees may presumptively use that email for Section 7 communication on nonwork time. In recognition of the employer's interest in maintaining employee productivity and protecting its property, the Board further held that an employer may demonstrate special circumstances necessary to maintain production or discipline that justify further restrictions on employee email use.

The Board's new standard is reasonable and consistent with the Act. The Board adopted an analysis that accommodates employees' Section 7 rights and their employers' legitimate interests by applying the framework of *Republic Aviation*. There, the Supreme Court approved the Board's adoption of a presumption that working time is for work but nonworking time is the employees' time to use as they wish without unreasonable restraint. Under that presumption, a rule prohibiting union solicitation on the employer's property outside working hours is presumptively unlawful. *Republic Aviation*, 324 U.S. at 803 n.10. The Board recognized that in the modern workplace employees regularly communicate with each other via email, whether they are in the office or teleworking. The Board reasonably concluded that, where employers have made email a normal method for employees to communicate in the virtual workplace, a rule flatly barring employees from using the employer's email system to communicate with their fellow employees on their nonwork time is presumptively an unreasonable impediment to self-organization.

The Board considered and rejected numerous arguments as to why employees should not have access to their work email for Section 7 purposes. For example, while employees may have alternate means of communication with each other (although they may not in some situations), the right to communicate in the workplace is not contingent on having no other place to do so. The Board

reasonably determined that, as in other situations where employer rights must yield to some extent, there is, in contrast, a minimal infringement on an employer's property right by allowing employees who are already using its email system to use it to communicate with each other about their work lives. In turn, the Board's rule aptly provides that the employer may rebut the presumption with evidence that special circumstances make the restrictions on email use necessary to maintain production or discipline. Even in the absence of such evidence, an employer may maintain productivity standards and apply uniform and consistently enforced controls over their email systems. The Board thus overruled its contrary rule in *Register Guard* because it undervalued employees' Section 7 rights, failed to recognize the importance of email as a means by which employees communicate, and put undue emphasis on the Board's precedent regarding other types of employer equipment that do not function in the same way as email.

Purple may disagree with the outcome of the balancing of interests that the Board engaged in here, but that is a task for the Board in the first instance and should be given deference. Furthermore, the Board's standard does not run afoul of the First Amendment or Section 8(c) of the Act, as Purple argues. An employee's statements made in an email could not reasonably be perceived as espousing a view endorsed by her employer where the position taken is known to be different from the employer's view. Nor does the Board's decision compel

employers to adopt or endorse the Board's views on protected concerted activity or any other subject. Purple failed to show any manifest injustice from retroactive application of the Board's new standard in this case where the purposes of the Act are significantly aided, delay could impinge on employees' rights for several years in ongoing cases, and Purple had an opportunity to rebut the Board's finding by demonstrating special circumstances. Purple can wholly comply with the Board's order by rescinding its unlawful policy and notifying its employees.

II. In issuing its Order, the Board acted within its broad remedial discretion to limit the notice-posting requirement to Purple's Corona and Long Beach facilities. Because the record did not show that Purple's electronic communications policy was in effect companywide and the parties stipulated that it was in effect at those two locations, the Board reasonably concluded that a companywide posting was not supported by substantial evidence.

ARGUMENT

I. THE BOARD'S NEW STANDARD REGARDING EMPLOYEE USE OF AN EMPLOYER'S EMAIL SYSTEM IS REASONABLE AND CONSISTENT WITH THE ACT

The Board's standard for employee access to an employer's email system is entitled to deference from the Court because it is reasonable and consistent with the Act. In a "carefully limited" decision, the Board reasonably determined that "employee use of email for statutorily protected communications on nonworking

time must presumptively be permitted by employers who have chosen to give employees access to their email systems." (ER 8.) The Board further held that an employer "may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights." (ER 21.) Here, Purple provides its employees with email access on its system but does not contend that special circumstances exist to justify its policy.

The Board's standard appropriately balances employees' statutory rights and employer's property rights consistent with "the longstanding and flexible Supreme Court precedent of *Republic Aviation*." (ER 24.) In reaching its decision, the Board examined the significance of employees' workplace communication to their Section 7 rights, as well as the growing importance of email as a communication forum in the contemporary workforce.

A. The Board reasonably adopted a new framework that accommodates the Section 7 rights of employees who use email in their work and the property rights of their employers

Section 7 of the Act guarantees employees the "right to self-organization, to form, join, or assist labor organizations…and to engage in…concerted activities for the purpose of collective bargaining or other mutual aid or protection."[3] 29

[3] In turn, Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158 (a)(1).

U.S.C. §157. Employees' rights under Section 7 of the Act to engage in self-organization lie "at the very core of the purpose for which the [Act] was enacted." *NLRB v. Calkins*, 187 F.3d 1080, 1087 (9th Cir. 1999) (quoting *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978)). The Supreme Court has "long accepted the Board's view" that this core right "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel*, 437 U.S. at 491-92. It is well-settled that an employer violates the Act where it prohibits its own employees from engaging in protected union organizing activities at the workplace during nonworking time and in nonworking areas, unless the employer can show that prohibiting the activity is necessary to maintain production or discipline. *Republic Aviation*, 324 U.S. at 803-04.

Exercising its ongoing obligation to adapt to the changing workplace, the Board noted the criticism that scholars leveled against the Board for its failure in *Register Guard* to give proper weight to the importance of email communication in the workplace and its narrow focus on employers' property rights.[4] (ER 8 & n.5.)

[4] *See, e.g.*, Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. Davis L. Rev. 1091, 1151 (2011) ("[T]he regulation of workplace discourse has become so far adrift that the NLRB now views e-mail as an affront to employer interests, rather than a low-cost, effective means for employees to exercise their right to collective action."); Christine Neylon O'Brien, *Employees On Guard: Employer Policies Restrict NLRA-Protected Concerted Activities On E-Mail*, 88 Ore. L. Rev. 195,

The Board recognized its obligation to accommodate the employees' Section 7 rights and the employers' property and management rights consistent with the Supreme Court's recognition that '"the locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context."' *Hudgens*, 424 U.S. at 522. As the Supreme Court recognized, "the primary responsibility for making this accommodation must rest with the Board in the first instance." *Id*.

Therefore, recognizing the need to balance the competing interests, the Board applied the longstanding and flexible precedent of *Republic Aviation* to the question of employee use of employer-provided email for Section 7 purposes on nonworking time. It did so "just as [the Board has] applied and adapted that decision over the intervening decades to address other unprecedented factual circumstances." (ER 24.) In *Republic Aviation*, the Supreme Court approved the Board's presumption that a total ban on oral solicitation in the workplace on employees' nonwork time was unlawful in the absence of an employer demonstrating special circumstances making the rule necessary to maintain production or discipline. 324 U.S. 793, 804 (1945). The *Republic Aviation* Court

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222 (2009) (*Register Guard*'s "overemphasis on the employer's property interests at the expense of the employees' [S]ection 7 rights undermines the credibility of the majority opinion").

determined that the Board's presumption was a legitimate accommodation of the employer's and employees' rights. *Id.* The Court approvingly cited the Board's determination that "[i]nconvience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining." *Id.* at 802 n.8. Furthermore, the Court accepted the Board's reasoning that nonworking time is "'an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property'" such that a total ban on oral solicitation on nonwork time "'must be presumed to be an unreasonable impediment to self-organization.'" *Id.* at 803 n.10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943)).

As the Board noted (ER 19), it has engaged in this weighing of employer and employee rights to accommodate the conflicting rights at issue in new fact patterns as the "normal conditions about industrial establishments," *id.* at 804, have evolved and changed. *See, e.g.*, *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978) (hospital employees' solicitation and distribution rights could be restricted in patient-care areas); *New York New York Hotel & Casino*, 356 NLRB 907 (2011) (access rights of employees of contractor to location at which they regularly work), *enforced*, 676 F.3d 193 (D.C. Cir. 2012); *Hillhaven Highland House*, 336 NLRB 646 (2001) (access rights of employees who work at a different location of their employer), *enforced sub nom. First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th

Cir. 2003); *Tri-County Med. Ctr.*, 222 NLRB 1089 (1976) (validity of employer rules prohibiting access by off-duty employees).

As has long been recognized, the core right of employees to engage in protected concerted activity, or to refrain from doing so, "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel*, 437 U.S. at 491. The rationale behind protecting employees' interest in discussing self-organization amongst themselves at the workplace is twofold. First, as the Board stated, "collective action cannot come about without communication." (ER 12.) As the Supreme Court has long recognized, and the Board reiterated, Section 7 organizational rights are "'not viable in a vacuum: their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.'" (ER 12 (quoting *Cent. Hardware*, 407 U.S. 539 at 542-43).) Second, the jobsite is a place "uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974). Indeed, as the Board indicated, "'it is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'" (ER 12 (quoting *Eastex v. NLRB*, 437 U.S. 556, 574 (1978)).)

The Board recognized that employees' need to share information is "particularly acute in the context of an initial organizing campaign." (ER 12.) Here, for example, Purple's employees were engaged in an organizing drive leading to union representation elections while its electronic communications policy prohibiting use of the employer's email system was in effect. (ER 8 n.8 (citing *Purple Comm'ns*, 361 NLRB 575, 575 (2014)).) As the Board long ago stated "employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization." *LeTourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944), *affirmed sub nom. Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

Turning next to the role that email plays in the workplace, the Board examined the changing industrial realities involving email systems and its exponential increase in usage over the past decade. The Board recognized that an employer-owned email system is not in all respects the same as a brick-and-mortar facility and thus chose to "apply *Republic Aviation* and related precedents by analogy in some but not all respects." (ER 12.) Specifically, the Board determined that an email system is substantially different from any other kind of employer

property that the Board has previously considered. The Board noted that individual emails may be solicitation, distribution of information, "or—as [the Board] expect[s] would most often be true—merely communications that are neither solicitation nor distribution, but that nevertheless constitute protected activity." (ER 19-20.) Accordingly, the Board did not treat email as solicitation or distribution per se, but rather reasonably determined that email is "fundamentally a forum for communication." (ER 18.)

The Board relied on empirical evidence demonstrating that "email has become a significant conduit for employees' communications with one another." (ER 19.) More than a decade ago, as the Board acknowledged in *Register Guard*, email had a "substantial impact on how people communicate, both at and away from the workplace." *Register Guard*, 351 NLRB 1110, 1116 (2007). The dissent in *Register Guard* noted that, according to a 2004 survey, over 81 percent of employees spent an hour or more on work-related email in a typical workday with about 10 percent spending at least 4 hours; and 86 percent of employees sent and received nonbusiness-related email at work. *Id.* at 1125 (citing American Management Association, *2004 Workplace E-mail and Instant Messaging Survey* (2004).) These percentages continued to grow.[5] According to a 2008 survey, 96

[5] Even if email use is difficult to quantify and classify, email has undisputedly developed tremendously in terms of use, speed, and lower maintenance costs. *See, e.g.*, Hirsch, 44 U.C. Davis L. Rev. at 1105-06.

percent of employees used the internet, email, or mobile phones to keep connected to their jobs, including outside of their working hours. Mary Madden & Sydney Jones, *Networked Workers*, Pew Research Center's Internet & American Life Project (September 24, 2008), at 1, available at http://www.pewinternet.org/2008/09/24/networked-workers/. The same survey indicated that 80 percent of these workers reported that this technology improved their ability to do their job and expanded the number of people they communicate with. *Id.* at 1, 6.

Significantly, the Board noted the change in the workforce itself, and considered evidence that the "number and percentage of employees who telework is increasing dramatically, resulting in more employees who interact largely via technology rather than face to face." (ER 14 & nn.26-29.) The Board cited (ER 14) research showing that telework increased nearly 80 percent between 2005 and 2012, with only a 7 percent increase in the work force (not including self-employed individuals). This trend has only continued since 2012. *See Latest Telecommuting Statistics*, Global Workplace Analytics (June 2017), available at http://globalworkplaceanalytics.com/telecommuting-statistics (regular work-at-home, among the non-self-employed population, has grown by 115 percent since 2005 and 3.7 million employees now work from home at least half the time). As the Board rightfully recognized, "[i]n offices that rely exclusively or heavily on

telework, it seems likely that email is the predominant means of employee-to-employee communication." (ER 15.)

Next, the Board cited empirical evidence that "increased use of email has been paralleled by dramatic increases in transmission speed and server capacity, along with similarly dramatic decreases in email's costs." (ER 14 & n.24.) *See* Michael Kanellos, *Moore's Law to roll on for another decade*, CNET News (February 10, 2003), available at http://news.cnet.com/2100-1001-984051 (for over 40 years, computer processor performance has doubled approximately every 18 months); Jimmy Daly, *Remember When One Gigabyte of Storage Cost $700,000?*, EdTech (December 4, 2012), available at https://edtechmagazine.com/higher/article/2012/12/remember-when-one-gigabyte-storage-cost-700000 (detailing plummeting storage costs as hard-drive capacities have increased). Thus, as the Board noted, "email's efficiency supports our conclusion that the marginal increase in the use and cost of email due to Sec[tion] 7 activity will be de minimis." (ER 14 n.22.) In view of this evidence, as the Board concluded, "[t]here is little dispute that email has become a critical means of communications, about both work-related and other issues, in a wide range of employment settings." (ER 13.)

The Board reasonably found that email's occupation of a virtual, rather than physical, space did not change its importance as a forum for employee

communication. (ER 15.) Indeed, the Board determined that email's ability to allow conversations to "multiply and spread more quickly than face-to-face communication," and thus "email's effectiveness as a mechanism for quickly sharing information and views *increases* its importance to employee communication." (ER 15.) In the current workplace, which is connected by technology, email is now a "forum in which coworkers who 'share common interests' will 'seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'" (ER 19 (quoting *Eastex*, 437 U.S. at 574 (additional citation omitted)).)

The Board thus found that the new virtual workplace created by email technology is appropriately governed by principles similar to those that have long governed the traditional workplace. Here, as there, "the workplace, and, when appropriate, a particular location in the workplace, as 'the natural gathering place' for employees to communicate with each other." (ER 15 (quoting *Beth Israel*, 437 U.S. at 505).) Stating that it was unwilling to ignore the "importance of electronic means of communication to employees' exercise of their rights under the Act" (ER 24), the Board exercised its obligation to assess workplace realities and "adapt the Act to changing patterns of industrial life," *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

The Board reasonably rejected (ER 20) arguments that *Republic Aviation* applies only to circumstances in which employees are "entirely deprive[d]" (Br. 19) of their rights of association. *See NLRB v. Baptist Hosp.*, 442 U.S. 773, 784-87 (1979) (prohibition on solicitation in certain areas unlawful despite evidence that solicitation permitted in other areas on nonwork time); *Beth Israel*, 437 U.S. at 505 (ban on solicitation in cafeteria unlawful despite solicitation permitted elsewhere in hospital); *Times Publishing Co. v. NLRB*, 605 F.2d 847, 850 (5th Cir. 1979) (rule prohibiting solicitation only in building lobby open to public unlawful). As the Board discussed (ER 20), whether or not an employer permits Section 7 employee communication in some areas of its facility is not part of the analysis for whether, under *Republic Aviation*, employees must be permitted to communicate with each other in a given area. As the Board pointed out, the Supreme Court determined that the Board "acted properly in applying a presumption favoring employees' exercise of their Sec[tion] 7 rights on their employer's property, even where there was no evidence that those rights would otherwise be 'seriously handicapped.'"[6] (ER 20 n.61 (quoting *Republic Aviation*, 324 U.S. at 799).) *See also New York New York*, 356 NLRB at 919 ("Neither the Board nor any court has ever required

[6] The Board made its rule regarding employee access to email for Section 7 purposes rebuttable because "it is the nature of the employer's business that determines whether special circumstances justify a ban on such communications at a particular location at the workplace." (ER 20-21 (internal quotation omitted).)

employees to prove that they lacked alternative means of communicating with their intended audience as a precondition for recognition of their right, subject to reasonable restrictions, to communicate concerning their own terms and conditions of employment in and around their own workplace."). Thus, the Board rejected the argument that employees access to or possession of personal electronic devices, social media accounts, or personal email accounts diminishes their Section 7 right to engage in electronic communication on the employer's systems any more than the fact that the employees in *Republic Aviation* could speak by telephone at home or meet off the premises diminished their right to engage their workplace on nonwork time.

Purple and its supporting amici rely (Br. 18-20, HR Br. 20-21)[7] on the ubiquity of smartphones and other personal electronic devices, as well as social media usage by American adults, as alternative means of communication. But, as the Board indicated, even if such alternative means of communication were "germane to the analysis here," the Board "would not agree that such personal communication options are adequate, in light of the high value our precedents place on communication *in the workplace*." (ER 13 n.18 (citing *Eastex*, 437 U.S.

[7] The Court accepted a brief collectively filed by the HR Policy Association, National Federation of Independent Business Small Business Legal Center, Coalition for a Democratic Workplace, and the National Association of Manufacturers as Amici Curiae in support of Purple.

at 574; *Magnavox*, 415 U.S. at 325).) It is a matter of common experience, that in the modern workplace, email may be the principal instrument for employee communication even when the employees involved are all physically present in the office. Personal cellphone calls or social media postings are not equivalent to using the employer's email system to participate in normal email dialogue among employees in the workplace.

Moreover, as the Board explained, an individual's ability to communicate with the general public through social media "does not demonstrate that he has adequate and effective means of making common cause *with his coworkers*." (ER 13 n.18.) In any case, employees' personal devices and personal email or social media accounts are not an effective alternative to an employer's system for multiple reasons. First, employees do not share all of the same private media due both to cost and a variety of options. Some employees do not use any personal electronic media. Additionally, employees may be virtual strangers to each other, separated by department, facility, shift, and/or telework location. And, even if employees have personal devices, not all employees know each other's personal email addresses or phone numbers. *See, e.g.*, *Beth Israel*, 437 U.S. at 489-90 (employer's locker areas were not an alternative to hospital cafeteria because not all employees had access to lockers and locker areas were not generally used as an employee gathering place).

The Board then examined the effect of allowing employees use of the employer's email system when the employer has given the employees access to the system. As the Supreme Court recognized, employees' interests are at their strongest when the Section 7 activity is "carried on by employees already rightfully on the employer's property." *Hudgens*, 424 U.S. at 521 n.10. Thus the Board limited its analysis only to employees' use of email where employers have "rightfully" given employees access to their email systems.[8]

When employees seek to engage in Section 7 activity on their employer's land, even against the owner's wishes, the owner's property rights may have to yield to some extent to accommodate the employees' Section 7 rights. As the Supreme Court has stated, "[i]nconvenience or even some dislocation of property rights may be necessary in order to safeguard the right to collective bargaining." *Republic Aviation*, 324 U.S. at 802 n. 8. Logically, the same must be true of the owner's property rights with regard to its equipment; if anything, an owner's rights regarding its personal property would seem relatively weaker as against competing Section 7 rights. *See* Restatement (Second) of Torts, Section 218 and comment i (liability for a trespass to personal property will be found only upon a showing of particular types of harm).

[8] As amici before the Board, National Grocers Association and Retail Litigation Center noted, most grocery and retail employers do not provide employees access to their email systems. (ER 13 n.21.) The Board's decision is inapplicable to those employers.

The Board does not disagree that "the property owner's *right* to control the use of its property" is at issue. (ER 18 n.50.) The Board thus addressed the pertinent question relevant to that issue—"[w]hether and when that right must give way to competing Section 7 rights." (ER 18 n.50.) As the Board acknowledged here (ER 18 n.50), and in other cases involving the balancing of property rights against Section 7 rights, "[a]ny rule derived from Federal labor law that requires a property owner to permit unwanted access to his property for a nonconsensual purpose necessarily impinges on the right to exclude….We must, and do, give weight to that fact." *New York New York*, 356 NLRB at 916. In according weight to an employer's property interest—whether its land or in this case its equipment—the Board recognizes that "the existence of a property right will not automatically trump a Sec[tion] 7 interest." (ER 18 n.50.) *See id.* at 916 n.37 (finding that the "inherent tension…between an employer's property rights and the Sec[tion] 7 rights of its employees…cannot be resolved merely by reference to the law of trespass") (citations omitted). Therefore, as the Board found, "allow[ing] total bans on employee use of an employer's personal property, even for Section 7 purposes, with no need to show harm to the owner," does not comport with either Board precedent or common-law principles. (ER 18.)

The Board determined that its *Register Guard* decision was based on a false equivalency between email systems and other employer communications

equipment (including bulletin boards and telephones) that employers are free under the Act to ban employees from using for any nonwork purpose. 351 NLRB at 1114-15. Here, the Board chronicled its precedent related to employer equipment and determined that it could not bear the weight that was placed on it by *Register Guard*. While the majority decision in *Register Guard* characterized the employer's email system as "equipment," and concentrated on the employer's property interest in its equipment, the Board here reasonably concluded that "email systems are different in material respects from the types of workplace equipment the Board has considered in the past." (ER 15.) As an example, the Board noted (ER 15) that if a union notice is posted on a bulletin board, the space it occupies is no longer available for the employer's own communication with employees. Likewise, a phone line being used for Section 7 or other nonwork-related purposes is not available for business use. In contrast, "[o]ne or more employees using the email system would not preclude or interfere with simultaneous use by management or other employees.'" (ER 15 (quoting *Register Guard*, 351 NLRB at 1125-26 (Members Liebman and Walsh, dissenting)).) *See Sprint/United Mgt. Co.*, 326 NLRB 397, 399 (1998) (noting employer's legitimate business interest in prohibiting use of bulletin boards is to ensure that "its postings can easily be seen and read and that they are not obscured or diminished" by employees' postings). As the Board reasonably concluded, "email's flexibility and capacity make

competing demands on its use considerably less of an issue than with earlier forms of communications equipment the Board has addressed." (ER 15.)

The Board also specifically addressed its precedent regarding use of employer-provided telephones for Section 7 activity. The Board noted that the telephone systems of 35 years ago, which its decisions addressed,[9] are, "at best, distant cousins of the sophisticated digital telephone systems that are now prevalent in the workplace." (ER 16.) The Board therefore relied on the fact that, "[g]iven their vastly greater speed and capacity, email systems function as an ongoing and interactive means of employee communication in a way that other, older types of equipment clearly cannot." (ER 16.)

Examining its precedent further, the Board questioned certain broad statements in the equipment cases that "employers may prohibit all nonwork use of such equipment" and noted that "[t]hose pronouncements are best understood as dicta." (ER 16.) In those cases, the broad language went beyond the principle of insuring nondiscriminatory treatment of employee Section 7 activity on which the Board's decision actually turned. *See, e.g.*, *Eaton Techs.*, 322 NLRB 848, 853 (1997) (finding employer discriminatorily applied equipment-use rule in case of union leaflet on bulletin board); *Champion Int'l Corp.*, 303 NLRB 102, 109 (1991)

[9] The Board specifically cited two cases in which union activity was conducted via telephone in 1980. *See Churchill's Supermarkets*, 285 NLRB 138, 155 (1987); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981).

(same, in case of union newsletter on copy machine), *Churchill's Supermarkets*, 285 NLRB at 155 (same, in case of union activity on telephone); *Union Carbide*, 259 NLRB at 980 (same). Because the employers applied their rules discriminatorily, the Board found violations of the Act in each of those cases without needing to answer the question whether a total ban on nonwork use of equipment would have been permissible if consistently applied. (ER 16.)

Overall, the Board rejected, in the context of email, the "supposed principle" that employees "have no right to use, for Section 7 purposes, employer equipment that they regularly use in their work." (ER 17.) The Board concluded, therefore, that the Board's prior case law regarding employer equipment "cannot bear the weight that the *Register Guard* majority sought to place on them." (ER 18.)

In light of this analysis of its precedent and the competing rights, the Board reasonably overruled *Register Guard*, finding it effectively minimized the importance of electronic discourse to employees' exercise of Section 7 rights. The Board found that the decision "undervalued employees' core Section 7 right" to communicate with each other in the workplace about their shared terms and conditions of employment, while according too much weight to employer's property rights. (ER 11.) Second, the Board rejected *Register Guard*'s failure to perceive the importance of email as a means of communication for employees, which "increased dramatically" in the 7 years following the Board's first

consideration of the issue. (ER 11.) Finally, the Board noted that *Register Guard* "mistakenly placed more weight on the Board's equipment decisions than those precedents can bear" by way of analogy to email. (ER 12.) The Board determined that it would be untenable "to smother employees' rights under a blanket rule that vindicates only the rights of employers." (ER 24.)

In establishing a new standard for employees' use of an employer's email system, the Board recognized that an employer has an interest in protecting its email systems and insuring employee productivity. The Board reasonably found that fears of a negative impact on productivity were unpersuasive because, even where special circumstances will not justify a total ban on access to email, an employer retains the right to "apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline." (ER 8.) First, employers are only required to permit employee Section 7 email communication on nonwork time, during which by definition there is no expectation of productivity. Second, employees can and do delete or ignore messages that are not relevant to their work or otherwise of no interest to them. Email is often the quickest and least disruptive means of communicating a brief personal message. Finally, employers can monitor their systems for misuse and employee work output for any reductions in productivity. (ER 22 n.72.) *See, e.g.*, *Caterpillar, Inc.*, 322 NLRB 674, 683-84 (1996)

(supervisory monitoring to ensure that employees are doing the work for which they are paid is not unlawful surveillance). The Board reasonably determined that an employer's interest in maintaining employee productivity can be effectively protected through a clearly conveyed definition of work time and the establishment of productivity standards.[10] Indeed, Purple maintains productivity benchmarks for its video interpreters that measure the amount of time logged into Purple's system and the amount of billable time interpreters generate. These productivity standards are posted at Purple's facilities for employees to see and are tied to employee bonuses. (ER 73; 162-63, SER 12-14.) Allowing access to email for Section 7 communications during nonwork time should not affect these established benchmarks.

The Board acknowledged that employers may have concerns about monitoring employee email, but emphasized that its decision "does not prevent employers from continuing…to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability." (ER 22.) Legitimate management interests in preventing

[10] The Board also found that "[s]ome personal use of employer email systems is common and, most often, is accepted by employers." (ER 14.) As the Supreme Court recently noted, "[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency." *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010) (involving search of personal text messages on department-issued police pager).

employer liability for offensive or harassing emails do not justify total bans on the use of email systems for protected Section 7 activity. Employers may lawfully maintain and enforce rules narrowly tailored to address those concerns, including, in particular, rules that prohibit emails that would be outside the protection of the Act.

As to concerns about allegations of unlawful surveillance of Section 7 activity by employers, the Board can assess surveillance allegations in this context using the same standards that have guided it in evaluating any alleged unlawful surveillance. (ER 22-23 & n.74.) *See, e.g.*, *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991) (employees who "choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them [as] [t]he Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not 'do something out of the ordinary'") (quoting *Metal Indus.*, 251 NLRB 1523, 1523 (1980)). Thus, as long as the employer "does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists," its monitoring of electronic communications via email will be lawful. (ER 23.) An employer may lawfully notify its employees—as many employers already do—that it monitors (or reserves the right to monitor) employees' email and computer use for legitimate,

nondiscriminatory business reasons and that they should have no privacy expectations when using employer-provided computer systems. (ER 23.) *Cf. Roadway Package Sys.*, 302 NLRB 961, 961 (1991) ("where…employees are conducting their activities openly on or near company premises, open observation of such activities by an employer is not unlawful").

Finally, an employer may, in keeping with *Republic Aviation*'s framework, demonstrate special circumstances necessary to maintain production or discipline to justify restricting employee rights. For example, the Board stated that an employer's interest in protecting its email system from damage or overloading due to excessive use is relevant to a showing of special circumstances. (ER 21 n.66.) *See New York New York*, 356 NLRB at 919 (recognizing that onsite contractor employee access to property could raise concerns for property owner that access by owner's own employees might not present). The Board further indicated that if special circumstances do not justify a total ban, "employers may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline." (ER 21.) The Board cautioned that in such a situation, an employer "must demonstrate the connection between the interest it asserts and the restriction," and that "theoretical" support for a restriction will be insufficient. (ER 21.) But an employer is not prevented from "establishing uniform and consistently enforced restrictions, such

as prohibiting large attachments or audio/video segments" if the employer demonstrates that the absence of such restriction interferes with the efficient functioning of its email system. (ER 22.)

In sum, in overruling *Register Guard*, and establishing a new standard, the Board sought to make "[n]ational labor policy… responsive to the enormous technological changes that are taking place in our society." (ER 24.) *See Register Guard*, 351 NLRB at 1121 (dissenting opinion). In issuing this carefully limited standard, the Board fulfilled its statutory responsibility to "adapt the Act to changing patterns of industrial life." *Hudgens*, 424 U.S. at 523.

B. The Board Reasonably Concluded that Purple Violated Section 8(a)(1) of the Act by Maintaining an Overly Broad Electronic Communications Policy

Applying its new rule to the facts of this case, the Board determined (ER 5) that Purple violated Section 8(a)(1) of the Act by maintaining an electronic communications policy that restricts employees' use of their work email for Section 7 purposes. The Board found (ER 4) that there was no dispute Purple grants its employees access to the company email system for work while also maintaining a prohibition on nonbusiness use of email that encompasses employee Section 7 activity during nonwork time. Purple expressly declined the opportunity

that the Board afforded it to establish special circumstances to rebut the presumption that it violated the Act.[11]

C. Purple's Remaining Arguments Provide No Basis for Denying Enforcement of the Board's Order

1. Purple's objections to the Board's accommodation of interests in this case are unavailing

In addition to the arguments discussed above, Purple contends that the Board failed to properly balance an "undeniable new infringement" on employer property rights against a "minimal or non-existent infringement" on employees' Section 7 rights. (Br. 11.) To the contrary, as fully discussed above, the Board rejected, with reasoned analysis, the various assertions of Purple and amici that any change in the *Register Guard* blanket prohibition on employees' use of the employer's email system during their nonwork time is unacceptable. Purple's argument (Br. 15-25) is little more than a disagreement with the Board's conclusion that Purple's interests did not wholly outweigh the employees' interests—a conclusion that it is "the task of the Board" to reach when presented with a conflict "between [Section] 7 rights and private property rights." *Hudgens*, 424 U.S. at 521. The weight given

[11] Purple's assertions (Br. 20, 30-31) that the Board failed to give guidance regarding the contours of special circumstances is disingenuous. The Board expressly remanded the case to provide Purple with an opportunity to present evidence that would justify the ban it imposed on the employees' use of its email system, and invited it to demonstrate any special circumstances that would "make the ban necessary to maintain production or discipline." (ER 8.) Purple declined to offer any evidence.

to the varying interests by the Board, and the Board's accommodation of those interests, is "subject to limited judicial review" as a reconciliation of the "conflicting interests of labor and management." *Weingarten*, 420 U.S. at 267.

Purple's assertion (Br. 15-17) that the Board created "a new 'right' of employees to compel their employers to allow use of company business equipment" is incorrect. (Br. 10.) As discussed above (pp. 30-31), the Board's new standard does not compel the use of an employer's email system; it applies only when an employer has already invited employees onto its email system.[12] Additionally, the Board readily distinguished its precedent regarding other types of employer business equipment as fundamentally different from an email system that employees have been given access to as part of their workplace. The Board examined the Section 7 right to engage in concerted activities and addressed the exercise of that right in the context of the evolving technological workplace.

The Board properly rejected Purple's argument (Br. 26) that it should apply its existing rules regarding employee distribution of literature to employee-to-employee email. Purple contends that, as written material, email restrictions are

[12] Because the Board has limited its new standard to employees who already have access to employer email, Purple's argument (Br. 16) that email cannot be a natural gathering place because the employer owns the means of transmission is not dispositive. Employers own physical spaces, including cafeterias and parking lots, where employees are permitted to engage in Section 7 activity on nonwork time when they are already lawfully on the property.

justified by its "right to prevent litter in the[] workplace." (Br. 11.) While acknowledging that Board rules permitting restrictions on distribution of literature in work areas were justified by concerns about the hazards of litter in a work area, the Board reasonably determined that emails were not analogous. (ER 20 & n.59 (citing *Stoddard Quirk Mfg. Co.*, 138 NLRB 615 (1962)).) The Board reasonably found that, although email contains some characteristics of printed literature, email is interactive in nature, informal, and often replaces face-to-face communications in the workplace. As such, emails are merely communications that are neither solicitation nor distribution, but that nevertheless constitute protected activity.[13] Purple's argument attributing an equivalency between email and literature and litter in the workplace would require the Board to also conclude that the email system itself was either a work or nonwork area. But it is unnecessary to characterize email systems as work areas or nonwork areas. As the Board found, in "the vast majority of cases, an employer's email system will amount to a mixed-use area, in which the work-area restrictions permitted on literature distribution generally will not apply." (ER 20.) *See, e.g.*, *United Parcel Serv.*, 327 NLRB 317, 317 (1998), *enforced*, 228 F.3d 772 (6th Cir. 2000).

[13] Thus the employer's suggestion (Br. 30) that a remand to apply the distribution standard is irrelevant.

2. The Board fully considered and found unpersuasive Purple's arguments regarding employer rights under Section 8(c) and the First Amendment

Purple contends (Br. 32-34) that employees will use company email "to communicate messages that Purple does not endorse." (Br. 11.) For that reason, Purple asserts that the Board's new policy infringes on employers' rights under Section 8(c) of the Act, 29 U.S.C. § 158(c), or the First Amendment. The Board considered and properly rejected those arguments.

The Board observed that an email sent "using an employer's email system, but not from the employer," could not "reasonably be perceived as speech by, or speech endorsed by, the employer," particularly where the message espoused a position known to be different from the employer's view. (ER 23.) Indeed, as the Board found, "[e]mail users typically understand that an email message conveys the views of the *sender*, not those of the email account provider." (ER 23.) For example, an individual would not think that a message sent from a Gmail account speaks for Google. (ER 23.)

Furthermore, both before and after the enactment of Section 8(c) of the Act, Section 8(a)(1) of the Act has been construed to require employers to tolerate unwelcome speech in the workplace where, after balancing the competing interests, the Board has determined that a refusal to tolerate that speech interferes with Section 7 rights. *See, e.g.*, *Lechmere v. NLRB*, 502 U.S. 527, 539-40 (1992)

(requiring mountain resort "to permit nonemployee union organizers to come on its premises in order to solicit employees"); *Eastex*, 437 U.S. at 570-75 (requiring employer to permit distribution of union newsletter on its premises); *Republic Aviation*, 324 U.S. at 803 (requiring employer to permit on-premises union solicitation by employees).

The Supreme Court has held that the First Amendment "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("*FAIR*"). The Court's cases interpreting that First Amendment prohibition, which it terms "compelled speech" cases, generally arise in two ways. First, there are the cases in which the Court has held the government cannot require that "an individual must personally speak the government's message." *Id.* at 63. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977) (state could not compel motorists to adopt state's message, "Live Free or Die," on license plate or suffer penalty); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (local government could not compel students to adopt its message by saluting and pledging allegiance to flag or face discipline). These cases are inapplicable.

The Board's decision does not compel employers to adopt or endorse the Board's views on protected concerted activity or any other subject. The Board correctly found that an email written by an employee "would not reasonably be

perceived as speech by the *Government* that the employer is required to host" because "it is simply speech by the employer's own employees, to whom the employer provided the forum." (ER 23.) Thus, amici's reliance (Br. 24) on *Wooley* and related cases is misplaced. Similarly, Purple's reliance (Br. 33) on *National Association of Manufacturers. v. NLRB*, in which the D.C. Circuit concluded that the Board's "notice-posting rule" improperly compelled employers to "personally speak the government's message" is misplaced.[14] *See* 717 F.3d 947, 957 n.13 (D.C. Cir. 2013), *overruled in part, Am. Meat Institute v. U.S. Dep't of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). The Board distinguished the court's decision in *National Association of Manufacturers* on the grounds that "there is obviously a vast difference between 'telling [employers] what they must say' and telling employers that they must let their employees speak." (ER 23 n.78 (quoting 717 F.3d at 956).)

In a second line of compelled-speech cases, the Supreme Court has limited the government's ability to force a speaker to host or accommodate another speaker's message. In those cases, the compelled speech "resulted from the fact

[14] In 2011, following a rulemaking, the Board issued a final rule requiring most private-sector employers covered by the Act to post a prescribed notice of employee rights under the Act. Employers and interest organizations challenged the rule. On appeal, the D.C. Circuit concluded, among other things, that Section 8(c) of the Act did not permit the Board to treat noncompliance with notice posting as an unfair labor practice or as evidence of unlawful motive. *Nat'l Ass'n of Mfrs.*, 717 F.3d at 959.

that the complaining speaker's own message was affected by the speech it was forced to accommodate." *FAIR*, 547 U.S. at 63. In *FAIR*, the Court rejected a "compelled speech" challenge to the Solomon Amendment, which conditioned certain federal funding on law schools' provision of equal access to military recruiters. The Court held that accommodating the military's message did not affect the law schools' speech because the law schools' provision of access to recruiters was "not inherently expressive," and because the "accommodation does not sufficiently interfere with any message of the school."[15] *Id.* at 64. Similarly, the Board's decision requires only that employers provide access to its email system to its employees for Section 7 communications, including communications with their coworkers expressing union or antiunion viewpoints. It does not interfere with whatever message the employer chooses to convey. Thus, an

[15] In *FAIR*, the Court distinguished, in ways equally applicable here, situations in which it found compelled-speech violations because "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. *Cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 568, 572-73 (1995) (state cannot compel parade organizers to include parade participants and their message); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 4, 12-15 (1986) (plurality opinion) (state cannot compel utility company to include in its newsletter third-party speech with which the utility disagrees). In *Hurley*, the Court relied on the "expressive nature of a parade" as "central to [its] holding" because "every participating unit affects the message conveyed by the [parade's] private organizers." *FAIR*, 547 U.S. at 63. Similarly, the Court determined that *Pacific Gas* was distinguishable because there the "forced inclusion of the other newsletter interfered with the utility's own message." *FAIR*, 547 U.S. at 64.

employer may also use email to convey its own views including "expressly dissociat[ing] themselves" from employee viewpoints. (ER 23.) *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (upholding state law requiring shopping center owner to allow certain expressive activities by others on its property). In *PruneYard*, the Supreme Court "explained that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was 'not…being compelled to affirm [a] belief in any governmentally prescribed position or view.'" *FAIR*, 547 U.S. at 65 (quoting *PruneYard*, 447 U.S. at 88).

Purple and its supporting amici cite (Br. 33, HR Br. 24-25) no authority or rationale for the proposition that others would reasonably assume that the employer endorses the substance of particular employee emails simply because those messages are processed through the employer's email system. This argument is particularly unconvincing where, as Purple and amici predict (Br. 33, HR Br. 25), the employees' communications run counter to the employer's interests. As the Board found, "employees 'can appreciate the difference between speech [their employer] sponsors and speech [it] permits because [it is] legally required to do so.'" (ER 23 n. 76 (quoting *FAIR*, 547 U.S. at 64-65).) *Accord Bd. of Educ. of Westside Cmty. Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality

opinion) (noting that high school students would understand that school did not endorse student religious group simply because school allowed groups access on nondiscriminatory basis); *PruneYard*, 447 U.S. at 87 (public would not likely consider views of people expressing ideas on shopping center property to be those of shopping center owner). It is well established that an employer remains free to present its own views, particularly in the context of an organizing drive, provided they are communicated in a noncoercive manner. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) ("an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit"). *Accord Overstreet v. Shamrock Foods Co.*, 697 F. App'x 561, 564-65 (9th Cir. 2017).

3. The Board appropriately applied its new rule retroactively

"The Board's usual practice is to apply its new policies and standards in all pending cases, at whatever stage, subject to balancing such retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *Beneli v. NLRB*, 873 F.3d 1094, 1097 (9th Cir. 2017) (quoting *Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717, 729 (2001)). This Court affords considerable deference to the Board's expertise on this determination where "it is clear from the Board's decision that it considered the

question of retroactive versus prospective application, and it provided a reasoned explanation for its choice." *Beneli*, 873 F.3d at 1098 (upholding Board's determination that its new arbitration deferral standard would be applied prospectively).

The Board applied its new policy retroactively as per its usual practice because application to the parties in the case does not work a "manifest injustice." *Pattern Makers*, 310 NLRB 929, 931 (1993). In making its determination, the Board balanced (ER 23-24) several factors including the reliance of the parties on preexisting law, the effect of retroactivity on accomplishing the purposes of the Act, and whether any particular injustice would arise from retroactive application.[16] *See Machinists Local 2777*, 355 NLRB 1062, 1069 n.37 (2010).

First, the Board acknowledged (ER 24) that Purple's electronic communications policy was lawful under *Register Guard*. However, the Board found no evidence indicating that Purple chose to grant employees access to its

[16] This Court recently applied a similar five-factor test in reviewing the Board's decision whether to apply a new standard retroactively or prospectively only. *See Beneli*, 873 F.3d at 1099. As described below, the Board's analysis shows that each of these factors favors retroactive application. The Court listed these factors: "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Id.* (citing *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982)).

email system in reliance on its ability to lawfully prohibit them from engaging in Section 7 activity via email on nonwork time.[17] *Cf. Beneli*, 873 F.3d at 1100 (noting that employer relied on the old arbitration deferral standard in negotiating contract and resolving grievance, which weighed in favor of prospective application).

Second, the Board concluded that retroactive application of its new rule would "significantly aid accomplishment of the purposes of the Act" by "promot[ing] the core Section 7 rights" of employees who use work email for other purposes. (ER 24.) The Board contrasted that result with "current prohibitions on such access deny[ing] employees their rights on a daily basis" such that prospective application of the Board's decision would continue the "far-reaching, wrongful denial" of employee rights "potentially for several more years in some pending cases." (ER 24.) For example, employees engaged in an organizing campaign in their workplace may be cut off from each other physically by working in different locations or teleworking. If they are unable to use their common email system to communicate their views (either for or against union representation) with

[17] Under this Court's five-factor test, this is a case of "first impression"—one in which a party successfully urged the Board to change its rule. *Beneli*, 873 F.3d at 1099. As in *Beneli*, this factor weighs in favor of retroactive application so as not to "'deny the benefits of a change in law to the very parties whose efforts were largely responsible for bringing it about.'" *Id.* (quoting *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 520 (9th Cir. 2012 (en banc))).

each other, the resulting outcome for employee representation could be altered for many years.

Finally, the Board determined that no particular injustice would result from finding Purple's extant policy unlawful under the new rule because Purple had an opportunity to rebut the Board's presumption that its employees should have access to their work email for Section 7 purposes on nonwork time. (ER 24.) The Board remanded the case to the judge for an opportunity for Purple to present evidence of special circumstances justifying its restrictions on employee email use; Purple declined the opportunity. Having established no special circumstances rebutting the presumption, Purple's remedial obligations are limited to rescission of the policy and standard notifications to employees. (ER 6.)

II. The Board's Order Was Well Within Its Remedial Discretion

Section 10(c) of the Act empowers the Board, after finding an unfair labor practice, to issue a remedial order requiring "such affirmative action ... as will effectuate the policies of th[e Act]." 29 U.S.C. § 160(c). The Board serves that goal by crafting remedies that provide for "a restoration of the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practice]." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) (discussing the Board's power to "fashion[] remedies to undo the effects of violations of the Act"). Only if it is "'a

patent attempt to achieve ends other than ... effectuat[ing] the policies of the Act'" will a Board remedy constitute a reversible abuse of discretion. *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1464 (9th Cir. 1997) (quoting *Seven-Up Bottling*, 344 U.S. at 346-37).

The Union contends (Br. 10-15) that the Board erred by not ordering a companywide remedial notice posting. While acknowledging that a companywide posting is appropriate when the record shows that an unlawful policy is maintained companywide, the Board concluded that the record did not show that Purple's electronic communications policy was in effect companywide. (ER 6 (citing *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), *enforced in relevant part*, 475 F. 3d 369 (D.C. Cir. 2007).) The stipulation entered into by Purple, the Union, and the Board's General Counsel states that the handbook containing that policy was in effect at the Corona and Long Beach locations. (ER 6; 157.) The Union correctly states that the stipulation "does *not* state that the handbook *only* applied at Purple's Corona and Long Beach, California call centers." (Br. 12-13.) However, the Board found that "the parties did not introduce testimony or other evidence showing that the handbook or the relevant policies were in effect companywide." (ER 6.) Further, as the Board noted (ER 6), in the severed part of the unfair-labor-practice case, the Board ordered posting only at the Corona and Long Beach locations regarding a different unlawful provision in the same handbook. *Purple*

Comm'ns, 361 NLRB 575, 575 n.4, 579 n.18, 580 (2014) (observing that the parties' stipulation in this case only reached the handbook's applicability at those two locations).

The Union's reliance (Br. 13-14) on cases in which the Board has ordered or courts have enforced nationwide notice posting is misplaced where, as here, the Board found, based on substantial record evidence, that such a posting was not supported. *See, e.g., NLRB v. U.S. Postal Serv.*, 254 F. App'x 582, 584 (9th Cir. 2007) (enforcing nationwide posting where substantial evidence showed that illegal union membership requirement was contained in nationwide guideline promulgated pursuant to nationwide collective-bargaining agreement). Thus, the Board did not abuse its discretion in declining the Union's request that its Order require Purple to post a remedial notice companywide.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petitions for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Pursuant to Local Rule 28-2.6, Board counsel is aware of one pending case that presents the closely related issue of whether an employer violated Section 8(a)(1) of the Act by restricting employee access to the employer's email system: *Sara Parrish v. NLRB*, 9th Cir. Case Nos. 17-70648, 17-71493, 17-71570.

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National Labor Relations Board
December 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMUNICATION WORKERS OF AMERICA, AFL-CIO Petitioner v. NATIONAL LABOR RELATIONS BOARD Respondent	No. 17-70948 Board Case No. 21-CA-095151
PURPLE COMMUNICATIONS, INC. Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner and COMMUNICATION WORKERS OF AMERICA, AFL-CIO Intervenor	Nos. 17-71062, 17-71276 Board Case No. 21-CA-095151

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,575 words of proportionally-spaced, 14-point

type, the word processing system used was Microsoft Word 2010.

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UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further

certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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