

Nos. 17-70648, 17-71493, 17-71570

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SARA PARRISH
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS
Intervenor

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

**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 the Court on the petitions of Sara Parrish and Cellco Partnership d/b/a Verizon Wireless (“the Company”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company finding several of its workplace rules unlawful. The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Decision and Order issued on February 24, 2017, and is reported at 365 NLRB No. 38. (ER 2-23.)¹

Parrish filed her petition for review in this Court, and the Company concurrently filed its petition for review in the D.C. Circuit. Venue was resolved by the Judicial Panel on Multidistrict Litigation, which ordered that the Company’s petition be transferred to this Court. The Board filed a cross-application for enforcement, and the Court consolidated the cases. 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 practices occurred in Arizona. The petitions and application were timely, as the Act provides no time limits for such filings. The Company has intervened on

¹ “ER” refers to the Excerpts of the Record filed by Parrish and “SER” refers to the Supplemental Excerpts of the Record filed with the Company’s opening brief. Further, “Br.” refers to the Company’s opening brief whereas “Amici Br.” refers to the brief filed by the Amici.

behalf of the Board in Parrish's challenge to the Board's Order. The National Association of Manufacturers, the Chamber of Commerce, the Coalition for a Democratic Workplace, the HR Policy Association, and National Federation of Independent Business Small Business Legal Center collectively filed an Amici Brief on behalf of the Company.

STATEMENT OF THE ISSUES

1. Is the Board's standard regarding employee use of an employer's email system reasonable and consistent with the Act? If so, whether the Board, applying that standard, reasonably found that the Company violated Section 8(a)(1) of the Act by maintaining a Solicitation and Fundraising rule that unlawfully interferes with employees' use of the employer's email system for Section 7 purposes during nonworking time.

2. Whether the Board properly exercised its broad remedial authority in ordering a physical posting of the Board's remedial notice at all the Company's facilities nationwide and a mailing of that notice to all current or former employees who worked at any of its shuttered facilities since August 2014.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by employee Sara Parrish, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining certain

workplace policies in its Code of Conduct that interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. (ER 120, 104-114.) The parties agreed to waive a hearing and to transfer the case with a stipulation of facts, directly to the Board's Division of Judges for a decision. (ER 94-99.)

The administrative law judge issued a decision and recommended order finding that several of the Company's workplace policies violated the Act. (ER 14-23.) Relevant to this case, the judge found (ER 15-16) that the Company's 2014 and 2015 Solicitation and Fundraising policy (Section 1.6 of the Code of Conduct), which prohibited employees from using company resources, including the email system, for solicitation or distribution of nonbusiness literature at any time, ran afoul of the Board's recent decision in *Purple Communications*, 361 NLRB No. 126, 2014 WL 6989135 (Dec. 11, 2014), *review pending sub nom. Communication Workers v. NLRB*, 9th Cir. Case Nos. 17-70948, 17-71062, 17-71276.² In *Purple Communications*, the Board found that employees who are given access to employer email in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time, absent the employer

² Briefing in *Purple Communications* will be complete after the filing of the employer's optional reply brief, which is currently due March 12, 2018. No challenge to the standard has been raised in any other circuit.

showing special circumstances that justify specific restrictions. 2014 WL 6989135 at *6. Here, the judge determined (ER 16) that the Company’s policy was overly broad and included Section 7-protected communications within its ambit and was thus unlawful under *Purple Communications*. The judge also noted that “[n]o special circumstances are present,” and the Company did not establish any justification for its overly restrictive policy. (ER 16.)

On review, the Board agreed (ER 2 n.3) with the administrative law judge that, under *Purple Communications*, the Company’s Solicitation and Fundraising policy was unlawful. In addition to this policy, the Board evaluated six other workplace rules that Parrish had challenged. However, as set forth fully in the Board’s Motion to Sever and Remand in Light of Recent Board Decision that was filed with the Court on January 17, 2018, the Board examined those six workplace rules in this case using an analytical framework that the Board has now overruled. *See Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017) (overruling the “reasonably construe” standard for determining the legality of facially neutral workplace rules announced in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).³ The Board no longer seeks enforcement of those findings and therefore does not defend them in this brief or otherwise respond to

³ The Board’s motion asked the Court to sever and remand the six findings affected by *Boeing* to allow the Board to evaluate the alleged violations under the newly announced standard. That motion remains pending at the time of filing this brief.

Parrish's or the Company's challenges to those findings. Rather, the Board continues to request that those findings be severed and remanded to the Board for reconsideration as requested in the Board's motion. Accordingly, the Board limits the argument in this brief to the one workplace rule that remains unaffected by *Boeing*, namely, the Company's 2014 and 2015 Solicitation and Fundraising policy (Section 1.6 of the Code of Conduct) and the related remedial order.⁴

I. THE BOARD'S FINDINGS OF FACT

The Company provides wireless telecommunication services and has offices and places of businesses throughout the country, including an office in Chandler, Arizona. It customarily communicates with its employees by email and through an intranet system. (ER 95, 98.)

The Company has maintained a Code of Conduct nationwide, including at its Chandler location, which was promulgated sometime before August 2014 and later revised in April 2015. (SER 41-78, 1-40.) Among other rules, the Code prohibits employees from using company resources, including the email system and computers, for solicitation and distribution of nonbusiness literature at any time. (SER 13, 53-54.) Specifically, the Company's Solicitation and Fundraising policy, which was included in the Code in both 2014 and 2015, states:

⁴ Given Parrish's petition for review challenged only one Board finding and that finding was affected by *Boeing*, as explained in the Board's motion, this brief does not respond to Parrish's opening brief.

Solicitation and fundraising distract from work time productivity, may be perceived as coercive and may be unlawful.

Solicitation during work time (defined as the work time of either the employee making or receiving the solicitation), the distribution of nonbusiness literature in work areas at any time or the use of company resources at any time (emails, fax machines, computers, telephones, etc.) to solicit or distribute, is prohibited. Non-employees may not engage in solicitation or distribution of literature on company premises. The only exception to this policy is where the company has authorized communications relating to benefits or services made available to employees by the company, company-sponsored charitable organizations or other company-sponsored events or activities. To determine whether a particular activity is authorized by the company, contact the V7 Compliance Guideline.

(SER 13, 53-54.) According to the Company's Code of Conduct, "[f]ailure to comply with any provision of this Code or company policy is a serious violation and may result in disciplinary action, up to and including termination of employment, as well as civil or criminal penalties." (SER 8, 48.)

II. THE BOARD'S DECISION AND ORDER

After exceptions were filed by the Company, the General Counsel, and Parrish, the Board (Members Pearce and McFarren; Acting Chairman Miscimarra dissenting in relevant part) determined (ER 1 n.3), in agreement with the administrative law judge, that the Company's 2014 and 2015 Solicitation and Fundraising policy unlawfully restricts employee use of its email system to engage in solicitation and distribution, including Section 7-protected communications,

during nonworking time. Therefore, the Board found that the Company's maintenance of that policy violates Section 8(a)(1) of the Act.

The Board's Order requires (ER 3-4) that the Company cease and desist from maintaining its 2014 and 2015 Solicitation and Fundraising 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, the Company must rescind the policy, and furnish employees with inserts for the Code of Conduct either advising them that the unlawful provisions have been rescinded or providing language of lawful provisions. (ER 4.) Alternatively, the Company may publish and distribute a revised Code of Conduct that does not contain the unlawful provisions or that provides language of lawful provisions. (ER 4.)

The Board's Order also directs (ER 4) the Company to post a remedial notice at all of its facilities nationwide and to distribute the notice electronically. Further, the Order directs (ER 4) the Company to mail a copy of the remedial notice to all current and former employees who, having been employed at any time since August 2014, worked at facilities involved in the proceeding that have gone out of business or closed.

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 Props., 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 “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) (“the 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

1. The Board, applying the rule announced in *Purple Communications*, found that the Company's Solicitation and Fundraising policy contained in its 2014 and 2015 Code of Conduct was unlawful. In *Purple Communications*, the Board held that, when an employer has already given employees access to email in the course of their work, as the Company indisputably has here, employees may presumptively use that email for Section 7 communication on nonwork time. And 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 Company here advocates for this Court to deny enforcement in this case on the ground that *Purple Communications* itself is an improper exercise of the Board's authority. The Company concedes that denying enforcement with respect to the Solicitation and Fundraising policy rests on a successful challenge to *Purple Communications*, but the Company fails to provide this Court with any persuasive basis for doing so.

2. The Board's standard under *Purple Communications* 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*, 324 U.S. 793 (1945). 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. *Id.* 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. 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 *Purple Communications*, established a carefully limited new standard regarding employee access to an employer's email system.

In announcing the new standard in *Purple Communications*, the Board considered and rejected numerous arguments similar to those raised by the

Company and Amici here 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*, 351 NLRB 1110 (2007), *enforced in part sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), 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.

The Company may disagree with the outcome of the balancing of interests that the Board announced in *Purple Communications*, but that is a task for the Board in the first instance and should be given deference. None of the arguments offered by the Company provides a basis for disturbing the Board's well-reasoned and fully explained rationale in *Purple Communications*. Nor did the Company in this case offer, much less establish, any special circumstances justifying any prohibition on use of the email system.

3. In issuing its Order, the Board acted well within its broad remedial discretion in directing a physical, nationwide posting of the notice and a mailing to current and former employees of closed facilities who were employed at those facilities at any time since August 2014, after the Code of Conduct was first issued that contained the unlawful policy. In this case, the Board imposed standard remedies for this type of violation, and the Company cannot show that the Board acted outside its remedial authority.

ARGUMENT

This case turns on the Company's challenge to the Board's decision in *Purple Communications*. The Board here found that the Company's Solicitation and Fundraising rule is unlawful because it runs afoul of the Board's rule established in *Purple Communications*, and the Company concedes (Br. 20 n.6) that its rule, in fact, contravenes *Purple Communications*. Its only argument

against enforcement is that *Purple Communications* was wrongly decided, primarily because, the Company asserts, the Board, when balancing employees' and employers' rights, accorded too much weight to employees' Section 7 rights and not enough to employers' rights.⁵ The Court should reject that contention.

⁵ At the outset, we note that many of Amici's arguments are precluded from judicial review. Amici alone argue that: there is no "justifiable basis" for distinguishing employer-owned email systems from employer-owned business equipment (Amici Br. 9); *Republic Aviation* applies only to circumstances in which employees are "entirely deprived" of their rights of association (Amici Br. 10); the Board's Order infringes on the Company's free speech rights (Amici Br. 14-15); email restrictions should be governed by the same restrictions as distribution of literature in work areas because emails are written material; and the Board's Order is too vague (Amici Br. 17). The Company did not raise *any* of these claims before the Board, and as such the Court is jurisdictionally barred from considering them. *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1992). Even if the arguments were not subject to that jurisdictional bar, the Company's failure to raise these challenges in its *opening* brief – an argument cannot be raised for this first time in a reply brief – would render them waived before the Court. *See Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992); *see also* Fed. R. App. Proc. 28(a)(9)(A) (party must raise all claims in opening brief). Furthermore, Amici cannot cure these jurisdictional defects because an amicus cannot expand the scope of appeal to raise issues not argued by the parties. *See Eldred v. Reno*, 239 F.3d 372, 378-79 (D.C. Cir. 1991), *aff'd*, 537 U.S. 186 (2003) (quoting *Resident Counsel v. HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993) ("amicus [is] constrained by the rule that [it] generally cannot expand the scope of an appeal to implicate issues not presented by the parties to the appeal")); *Cellnet Commc'ns, Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998) (to the extent that amicus raises issues or make arguments that exceed those properly raised by the parties, court may not consider such issues).

I. THE BOARD PROPERLY APPLIED *PURPLE COMMUNICATIONS* IN FINDING THAT THE COMPANY’S CODE OF CONDUCT WAS UNLAWFUL

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.” *Purple Commc’ns*, 2014 WL 6989135, at *1. 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.” *Id.* at *14. Here, the Company stipulated that it provides its employees with email access on its system and does not contend that special circumstances exist to justify its policy. Rather, the Company challenges only the reasonableness of the Board’s standard.

As detailed below, 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*.” *Purple Commc’ns*, 2014 WL 6989135, at *17. 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 in *Purple Communications* 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 organization . . . and to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁶ 29 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

⁶ 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).

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 in *Purple Communications* 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.⁷ *Purple Commc'ns*, 2014 WL 6989135, at *1 n.5. 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." *Id.* at *12 (quoting *Hudgens*, 424 U.S. at 522). As the Supreme Court stated, "the primary responsibility for making this accommodation must rest with the Board in the first instance." *Hudgens*, 424 U.S. at 522.

⁷ 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, 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").

Therefore, balancing 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.” *Purple Commc’ns*, 2014 WL 6989135, at *1. 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. at 804. The *Republic Aviation* Court 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]nconvenience 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 in *Purple Communications*, 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,” *Republic Aviation*, 324 U.S. at 804, have evolved and changed. *See, e.g., Beth Israel*, 437 U.S. at 483 (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.” *Purple Commc’ns*, 2014 WL 6989135, at *6. 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.” *Id.* (quoting *Cent. Hardware*, 407 U.S. 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 stated in *Purple Communications*, “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.” 2014 WL 6989135, at *6 (quoting *Eastex v. NLRB*, 437 U.S. 556, 574 (1978)).

Turning next to the role that email plays in the workplace, the *Purple Communications* 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.” *Purple Commc’ns*, 2014 WL 6989135, at *13. 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.” *Id.* 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.” *Id.* at *12.

The Board relied on empirical evidence demonstrating that “email has become a significant conduit for employees’ communications with one another.” *Id.* at 13. 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.” 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.⁸ According to a 2008 survey, 96 percent of employees used the internet, email, or mobile phones to keep connected to their

⁸ 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.

jobs, including outside of their working hours. *See* 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/> (last viewed Jan. 29, 2018). 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.” *Purple Commc’ns*, 2014 WL 6989135, at *8 & nn.26-29. The Board cited research, *id.*, 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) (last viewed on Jan. 29, 2018). 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.” *Purple Commc’ns*, 2014 WL 6989135, at *8.

The Company complains that the Board’s decision will lead to an increased use of its email, which it claims is an “increasingly expensive business investment.” (Br. 12.) But the Board gave due consideration to that cost, and 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.” *Id.* at *8 & 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) (last viewed Jan. 29, 2018); 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) (last viewed Jan. 29, 2018). 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.” *Purple Commc’ns*, 2014 WL 6989135, at *7 n.22. In view of this evidence, the Board did not, as the Company claims, “overstate the importance of the use of *employer*

email to organizing.” (Br. 12) (emphasis in original). Rather, as the Board concluded in *Purple Communications*, “[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.” *Purple Commc’ns*, 2014 WL 6989135, at *7.

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. *Id.* at *8. 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.” *Id.* 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.’” *Id.* at *13 (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 Board and the Supreme Court have recognized the workplace, and, when appropriate, a particular location

in the workplace, as ‘the natural gathering place’ for employees to communicate with each other.” *Purple Commc’ns*, 2014 WL 6989135, at *8 (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,” *Purple Commc’ns*, 2014 WL 6989135, at *17, the Board exercised its obligation to assess workplace realities and “adapt the Act to changing patterns of industrial life,” *Weingarten*, 420 U.S. at 266.

The *Purple Communications* Board reasonably rejected arguments that *Republic Aviation* applies only to circumstances in which employees are “entirely deprived” of their rights of association. *Purple Commc’ns*, 2014 WL 6989135, at *13; 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 Publ’g 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, whether 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. *Purple Commc’ns*, 2014 WL 6989135, at *13. Further, as the Board

emphasized, the Supreme Court determined that the Board “acted properly in applying a presumption favoring employees’ exercise of their Sec[ti]on 7 rights on their employer’s property, even where there was no evidence that those rights would otherwise be ‘seriously handicapped.’”⁹ *Id.* at 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 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.

The Company and supporting Amici rely (Br. 16-17, Amici Br. 10-11) on the ubiquity of smartphones and other personal electronic devices, as well as social

⁹ 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.” *Purple Commc’ns*, 2014 WL 6989135, at *13 (internal quotation omitted).

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.*” *Id.* at *6 n.18 (citing *Eastex*, 437 U.S. at 574; *Magnavox*, 415 U.S. at 325) (emphasis in original). 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.*” *Purple Commc’ns*, 2014 WL 6989135, at *6 n.18 (emphasis in original). 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.¹⁰

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."

¹⁰ None of the Amici before the Court has indicated whether they or the employers they represent provide employee access to their email systems. *Purple Communications* only applies to those employers who provide such access in the first instance.

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).

The Board did not disagree in *Purple Communications* that “the property owner's right to control the use of its property” is at issue. *Purple Commc'ns*, 2014 WL 6989135, at *11 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.” *Id.* As the Board acknowledged, 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.” *Purple Commc'ns*, 2014 WL 6989135, at *11 n.50; *New York New York*, 356 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. *Purple Commc’ns*, 2014 WL 6989135, at *11.

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. In *Purple Communications*, 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 reasonably concluded in *Purple Communications* that “email systems are different in material respects from the types of workplace equipment the Board has considered in the past.” *Purple Commc’ns*, 2014 WL 6989135, at *9. As an example, the Board noted 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. *Id.* 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.” *Id.* (quoting *Register Guard*, 351 NLRB at 1125-26); 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.” *Purple Commc’ns*, 2014 WL 6989135, at *9.

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,¹¹ are, “at best, distant cousins of the sophisticated digital telephone systems that are now prevalent in the workplace.” *Id.* at *10. The Board therefore relied on the fact that, “[g]iven their vastly greater speed and capacity, email systems function as an

¹¹ 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).

ongoing and interactive means of employee communication in a way that other, older types of equipment clearly cannot.” *Id.* at *9.

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.” *Id.* at *10. 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) (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. *Purple Commc’ns*, 2014 WL 6989135, at *10.

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.” *Id.* 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.”¹² *Id.* at *11.

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. *Id.* at *5. 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. *Id.* 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. *Id.* The Board determined that it

¹² In a related vein, this principle disposes of the Company’s complaint (Br. 15-16) that the Board’s decision is internally inconsistent. Specifically, the Company argues that the Board cannot square allowing employers not to provide employees with *any* email access with its finding that if they do, then they must also provide access for Section 7 purposes during nonworking hours. In its view, the Company cannot violate the Act by limiting use once it has granted certain access if another employer that provides no access at all is fully complying with the Act. The Company is mistaken. The Board’s holding here is analogous to the well-established notion that once an employer has granted employee access to its real property, it cannot ban employees from engaging in Section 7 activities on the property. See *Republic Aviation*, 324 U.S. at 802 n.8; *Purple Commc’ns*, 2014 WL 6989135, at *11.

would be untenable “to smother employees’ rights under a blanket rule that vindicates only the rights of employers.” *Id.* at *17.

In establishing a new standard for employees’ use of an employer’s email system in *Purple Communications*, the Board recognized – notwithstanding the Company’s and Amici’s protestations otherwise (Br. 13-14; Amici Br. 13) – that an employer has an interest in protecting its email systems and ensuring employee productivity. The Board reasonably found that fears of a negative impact on productivity, such as those expressed by the Company and Amici here (Br. 14-15; Amici Br. 11-12), 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.” *Purple Commc’ns*, 2014 WL 6989135, at *14. 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. *Id.* at *14 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.¹³

The Board acknowledged that employers may have concerns, expressed by the Company and Amici here (Br. 14; Amici Br. 11-12), 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

¹³ The Board also found that “[s]ome personal use of employer email systems is common and, most often, is accepted by employers.” *Purple Commc’ns*, 2014 WL 6989135, at *8. 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). These findings undercut the Company’s otherwise exaggerated claims (Br. 13, 15) that the Board has “created a new right” for employees “to commandeer” employer email systems for personal use or that it has created a new problem by allowing access of those systems outside of working time. As discussed in more detail above, most employers have been allowing employees to use company email systems, including for personal use. *See* pp. 23-24 (discussing current state of employee use of company email systems). And, as the Board explained, *Purple Communications* did not create any new statutory right. Rather, it simply applied the well-recognized right of employees to communicate with one another to a new context. *Purple Commc’ns*, 2014 WL 6989135, at *6 n.15

liability.” *Purple Commc’ns*, 2014 WL 6989135, at *15. Legitimate management interests in preventing 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 the Company’s and Amici’s concerns (Br. 13; Amici Br. 13) 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. *Id.* at 15 & 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. *Purple Commc’ns*, 2014 WL 6989135, at *15. 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. *Id.*; *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. *Id.* at 14 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.” *Purple Commc’ns*, 2014 WL 6989135, at *14. 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. *Id.* 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. *Id.*

In sum, in overruling *Register Guard*, and establishing a new standard in *Purple Communications*, the Board sought to make “[n]ational labor policy... responsive to the enormous technological changes that are taking place in our society.” *Id.*; 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, under *Purple Communications*, the Company’s Solicitation and Fundraising Policy Violated Section 8(a)(1)

Applying *Purple Communications* to the facts of this case, the Board determined that the Company violated Section 8(a)(1) of the Act by maintaining a Solicitation and Fundraising policy that restricts employees’ use of company resources, including email, for Section 7 purposes. As the Board observed (D&O 14), the Company stipulated that it 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. According to the Board, “[t]his rule is contrary to *Purple Communications* presumption that employees have a right use [the Company’s] email system to engage in Section 7 communications during their nonworking time.” (D&O 14-15.) And the Company did not offer or establish special circumstances to rebut the presumption that it violated the Act. Accordingly, the Board’s finding that the policy violates the Act is beyond reproach under *Purple Communications*. Indeed, as noted above, the Company agrees with this conclusion. (Br. 20 n.6.)

C. The Company’s Remaining Arguments Provide No Basis for Denying Enforcement of the Board’s Order

In addition to the arguments discussed above, the Company and Amici contend (Br. 12-15; Amici Br. 12-14) that the Board failed to take proper account of an employer’s substantial investment in its email system, the costs associated with misuse of that system, and the heightened security risks that accompany increased employee use of that system. At the outset, these challenges amount to little more than a disagreement with the Board’s conclusion that the Company’s interests here simply 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 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.

Further, the Board in *Purple Communications* expressly recognized that an employer could present evidence of damages to its system as a “special justification” warranting a lawful ban on its email system. 2014 WL 6989135, at *14-*15. Here, the Company offered only pure speculation that employees would misuse its system and speculated further that this misuse would result in increased security risks. Notably, the Company submitted no evidence to support its assertions that employee use of its email system to engage in protected activity during non-work time would impede productivity or affect the functionality of its system.

In short, the Company appears to complain that allowing employees to use its email systems for protected Section 7 activity will be difficult. As explained above, however, the Supreme Court has acknowledged that employers may have to experience “inconvenience or even some dislocation of property rights in order to safeguard” employees’ Section 7 rights. *Republic Aviation*, 324 U.S. at 802 n.8. And while banning employee use of employer email may be a simpler rule, as the Board explained, such a rule fails to take into consideration, as the Board must, “the changing patterns of industrial life.” *Purple Commc’ns*, 2014 WL 6989135 at *14 n.72.

Finally, the Company makes the untenable claim that the Board’s rationale in *Purple Communications* deserves less deference because it was issued by a “sharply divided Board” (Br. 18).¹⁴ As noted above (pp. 9-12), the Court “will not upset [a] new standard,” so long as the Board “provide[s] a reasoned justification for departing from precedent.” *W&M Props.*, 514 F.3d at 1346-47. Contrary to the Company’s view, courts will “defer to the Board’s policy choice[s]” that are based on reasonable interpretations of the Act, even if those views are a departure from prior precedent. *Local 702, IBEW*, 215 F.3d at 17. As the Board has outlined in detail herein (pp. 19-41), there can be no doubt that the Board has provided a reasoned justification.

II. The Board’s Order Is 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].”

¹⁴ In making this meritless assertion, the Company relies on an unpublished case that was superseded just two months later. *See NLRB v. Machinists Local 1327, Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO, Dist. Lodge 115*, 608 F.2d 1219 (9th Cir. 1979), *superseding* 1979 WL 6180 (9th Cir. Aug. 6, 1979). Most notably, the published decision, which superseded the case cited by the Company, does *not* include any language casting doubt on deference owed to Board decisions that issue with dissenting opinions.

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 Board directed the Company to post a physical copy of the remedial notice at all of its facilities and to mail it to current and former employees employed by the Company at any shuttered facility at any time since August 2014. The Company argues (Br. 40) that it should only have to post the notice electronically and claims that a mailing is too burdensome. Neither objection is persuasive.

Under well-established Board law, a nationwide posting is appropriate when the record shows that an unlawful policy is maintained companywide. *See Guardsmark, LLC*, 344 NLRB 809, 812 (2005) (“[W]e have consistently held that, where an employer’s overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.”), *enforced in relevant part*, 475 F.3d 369 (D.C. Cir. 2007). Here, the Company stipulated that the Solicitation and

Fundraising policy was in effect at “all of its offices and places of business throughout the United States,” (ER 95, 98) and does not object to posting on a nationwide basis.

The Board properly rejected the Company’s argument that sending the notice only electronically is sufficient. While the Board now requires electronic postings by employers that regularly communicate with their employees electronically, *see J. Picini Flooring*, 356 NLRB 11 (2010), the Board has never held that the electronic-posting requirement supplants the physical-notice posting requirement. And physical posting provides an alternative for those employees who do not see the electronic posting. Moreover, the Company provided no evidence of any burden of physical posting the notice at its facilities. Thus, the Board did not abuse its discretion in directing the Company to physically post the remedial notice at its facilities nationwide.

Likewise, as the Board observed here, “mailings to former employees of closed facilities is a standard Board remedy.” (D&O 1 n.2); *see Indian Hills Care Ctr.*, 321 NLRB 144, 145 & n.7 (1996) (“If the record indicates that the respondent’s facility has closed, the Board routinely provides for mailing of the notice to employees.”); *see also Fresh & Easy Neighborhood Market*, 356 NLRB No. 145, 2011 WL 1615652, at *2 (Apr. 28, 2011) (mailing to former employees of shuttered facilities “is permissible and necessary to ensure that all affected

employees will be informed of the Respondent's violation and the nature of their rights under the Act”), *enforced*, 468 F. App’x 1 (D.C. Cir. 2012). The Company’s bald assertion (Br. 40) that tracking down last-known addresses of former employees would be burdensome is insufficient to show that the Board abused its discretion in imposing a standard remedy regarding dissemination of a remedial notice.

CONCLUSION

The Board respectfully requests that the Court deny the petition for review and enforce 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: *Communication Workers v. NLRB*, 9th Cir. Case Nos. 17-70948, 17-71062, 17-71276.

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National Labor Relations Board
February 2018

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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)	
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)	No. 17-70648
v.)	
)	Board Case No.
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Respondent)	
)	
and)	
)	
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS)	
)	
Intervenor)	
)	
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)	Nos. 17-71493, 17-71570
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)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 11,028 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 8th day of February, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2018, 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

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