UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION
d/b/a RIO ALL-SUITES HOTEL AND CASINO

and Case 28-CA-060841

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL 15,
LOCAL 159, AFL-CIO

BRIEF OF THE GENERAL COUNSEL

This brief is submitted by the General Counsel in response to questions posed by the Board on August 1, 2018 concerning the application of *Purple Communications, Inc.*, 361 NLRB 1050 (2014), to this case and the Administrative Law Judge's decision that Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel and Casino (the "Employer") violated Section 8(a)(1) by maintaining a rule on "computer usage," stating that "Computer resources are Company property and are provided to authorized users for business purposes." On June 30, 2016, the Employer filed Exceptions to the Administrative Law Judge Mara-Louise Anzalone's May 2016 decision. On August 31, 2016, the General Counsel filed a brief in opposition to the Employer's exceptions arguing that the ALJ's decision should be upheld. The General Counsel hereby withdraws that brief and its opposition to the Employer's position and, for the reasons discussed below, urges the Board to overturn *Purple Communications* and, accordingly, find the Employer's rule lawful.

On August 1, 2018, with respect to this case, the Board solicited the parties and interested amici to file briefs addressing the following questions: (1) should the Board adhere to, modify, or overrule *Purple Communications*, 361 NLRB 1050 (2014); (2) if overruled, should the Board return to the standard of *Register Guard*, 351 NLRB 1110 (2007), *enforced in part and*

remanded sub nom. Guard Publishing v. NLRB, 571 F.3d 53 (D.C. Cir. 2009), *overruled by Purple Communications*, 361 NLRB at 1050, or adopt some other standard; (3) if the Board returns to the holding of *Register Guard*, should the Board carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system and, if so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis; and (4) should the Board apply a different standard to the use of employer computer resources other than email and, if so, what should that standard be.

I. Summary of Argument

The Board should overrule *Purple Communications* and return to the holding of *Register Guard*. Exceptions should be made on a case-by-case basis where the Board determines that employees are unable to communicate in any way other than through the employer's email system. Finally, *Register Guard* should apply to other employer-owned computer resources not made available by the employer to the public.

II. History of the Case

This case was first tried before Administrative Law Judge ("ALJ") William J. Schmidt on January 10, 2012 on the issue of, *inter alia*, whether the Employer violated Section 8(a)(1) by maintaining a rule on "computer usage," stating that "Computer resources are Company property and are provided to authorized users for business purposes." *Rio All-Suites Hotel and Casino*, JD(SF)–11–12, at 8 (Mar. 20, 2012). Following the holding of *Register Guard*, the ALJ found the rule to be lawful and dismissed the complaint as to that charge. *Id.* at 8–9. The Board, on exceptions, and following its decision in *Purple Communications*, which had overruled *Register Guard* during the interim, remanded the portion of the case concerning the computer-usage rule

for further proceedings consistent with *Purple Communications*. *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 5 (Aug. 27, 2015). On remand, ALJ Mara-Louise Anzalone issued a decision finding that, under *Purple Communications*, the Employer's computer-usage rule violated Section 8(a)(1). *Rio All-Suites Hotel and Casino*, JD(SF)–20–16, at 7–8 (May 3, 2016). On June 30, 2016, the Employer filed exceptions asking the Board to overrule *Purple Communications* and return to the standard enunciated in *Register Guard* on employee use of an employer's email system. The Employer further argued that even under the standards of *Purple Communications*, its email system and usage rule would be lawful because the users of its email systems were primarily managers and supervisors and not general staff. Accordingly, its restriction of usage of its email system for business purposes would have little or no impact on Section 7 rights.

III. Argument

A. The Board Should Overrule *Purple Communications*.

The Board should overrule *Purple Communications* for a variety of legal and practical reasons. First, contrary to decades of Board precedent, the decision impermissibly created a right by employees to use employer-owned and -financed communication systems, even where employees possess a plethora of other means of communication. Second, the decision requires employers to provide and pay for employee communications in violation of their First Amendment rights. Third, permitting employees to use an employer's email systems for Section 7 communications places an undue and unnecessary burden on employers' business operations and has the practical effect of reducing productivity, disrupting business operations, and can compromise system security and confidentiality.

i. ***Purple Communications* Is in Conflict with Board Precedent.**

An employer has a "basic property right" to "regulate and restrict employee use of company property." *Union Carbide Corp. v. NLRB,* 714 F.2d 657, 663–64 (6th Cir. 1983). Email systems are purchased by employers for use in operating their businesses. Employers thus have a legitimate business interest in maintaining the efficient operation of their email systems. These systems are costly to establish, maintain, and keep secure, and have been created and implemented by employers to conduct business, not as a forum or platform for public communication. Thus, employers who have invested in email systems seek to use them to promote their business agenda and "have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails." *Register Guard*, 351 NLRB at 1114; *Purple Communications*, 361 NLRB at 1069 (Member Miscimarra, dissenting).

Whether employees have a right under the Act to use an employer's communication system purchased for business purposes for Section 7 communications has been addressed by the Board in numerous cases involving various communications media such as bulletin boards, telephones, televisions, and email systems. The Board has consistently held that there is "no statutory right … to use an employer's equipment or media," as long as the restrictions are nondiscriminatory. *Register-Guard*, 351 NLRB at 1114 (no statutory right to use employer's email systems); *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (no statutory right to use the television in the employer's break room to show a prounion campaign video), *enforced per curiam*, 269 F.3d 1075 (D.C. Cir. 2001). *See also Eaton Technologies*, 322 NLRB 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin

board."); *Champion International Corp.*, 303 NLRB 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property" such as a copy machine); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987) ("[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations …."), *enforced per curiam*, 857 F.2d 1474 (6th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989); *Union Carbide Corp.-Nuclear Div.*, 259 NLRB 974, 980 (1981) (employer "could unquestionably bar its telephones to any personal use by employees"), *enforced in relevant part*, 714 F.2d 657 (6th Cir. 1983). *Cf. Heath Co.*, 196 NLRB 134, 135 (1972) (employer did not engage in objectionable conduct by refusing to allow prounion employees to use public address system to respond to antiunion broadcasts).

Those decisions all held that an employer had the right to prohibit use of employer-owned communications systems that were purchased for the employer's business activities for non-business activities. In *Purple Communications*, the Board departed from this long-standing precedent and overturned *Register Guard* without adequate explanation as to what communication problem the *Register Guard* ruling had created that needed to be fixed or why the use of an employer's email system required a different analysis. *See Purple Communications*, 361 NLRB at 1104 (Member Johnson, dissenting). Rather, apparently wishing to fix a problem that did not exist and to reach a result different from what precedent would require, the majority in *Purple Communications* relied on *Republic Aviation*—a decision that is inapt and does not support the *Purple Communications* majority's conclusion. *See id*. at 1070 (Member Miscimarra, dissenting). In *Republic Aviation*, the employer maintained a general rule prohibiting all solicitation at any time on the premises. 324 U.S. 793, 802 (1945). The employer's rule "entirely deprived" employees of their right to communication in the workplace on their own time, and

employees had no time at the workplace in which to engage in Section 7 communications. *Id.* at 801 n.6.

Here, and in *Purple Communications*, there was no claim that employees had no other means of communication or that they were restricted from communicating with each other during non-work time or were deprived of all types of communication. Further, *Republic Aviation* is inapplicable to the use of an employer's email system because *Republic Aviation* involved face-to-face solicitation and not the use of employer equipment. Moreover, according to *Register Guard*, "*Republic Aviation* requires the employer to yield its property interests to the extent necessary to ensure that employees will not be 'entirely deprived,' 324 U.S. at 801 fn. 6, of their ability to engage in Section 7 communications in the workplace on their own time. It does not require the most convenient or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications." *Register Guard*, 351 NLRB at 1115.

Here, and in *Purple Communications*, employees may use any methods of communications systems normally available to them, including their own cellphones, and may email, text, blog, tweet, and post. Indeed, the only restriction here is that employees may not use their employer-owned and paid-for email system to communicate. Thus, "[w]hat the employees seek here is use of the Respondent's communications equipment to engage in additional forms of communication beyond those that *Republic Aviation* found must be permitted. Yet, 'Section 7 of the Act protects organizational rights … rather than particular means by which employees may seek to communicate.'" *Register Guard*, 351 NLRB at 1115 (quoting *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995). *See also NLRB v. Steelworkers (Nutone*), 357 U.S. 357, 363–64 (1958) (The Act "does not command that labor organizations as a matter of . . . law,

under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications simply because the employer is using it").

Accordingly, just because it may be more convenient for an employee to communicate via a particular communication system, the Act does not require that employees be given access to such a communication system if other communications systems are available to them. Thus, in numerous cases decided long after the issuance of the *Republic Aviation* decision, the Board found no Section 7 right to use an employer's equipment for communication. *See, e.g.*, *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986) (no statutory right to use an employer's bulletin board); *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663 (6th Cir. 1983) ("As recognized by the ALJ, Union Carbide *unquestionably* had the right to regulate and restrict employee use of company property." (emphasis in original)).

ii. **Employers Should Not Be Required to Subsidize Speech.**

The Board should also rely on First Amendment concerns to overturn *Purple Communications*, as discussed by the Supreme Court in *Janus*. *See Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) ("Compelling a person to *subsidize* the speech of other private speakers raises . . . First Amendment concerns." (emphasis in original)). *See also Purple Communications*, 361 NLRB at 1105–07 (Member Johnson, dissenting) ("The First Amendment violation is especially pernicious because the Board now *requires an employer to pay for its employees to freely insult* its business practices, services, products, management, and other coemployees on its own email." (emphasis in original)). *See generally* Josh Carroll, *The NLRB's Purple Communications Decision: Email, Property, and the Changing Patterns of Industrial Life*, 14 DUKE L. & TECH. REV. 280, 289 (2016) (discussing

significant monetary cost in providing employees access to employer's email systems, including information technology support and expensive hardware and software configurations). Thus, holding that employees have a presumptive right to use their employer's email system to engage in Section 7 communications raises First Amendment concerns because the Board, as a government entity, may not compel an employer to subsidize hostile speech by requiring the employer to pay for an email system to send, receive, and store speech with which it does not agree.

iii. **The *Purple Communications* Rule Burdens Employer Operations.**

Finally, and most important, the practical effect of *Purple Communications* is that it unnecessarily burdens employer operations by creating unworkable rules that cannot easily be implemented without risking other possible violations of the Act. Employers typically limit the use of their email systems to business usage for a variety of reasons, including (1) to ensure productivity so that employees are not using work time to send or look at personal emails, (2) to protect the dissemination of confidential information from disclosure, (3) to protect the integrity of its communications system from viruses and malware, (4) to prevent use of email systems for offensive or unlawful purposes, and (5) to protect themselves from liability due to the potential for employee use of email systems for discriminatory or other unlawful purposes. Permitting employees access to employers' email systems for Section 7 communications, even during non-work time, effectively eliminates the possibility that any of these goals can be achieved.

First, permitting employee use of the employer email system for Section 7 communications inevitably leads to lower productivity. Even if employees don't write and send Section 7 emails during work time, employees will open and read the emails during work time because employees will not know that the emails they have received are Section 7

communications until they are opened and read. And how many will resist the temptation to respond to the communication until after work hours? *See* Carroll, *The NLRB's Purple Communications Decision*, at 293 (*Purple Communications* requires employers to engage in "tedious monitoring of computer workstations" that will "build distrust among employers who will have limited ability to know when an employee is working or just sending an unauthorized email during work [time]"). Even if review of these emails took only 5 or 10 minutes per employee per day, if this review were replicated among hundreds of employees in a large workforce, loss of productivity and disruption of operations could be significant. Indeed, in work settings where breaks are not clearly defined, this negative result will be further compounded and work standards will be even more difficult to enforce. *See id*.

Second, permitting non-business use of email systems can compromise the security of the system as well as the confidentiality of proprietary and other confidential information. It is too easy to forward to outsiders emails containing confidential attachments and email strings and to receive email containing viruses and malware, if email usage is expanded beyond business purposes.

Third, permitting non-business email usage complicates and makes more expensive the monitoring of email systems for, and the detection of, prohibited usage. *See id*. (employers will need to set up enhanced monitoring systems and hire additional IT support specialists to monitor the increase in email traffic). Like the employee who does not know whether or not an email is a Section 7 communication until it is opened and read, the employer will not know whether an email is a protected Section 7 communication until it is opened and read by someone with sufficient knowledge of the Board's myriad interpretations of Section 7. Thus, employers will have to employ individuals who are experts in NLRA law to review emails to determine whether

the email contained any Section 7 protected speech and whether the communication occurred during work time. Such monitoring can expose employers to unfair labor practice charges for surveillance, let alone unfair labor practice charges if an employee is disciplined for sending an email that is later considered to be protected under the Act.

Moreover, an employer acts at its peril if it does not monitor its email systems. In addition to the obvious threats of loss of proprietary information, invasion from an outside entity, and introduction of malware, today's employers face significant risks of liability in harassment and discrimination claims based on communications employees place on their internal communication systems. Requiring employers to allow employees to use their electronic communication systems for Section 7 activity will certainly increase the cost of monitoring those systems.

Finally, *Purple Communications* ignored the multitude of other easier and more efficient means for employees to communicate with one another, such as smart phones that can easily access personal email, text messaging, and various social media platforms. Indeed, personal email provides a better means for protected activity where the average consumer maintains 3.9 personal email accounts and logs into those accounts 3.8 times per day. Harrison C. Kuntz, *Crossed Wires: Outdated Perceptions of Electronic Communications in the NLRB's Purple Communications Decision*, 94 WASH. U. L. REV. 511, 537 (2017) ("Given the extensive role of personal email in modern life, it seems disingenuous to argue that employees must have access to *their employer's* email system in order to effectively exercise their Section 7 rights." (emphasis in original)). Further, the use of smart phones and social media as a tool to bring individuals together around a common cause has continued to grow in both popularity and effectiveness since the Board's *Purple Communications* decision. *See* Stacey B. Steinberg, *#Advocacy: Social*

Media Activism's Power to Transform Law, KY. L.J. 413, 433 (2017); PEW RESEARCH CENTER, April 2015, "The Smartphone Difference," at 13, 23–24, available at: http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015 (finding that nearly two-thirds of Americans own a smartphone that is capable of accessing personal email and social media). Smart phones are particularly apt as a superior means of organizing where they provide a "multiplier effect" to email, text messaging, and social media communication because they can be used anywhere the owner goes. Kuntz, *Crossed Wires* at 539.

Given the lack of applicable legal authority for its holding, the lack of evidence that employees are impeded in any way in communicating with each other concerning Section 7-related matters by using communications systems other than their employer's email system, and the real burdens to productivity and the integrity of employers' email systems by requiring non-business usage, *Purple Communications* should be overruled. Rather than fixing a communications problem, that decision created one.

B. The Board Should Return to the *Register Guard* Standard.

The Board should return to *Register Guard*'s well-reasoned holding that employees have no statutory right to use an employer's email system for Section 7 purposes, as long as the employer's restrictions on email use are nondiscriminatory. 351 NLRB at 1110, 1114–16. There, the Board explained that Section 7 protects organizational rights rather than employees' means to communicate in exercising their rights. *Id.* at 1115. The Board also noted, citing the Supreme Court's *Republic Aviation* decision, that employers must only yield their property interests to the extent necessary to ensure that employees are not "entirely deprived" of their ability to communicate with other employees in the workplace about their terms and conditions of employment. *Id.* (citing *Republic Aviation*, 324 U.S. at 801 n.6). Thus, although an employer

may have to yield property rights so that employees are not "entirely deprived," neither Section 7 nor the *Republic Aviation* Court require an employer to yield property rights that will result in the most convenient or most effective way for employees to conduct Section 7 communications. Accordingly, employees do not have a statutory right to use an employer's systems for Section 7 communications.

In addition to face-to-face communications, employees use phones, personal emails, texts, tweets, social media postings, and blogs—to name only a few of the plethora of means available—to communicate with each other concerning Section 7 matters. There is thus no reason why an employer-owned and -subsidized email system must also be made available to employees as a Section 7 communication tool. The *Register Guard* decision recognizes this reality, and its reasoning should be used by the Board in reviewing email systems policies.

Accordingly, the Board should return to the standard articulated in *Register Guard*. Here, under the *Register Guard* analysis, the Employer's rule is lawful because it prohibits use of the Employer's email system only for non-business communications.

C. Exceptions to the *Register Guard* Rule.

The Board should make exceptions to the *Register Guard* rule that employees have no statutory right to use their employer's email system for Section 7 purposes on a case-by-case basis only where it is shown that employees cannot communicate by other means. For example, although rare, there may be situations where the workplace is in an area with minimal or nonexistent cell phone coverage, or there is no established workplace and employees have no way to exchange personal contact information. Requiring employers to permit employee use of their email system in these circumstances is consistent with well-established Board law holding that, in balancing employer business and property interests with Section 7 rights, the Board needs

to determine whether employees have "reasonable alternative means" to engage in Section 7 activities. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 489–90 (1978) (requiring employer to allow employees to engage in solicitation in cafeteria where employer's rule otherwise insufficiently allowed its 2,200 employees to solicit in six scattered locker areas with only 613 lockers accessible to all employees); *Heath Co.*, 196 NLRB at 135 (employer lawfully denied prounion employees use of its broadcast system, in part because it provided alternative by approving employees' request to use plant cafeteria during nonwork time to present views to fellow employees). *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538–39 (1992) (nonemployee union organizers may be granted access to employer's property where there is no viable alternative means to reach employees). *See generally Republic Aviation Corp.*, 324 U.S. at 801 n.6 (employer may not "entirely depriv[e]" employees of their "full freedom of association" (citations omitted)).

The ability to communicate for Section 7 purposes is necessarily limited in the rare situation where employees work in locations with lack of access to face-to-face communication and minimal or nonexistent cell phone coverage, or where there is no established workplace and employees have no way to exchange personal contact information. Personal email, text messaging, and social media represent viable communication alternatives where employees are able to use their phones or other devices to access the internet or send text messages. If employees are unable to use these alternative means of communication, prohibiting all non-business use of an employer's email system could effectively deprive employees of their ability to communicate regarding their working conditions on their non-work time. Such deprivation of means of communication is a significant harm to the exercise of Section 7 rights that could outweigh the employer's property rights and First Amendment interests regarding its email

system. Therefore, in this rare type of workplace, the Board should balance the interests of the employers and employees, and if alternative means of Section 7 communication are unavailable, employees should be able to use the employer's email system to engage in Section 7 communications.

D. Other Computer Resources Provided by Employers.

To the extent employers provide computer resources and communications systems other than email as part of their business operations, the standards to be used in determining whether employees should be granted access to those systems for Section 7 communications should depend upon the reason for the resource, the intended use of the resource, and the group of individuals that have access to such resource. The standards for reviewing resources that are internal and not available to the public would be different from those that are external or available to the public. For resources that are not open to the public, the General Counsel recommends that the same standards and guidelines articulated under *Register Guard* should apply. Thus, the General Counsel recommends review of such resources individually on a case-by-case basis.

IV. Conclusion

Based on the foregoing, we urge the Board to overturn *Purple Communications* and, accordingly, dismiss the Complaint allegations that the Employer violated Section 8(a)(1) by maintaining a rule on computer usage that limited such usage to authorized users for business purposes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief of the General Counsel in Case 28-CA-060841 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 14th day of September, 2018.

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