

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION)
D/B/A RIO ALL-SUITES HOTEL AND CASINO)

Respondent,)

and)

Case No. 28-CA-060841)

INTERNATIONAL UNION OF PAINTERS AND)
ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 19)
AFL-CIO)

Charging Party.)

SUPPLEMENTAL BRIEF IN SUPPORT OF RESPONDENT
CAESARS ENTERTAINMENT CORPORATION D/B/A/ RIO ALL-SUITES HOTEL AND CASINO

Lawrence D. Levien
James C. Crowley
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036-1564
(202) 887-4000 phone
(202) 887-4288 fax

Mark J. Ricciardi
FISHER & PHILLIPS LLP
300 South Fourth Street
Suite 1500
Las Vegas, NV 89101
(702) 862-3804 phone
(702) 252-7411 fax

Counsel for the Respondent,
Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTRODUCTION	1
FACTS	1
STATEMENT OF QUESTIONS PRESENTED.....	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT	7
I. <i>Purple Communications</i> Should Be Overruled.....	7
A. The Board’s <i>Purple</i> Doctrine Cannot Be Reconciled with Its Own Precedent.....	7
B. <i>Purple</i> ’s Failure to Adhere The Supreme Court’s Balancing Standard Is Not Legally Sustainable.....	13
C. <i>Purple</i> Violates the First Amendment and Section 8(c) of the NLRA.....	18
II. The Board Should Return to and Extend Its Easily-Applied Rule in <i>Register-Guard</i>	22
CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Allegheny Ludlum Corp.</i> , 301 F.3d 167 (3d Cir. 2002).....	19
<i>Allentown Mack Sales & Serv., Inc. v. NLRB</i> , 522 U.S. 359 (1998).....	19, 21
<i>Allied Stores of N.Y., Inc.</i> , 262 N.L.R.B. 985 (1982)	8
<i>Auto. Plastic Techs., Inc.</i> , 313 N.L.R.B. 462 (1993)	12
<i>Babcock v. Wilcox</i> , 351 U.S. 105 (1956).....	14
<i>Beth Israel Hosp. v. NLRB</i> , 437 U.S. 483 (1978).....	8, 15, 16, 23
<i>Beverly Enters.-Haw., Inc.</i> , 326 N.L.R.B. 335 (1998)	20
<i>Boeing Co.</i> , 365 N.L.R.B. No. 154 (2017)	4
<i>Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino</i> , 362 N.L.R.B. No. 190, slip op. (2015).....	3, 15
<i>Caterpillar, Inc. v. United Auto Workers</i> , 909 F. Supp. 254 (M.D. Pa. 1995), <i>rev'd</i> , 107 F.3d 1052 (3d Cir. 1997).....	13
<i>Chamber of Commerce v. Brown</i> , 554 U.S. 60 (2008).....	19, 22
<i>Container Corp. of Am.</i> , 244 N.L.R.B. 318 (1979), <i>enforced in relevant part</i> , 649 F.3d 1213 (6th Cir. 1981)	8
<i>Crown Cork & Seal Co. v. NLRB</i> , 36 F.3d 1130 (D.C. Cir. 1994).....	19
<i>Eaton Techs., Inc.</i> , 322 N.L.R.B. 848 (1997)	9

<i>Electromation, Inc.</i> , 309 N.L.R.B. 990 (1992), <i>enforced</i> , 35 F.3d 1148 (7th Cir. 1994)	8
<i>First Nat’l Maint. Corp.</i> , 452 U.S. 666 (1981).....	11
<i>Graham Architectural Prods. Corp. v. NLRB</i> , 697 F.2d 534 (3d Cir. 1983).....	20
<i>Guard Publishing Co. d/b/a The Register-Guard</i> , 351 N.L.R.B. 1110 (2007)	passim
<i>Harris v. Quinn</i> , 134 S. Ct. 2618 (2014).....	19
<i>Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.</i> , 515 U.S. 557 (1995).....	21
<i>Janus v. Am. Fed’n of State, Cty., & Mun. Emps.</i> , 138 S. Ct. 2448 (2018).....	18, 21, 22
<i>Lafayette Park Hotel</i> , 326 N.L.R.B. 824 (1998), <i>enforced</i> , 203 F.3d 52 (D.C. Cir. 1999).....	12
<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527 (1992).....	9
<i>LeTourneau Co.</i> , 54 N.L.R.B. 1253 (1944), <i>rev’d</i> , 143 F.2d 67 (5th Cir. 1944).....	14
<i>Martin Luther Mem’l Home, Inc. d/b/a Lutheran Heritage Village-Livonia</i> , 343 N.L.R.B. 646 (2004)	3
<i>Mid-Mountain Foods, Inc.</i> , 332 N.L.R.B. 229 (2000)	7, 8
<i>Nat’l Ass’n of Mfrs. v. NLRB</i> , 717 F.3d 947 (D.C. Cir. 2013)	20
<i>NLRB v. Baptist Hosp.</i> , 442 U.S. 773 (1979).....	8, 11
<i>NLRB v. Steelworks (Nutone)</i> , 357 U.S. 357 (1958).....	14
<i>Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n</i> , 475 U.S. 1 (1986).....	21

<i>Peyton Packing Co.</i> , 49 N.L.R.B. 828 (1943), <i>enforced</i> , 142 F.2d 1009 (5th Cir. 1944)	11
<i>Purple Communications, Inc.</i> , 361 N.L.R.B. 1050 (2014)	passim
<i>Republic Aviation</i> , 324 U.S. 793 (1945)	14, 23
<i>Union Carbide Corp.</i> , 259 N.L.R.B. 974 (1982), <i>enforced in relevant part</i> , 714 F.2d 657 (6th Cir. 1983)	8
STATUTES	
29 U.S.C. § 158(c)	19
29 U.S.C. § 186.2(a) (2017)	12
OTHER AUTHORITIES	
“BYOD alert: Confidential data on personal devices” (Sept. 6, 2013), https://www.cbsnews.com/news/byod-alert-confidential-data-on-personal-devices	17
Carol Huang, “Facebook and Twitter key to Arab Spring uprisings: report,” THE NATIONAL (June 6, 2011), https://www.thenational.ae/uae/facebook-and-twitter-key-to-arab-spring-uprisings-report-1.428773	17
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Laurent Philonenko, “BYOD or BYOWD?” (Feb. 19, 2013), https://blogs.cisco.com/collaboration/byod-or-byowd?dtid=ossdc000283	17
Lily Hay Newman, “The Devious Netflix Phish that Just Won’t Die” (Nov. 7, 2017), https://www.wired.com/story/netflix-phishing-scam/	22
Teena Maddox, “BYOD IoT and wearables thriving in the enterprise” (Jan. 4, 2016), http://www.techproresearch.com/article/byod-iot-and-wearables-thriving-in-the-enterprise/	17

INTRODUCTION

An administrative law judge, applying *Purple Communications, Inc.*, 361 N.L.R.B. 1050 (2014), found that Respondent Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino (“Rio”) violated Section 8(a)(1) of the National Labor Relations Act (the “NLRA” or the “Act”) by maintaining a policy prohibiting the use of its computer resources to send non-business information. Under *Purple Communications, Inc.*, employees who have been given access to their employer’s email system for work-related purposes have a presumptive right to use that system for Section 7 activity. In its invitation to file briefs, the National Labor Relations Board (the “Board” or “NLRB”) asked whether it should overrule *Purple*, and return to *Guard Publishing Co. d/b/a The Register-Guard*, 351 N.L.R.B. 1110 (2007). Under *Register-Guard*, employers may lawfully maintain neutral restrictions on employees’ nonwork-related use of employer email systems. This brief answers the Board’s question affirmatively and applies it to the circumstances under which Rio regulates employees’ use of its computer resources.

FACTS

Rio is one of several gaming and hospitality properties in Las Vegas, Nevada that are owned and operated by Caesars Entertainment Corporation. The Rio property employs more than 3,000 workers. All 3,000 workers receive and acknowledge the same employee handbook. The handbook governs the terms and conditions of employment, in some part, for Rio’s total workforce. The International Union of Painters and Allied Trades, District Council 15, Local 19 AFL-CIO (“Local 19”) does not represent Rio employees, but nonetheless challenged 10 handbook rules. Among the challenged rules was a regulation on employer email systems and other electronic resources accessible to only a small subset of nonsupervisory employees, such as human resources employees and “VIP” front-desk agents. (Tr. 46:1-47:16; 56:1-20).

The Regional Director subsequently filed a complaint. In its complaint, the Regional Director alleged that Rio violated Section 8(a)(1) of the Act by maintaining work rules in its employee handbook that restrict, among other things, use of the Company's e-mail system and other computer resources for unapproved non-business purposes. In relevant part, this computer resources policy provides:

Computer Usage:

Computer resources are Company property and are provided to authorized users for business purposes. The Company has the right to review or seize computer resources, including hardware, software, documents and electronic correspondence.

Confidentiality:

Do not disclose or distribute outside of [Rio] any information that is marked or considered confidential or proprietary unless you have received a signed non-disclosure agreement through the Law Department. In some cases, such as with Trade Secrets, distribution within the Company should be limited and controlled (e.g., numbered copies and a record of who has received the information). You are responsible for contacting your department manager or the Law Department for instructions.

General Restrictions:

Computer resources may not be used to:

- Commit, aid or abet in the commission of a crime
- Violate local, state or federal laws
- Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an Internet message board to post any message, in whole or in part, or by engaging in an internet or online chat room
- Convey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous
- Send chain letters or other forms of non-business information
- Seek employment opportunities outside of the Company
- Invade the privacy of or harass other people
- Solicit for personal gain or advancement of personal views
- Violate rules or policies of the Company.

Jt. Ex. 1 at 25–26.

On March 20, 2012, ALJ William Schmidt entered a recommended Order of the lawfulness of the challenged rules, sustaining almost none of the General Counsel's allegations. *See* Decision

of ALJ William Schmidt (“ALJ Dec.”) at 8–9. The ALJ rejected the General Counsel’s argument that “the restrictions contained in the Company’s computer usage policy ‘inhibit employees’ Section 7 rights, as they do not allow employees to express concerns which may later become logical outgrowths of group concerns or discuss wages or working conditions.’” ALJ Dec. at 9. The ALJ specifically found that the General Counsel failed to meet its burden to demonstrate “that employees would reasonably construe the computer usage rule so as to prohibit Section 7 activity.” *Id.*

In a partially divided decision, the Board reversed the ALJ’s rulings on several of the rules, applying its decision in *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004), to determine whether a reasonable employee would read the rules as restricting Section 7 activity. The portion of the case involving Rio’s e-mail policy was remanded to a second ALJ for further factual findings pursuant to the *Purple Communications* decision, “including allowing the parties to introduce evidence relevant to a determination of the lawfulness of those rules.” *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 362 N.L.R.B. No. 190, slip op. at 5-7 (2015). Member Johnson dissented, concluding that “the evidence does not establish that employees would reasonably construe the computer usage rules as prohibiting Sec. 7 activities,” *id.* at 5 n.14 (Johnson, Member, dissenting), and pointing to his original dissent in *Purple Communications* in which he stated that “the Act does not create a statutory right for employees to use their employer’s email system to engage in Section 7 activity,” *Purple*, 361 N.L.R.B. at 1079; *see Rio*, slip op. at 5 n.14.

Following a second evidentiary hearing, ALJ Mara-Louise Anzalone issued a decision, finding that Rio’s e-mail policy violated Section 8(a)(1). The ALJ specifically concluded that “because Respondent grants employees access to its email system for nonwork purposes, any

restriction on their use of the system for Section 7 purposes is presumptively invalid pursuant to *Purple Communications*.” Decision of ALJ Mara-Louise Anzalone (“Remanded ALJ Dec.”) at 7. The ALJ based this conclusion on, among other things, the policy’s ban on “send[ing] chain letters or other forms of non-business information,” because, in her view, “insofar as the rule bans all use of Respondent’s email system for nonbusiness distribution and solicitation, it is squarely covered by the new presumption and violates the *Purple Communications* dictate 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.’” Remanded ALJ Dec. at 7 (alteration in original).

Rio then filed Exceptions to the second ALJ’s decision on June 30, 2016. In its Exceptions, Rio challenged the ALJ’s finding that the Company’s e-mail policy violated Section 8(a)(1), urged the Board to reverse its position in *Purple Communications*, argued that the ALJ misapplied the presumption of access created by *Purple Communications*, and affirmatively stated that the ALJ overlooked special circumstances that justified the Company’s policy. After Rio filed its exceptions, the Board overruled the standard by which the Board judges all facially neutral work rules. *See Boeing Co.*, 365 N.L.R.B. No. 154 (2017). In doing so, the Board called into question its decision in *Purple Communications*, consummating a series of precedential rulings that together will define the Board’s applications and interpretations of the Act. On January 23, 2018, Rio filed a motion to supplement briefing in light of these developments. On August 1, 2018, the Board issued an invitation to file briefs on whether to overrule *Purple*.

STATEMENT OF QUESTIONS PRESENTED

- (1) Whether *Purple Communications* was incorrectly decided and should be overruled?
- (2) Whether the Board should return to the holding of *Register-Guard*?
- (3) Whether *Register-Guard* should apply to other types of electronic communication?

(4) Whether the Board should recognize any exceptions to *Register-Guard*?

SUMMARY OF ARGUMENT

This case vividly illustrates the impossible position facing employers in applying the *Purple* Board's "presumption-based" doctrine. For decades, the Board and the courts have reiterated the common sense rule that the Act permits restrictions on the use of employer property where there is a reasonable alternative area to engage in protected solicitation during nonworking time. According to some of the Board's cases, work rules regulating the means by which protected concerted activity is carried out, not the activity itself, do not violate the Act. Both rules sensibly allow employers to retain the ability to regulate operational areas of the workplace.

Acting in good-faith reliance on those settled rules, Rio concluded that it could prohibit its employees from using its workplace email system for nonwork-related email. The *Register-Guard* Board previously held that such facially neutral actions were valid. Yet, the Board responded to Rio, Purple Communications, and many other employers by declaring this heretofore presumptively valid action now presumptively invalid, and then making its new presumption of invalidity retroactive and virtually un rebuttable. By creating a presumptive right to "use your employer's device," despite the availability of more suitable means to act in concert, the Board entirely and erroneously ignored the critical question: would a neutral restriction on business email use prevent employees from engaging in Section 7 activity at its core? Or would such a restriction merely limit the use of a convenient, but ultimately peripheral, means of communication that the employer owns and provides its employees solely to advance productive business interests? In defiance of its long-held precedent, the Board here and in *Purple* chose convenience.

As these internally inconsistent legal standards reflect, the Board's doctrine in this area has become utterly divorced from the animating concern of the Supreme Court and the Board's own jurisprudence, which is whether an employer is *restricting solicitation in every form during*

nonworking time. Plainly, that restriction is not what Rio was trying to accomplish here. Nor does the sort of work rule that *Purple* outlawed even come close to preventing nonworking-time solicitations. In fact, nondiscriminatory restrictions on the use of business email systems adhere to the long-established bright line rule that “working time is for work.” Yet, the *Purple* doctrine requires employers to pay employees for their time reading and writing emails only tangentially related to the terms and conditions of employment. And to make matters worse, the doctrine violates the First Amendment, and contorts Section 8(c) until almost unrecognizable, by requiring employers to subsidize employees while they write employer-critical e-mails, and to host employer-critical speech on business e-mail systems.

The Board’s decision to abandon *Register-Guard* suffers from the same basic defects. *Register-Guard* squared with the numerous Board and court decisions concluding that the Act permits restrictions on the use of employer equipment so long as employees have “adequate avenues of communication” to “effectively” communicate in concert. That restrictive action is what Rio took with respect to its email system, which is accessible to a narrow subset of a larger workforce during working time—all of whom have unrestricted access to a break room, cafeteria, and Wi-Fi during nonworking time. Yet, according to *Purple*, the only practical way Rio could regulate its email system is by not maintaining one at all, or at least by maintaining one that is inaccessible to NLRA-covered employees. In other words, the *Purple* Board effectively redrew the line between working and nonworking time to overrule *Register-Guard* and supplied an unfettered right to adversely possess electronic equipment to which the Board’s own precedents insist no person is entitled.

In short, the NLRA does not create a right of adverse possession against well-meaning employers who provide avenues for electronic communication solely to manage their business

operations. Nor does the Act—or could it, without violating the First Amendment—convert every work rule that limits such avenues into an unfair labor practice. It is one thing to require an environment for free-flowing communication about the terms and conditions of employment, but quite another to create an employer-subsidized, employer-critical speech zone. Because the *Purple* doctrine would render the Act both unworkable and unconstitutional, it must be rejected.

ARGUMENT

I. *Purple Communications* Should Be Overruled.

A. The Board’s *Purple* Doctrine Cannot Be Reconciled with Its Own Precedent

The *Purple* Board’s conclusion that employers cannot prohibit employees from using business email systems for nonbusiness purposes is legally unfounded. It has long been settled law that “there is no statutory right of an employee to use an employer’s equipment or media” in aid of protected concerted activity. *Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 229, 229 (2000). That rule reflects the common sense principle that the use of equipment to communicate is not a substitute for face-to-face communication in a defined physical space and at a discrete time. There is no sound reason for doing away with that rule simply because an employer has invested in and given employees access to a workplace email system for business communications. The *Purple* Board’s contrary conclusion has the perverse result of creating a damned-if-you-do-damned-if-you-don’t doctrine that threatens employers with an unfair labor practice charge or violation of the Labor Management Relations Act (“LMRA”) if they give employees access to business email systems at all.

While the NLRA generally protects the rights of employees to make solicitations on their employer’s physical property during nonworking time, both the Board and the courts have recognized for decades that an employer’s equipment deserves a different approach. Equipment, after all, is not the “natural gathering place” where employees congregate when they are not

working. *Cf. Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 506 (1978). It is “purchased by the [employer] for use in operating its business,” not for employees to use during paid time as a microphone to voice employment-related complaints. *Register-Guard*, 351 N.L.R.B. at 1114. In fact, employers often violate the Act when they provide their employees equipment to use for Section 7 activity during paid time. *See Electromation, Inc.*, 309 N.L.R.B. 990, 991, 998 n.31 (1992) (employer violated Section 8(a)(2) by giving employees writing materials and calculator to use during paid time when addressing employment-related complaints), *enforced*, 35 F.3d 1148 (7th Cir. 1994). Employers thus have not only a right, but an obligation, not to give employees equipment, including electronic media, that would “interfere with the formation or administration of any labor organization or contribute financial . . . support to it.” *Id.* at 992.

In keeping with that understanding, the Supreme Court long ago concluded that its “usual presumption that rules against solicitation on nonwork time are invalid gives too little weight to the need to avoid disruption” of an employer’s operations. *NLRB v. Baptist Hosp.*, 442 U.S. 773, 778 (1979). That principle is particularly applicable where employees use “employer’s equipment or media” to communicate about the terms and conditions of employment. *Mid-Mountain Foods*, 332 N.L.R.B. at 229. Because “Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate,” *see Register-Guard*, 351 N.L.R.B. at 1115, the Board consistently has deemed it lawful to “promulgate a nondiscriminatory rule denying employees any access to [employer-owned equipment] for any purpose,” including and especially nonwork purposes. *Allied Stores of N.Y., Inc.*, 262 N.L.R.B. 985, 985 n.3 (1982) (blackboards); *see Container Corp. of Am.*, 244 N.L.R.B. 318, 318 n.2 (1979) (“It is well established that there is no statutory right to use an employer’s bulletin board.”), *enforced in relevant part*, 649 F.3d 1213 (6th Cir. 1981); *see also Union Carbide Corp.*, 259 N.L.R.B. 974,

980 (1982) (employer “could unquestionably bar its telephones to any personal use by employees”), *enforced in relevant part*, 714 F.2d 657 (6th Cir. 1983). The Board thus applied that settled principle to conclude that “absent discrimination, employees have no statutory right to use an employer’s equipment or media for Section 7 communications.” *Register-Guard*, 351 N.L.R.B. at 1116.

Under those long-settled principles, this case should be easy. Mindful of its employees’ interest in union-related activities, Rio adopted a number of policies that permit employees to engage in union-related speech and other concerted activity in the workplace, so long as they do not compromise the Company’s need to operate its gaming and hospitality business. For instance, although employers are not required to allow employees to use company bulletin boards to display union-related notices, *see Eaton Techs., Inc.*, 322 N.L.R.B. 848, 853 (1997) (“there is no statutory right of employees or a union to use an employer’s bulletin board”), Rio has agreed through some of its CBAs to supply bulletin boards on which union notices can be displayed. Consistent with this allowance, company bulletin boards have become a means for communicating and documenting union meetings and other concerted activities to all Rio employees regardless of union affiliation. So too with access by nonemployee union staff to the property; although lacking a statutory right, *see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), Rio, through some of its CBAs, allows union staff access to meet with employees regarding their terms and conditions of employment.

But Rio balances that more speech-permissive approach with a continuing ability to ensure that employee use of its property, particularly its electronic media, does not interfere with the Company’s primary mission of providing world-class gaming, entertainment, and hospitality to its guests. Here, Rio understandably became concerned for the privacy of its guests and efficient

running of its gaming operations when the narrow subset of its workforce with access to the Company's email system started sending personal email messages out of the network. Accordingly, following the guidance that both the Board and courts have provided, Rio concluded that employees with Company email accounts could send only business emails within and out of the network.

Unable to overcome the traditional presumption that respected the decisionmaking of employers in neutrally regulating equipment use, the *Purple* Board decided to change its *Register-Guard* rule mid-stride and create an unfair labor practice that was nearly impossible for Rio to avoid. Notwithstanding decades of settled law to the contrary, fewer than five years after *Register-Guard* was enforced, the *Purple* Board announced that restrictions on business email systems would no longer be entitled to a presumption of validity unless the employer proves unspecified "special circumstances," in "after-the-fact Board litigation."¹ *Purple*, 361 N.L.R.B. at 1068 (Miscimarra, Member, dissenting). The *Purple* Board declared that neutral bans on personal use of business email during nonworking time henceforth would be presumptively invalid, even when applied to a workforce that neither telecommutes nor lacks physical spaces in which to solicit one another face-to-face. The Board was then asked to invoke that new rule in this case to conclude that Rio's neutral electronic media policy was unlawful.

As the dissenting members in *Purple* explained, the Board's about-face was not grounded in law, logic, or fact, and cannot be reconciled with the considerations that employers must make

¹ Given the *Purple* presumption, employers that implement a restriction on their email systems will not know whether they violated the NLRA or qualified for the Board's "special circumstances" exception until after the restriction is challenged in an unfair labor practice charge, a Regional Director issues a complaint, and the challenge is litigated. In other words, there is no bright line rule that enables employers to determine whether they qualify for "special circumstances."

simultaneously to comply with the Act and the LMRA. To be sure, the Board generally is entitled to deference in adopting presumptions to govern employee organizational rights. *See First Nat'l Maint. Corp.*, 452 U.S. 666, 689 (1981) (Brennan, J., dissenting). But its presumptions must give employees, unions, and employers certainty beforehand about what they may and may not do. *See id.* at 679. These presumptions must be consistent, moreover, with the Act itself and the policies the Act embodies, and “must rest on a sound factual connection between the proved and inferred facts.” *Baptist Hosp.*, 442 U.S. at 787. The *Purple* Board’s “proven-after-the-fact” presumption satisfies none of these standards.

At the outset, the *Purple* Board’s approach unnecessarily upsets the bedrock labor law principle that it is “within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working [time].” *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944). Although it is axiomatic that “working time is for work,” by the *Purple* Board’s logic, employees whose regular duties include using email will invariably read incoming nonbusiness emails during working time. *Id.* Recognizing that employers may lawfully ban nonbusiness emails during working time, the *Purple* Board left open the possibility that senders and recipients could thus be subject to discipline for engaging in Section 7 activity over email. In effect, the *Purple* doctrine’s statutory right to email use is illusory for many employees and working-time restrictions are impossible for most employers to enforce without risking an unfair labor practice charge.

To make matters worse, the *Purple* Board’s presumption makes it nearly impossible for employers to avoid an unfair labor practice charge while simultaneously dodging liability for employees’ inappropriate emails. As the *Register-Guard* Board recognized, employers have a “legitimate business interest in . . . avoiding company liability for employees’ inappropriate e-

mails” by monitoring business email systems. 351 N.L.R.B. at 1114. At the same time, the Board considers a wide range of communications protected by the Act, including profanity, harassment, and possibly even libel. *See, e.g., Lafayette Park Hotel*, 326 N.L.R.B. 824, 828 (1998) (invalidating employer rule against “false, vicious, profane, or malicious statements toward or concerning . . . [other] employees”), *enforced*, 203 F.3d 52 (D.C. Cir. 1999). To make this tightrope even tighter, engaging in surveillance of NLRA-protected activities, or even giving the impression of surveillance, is itself an unfair labor practice that employers policing their own email systems would be loath to contest. *See Auto. Plastic Techs., Inc.*, 313 N.L.R.B. 462, 462 (1993) (finding unlawful surveillance based on continuous scrutiny over substantial period of time). Extended to this situation, employers monitoring their email systems for harassing, assaultive, and even libelous language could thus themselves be liable for illegally surveilling their employees because *Purple* presumes that any Section 7 speech on an employer’s email server is NLRA-protected. Section 8(a)(1) cannot possibly tolerate any rule that puts employers in that kind of damned-if-you-do-damned-if-you-don’t position.

The *Purple* doctrine is all the more troubling because it forces employers into an entanglement with the LMRA’s prohibition on employers paying labor organizations that represent their employees. Section 302(a) of the LMRA makes it unlawful—with potential criminal liability—for any employer to “pay, lend, or deliver” any “thing of value” to any “labor organization” or “officer or employee thereof” that “represents” or “seeks to represent” any of the employer’s employees.” 29 U.S.C. § 186.2(a) (2017). Although courts have yet to draw bright lines around what employers may or may not do when it comes to paying unions and union employees, courts have not foreclosed the possibility that the cost of maintaining a server for the benefit of a union’s communications with its employee stewards is in fact a “thing of value” under

the LMRA. That the *Purple* doctrine requires maintaining email servers for this purpose springs a legal trap that the Board lacks jurisdiction to resolve. *C.f. Caterpillar, Inc. v. United Auto Workers*, 909 F. Supp. 254, 257 (M.D. Pa. 1995) (employer no docking-policy violated Section 302 by providing “thing of value” to union executive), *rev’d*, 107 F.3d 1052 (3d Cir. 1997).

The ultimate result here is not only to force employers to restrict employee access to resources they otherwise would provide, but to create labor law violations where they should not exist. A finding that a valid working-time solicitation rule was enforced or that an employer routinely monitored its email system for legal violations is not a substitute for a finding that an employer abridged Section 7 of the Act. Nor is a finding that an employer restricted use of its operational equipment a substitute for a finding that the employer restricted all nonworking-time solicitations at the workplace. The *Purple* Board should not have relieved itself from the task of explaining the latter findings when it created a presumption that an employer cannot regulate the nonwork use of its email system as though Section 7 depended on it. Nor should the Board here retain or expand that presumption to other electronic media.

B. *Purple’s* Failure to Adhere to The Supreme Court’s Balancing Standard Is Not Legally Sustainable.

Not only did the *Purple* Board retroactively apply a presumption that is legally unsound; it then compounded the problem by writing off the alternative, usually more effective, means employees can use to communicate their Section 7 rights. In *Register-Guard*, the Board reiterated the unremarkable proposition that “[a]n employer has a ‘basic property right’ to ‘regulate and restrict employee use of company property.’” 351 N.L.R.B. at 1114. It was unremarkable because the Supreme Court held long ago that the Act “does not command that labor organizations as a matter of abstract 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.” *NLRB v. Steelworks (Nutone)*, 357 U.S. 357, 363 (1958). Accordingly, in determining whether employees exercising organizational rights should be given access to employer-owned property, the Supreme Court recognized that because “[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights [a]ccommodation between the two must be obtained with as little destruction of one as is consistent with maintenance of the other.” *Babcock v. Wilcox*, 351 U.S. 105, 112 (1956).

The *Purple* Board’s decision to adopt a presumption of invalidity for restrictions on email use runs headlong into those Supreme Court precedents. Even if email systems stood apart from other types of employer equipment—which they do not—the *Purple* doctrine fails to build in the balancing that the Supreme Court requires when an employer’s property interest is at stake. The Board long ago admonished that “employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they . . . may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization.” *LeTourneau Co.*, 54 N.L.R.B. 1253, 1260 (1944), *rev’d*, 143 F.2d 67 (5th Cir. 1944). This admonition then informed the Supreme Court in *Republic Aviation* when it held that an employer’s policy “entirely deprived” employees of their right to communication in the workplace on their own time. 324 U.S. 793, 801 n.6 (1945). In other words, a ban on solicitation during nonworking time was “an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.” *Id.* at 803 n.10. As the Court later made clear, employers may restrict nonworking-time solicitations on their property where, in the balance, the “primary function” of the restricted area is operational, there are “alternative areas of the facility

in which [Section 7] rights effectively could be exercised,” and the interference with the employer’s operations is less than remote. *Beth Israel*, 437 U.S. at 506–07.

The *Purple* Board did not conclude or attempt to demonstrate that business email systems strike this balance one way or the other. To the contrary, *Purple* focused on increasing employee use of business email systems at the workplace, inferring without investigating, that “email has effectively become a ‘natural gathering place,’ pervasively used for employee-to-employee conversations.” *Purple*, 361 N.L.R.B. at 1057. Yet, rather than explain why Section 7 rights could not be exercised through alternative means of communicating, the Board insisted on adopting its presumption because of “email’s effectiveness as a mechanism for quickly sharing information and views.” *Id.* In doing so, the *Purple* Board relied on the legally unsupportable principle that the effectiveness of employer media as a means of communicating and the frequency of its use together create a presumption against restricting email use to work-related activities. In other words, *Purple* sidestepped the balancing required by *Republic Aviation* and *Beth Israel* for a test of convenience that, taken to its logical limit, would create a presumption that all employer-provided equipment ought to be unrestricted for Section 7 purposes because “it would be much more convenient for employees to be able to use the same copiers, markers, paper, bulletin boards, conference rooms, pagers, tablet-computers, phone networks, and audio-visual equipment.” *Purple*, 361 N.L.R.B. at 1084 (Johnson, Member, dissenting).

This approach, which fails to balance, directly conflicts with the holdings of *Republic Aviation* and *Beth Israel*, as it creates a right to adversely possess convenient mechanisms for employee communication while contorting the Board’s traditional law regarding solicitation. *Rio* is a case in point. There is no dispute that the primary function of *Rio*’s email system is for business communications among a narrow subset of employees. Far from being remote to casino guests,

gaming, and staffing operations, the email system is the Company's direct line of contact to the small number of employees who use it. Rather than asking whether alternative communication networks in this context facilitate Section 7 activity, the *Purple* doctrine stops short.

Yet that is precisely the question that *Republic Aviation* and *Beth Israel* would seem to require. Not only was *Purple* wrong in concluding that business email is the "critical means" of employee communication for "work-related" issues and a "natural gathering place." 361 N.L.R.B. at 1055, 1057. It is neither. But *Purple* also mistakenly assumed that email had replaced or was replacing face-to-face interactions as the preferred means of communicating among employees. To the contrary, at the time that *Purple* was decided, the vast majority of the U.S. labor force still preferred in-person contact to email.² This preference is particularly true here, where no employees telecommute and most eat meals, take breaks, and use the restroom in areas away from their desks, game tables, or other job postings. Taking this reality into account, Rio set aside physical spaces on its property where employees are free to speak among themselves: an employee breakroom and an onsite cafeteria with free meals for the workforce. Through direct face-to-face communication, workers can and do engage their coworkers with expressions and emotional reactions that can only be described, but not performed, in an email.

Equally important, this case illustrates how an employer's email system is not only unnecessary for exercising Section 7 rights, but ineffective too. Email access for the vast majority of Rio's workforce would not serve any business purpose, much less any Section 7 rights, because most Rio employees travel about the property engaging in face-to-face interface with coworkers

² See "Face-to-Face Communication in Business," available at <https://smallbusiness.chron.com/face-to-face-communication-business-2832.html> (noting "eight out of 10 respondents said they preferred face-to-face meetings over technology-enabled meetings such as videoconferencing").

or guests in the hotel, on the casino floor, and in the back of the house. Instead of business email, these employees speak with their coworkers in person at break times or use their mobile devices to communicate during nonworking time in the back of the house. Through connecting on social media platforms, such as Twitter, Instagram, and Facebook, they can reach a wide audience in a way that work email systems never could. Indeed, national uprisings and revolutions against authoritarian regimes—definitional concerted activity—have been engineered and successfully executed on these social media platforms.³ Nothing about working at a casino or hotel is more restrictive than the circumstances under these regimes.

On the use of social media, Rio employees are not outliers. Ample evidence indicates that personal devices, rather than business computers and workplace emails, are the primary method that employees communicate electronically and have been for longer than the *Purple* doctrine has been law. In the year leading up to the *Purple* decision, an estimated 200 million personally owned smart devices were found in the workplace.⁴ By 2016, “BYOD [was] in use at 59% of organizations with another 13% planning to allow it.”⁵ Some estimates have been even greater, with one study showing that “67 percent of people use personal devices at work, regardless of the office’s BYOD policy.”⁶ Yet, as this widespread use of personal devices continues to grow in the

³ See, e.g., Carol Huang, “Facebook and Twitter key to Arab Spring uprisings: report,” THE NATIONAL (June 6, 2011) (“Nearly 9 in 10 Egyptians and Tunisians surveyed in March [2011] said they were using Facebook to organise protests or spread awareness about them.”), <https://www.thenational.ae/uae/facebook-and-twitter-key-to-arab-spring-uprisings-report-1.428773>.

⁴ See Laurent Philonenko, “BYOD or BYOWD?” (Feb. 19, 2013), <https://blogs.cisco.com/collaboration/byod-or-byowd?dtid=ossdc000283>.

⁵ Teena Maddox, “BYOD IoT and wearables thriving in the enterprise” (Jan. 4, 2016), <http://www.techproresearch.com/article/byod-iot-and-wearables-thriving-in-the-enterprise/>.

⁶ “BYOD alert: Confidential data on personal devices” (Sept. 6, 2013), available at <https://www.cbsnews.com/news/byod-alert-confidential-data-on-personal-devices>.

labor force, the *Purple* doctrine fixes its attention on business email's narrow operational space.

At bottom, the *Purple* doctrine's presumption of invalidity cannot be sustained even if email stands apart from the other types of equipment the Board has found no statutory right to use. The *Purple* Board's resistance to balancing, together with a blindness to alternative—often more effective—means of communicating the terms and conditions of employment renders the doctrine legally unsustainable. The doctrine itself unthinkingly elevates the concerns of labor policy over the concerns of business operations. And even as a matter of labor policy, the doctrine makes no sense, as it forces employers to underwrite a vast network of email connections that have nothing to do with the business or, in Rio's case, to pretend that an email system serving a narrow subset of a large workforce can entertain anything more than a one-person karaoke performance.

C. *Purple* Violates the First Amendment and Section 8(c) of the NLRA

The *Purple* Board fared no better in ignoring the bedrock principle, recently reaffirmed by the Supreme Court, that “[c]ompelling a person to subsidize the speech of other private speakers raises . . . First Amendment concerns,” especially when that speech is hostile. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018). Likewise, the *Purple* Board overlooked essential constitutional protections and workplace realities in concluding that compelling an employer to pay for its employees to freely insult its business on its own email server would rarely be perceived as employer-endorsed speech. Notwithstanding the *Purple* Board's apparent belief otherwise, the NLRA does not convert the right to engage in employer-hostile speech into a right to have that speech subsidized. To the contrary, the Act explicitly protects an employer's right *not* to subsidize employer-hostile speech. Yet, here, the charging party would have the Board find that Rio violated Section 8(a)(1) solely because it did not subsidize sometimes hostile union speech on its email server. As Member Johnson explained in dissent, that conclusion is flatly irreconcilable with the NLRA and the constitutional rights that it protects. *See*

Purple, 361 N.L.R.B. at 1106 (Johnson, Member, dissenting).

“[A]n employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 386 (1998) (Rehnquist, C.J., concurring in part and dissenting in part). To that end, Section 8(c) of the Act provides: “expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). Section 8(c) was enacted both to “implement[] employers’ First Amendment rights,” *Allegheny Ludlum Corp.*, 301 F.3d 167, 177 (3d Cir. 2002), and to “correct [the Board’s] practice in an earlier time, when . . . ‘the Board condemned almost any anti-union expression by an employer,’” *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1138 (D.C. Cir. 1994). By “expressly preclud[ing] regulation of speech about unionization ‘so long as the communications do not contain a threat of reprisal or force or promise of benefit,’” *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008), the NLRA ensures that employers remain free to engage in constitutionally protected expression on matters of critical importance to employees and employers alike.

Like the First Amendment itself, the NLRA thus embodies an explicit “policy judgment . . . ‘favoring uninhibited, robust, and wide-open debate in labor disputes,’” and a broad zone of expression for employees and employers to express their views on the terms and conditions of employment. *Brown*, 554 U.S. at 67–68. Almost inevitably, an employee’s “view[] necessarily will include messages and viewpoints the employer does not support or in some instances even viscerally opposes”—in short, hostile speech. *Purple*, 361 N.L.R.B. at 1105 (Johnson, Member, dissenting). Particularly in the hostile speech context, “no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.” *Harris v. Quinn*, 134

S. Ct. 2618, 2644 (2014). To require an employer “to subsidize (to the same extent) the expression of contrary opinions with production time, and thereby place at risk order and discipline in the facility” abridges the core First Amendment activity entitled to the protection of the Constitution and the Act. *Beverly Enters.-Haw., Inc.*, 326 N.L.R.B. 335, 357 (1998); see *NLRB v. F.W. Woolworth Co.*, 214 F.2d 78, 80 (1954) (“The statute expressly protected the address involved here, but by construing with the section a requirement of an allowance of equal time to be given to union agents the Board nullified the congressional protection.”).

The Board’s decision in *Purple* is flatly irreconcilable with these principles. According to the *Purple* Board, Purple Communications—and now possibly Rio—violated section 8(a)(1) by doing precisely what both Section 8(c) and the First Amendment entitle them to do—namely, they refused to pay for the transmission, reception, and storage of hostile email on working time.⁷ If Section 7 required employers to post a union’s message on company bulletin boards and computer systems, then “the Act would directly collide with the Constitution.” *Graham Architectural Prods. Corp. v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983). Because Congress enacted Section 8(c) to guard against that untenable result, both the Board and courts have had little trouble rejecting the notion that refusing to subsidize employer-hostile speech runs afoul of the Act. See *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947, 956, 959 (D.C. Cir. 2013) (by requiring employers to post the Board’s message [on company bulletin boards and computer systems], the Board unlawfully “[told] people what they must say”).

⁷ The *Purple* Board did not find that the employer there subsidized antiunion speech through its email system, while denying a union the use of its email system to broadcast employer-hostile speech. Nor is a section 8(a)(3) violation alleged here. And even if it were, the *Purple* doctrine would still suffer from the same pernicious First Amendment violation because it still “compels employer funding of a huge volume of speech that the employer does not support.” *Purple*, 361 N.L.R.B. at 1106 (Johnson, Member, dissenting).

To make matters worse, the *Purple* Board sought to overcome the First Amendment issues with its presumption by concluding that “the same argument could be made about employers’ obligations under the Act regarding employee solicitation and distribution in break rooms and parking lots.” *Purple*, 361 N.L.R.B. at 1107 (Johnson, Member, dissenting). According to *Purple*, employer-hostile speech on employer email systems avoids entanglement with the Act and the Constitution because there is obviously a vast difference between “‘telling [employers] what they must say’ and telling employers that they must let their employees speak.” *Id.* at 1106. But as the courts and the Board have admonished, that is not the line that Congress has drawn. The whole point of Section 8(c) is to make clear that “an employer’s free speech right to communicate his views” is not infringed by a union or the Board. *Allentown*, 522 U.S. at 386, which includes protections *against* “[c]ompelling a person to subsidize the speech of other private speakers.” *Janus*, 138 S. Ct. at 2464. Far from letting an employee use nonworking time to prepare union flyers in a break room, employers have to pay for the data used in transmitting an email, the storage space needed to receive an email, and the working time that the recipient of a nonwork email spends reading it.

In concluding otherwise, the *Purple* Board creates a second First Amendment problem by compelling employer-hostile speech over email that alters the employer’s message. It is unconstitutional for the government to force someone to alter the message they are trying to communicate. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 14-20 (1986) (plurality opinion) (state agency cannot require a utility company to include a third-party hostile newsletter in its billing envelope because it would confuse customers about company’s message); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 581 (1995) (state law violated First Amendment by requiring privately sponsored parade to include

group whose message parade’s organizer does not wish to send). Here, employee emails on company servers inevitably create the appearance that the company endorses the message because emails sent from “johndoe@caesars.com” to Caesars email addresses are more likely to be confused as employer-approved, or at least employer-tolerated, speech than a message from “johndoe@gmail.com.” For this same reason, phishing scams impersonate popular brands (e.g., Chase, Comcast, TD Bank, and Wells Fargo) to host malicious pages that confuse consumers into turning over personally protected information they would otherwise provide to brand-name companies they know and trust.⁸ That the *Purple* Board failed to recognize as much only underscores that its conclusions are divorced from the critical constitutional rights that the Act protects.

In short, *Purple*’s approach to email cannot be squared with Congress’ “policy judgment . . . ‘favoring uninhibited, robust, and wide-open debate in labor disputes.’” *Brown*, 554 U.S. at 67–68. Nor can it be reconciled with the axiomatic and recently reinforced rule that “[c]ompelling a person to subsidize the speech of other private speakers raises . . . First Amendment concerns.” *Janus*, 138 S. Ct. at 2464. Simply put, the NLRA does not require employers to subsidize employer-hostile speech any more than it commands them to host employee speech that can easily be mistaken for the employer’s views. Because the *Purple* doctrine has precisely the opposite requirement, it would violate both the Act and the First Amendment to conclude that Rio’s computer resources policy is an unfair labor practice.

II. The Board Should Return to and Extend Its Easily-Applied Rule in *Register-Guard*

The Board should return to *Register-Guard*’s bright line rule that permits employers to

⁸ See Lily Hay Newman, “The Devious Netflix Phish that Just Won’t Die” (Nov. 7, 2017), <https://www.wired.com/story/netflix-phishing-scam/>.

maintain neutral restrictions on nonbusiness use of their email systems, and apply the rule to other computer resources at the workplace. 351 N.L.R.B. at 1110, 1114-e16. The rule does not suffer from *Purple's* legal, logical, and constitutional deficiencies. Coming full circle, the Board should then apply *Republic Aviation* as the Supreme Court intended it to be applied and only yield property interests to the extent necessary to ensure that employees are not “entirely deprived” of their ability to communicate with their coworkers about their terms and conditions of employment. *See Republic Aviation*, 324 U.S. at 801 n.6. More specifically, where employees lack a defined physical workplace and work in remote enough conditions to lack mobile phone coverage, they may also lack alternative means of communicating the terms and conditions of employment. In that limited universe of remote workplaces, the Board should apply *Republic Aviation* and *Beth Israel* balancing, consider the interests of employers and employees, and whether alternative means of Section 7 communication are unavailable. As Rio is not such an employer, the Board need not and should not consider whether Rio’s workforce is entitled to use the Company’s email system for any nonbusiness purpose. Under *Register-Guard*, it is not. For that reason, the Board should hold that Rio’s computer resource policy is lawful.

CONCLUSION

For the foregoing reasons, Rio respectfully requests that the Board overrule *Purple Communications, Inc.*, return to the *Register-Guard* standard, extend *Register-Guard* to other electronic media, and refuse to adopt the ALJ’s findings and conclusions with regard to the allegations in Paragraphs 4(6) and 4(7) of the Complaint.

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP

By /s/ Lawrence D. Levien

Lawrence D. Levien

James C. Crowley

AKIN GUMP STRAUSS HAUER & FELD LLP

1333 New Hampshire Ave., NW

Washington, DC 20036-1564

(202) 887-4000 phone

(202) 887-4288 fax

Counsel for the Respondent,

Caesars Entertainment Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2018, I caused a copy of the foregoing Brief in Support of Respondent Caesars Entertainment Corporation's Supplemental Brief to the National Labor Relations Board to be served, via the NLRB e-filing system and electronic mail, on the following:

Cornele A. Overstreet
Regional Director
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
cornele.overstreet@nlrb.gov

Chad Wallace
Stephen Kopstein
Larry A. Smith
Counsel for the General Counsel
National Labor Relations Board – Region 28
300 South Las Vegas Boulevard, Suite 2-901
Las Vegas, NV 89101
chad.wallace@nlrb.gov
larry.smith@nlrb.gov

David Rosenfeld
Caren Sencer
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
drosenfeld@unioncounsel.net
csencer@unionlaw.net

By /s/ James C. Crowley
James C. Crowley
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036-1564
(202) 887-4000 phone
(202) 887-4288 fax

Counsel for the Respondent,
Caesars Entertainment Corporation