CASE NO. 17-70948 [CONSOLIDATED WITH 17-71062 AND 17-71276]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Petitioner and Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Petitioner,

v.

PURPLE COMMUNICATIONS, INC.

Respondent, Petitioner, and Intervenor.

On Appeal from the National Labor Relations Board

Brief of *Amici Curiae* HR Policy Association, National Federation of Independent Business Small Business Legal Center, the Coalition for a Democratic Workplace, and the National Association of Manufacturers in Support of Purple Communications, Inc.

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<u>STATUTE:</u>

OTHERS:

Amici Curiae HR Policy Association, the National Federation of Independent Business Small Business Legal Center, the Coalition for a Democratic Workplace, and the National Association of Manufacturers ("*Amici*") respectfully submit this brief in support of Purple Communications, Inc.'s ("Purple Communications") appeal from an order of the National Labor Relations Board ("NLRB" or "Board").

INTEREST OF *AMICI CURIAE*

The HR Policy Association is a public policy advocacy organization representing the chief human resources officers of major employers. The HR Policy Association consists of more than 375 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of the HR Policy Association's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state

capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Coalition for a Democratic Workplace ("CDW") compromises over 600 organizations representing millions of employers nationwide in nearly every industry. CDW provides a collective voice to its membership on issues related to labor law reform.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici file here because the Board's decision will make it extremely difficult for businesses to enforce discipline and ensure productivity for employees using

company computers and email systems. Moreover, the Board's decision imposes further burdens on businesses—creating potential data security vulnerabilities and strains on company computers and email systems.

This brief was not authored in whole or in part by counsel for a party to this case, and no person or entity has contributed money for the preparation or submission of this brief. This brief was authored and filed with the consent of the counsel on record for Purple Communications, the National Labor Relations Board, and the Communication Workers of America, AFL-CIO.

JURISDICTIONAL STATEMENT, ISSUES FOR REVIEW, STATEMENT OF CASE AND FACTS

Amici agree and adopt Respondent-Petitioner-Intervenor Purple Communications Inc.'s Jurisdictional Statement, Issues for Review, Statement of the Case, and Facts.

STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech.

The Fifth Amendment to the U.S. Constitution provides, in pertinent part:

> . . . [N]or shall private property be taken for public use, without just compensation.

29 U.S.C. § 157 provides:

> Employees shall have 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, and shall also have the right to refrain from any or all of such activities . . .

SUMMARY OF ARGUMENT

The National Labor Relations Board case at issue in this appeal is *Purple Communications, Inc.*, 361 N.L.R.B. No. 126 (2014) ("*Purple Communications*"). This case was decided on a 3-2 basis, with lengthy dissents by Board members Phil Miscimarra and Harry Johnson III. The central holding in the case by the Board majority stated as follows:

> [W]e decide today that employees' 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. We therefore overrule the Board's divided 2007 decision in *Register Guard* to the extent it holds that employees can have no statutory right to use their employer's email systems for Section 7 purposes. 361 N.L.R.B. No. 126 at *1 (2014) (internal citations omitted).

To fully understand the reach of the Board's decision in *Purple Communications*, it is important for the Court to understand the broad reach of Section 7 rights under the National Labor Relations Act ("NLRA" or "Act"). Section 7 of the Act states, in pertinent part:

> Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities* for the purpose of collective bargaining or *other mutual aid and protection*, and shall also have the right to refrain from any or all such activities. 29 U.S.C. § 157 (emphasis added).

Section 7 rights, while including union activity, also encompass an additional extremely wide array of protected concerted activities by employees, including discussions among workers involving virtually every aspect of their relationship with their employer. For example, Section 7 rights protect controversial employee discussions in the workplace, demonstrations over such workplace issues such as immigration, recruitment and hiring policies, employer positions on federal and state legislative considerations and enactments involving employment issues, and a wide array of other subjects and issues that may not only be volatile in the workplace, but also among the general public.[1]

For example, under the Board's *Purple Communications* holding, an employer would be required to allow an employee to post crude remarks on its email servers as deemed protected by the Board's recent decision in *Pier Sixty, LLC*, 362 N.L.R.B. No. 59 (2015), aff'd 855 F.3d 115 (2nd Cir. 2017) (deciding that a social media post was protected under Section 7, even though it used repeated profanity: "Bob is such a NASTY MOTHER [expletive] don't know how to talk to people!!!!!!

[1] *See, e.g.,* NLRB Gen. Couns. Mem. 08-10 (Jul. 22, 2008).

[Expletive] his mother and his entire [expletive] family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" The Board's *Purple Communications* decision would also allow racially derogatory remarks to be posted by employees on employers' servers, such as those recently found to be protected under the Board's *Cooper Tires and Rubber Co.* decision. 363 N.L.R.B. No. 194, aff'd 866 F.3d 885 (8th Cir. 2017) (ruling that racially derogatory remarks such as "Go back to Africa, you bunch of [expletive] losers," and "Hey, anybody smell that? I smell fried chicken and watermelon" are protected under Section 7 of the NLRA).[2] If an employer is required to permit such racially insensitive and crude remarks on its servers, it will run afoul of hostile work environment and harassment regulations enacted by other federal agencies. The Board's *Purple Communications* decision places employers in very difficult situations—if they comply with NLRB orders, they could be found to be in violation of decisions from the Equal Employment Opportunity Commission and the courts. Indeed, if an employee has a statutory right is to post such racially insensitive and crude remarks on an employer's email system, such as the protected Section 7 employee statements that were made in the *Pier Sixty* and *Cooper Tire* cases, it no doubt would be subject to discrimination charges and related litigation.[3]

[2] Ironically, and irrationally, however, the statements found protected in *Pier Sixty* and C*ooper Tire* could be prohibited from being posted on an employer's bulletin board. *See Purple Communications*, 361 N.L.R.B. No 126 at *9. However, the potential communication reach of the bulletin board, in virtually every instance, would be much less than the larger reach of email postings.

[3] Press Release, Equal Employment Opportunity Commission, EEOC Launches New Training Program on Respectful Workplaces (Oct. 4, 2017) (announcing a new training program that focuses on "respect, acceptable

The Board's decision in *Purple Communications* is problematic on both statutory and constitutional grounds. The Board's decision not only fails to provide an adequate explanation for its rationale, but also departs from long established precedent developed over many decades by both Democrat and Republican Boards. It presents both legal and practical problems for employers of all sizes. Further, the Board's decision rests, at least in part, on the flawed conclusory assertion that its newly-minted rule will not significantly affect legitimate business interests.

Accordingly, the Board's imposed standard is both inherently unworkable and without legal support. This Court should eschew the Board's improper application of the Supreme Court's balancing test in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Further, there is no compelling need for employers to be required to give employees virtually unlimited access to a company's private electronic communication systems for non-business purposes. Indeed, this is especially true in an age where virtually every employee today is connected through free and public social media channels online.

Finally, the Board's decision unnecessarily creates significant constitutional questions. First, the Board's interpretation should be rejected under the canon of constitutional avoidance because it raises a significant problem under the First

workplace conduct, and the types of behaviors that contribute to a respectful and inclusive, and therefore ultimately more profitable, workplace."

Amendment in contravention of the compelled speech doctrine. Second, in abrogating the employer's right to exclude non-business-related use of private property, the Board's interpretation violates the Takings Clause of the Fifth Amendment.

ARGUMENT

I. The Board's Decision Creates Legal and Practical Problems for Employers of All Sizes

As a predicate for its decision purportedly conferring "rights" on employees to use private company-owned computers and email systems for unionization and union-related dialogue, the Board pronounced that "[e]mail … is fundamentally a *forum* for communication." *Purple Communications,* 361 N.L.R.B. No. 126 at *11 (2014) (emphasis added). This assertion belies the fact that the Board's decision will invite extended and time-consuming debate on a whole host of labor and technical-related issues. For example, do employees now have unlimited access rights to all facets of an employer's email system, including the right to send emails to all users of such system? Do employees have the right to communicate to third parties who are not employees, but who have access to an employer's email system? What if such users include clients and customers of an employer, and the general public? What restrictions can an employer place on employee use of its email system regarding frequency of emails and length of emails? How will the Board determine whether an employer is lawfully monitoring employee use of its email system as

opposed to engaging in unlawful surveillance? Has the Boards decision in *Purple Communications* turned an employer's email systems into public debate forums over controversial issues that are in the penumbra of Section 7 rights protected by the NLRA? [4] These are but a few of the questions raised by the Board's decision in *Purple Communications*. In any event, the Board is unequivocally wrong in suggesting that private company-owned email systems exist to serve as a public "forum for communication."

Today, companies invest tremendous resources in developing, maintaining, and monitoring their email systems. Business success and survival in the 21st Century demands email connectivity. And while email systems facilitate communication, these systems exist in the business setting *solely to advance business interests*—as is true of any other form of company-owned property. For this reason, most companies establish policies dictating that computers and email systems are intended for business-related purposes and prohibiting or limiting personal use.[5] *See* NFIB Guide to the Employee Handbook: How to Create a Custom

[4] *See* Merriam-Webster Dictionary, *available* at https://www.merriam-webster.com/dictionary/forum (defining a "forum" as "a *public* meeting place for open discussion") (emphasis added).

[5] To the extent that employers allow for *de minimis* use of company email systems for non-essential communication, the allowance is intended to further the company's interests by facilitating a sense of community within the workplace, and in recognition of the fact that it is unrealistic to police every single email an employee might send. Even where some non-business-related messages are allowed, companies universally (and appropriately) prohibit use of company communication systems for purposes adverse to the company's business interests. These policies are consistent with the principle that employees have a fiduciary obligation to utilize company property only in the furtherance of business interests. *See Pierce v. Lyman*, 1 Cal.App.4th 1093, 1102 (1991) ("The basic fiduciary obligations are two-fold: undivided loyalty and confidentiality.") (quoting *Barbra A. v. John G.*, 145 Cal.App.3d 369, 383 (1983)).

and Effective Handbook for Employees, Sec. 3.4 (2012) ("Company property, such as equipment, vehicles, telephones, computers, and software, is not for private use. These devices are to be used strictly for company business…").[6] Indeed, NLRB case law for decades under both Republican and Democratic Boards has recognized this fundamental principle.[7]

In taking away the employer's prerogative to dictate usage terms for its own property (*i.e.*, the fundamental right to exclude non-business-related uses), the Board will now require employers to host various non-business discussions over a wide range of subjects, including unionization activities, at the employer's expense, and at the cost of lost workplace productivity. The Board suggests that "special circumstances" may (in theory) allow an employer to avoid these added costs and inconveniences in an extraordinary case. Yet, the Board set an impermissibly high standard making it virtually impractical for employers to protect legitimate business interests while accommodating employees' debate and dialogue on non-business-related topics.

A. Extensive Email Traffic on Non-Business-Relates Issues, Including Unionization Issues, Will Prove a Distraction in the Workplace

[6] *Available* online http://www.nfib.com/Portals/0/PDF/AllUsers/legal/guides/NFIB-employee-handbook-guide-WEB-2017.pdf

[7] *See e.g., Register Guard*, 351 NLRB 1110 at 1114-15 (2007) (bulletin boards); *Champion International Corp.*, 303 NLRB 102 (1991) (copy machine); *Churchill's Supermarkets*, 285 NLRB 139 (1987) (telephone); *Union Carbide Corp.*, 259 NLRB 974 (1981) (telephone); *Heath Co.*, 196 NLRB 134 (1972) (P.A. system).

While emails are an integral part of our work lives, anyone with an office job knows that sorting through, reviewing, discarding, and responding to them can prove tremendously time-consuming. *See* Laura Vanderkam, *Stop Checking Your Email, Now*, Fortune (Oct. 8, 2012) (discussing a McKinsey Global Institute report finding that the average office worker "spen[t] 28% of her work time managing email [as of 2012].").[8]

Accordingly, if company email systems are opened up as a "forum" for virtually unlimited discussions regarding non-business-related issues that are arguably covered by Section 7, including but not limited to unionization and union-related discussion, employees will spend even more time on email and be distracted from their jobs. Indeed, even if employees devote little time to responding to non-business-related emails, their productivity, as noted above, will be significantly diminished. To be sure, email discussion on topics such as organizing, collective bargaining, and concerted action (*e.g.*, a potential strike or a plan to engage in leafletting) and demonstrating will spark passionate debate among those potentially affected. It is reasonable to expect that a single email addressing the mere possibility of employees seeking to engage in collective action or union representation will trigger many emails in response. In the union area alone, organizing campaign issues, contract negotiation subjects, and discussion of contentious grievances or

[8] *Available* online at http://fortune.com/2012/10/08/stop-checking-your-email-now/ (last visited Sept. 29, 2017).

lawsuits, will result in hundreds—if not thousands—of emails. Further, the Board's standard invites business email systems to become an open forum for topics will beyond union organizing and bargaining, including immigration, workplace leave (employer's policy, who is taking leave, who is not, etc.), scheduling, discipline, and many other subjects that touch upon terms and conditions of employment. As we have seen with social media, these open debates can spark passionate and sometimes intensive and inappropriate responses, and could generate a possibly endless source of employee email activity.

Given that these topics can quickly enflame passions, these potentially extended exchanges will prove extraordinarily disruptive in the workplace and more distracting than fleeting breakroom conversations. Moreover, emails populating silently at the employee's workstation create greater risk of distraction since employees can draft or read emails covertly during working hours.

B. Employers Will find it Difficult to Prevent Misuse of Communication Systems and to Ensure Employee Productivity

In forcing employers to host email "forums" on NLRA Section 7 protected issues, the Board has required employers to accept inefficiency in the workplace. Employees will now need to sort through non-business-related emails to perform real work.[9] This fact alone demonstrates the impracticability of enforcing a policy

[9] Similar concerns over allowing personal employee messages to obscure company postings on employer bulletin boards led the Board to uphold nondiscriminatory employer policies prohibiting such employee postings on the

limiting non-business use of company emails to off-hours. Regardless of whether email traffic occurs entirely during non-working hours (as unlikely as that may be), employees will still need to sort through those emails during paid working hours. Indeed, an employer, pursuant to the requirements of the Fair Labor Standards Act, 29 U.S.C. § 201, is required to pay employees for such tasks, as these activities constitute "work time."

The Board's decision unquestionably hampers the employer's ability to monitor and ensure employee productivity in the use of company email systems—which is especially problematic since the Board itself recognizes that "employers have a [protected] right to ensure that employees are productive during working time."[10] *Purple Communications*, 361 N.L.R.B. No. 126 at *11 (citing *Peyton Packing Co. Inc.*, 49 NLRB 828, 843 (1943)). While in one breath acknowledging that employers may impose restrictions where "necessary to maintain production or discipline," the Board stresses that employers will only be able to justify restrictions in "rare" cases where the employer can demonstrate "special circumstances." *Id*. at *14. But this completely discounts the fact that *in all cases* employers will be extremely vulnerable to non-productive time if employees are entitled to exercise a

employers' property. *Sprint/United Management Co.*, 326 NLRB 397, 399 (1988); *Container Corp. of America*, 244 NLRB 318 (1979).

[10] In rejecting the suggestion that email systems may be analogized to other physical spaces within the workplace, the Board said that in most cases "email systems will amount to a mixed use area…" But this amounts to a tacit acknowledgement that it is impractical to compartmentalize work email usage—which necessarily undermines the Board's suggestion that employers can effectively limit non-work-related email usage to non-working hours.

NLRB conferred right to use company-owned email systems for their unionization forums.

This also means that employers will assume liabilities stemming from use of emails for non-business-related reasons. For example, employees who send non-work-related emails to third parties or other employees may expose their employer to legal action based on the employer's acts or omissions under federal civil rights laws. *See Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000) (finding employer responsibility to correct harassment occurring on electronic bulletin board deemed to be part of the workplace); *Amira-Jabbar v. Travel Services, Inc.*, 726 F. Supp. 2d 77 (D.P.R. 2010) (considering evidence of social media harassment as part of a hostile work environment); Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 Wash. L. Rev. 249, 269-74 (2012). Such employment discrimination exposure has recently been highlighted by the Boards decisions in *Pier Sixty* and *Cooper Tire*. For example, in *Pier Sixty*, the Board decided that an employee's crude post on a social media website was protected activity under Section 7. The post read, ""Bob is such a NASTY MOTHER [expletive] don't know how to talk to people!!!!!! [Expletive] his mother and his entire [expletive] family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" 362 N.L.R.B. No. 59 at *2 (2015). Despite the crude and rude nature of this statement, the employer was not permitted to terminate the employee because

the Board deemed the posting to be protected concerted activity. Similarly, in *Cooper Tire*, the Board protected employees from termination based on their racially insensitive remarks to replacement workers, which included telling them to "Go back to Africa, you [expletive] losers," and "Hey, anybody smell that? I smell fried chicken and watermelon." 363 N.L.R.B. No. 194 (2015). Permitting these statements on employer email servers based on the requirements of the Board's recent decisions would, without doubt, expose employers to hostile workplace liability charges from the Equal Employment Opportunity Commission.

In response to these legitimate business concerns, the Board suggests that employers can monitor "electronic communications on its email system… so 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." *Purple Communications*, 361 N.L.R.B. 126 at *16. But this supposed "guidance" on the employer's right to monitor its own email systems greatly impedes employers from monitoring workplace productivity and places an employer in a precarious legal position. Telling employers not to hone in on the individuals whom they reasonably suspect to be reading and drafting non-work-related emails during working hours means that employers will find it difficult to maintain workplace production and discipline. Alternatively, if an employer does engage in such monitoring, it may not be in compliance with other workplace laws.

C. Requiring Consent to Non-Business-Related Email Traffic Burdens the Employer's Private Computers and Servers—While Creating New Data Security Vulnerabilities

The Board's decision further imposes burdens on employers who must incur additional costs in hosting non-business-related "forums" on company computers and servers. Of special concern, the Board's decision requires businesses to allow email traffic that may create or exacerbate security vulnerabilities. *Cf.* Brianna Gammons, *6 Must-Know Cybersecurity Statistics for 2017*, BARKLY BLOGS (Jan. 2017) (noting that the amount of phishing emails containing a form of ransomware grew significantly in 2016).[11] This is a tremendous concern because of the potential for hacks that may compromise sensitive company data and consumer privacy. In an age where businesses face increased cyber-security threats and scrutiny under the Federal Trade Commission's evolving data-security standards, businesses are concerned about any government mandate that may further strain information technology resources, or lead to potential vulnerabilities—which is a more likely threat when employees communicate with outside parties through company servers. *Cf., FTC v. Wyndam Worldwide Corp.*, 799 F.3d 236 (3rd Cir. 2015) (affirming a company's liability for a data security breach under FTC's evolving standards).[12]

[11] *Available* online at https://blog.barkly.com/cyber-security-statistics-2017 (last visited Sept. 29, 2017).

[12] "If you're sending email to someone on the very same service you use (say, Outlook.com), you have at least [some]... potential network vulnerabilities: your connection to Outlook.com and your recipient's connection to Outlook.com). If your recipient's email is elsewhere (say a company or school) then you have at least one more [vulnerability]: the connection between Outlook.com and your recipient's email provider... If one connection is secure, there's no guaranteeing any other connection in the sequence is secure." Geoff Duncan, Here's Why Your

The Board suggests that employers may apply "uniform and consistently enforced restrictions," to maintain the integrity of company systems, "such as prohibiting large attachments or audio/video segments…" *Purple Communications*, 361 N.L.R.B. No. 126 at *15. This "allowance"—which will no doubt have to be determined on a case-by-case basis—simply ignores the employer's practical concern that they will be burdened and exposed to further vulnerabilities if compelled to host public forums on non-business-related issues.[13] And in any event, the Board's supposed accommodation for employers still places the burden on the company to "demonstrate that [hosting a public forum on various Section 7 issues] [will] interfere with the [company's] email system's efficient functioning," which effectively means that all employers, and especially small and mid-sized firms (those most likely to incur technical difficulties) will be unable to impose even content-neutral restrictions, to preserve the integrity of the company systems, without risking litigation. *Id*.

D. The Board's Decision Discourages Companies from Investing in Socially Beneficial Platforms that May Foster Innovation and Workplace Cohesion

Though the Board ostensibly limited its decision to emails, its rationale would seemingly apply to all forms of employer-provided electronic communications—

Email is Insecure and Likely to Stay That Way, Digital Trends (Aug. 24, 2013), *available* online at https://www.digitaltrends.com/computing/can-email-ever-be-secure/ (last visited Oct. 2, 2017)

[13] There is no reason why employers should be expected to bear those costs or tolerate those added vulnerabilities.

including employer-provided social media platforms. This regulatory overreach may discourage employers from investing in or developing platforms that may otherwise permit job growth and foster a sense of community among workers.[14]

Further, the Board's decision overruling *Register Guard*, 351 NLRB 1110 (2007), may compel companies to abandon investments in such platforms. Under the Board's decision, employers will be concerned that they cannot effectively monitor employee non-business use of these platforms because doing so may constitute unlawful surveillance.[15] Considering these factors, many employers may view the legal and practical costs of further investing in certain technology as outweighing the potential benefits in innovation and collaboration.

II. There is No Need to Commandeer Private Company Computers and Servers in an Age Where Virtually Everyone is Connected Through Free Social Media Accounts, In-Pocket Communication Devices, and Free Personal Email Accounts

The argument that employees must be enabled to use their employer's electronic communication systems to exercise Section 7 rights becomes less convincing every day—as communicative technology is continually advancing.

[14] In a survey of 290 large and midsized organization by global professional services company Tower Watson, 56% of those employers currently use various social media tools as part of their internal communication initiatives to build community. *See* WILLIS TOWERS WATSON, *How the Fundamentals Have Evolved and the Best Adapt*, *available* online at https://www.towerswatson.com/DownloadMedia.aspx?media=%7B69374AC2-7482-478F-958B-5DC98C92F195%7D (last visited Sept. 29, 2017). According to information technology research firm Gartner, Inc., 50% of large organizations will have a "Facebook-like" internal network and 30% of these will be viewed essentially as telephones and emails are today. GARTNER, Press Release (Jan. 29, 2013), *available* online at http://www.gartner.com/newsroom/id/2319215 (last visited Sept. 29, 2017).

[15] *Cf. Hill v. National Collegiate Athletic Assn.*, 26 Cal.Rptr.2d 834, 845, 856 (Cal., 1994) (holding that California's constitutional guarantee of privacy rights applies against both public and private entities, and that courts must assess the reasonableness of the asserted claim of privacy rights depending on the circumstances of the case).

Employees have an ever-increasing array of options by which they can exercise their Section 7 rights, including the use of personal electronics, free social media accounts, and free personal email accounts. These modes of communication make it as easy to communicate with others as using the employer's email systems without the additional legal questions, managerial and IT burdens, or financial strains that the Board's chosen solution presents.

First, the number of American adults who own and routinely use communication devices has grown exponentially over the years and continues to do so seemingly every day. According to a study by Pew Research Center's Internet and Technology Division, 87% of American adults owned a cellphone and 44% owned a smartphone capable of accessing the internet in 2012. *See* Pew Research Center, *Mobile Fact Sheet*.[16] In only four years,[17] those numbers have increased to 95% and 77%, respectively. *Id.* So, in just four years, an additional *one-third* of American adults have acquired a smartphone, and that number will continue to increase. The percentage of the country's population that own other electronic devices, such as tablets and laptops, is growing similarly.[18] The capability to instantly connect to the internet, social media accounts, personal email accounts, and

[16] *Available at*, http://www.pewinternet.org/fact-sheet/mobile/.
[17] The latest information was compiled in November 2016.
[18] Laptop ownership has grown 1% since 2012, but tablet ownership has grown by 48%, from 3% to 51%. *See*, PEW RESEARCH CENTER, *The Evolution of Technology Adoption and Usage*, http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/ft_17-01-10_internetfactsheets/.

other communicative methods provides employees with an unprecedented ability to stay in contact with each other to discuss wages, hours, and other terms and conditions of employment as they chose on their own time.

Second, beyond simply having access to the internet through personal devices, social media platforms are readily available to employees at any time. Similar to the use of electronic communications devises, studies show a 10% rise in American adult social media usage over the past four years. As of the November 2016, 69% of American adults use at least one social media account, and that number increases to 88% when talking about younger adults.[19] *See* Pew Research Center, *Social Media Fact Sheet*.[20] This continued trend means that employees can access their social media platforms, and union organizers can access employees, through mobile devices at any point of a given day, giving them access to personal and social news, as well as convenient and user-friendly methods of communication without the need to use an employer's email system.

Further, as technology has evolved, virtually every organization in the country that communicates with employees, including unions, has identified new uses of technology to communicate their message(s). For example, many unions have turned to social media as a tool for organizing and are issuing communication guides to

[19] Younger adults range from age 18-29.
[20] *Available at*, http://www.pewinternet.org/fact-sheet/social-media/.

their organizers—offering strategies on how to utilize social media to effectively organize a given workforce. *See, e.g.,* International Alliance of Theatrical Stage Employees, *Communications Guides*.[21] This signals that unions are adapting to changes in technology to find a simpler method of reaching more members. Also, unions have turned to social media platforms such as Facebook to reach out to union members and non-union individuals alike to advocate for or against issues such as the "Fight for $15" and California's Prop. 32 in 2012. *See* Service Employees International Union, *Home Care Fight for $15 and a Union!*, (asking others to use "hashtags" to help get the word out on social media);[22] Joe Garofoli, *Labor Beat Prop. 32 Via Social Media*, SF Gate (Dec. 25, 2012).[23]

Finally, this vast growth in personal electronic and social media use has granted employees and organizations representing and assisting workers many opportunities to communicate with one another about Section 7-protected issues. Given these recent trends, it is clear that employees do not need to commandeer their employer's email systems to carry out their Section 7 rights. Employees have moved forward with technological advances, leaving behind the days in which email systems were the modern-day "water cooler"—if that was ever an appropriate analogy. Accordingly, the Board's decision is already obsolete—and will prove even

[21] *Available at*, http://www.iatse.net/member-resources/communications-guides (last visited Oct. 4, 2017).
[22] *Available at*, http://www.seiu105.org/our-campaigns/home-care/
[23] *Available at*, http://www.sfgate.com/politics/joegarofoli/article/Labor-beat-Prop-32-via-social-media-4145607.php.

more cumbersome and antiquated as technologies and social media platforms continue to evolve.

III. The Board's Interpretation of the NLRA Should Be Rejected Under the Canon of Constitutional Avoidance

Under the well-established canon of constitutional avoidance, courts and regulatory agencies have an obligation to interpret a statute in a manner that does not implicate constitutional questions. *See, Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (Brandeis, J., concurring) (1936). The Board's decision in *Purple Communications* clearly violates that canon by inviting serious constitutional. The Board's decision overruling *Register Guard* not only departs from longstanding precedent under the NLRA, but creates conflicts with the First and Fifth Amendments of the Constitution. Here, the Board has compelled employer speech, in violation of the First Amendment, and has affected a taking, in violation of the Fifth Amendment. Accordingly, the Board's *Purple Communications* decision should be overturned to avoid unnecessary constitutional questions and violations.

A. Upholding *Purple Communications* Would Impermissibly Restrict the Employer's First Amendment Rights by Compelling the Employer to Speak Against Its Own Interests

An employer cannot be forced to provide its employees a means of communication for the sole purpose of advocating views with which the employer may not agree. As noted above, the range of subjects and issues for discussion on an employer's email system goes far beyond union representation issues. The

decision will require an employer to host a broad array of issues protected under Section 7 of the NLRA, including many issues that are quite controversial. The board's decision in *Purple Communications*, mandating that an employer publish crude and rude employee outbursts such as in *Pier Sixty* and racially insensitive statements protected in *Cooper Tire*, is a violation of an employer's free speech rights.

The United States Supreme Court has ruled on multiple occasions that the First Amendment prevents the government from requiring an employer to directly or indirectly promote views with which it disagrees—which necessarily prohibits forcing companies to allow the use of their communication systems for unwanted messages. For example, the Court has ruled that a utility company cannot be required to place leaflets with which it does not agree in its monthly bill mailings, *Consolidated Edison Co. of New York, Inc. v. Public Services Comm'n of New York*, 447 U.S. 530, 544 (1980), that a newspaper cannot be compelled to print a reply to a political stance or opinion that the paper has taken, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and that a private organization cannot be forced to associate with the speech of those whose outlook is wholly dissimilar from its own. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In each of these cases, the Supreme Court has refused to require a company to permit its means of communication to be used to advocate against the interests of the company.

Similarly, in *Purple Communications*, the Board is requiring that employers permit their employees to actively advocate against the interests of the employer while using the very system that the employer pays to implement and maintain. Furthermore, the Board's decision in *Purple Communications* violates the First Amendment as the right of free speech implicitly protects the right to not speak if one so chooses. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1976).

B. The Board's Interpretation of the NLRA Violates the Fifth Amendment by Taking Away Employers' Rights to Exclude and Control the Use of Its Private Property

The Fifth Amendment of the U.S. Constitution guarantees that private property cannot be taken by the government for third party use without just compensation. U.S. CONST. amend V. Its purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 80 (1960). The Supreme Court has determined that the "Takings Clause" requires the government to pay a property owner just compensation whenever government regulations require an owner to suffer a physical invasion of her property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

In *Loretto*, the Supreme Court ruled that permanent occupations of land installations such as telegraph and telephone lines, rails, and underground pipes are a taking if they are required by regulation. This action is a taking even if such

installations are only minimally intrusive on the private property and do not seriously interfere with the landowner's use of the rest of the property. As the Court reaffirmed in *Loretto*, "the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435 (citing *Kaiser Aetna*, 444 U.S. 164, 179-80 (1979)).

The Board concluded in *Purple Communications* that, while email systems are without question the property of the employer, the employer's property rights must give way to the Section 7 rights of the employee. See, *Purple Communications*, 361 N.L.R.B. No. 126 at *11, n. 50. The Board improperly applied the Supreme Court's balancing test in *Republic Aviation*, and concluded that employees' section 7 rights trump employer property rights. *Id.* However, the Supreme Court has made clear time and time again that there is no balancing of competing rights under the Fifth Amendment when the invasion of private property is permanent in nature. *See, e.g., Loretto*, 458 U.S. at 432 (1982). Further, as stated in NLRB member Harry Johnson's dissent in *Purple Communications*, even a minimal intrusion upon physical property can constitute an unlawful taking. 361 N.L.R.B. No 126 at *51, n. 51. The Takings Clause imposes categorical liability whenever government authorizes third party access or use to private property—regardless of however compelling or important the public interest may be.

Here, the Board has granted employees the right to physically invade the employer's email systems and to take over portions of the employer's server with their personal email communications in the name of Section 7 rights. This is a physical taking by government mandate, as this regulation creates an effective easement for third party use of the employers' email systems. *See Causby v. United States*, 328 U.S. 256 (1946) (holding that, while airspace is a public highway, a landowner must have the exclusive control over the immediate reaches of the enveloping atmosphere if she is to have the full enjoyment of her land). This taking is permanent in nature because, although an employer may periodically clear specific information from its servers, the right to physically occupy the servers is ongoing.[24] Additionally, an employer has no control over how many times an email has been transmitted to third parties, or the number of third parties receiving such emails.

The NLRB may argue that, based on the Supreme Court's holding in *Systems Corp. v. Fed. Communication Comm'n*, 570 F.3d. 83, 98 (2nd Cir. 2008),[25] that an electronic regulation does not violate the Fifth Amendment. But this argument is a non-starter. Employee use of the employer's email system is in fact a physical taking. First, the Board's decision authorizes employees to physically use company computers, which are protected under the Takings Clause on equal terms with real

[24] From a technical perspective, email cannot be deleted per se, as they remain in some form of storage within the employer's server. In other words, emails are written in pen, not in pencil, and cannot be erased in practice.
[25] The Court ruled that a regulation requiring a television provider to carry a specific television channel did not constitute a taking under the Fifth Amendment.

property. *See Horne v. USDA*, 133 S.Ct. 2053 (2013) (emphasizing that the same per se rules apply to personal property). Second, electronic messages are not abstract or metaphysical. They exist in a very real and physical sense in occupying space and burdening company computers and servers.

Accordingly, the Board's *Purple Communications* decision constitutes a taking in violation of the Fifth Amendment, and the employer is due just compensation. However, because the Board does not have congressional authorization to pay out such compensation, the only sufficient remedy is a reversal of the Board's decision.

CONCLUSION

For the foregoing reasons, this Court should refuse to enforce the Board's Order in *Purple Communications*.

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Respectfully submitted,

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Date: 10/10/17

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October 2017, I electronically filed a true and correct copy of the foregoing using the CM/ECT system, thereby sending notification of such filing to all counsel of record.

/s/ G. Roger King
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