UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC.

and **Cases: 21-CA-095151**
21-RC-091531
21-RC-091584

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

BRIEF OF THE GENERAL COUNSEL

Submitted by:
Kayce R. Compton
Counsel for the General Counsel
Division of Advice
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570
(202) 273-2491
kayce.compton@nlrb.gov

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Martin H. Malin & Henry H. Perritt, Jr.,
The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces,
49 U. Kan. L. Rev. 1 (November 2000)……9,16,19

National Workrights Institute,
Survey of Companies' E-mail and Internet Monitoring, Business and Society Review
108:3 285-307
(2003)……20

The Radicati Grp., Inc.,
Survey: Corporate Email, 2011-2012, Executive Summary
(2011)
http://www.radicati.com/wp/wp-content/uploads/2011/09/Survey-Corporate-Email-2011-2012-Executive-Summary.pdf……..11

The Radicati Grp., Inc.,
Email Statistics Report 2014-2018 Executive Summary,
(April 2014)
http://www.radicati.com/wp/wp-content/uploads/2014/04/Email-Statistics-Report-2014-2018-Executive-Summary.pdf……10, 11

Frederick D. Rapone, Jr.,
This is Not Your Grandfather's Labor Union-Or Is It? Exercising Section 7 Rights in The Cyberspace Age,
39 Duq. L. Rev. 657 (Spring 2001)……..15

WorldatWork & Buck Consultants,
The State of Electroinc Communications in Compensation and Human Resources
(Survey Brief)
(October 2005)
http://www.worldatwork.org/pub/E157963EC05.pdf……..12

WorldatWork,
Workplace Flexibility 2013
(October 2013)
http://www.worldatwork.org/waw/adimLink?id=73898……..11,19

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC.

and **Cases: 21-CA-095151**
21-RC-091531
21-RC-091584

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

BRIEF OF THE GENERAL COUNSEL

On April 30, 2014, the Board solicited the parties and interested amici to file briefs addressing issues related to whether the Board should overrule the holding in *Register Guard* that "employees have no statutory right to use the[ir] Employer's e-mail system for Section 7 purposes." 351 NLRB 1110 (2007), *enfd. in relevant part and remanded sub nom. Guard Publ'g v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

I. Summary of Argument

The Board should overrule *Register Guard* and apply the framework set forth in *Republic Aviation Corp. v. NLRB*, 324 NLRB 793 (1945), to balance employees' Section 7 right to communicate with each other in workplaces that utilize electronic communications systems and employers' management interests in maintaining production and discipline. Specifically, the Board should hold that employees who use their employer's electronic communications systems to perform their work have a statutory right to use those systems for Section 7 purposes during nonwork time, absent a showing of special circumstances relating to the employer's need to maintain production and discipline.

Employee discourse is crucial to employees' effective exercise of their Section 7 rights because employees must be able to communicate with each other in order to self-organize and engage in other collective action for their mutual aid and protection. It is well-recognized that the workplace is a place uniquely suited for employee discourse to occur. The Board's *Register Guard* decision is a departure from these fundamental Section 7 principles because it failed to account for the importance of electronic employee discourse in the modern workplace. Since the Board's 2007 decision in *Register Guard*, email has become even more deeply entrenched in workplaces and is now often the preferred method of employee discourse. As such, employees' right to use their employer's electronic communications systems is vital to the exercise of their Section 7 rights.

The Board should apply to employee-to-employee electronic communications the analysis governing employee workplace discourse set forth in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) because that framework appropriately balances the employees' Section 7 interest in engaging in email communications and the employer's business interests in regulating that use. When applying the *Republic Aviation* framework, the Board should conclude that an employer may restrict its employees' access to its electronic communications systems based only on a particularized showing that specific management interests relating to production or discipline outweigh the employees' Section 7 right to use the system on their nonwork time. Because employees' alternative means of communication are irrelevant to this analysis, the availability of personal electronic devices should not affect the proper balance between employers' and employees' rights. The Board should thus conclude that broad rules prohibiting employees' personal use of email and similar electronic communications systems, which encompasses Section 7 activity, are presumptively unlawful absent an employer's particularized

showing that its management interests involving production or discipline outweigh the employees' right to engage in workplace discourse during their nonwork time. A decision by the Board to overrule *Register Guard*, and apply the *Republic Aviation* framework to employee-employee electronic workplace discourse, would address the realities of modern technological workplaces and insure that Section 7 remains relevant for many of today's workers.[1]

II. History of the Case

Purple Communications, Incorporated (Employer) provides communication services to deaf and hearing-impaired individuals from 15 call centers around the country, primarily by employing "video relay interpreters" (employees) who provide sign language interpretation between hearing-impaired and hearing persons through video calls. *Purple Communications, Inc.*, Cases 21-CA-095151, et al. (October 24, 2013), JD-75-13, slip op. at 2. The Employer employs 30 and 47 employees at its Corona and Long Beach, California facilities, respectively. *Id.* The employees process calls on Employer-provided computers from individual workstations and are allowed an approximate ten-minute break every hour. *Id.* at 3; Transcript (Tr.) 75. Employees can access the Employer's intranet, email system, work programs, and games like "Solitaire" and "Minesweeper" at their workstations. JD, slip op. at 3; Tr. 46. The Employer assigns all employees an email account for its email system that employees can access from their individual workstation computers, home computers, and cell phones. JD, slip op. at 3. Employees routinely use the Employer's email system to communicate with each other, and managers routinely email employees and other managers. *Id.* Although employees have limited,

[1] Workplaces that utilize some or all computer communication technologies, such as email, the Internet, an intranet, and others, will be referred to generally as "technological workplaces."

if any, Internet access from the computers located at their individual workstations, they can access the Internet from a small number of shared computers in employee common areas. *Id.*

The Employer maintains an employee handbook containing policies and procedures, including a policy concerning employee use of the Internet, intranet, and electronic communications. The policy provides, in part, that all "[c]omputers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment … are the sole and exclusive property of the Company … [and] should be used for business purposes only."[2] Jt. Ex. 1, at 30. Improper use of the communications systems could result in discipline, up to and including termination. JD, slip op. at 4. The record contains little evidence of employees' personal use of email and no evidence that the Employer has applied its communications policy in a discriminatory manner. Despite the limited evidence of employee email use in the record, the Employer knew that employees used its email system for personal use as demonstrated by its receipt of an employee petition, attempting to cancel the upcoming Union vote at the facilities, with email attachments showing that some employees circulated the petition among themselves over the Employer's email system. *See* Respondent Ex. 8.

Applying the Board's decision in *Register Guard,* the Administrative Law Judge dismissed the General Counsel's allegation that the Employer violated Section 8(a)(1) by maintaining an overly-broad electronic communication policy that prohibited employees from using its computers, Internet, and email for non-business purposes. *Id.* at 5-6.

[2] The Employer's electronic communications policy also prohibits employees from using the Employer's computers and computer systems to "engag[e] in activities on behalf of organizations or persons with no professional or business affiliation with the Company" or to "[s]end[] uninvited email of a personal nature." *See* JD, slip op. at 6; Jt. Ex. 1, at 30-31. Although the General Counsel excepted to the ALJ's failure to find that those two rules violate Section 8(a)(1), we do not address the legality of those rules here because the Board's questions are limited to the lawfulness of the Employer's "business purposes only" rule.

The General Counsel and Charging Party both filed limited exceptions to that conclusion, arguing that the ALJ erred by finding that the Employer's communication policy was not facially unlawful. On April 30, 2014, the Board invited the parties and amici to submit briefs addressing five questions concerning whether *Register Guard* should be overturned and, if so, what standard the Board should apply to employees' use of their employer's electronic communications systems. Specifically, the Board asked the following questions:

1. Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes?

2. If the Board overrules *Register Guard*, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?

3. In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?

4. Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?

5. Identify any other technological issues concerning email or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since *Register Guard* was decided. How should these affect the Board's decision?

We have addressed each of the Board's questions in the Argument section of our brief as follows: we address Question 1 in Section 1, Question 2 in Sections 2 and 3, Question 3 in Section 3, and Question 4 in Section 4. Question 5 is relevant to all of the Board's preceding four questions, and we have attempted to identify and address any relevant technological issues and changes where appropriate.

III. Argument

1. The Board Should Overrule *Register Guard* Because Its Holding Disregarded the Importance of Electronic Employee Discourse to the Exercise of Section 7 Rights

In its 2007 *Register Guard* decision, the Board acknowledged that electronic mail (email) already "had a substantial impact on how people communicate, both at and away from the workplace," but nonetheless rejected the notion that employees who use email for work also have a statutory right to use their employer's email system for Section 7 communications. *Register Guard*, 351 NLRB at 1116. Instead, the Board held that an employer may lawfully ban all non-business use of its email system absent discrimination against Section 7 activity. *Id.* Technological developments since 2007 have made it even clearer that in many workplaces, employees primarily communicate with each other electronically. The Board should therefore overrule *Register Guard*, reaffirm its commitment to protect employee discourse in the workplace, and hold that employees who are provided access to their employer's electronic communications systems for work have a statutory right to use those systems for Section 7 purposes during nonwork time, subject to the employer's need to maintain production and discipline.

a. Employee discourse in the workplace is crucial to the exercise of Section 7 rights

The National Labor Relations Act was enacted to protect the right of employees to engage in collective bargaining through representatives of their choice and to engage in other collective action for their mutual aid or protection. *See* 29 U.S.C. § 151 (2006). It is axiomatic that without free discourse, there can be no collective action. Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. Davis L. Rev. 1091, 1093 (April 2011). Employees' ability to access information and communicate with each other is vital to their ability to have "full freedom of association, self-

organization, and designation of representatives of their own choosing." *Id.* at 1101-1102, citing 29 U.S.C. § 151 (2006).

The Supreme Court has long recognized that workplace discourse must be protected if employees are to be able to effectively exercise their Section 7 rights. Thus, the Court has noted that employees' right to self-organize and bargain collectively "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491-92 (1978). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945). Section 7 rights are only effective to the extent that employees can learn about the advantages and disadvantages of organization from others. *See Beth Israel*, 437 U.S. at 491 n.9, citing *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972); *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966) (an obvious impediment to employee free choice is "a lack of information with respect to one of the choices available"). The Supreme Court also recognizes the importance of the workplace as a place "uniquely appropriate" for employee discourse to occur. *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974) ("the place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees"); *Republic Aviation*, 324 U.S. at 801 n.6 (quoting with approval the Board's rejection of an employer rule that barred all employee solicitation "in the plant on [employees'] own time, the very time and place uniquely appropriate" for such communications).

These twin principles—employees' right to communicate with each other *and the right to do so at work*—consistently inform the Court's evaluation of employer rules limiting employee-to-employee discourse. Thus, the Court has recognized that when employees are "already rightfully on the employer's property" to perform work, the employer's management interest in production

and discipline rather than its property interests are at stake. *See Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (citing *Republic Aviation*). In *Republic Aviation,* the Court held that the validity of an employer's rule regarding employee discourse at the workplace depended on "an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. at 797-98. The Supreme Court has continued to evaluate the lawfulness of workplace rules limiting Section 7 communication by considering the rationality of the Board's balancing of these particular Section 7 and employer managerial interests. In *Beth Israel*, the Court applied the analytical framework set forth in *Republic Aviation* to hospitals, and concluded that the Board's presumption permitting discourse in the hospital cafeteria was appropriate, since the cafeteria was the employees' "natural gathering area" and the risk of disruption to patient care was relatively low. 437 U.S. at 490, 495, 504-505.

b. The Board's decision in *Register Guard* departed from fundamental Section 7 principles because it ignored the importance of employee electronic discourse in the modern workplace

Register Guard is a departure from the basic premise that workplace discourse is crucial to employees' effective exercise of their Section 7 rights. Thus, despite the established success of the *Republic Aviation* framework in balancing employees' Section 7 right to communicate at work with employers' management interests, the *Register Guard* Board declined to apply that framework to the primary means of employee communication in certain modern workplaces. Instead, the Board effectively minimized the importance of electronic discourse to employees' exercise of Section 7 rights. And, at the same time, the Board characterized the employer's email system as "equipment," and concentrated on the employer's property interest in its equipment instead of recognizing that it is only the employer's management interests that are at stake when

employees are already "rightfully on the employer's property." *Hudgens v. NLRB*, 424 U.S. at 521 n.10). *See also* Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. Kan. L. Rev. 1, 54 (November 2000) (once employer licenses employees to use email system, it should not be permitted to prohibit email solicitation to support union without showing special circumstances).

While in its so-called "equipment cases" the Board has found that an employer may put nondiscriminatory limits on employees' use of bulletin boards, public address systems, video equipment, and photocopiers,[3] the property at issue in those cases did not constitute a means of regular employee discourse as does email. In addition, an employer's business interests in prohibiting employees from cluttering its bulletin board or monopolizing its public address system or photocopier are more compelling than its interest in limiting the use of computers and email addresses issued to individual employees to use on networks where thousands of communications occur simultaneously. *See Sprint/United Mgt. Co.*, 326 NLRB 397, 399 (1998) (noting employer's legitimate business interest in prohibiting use of bulletin boards is to ensure that its postings can easily be seen and read and that they are not obscured or diminished by employees' postings). Thus, the *Register Guard* Board's reliance on the "equipment" cases was misguided given how employees use email as a regular means of employee discourse, the management interests at stake, and the nature of the technology.[4]

---

[3] *See, e.g.*, *Mid-Mountain Foods, Inc.*, 332 NLRB 229, 230 (2000) (video on television), *enfd.* 269 F.3d 1075 (D.C. Cir. 2001); *Champion Int'l Corp.*, 303 NLRB 102, 109 (1991) (photocopier); *Honeywell, Inc.*, 262 NLRB 1402, 1402-1403 (1982) (bulletin board), *enfd.* 722 F.2d 405 (8th Cir. 1983); *The Heath Co.*, 196 NLRB 134, 134-35 (1972) (public address system).

[4] While two Administrative Law Judges suggested in dicta that an employer could bar employees from using telephones for personal use, both cases were decided on discriminatory enforcement grounds, and the Board has never squarely addressed this issue. *See Union Carbide Corp.*, 259

c. The steady growth in electronic communications since *Register Guard* underscores that workplace discourse often occurs electronically and that employees' use of their employer's electronic communications systems is vital to the exercise of their Section 7 rights

In the seven years since *Register Guard* issued, email use has steadily increased, thereby changing how people interact. In many workplaces, employees routinely use email to communicate with each other and their employers, transforming how employees do their jobs. *See* Hirsch, 44 U.C. Davis L. Rev. at 1105; Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 Geo. Wash. L. Rev. 262, 274-75 (February 2008). A 2008 study revealed that 62 percent of employees were using email and the Internet at work, an increase from 55 percent in 2003. *See* Mary Madden & Sydney Jones, *Networked Workers*, Pew Research Ctr.'s Internet & Am. Life Project (September 24, 2008), at 1, *available at* http://www.pewinternet.org/2008/09/24/networked-workers/; *BLS Finds 55 Percent of Employees Used Computers at Work in October 2003*, Daily Labor Report (BNA) No. 148 (August 3, 2005), at D-24.[5] "Email remains the most common form of communication in the business space." *Email Statistics Report 2014-2018 Executive Summary*, The Radicati Grp., Inc. (April 2014), at 3, *available at* http://www.radicati.com/wp/wp-content/uploads/2014/04/Email-

---

NLRB 974, 980 (1981), *enfd. in rel. part* 714 F.2d 657, 663-64 (6th Cir. 1983); *Churchill's Supermarkets*, 285 NLRB 138, 139, 155 (1987), *enfd.* 857 F.2d 1474 (6th Cir. 1988). In any event, management interests 25 to 30 years ago in regulating employees' personal use of telephones are different today, with the advent of multiple lines, call waiting, voice-mail, and other modern characteristics blurring the lines between telephones and other forms of electronic communication. To the extent that *Union Carbide* and *Churchill's Supermarkets* could be read to uphold an employer's ban on all personal communications over its telephone system, we urge the Board to overrule those cases for the same reasons that *Register Guard* should be overruled.

[5] A 2004 private study by the American Management Association showed that over 80 percent of employees spent at least one hour working on email each day. *See* Hirsch, 44 U.C. Davis L. Rev. at 1105-1106 & nn.67-68, citing American Management Association, *Workplace E-Mail and Instant Messaging 2004 Survey*, available at http://www.amanet.org/training/articles/2004-Workplace-e-Mail-and-Instant-Messaging-Survey-18.aspx. The study showed that over 80 percent of surveyed employees also engaged in some use of personal email at work. *Id.*

Statistics-Report-2014-2018-Executive-Summary.pdf (summary of global email data). Both in and outside of the workplace, reliance on email continues to grow. By 2010, email users were receiving an average of 72 emails per day and sending an average of 33, *see Survey: Corporate Email, 2011-2012, Executive Summary*, The Radicati Grp., Inc. (2011), at 3, *available at* http://www.radicati.com/wp/wp-content/uploads/2011/09/Survey-Corporate-Email-2011-2012-Executive-Summary.pdf, and the use of email has undoubtedly increased appreciably even since then. And, despite the use of personal devices like smartphones for texting, global email traffic is expected to grow to 227.7 billion emails per day by 2018. *See Email Statistics Report 2014-2018 Executive Summary*, The Radicati Grp., Inc., at 4. Indeed, according to one survey, 73 percent of users preferred email to regular mail and texts. *See Key Findings: Email/Mobile Survey Infographic*, Acxiom (2013), *available at* http://www.acxiom.com/resources/key-findings-emailmobile-survey-infographic/.

Employees' increased use of email and other electronic communications systems also continues to change the nature of the workplace. For instance, it is reasonable to assume that the growth of telework in recent years is possible only because of the ease with which employees can communicate electronically with each other and their employers. Currently, 88 percent of surveyed businesses worldwide offer some form of telework to their employees and 23 percent of surveyed employees work at least some hours at home on an average workday. *See Survey on Workplace Flexibility 2013*, WorldatWork (October 2013), at 6, *available at* http://www.worldatwork.org/waw/adimLink?id=73898; *American Time Use Survey-2012 Results*, USDL 13-1178 (U.S. BLS, June 20, 2013), *available at* http://www.bls.gov/news.release/atus.nr0.htm. In addition to formal telework programs, the prevalence of electronic communications technology has increased the amount of time

employees informally work outside of their physical offices and core business hours. For instance, a 2008 study showed that 50 percent of employed email users checked their work email on the weekends, and 22 percent did so "often." *See* Madden & Jones, *Networked Workers*, at 4. Thirty-four percent of employees checked their work email while on vacation (11 percent did so "often") and 46 percent of employees checked their work email while on sick leave (25 percent checked "often"). *See id.* The rise of both formal and informal telework in turn amplifies the importance of electronic communication to the effective exercise of Section 7 rights.

Employers also increasingly rely on computer technology and email to communicate with their employees. In a 2005 study comprised of more than 500 businesses in a wide range of industries, including finance, manufacturing, healthcare, retail, construction, and wholesale trade, 93 percent had a website and 88 percent an employee intranet. *See The State of Electronic Communications in Compensation and Human Resources*, WorldatWork Survey Brief, WorldatWork and Buck Consultants (October 2005), at 1, 13, *available at* http://www.worldatwork.org/pub/E157963EC05.pdf. As of 2005, the vast majority of surveyed employers used the Internet or intranet to communicate important information to their employees about terms and conditions of employment: 90 percent posted general benefits information (up from only 25 percent in 2001); 86 percent posted health care and employee wellness information; 77 percent posted savings plan information; 71 percent had online training programs; 53 percent posted orientation information; 49 percent posted pay information; and 40 percent had "virtual" meetings. *Id.* at 5-6. Moreover, a large majority of employers indicated that website/Intranet use was increasing. *Id.* at 11. Electronic communications have also enabled employers to communicate with employees about labor relations and collective-bargaining negotiations. *See* Francois Quintin Cilliers, *The Role and Effect of Social Media in the Workplace*, 40 N. Ky. L.

Rev. 567, 574 (2013). This data makes "clear that employers are using electronic technology to communicate with their employees" and that "[i]t does not appear that the extent of electronic communications will diminish in the near future." WorldatWork Survey Brief at 2, 5. It is an anomaly that the systems that employers regularly use to communicate with their employees about their terms and conditions of employment may not at present be used by those employees for the same purpose, if the employer chooses to ban "personal use" of its system.

As employees increasingly use electronic communications as part of their jobs, email has become the virtual "natural gathering area" for employee discourse. *See Beth Israel*, 437 U.S. at 505 (cafeteria was employees' "natural gathering area"). As one scholar notes, electronic communications "provide an effective means of discourse that can promote employees' labor rights while imposing few legitimate costs on employers." *See* Hirsch, 44 U.C. Davis L. Rev. at 1123. Certainly, employees who are geographically separated or working at home may have limited other means of discourse. But, even where employees work at the same site, employees' increasing reliance on email in their daily lives has made email now more than ever a virtual "gathering area" for them to communicate with each other about both work and nonwork issues. *See Beth Israel*, 437 U.S. at 505. Because employee discourse is crucial to Section 7, and because of the prevalence of electronic communications in many modern workplaces, employees should have a Section 7 right to communicate with each other through email in their workplace. *See id.* at 491-92 (effectiveness of employees' Section 7 rights "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite"); Hirsch, 44 U.C. Davis L. Rev. at 1093 (discussing vital role of workplace discourse to effectiveness of Section 7).

As the Supreme Court recently noted, "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior." *City of Ontario, California v. Quon*, 560 U.S. 746, 759 (2010) (involving search of personal text messages on department-issued police pager). To protect the Section 7 rights of many of today's employees, the Board should recognize the importance of electronic communications to employee discourse and protect those electronic workplace communications because the "responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *Hudgens*, 424 U.S. at 523, *citing NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Moreover, the Board must adapt its application of the Act to the realities of the modern workplace if the Act is to have any relevance to today's employees. *See* Hirsch, 76 Geo. Wash. L. Rev. at 263-64.

2. The Analytical Framework Adopted in *Republic Aviation* Successfully Accommodates Both Employees' Section 7 Rights and Employers' Management Interests and Should Therefore Govern Employees' Use of Their Employer's Electronic Communications Systems

When evaluating rules limiting employee-to-employee communication, the Board must balance the employees' Section 7 rights and the employer's management interests in a way that accommodates both rights with the least abridgment to either. *See Beth Israel*, 437 U.S. at 495, 504-505, *citing Hudgens*, 424 U.S. at 521-22, n.10; *Republic Aviation*, 324 U.S. at 805. In balancing those respective rights, the Board should take into account the "dominant purpose of the legislation . . . the right of employees to organize for mutual aid without employer interference." *Republic Aviation*, 324 U.S. at 798. As already noted, in *Republic Aviation* the Supreme Court held that the validity of an employer rule limiting employee discourse depended on "an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their

establishments." 324 U.S. at 797-98. The Court stressed the importance of both interests: "Opportunity to organize and proper discipline are both essential elements in a balanced society." *Id.* at 798. In balancing these rights, the Court rejected a "rigid scheme of remedies," instead favoring administrative flexibility within appropriate statutory limits. *Id. See also* Hirsch, 44 U.C. Davis L. Rev at 1113-14 (discussing flexibility of *Republic Aviation* analysis); Frederick D. Rapone, Jr., *This is Not Your Grandfather's Labor Union—Or Is It? Exercising Section 7 Rights in the Cyberspace Age*, 39 Duq. L. Rev. 657, 660-67 (Spring 2001) (discussing legacy of *Republic Aviation* and its policy of accommodating competing interests). The Court determined that the Board's presumption that an employer cannot prohibit employee solicitation at the plant during nonwork time absent special circumstances was rationally based on the Board's appraisal of the typical employee and employer interests at stake in industrial establishments. 324 U.S. at 803-805.

The Board, with the Supreme Court's approval, has extended the *Republic Aviation* analytical framework to nonindustrial settings. In *Beth Israel*, for instance, the Supreme Court upheld the Board's general approach of requiring health-care facilities to permit employee solicitation during nonwork time, absent a demonstration that a particular prohibition was necessary to avoid disruption of health-care operations or disturbance of patients. 437 U.S. at 507. More specifically, the Court held that the Board's application of this approach to require a health-care provider to permit solicitation in the hospital cafeteria was appropriate where the cafeteria was the "natural gathering area" for employees and the risk of disruption to patient care there was relatively low. *Id.* at 490, 495, 504-05. *See also Marriott Corp.*, 223 NLRB 978, 978 (1976) (to account for employers' interests in serving customers, employers can prohibit solicitation on nonwork time in customer or sales areas of restaurants).

Republic Aviation's basic framework is sufficiently flexible to apply as well to modern workplaces where electronic communications systems are regularly used by employees to perform their work duties. As the Court and the Board have recognized with respect to the typical industrial workplace, once employees are "already rightfully on the employer's property," it is the employer's management interests that are primarily implicated, not its property interests. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 571-73 (1978) (noting that balance is struck differently when employer's property right involves keeping nonemployees from trespassing on property). Likewise, once the employer decides to provide its employees with computers and electronic communications systems for work, the employees are "rightfully" present in the systems and are thus permitted to use those systems, subject to the employer's management interests in maintaining production and discipline. At that point, the employer's property interests are no longer implicated. *See Hudgens*, 424 U.S. at 521 n10; Malin & Perritt, 49 U. Kan. L. Rev. at 54.

Further, the *Republic Aviation* analytical framework may be adapted to evolving concepts of work time. *See* Hirsch, 44 U.C. Davis L. Rev. at 1113-14 (*Republic Aviation*'s structure is sound and should serve as basis for non-traditional communication analyses). To be sure, the definition of "work time" is subject to a variety of meanings in technological workplaces where employees often self-release for breaks and are judged on their productivity rather than on hours punched by a time clock. Despite these shifting paradigms, employers have been able to decide, based on their business interests, how the concept of "work time" will apply to their employees, and our proposed analysis does not limit the employer's ability to define what constitutes "work time."

The Board should therefore apply the *Republic Aviation* framework to technological workplace communications and hold that where an employer that has provided computers and electronic communications systems to its employees for work, those employees have a Section 7 right to use those systems during nonwork time, absent a showing that special circumstances relating to production or discipline outweigh the employees' Section 7 right. *See Republic Aviation*, 324 U.S. at 803 n.10.

3. An Employer May Restrict Its Employees' Access to Its Electronic Communications Systems Based Only on a Particularized Showing That Its Management Interests Outweigh the Employees' Section 7 Right

Under the *Republic Aviation* framework, an employer may establish that its business interests related to production or discipline give rise to special circumstances warranting a restriction on employee use of its electronic communications systems for personal email, including Section 7 communications. This would require more than a general assertion of management interests at stake, but, rather, a particularized showing that the employer cannot achieve its actual, identified interest without restricting employees' Section 7 right to communicate via email. Whether an employer has demonstrated such special circumstances should be determined on a case-by-case basis, based on a full evidentiary record. In making that determination, the Board should bear in mind that, even if Section 7 use of an employer's electronic communications systems intrudes to some extent upon its business interests, limited intrusions may be warranted to accord "commensurate recognition to the statutory right of employees" to communicate about workplace issues. *Stoddard-Quirk*, 138 NLRB 615, 620 (1962).

Notably, some business interests that were asserted as justifications for restrictions on employees' personal use of an employer's email systems before *Register Guard* are no longer as

great of a concern. For example, while employers have a business interest in protecting their server space and/or minimizing the cost of data storage, there are now multiple data storage options available that can alleviate server congestion while also reducing costs. For instance, an employer can contract with third-party server providers or store information with third-party providers for free in "the cloud," thus allowing it to save information in "massive databases holding unimaginable amounts of information." *See* Wendy K. Akbar, *Evidence That Bytes: E-Discovery in the Age of Hidden Data, Clouds, Facebook, Twitter, and the Digital Family*, 15 No. 1 J. Internet L. 1, 12 (July 2011). There are also additional protections now available against computer viruses and cyber-attacks, including insurance plans, Security and Exchange Commission cyber-security guidelines, and cell phone programs and applications that mitigate the risk of infecting employer systems from employees' personal devices. *See* Roberta D. Anderson, *Viruses, Trojans, and Spyware, Oh My! The Yellow Brick Road to Coverage in the Land of Internet Oz*, 49 Tort Trial & Ins. Prac. L.J. 529, 533-34 (Winter 2014); Computer Weekly, *BYOD: Can enterprise mitigate the risks?* (August 2012), *available at* http://www.computerweekly.com/feature/BYOD-Can-enterprise-mitigate-the-risks. Moreover, while protection against cyber-crime and viruses remains a legitimate business interest, the potential for cyber-attack exists independent of employees' use of an employer's email system. *See* Anderson, 49 Tort Trial & Ins. Prac. L.J. at 535-38 (discussing the multiple sources for cyber-crime, including the "reality of the modern business world").

Legitimate management interests in preventing employer liability for offensive or harassing emails do not justify bans on the use of email systems for protected Section 7 activity. Employers may lawfully maintain and enforce rules narrowly tailored to address those concerns, i.e., rules that prohibit emails that would not be protected by Section 7. *See, e.g., Lutheran*

Heritage Village-Livonia, 343 NLRB 646, 647 (2004) (upholding rule prohibiting "verbal abuse," "abusive or profane language," and "harassment" that would not reasonably discourage employees from engaging in Section 7 activity). *See also* Brian G. Dershaw, *Cyberstalking and Cyberharrassment in the Workplace*, 2014 WL 1600588, **4-6 (Aspatore 2014) (discussing effective and appropriate strategies for addressing workplace cyberstalking and harassment, noting that such actions are not protected by the NLRA).

Similarly, an employer's interest in protecting confidential information and trade secrets may be adequately protected by a company-wide confidentiality rule lawfully constructed so as to not prohibit Section 7 activity. *See, e.g., Lafayette Park Hotel*, 326 NLRB 824, 826 (1998) (upholding rule prohibiting disclosure of certain information, since employees would reasonably construe rule to apply only to business-related information and not employee wages or terms and conditions of employment), *enfd. mem.* 203 F.3d 52 (D.C. Cir. 1999); *Super K-Mart*, 330 NLRB 263, 263 (1999) (same). Moreover, other federal law protects employers against employee theft of trade secrets. *See, e.g.*, Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2008).

Finally, an employer's business interest in ensuring that employees do not spend excessive time engaged in personal email to the detriment of productivity can be effectively protected through a clearly conveyed definition of "work time" and the establishment of productivity standards. *See* Malin & Perritt, 49 U. Kan. L. Rev. at 52-53 (no reason to assume that electronic communications cause more than a de minimus workplace disruption, since email recipient controls when to read the message and can do so on nonwork time). Analogously, businesses that have successful telework programs handle similar concerns by instituting formal telework policies and training employees and managers on how to successfully use those programs. *See Survey on Workplace Flexibility 2013*, WorldatWork, at 9. We note that some

personal use of email and the Internet at work has become, in many workplaces, the new quid pro quo for working informally after business hours. *See* Timothy B. Lee, *Your Boss and Your BlackBerry - Snooping Isn't the Answer*, N.Y. Times (December 21, 2009), *available at* http://roomfordebate.blogs.nytimes.com/2009/12/21/your-boss-and-your-blackberry/. Indeed, the Supreme Court recently noted that, "many employers expect or at least tolerate personal use of [communication] equipment by employees because it often increases worker efficiency." *Quon*, 560 U.S. at 759. Email is often the quickest and least disruptive means of communicating a brief personal message.[6] And, an employer that encounters or is concerned about a productivity problem associated with email overuse has many available options to help it address the issue. *See, e.g.*, Corey A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 Am. Bus. L.J. 285, 301-13 (Summer 2011) (discussing employer Internet monitoring and techniques such as automatic screen warnings, access panels, and firewalls). *See also* Cilliers, 40 N. Ky. L. Rev. at 591 (employers can install web filtering software that restricts to nonwork time employees' access to nonwork sites). Indeed, such business practices are already commonplace. *See* Madden & Jones, *Networked Workers*, *Snapshots of the Wired Workforce*, at 1 n.3 (by 2007, 66 percent of businesses surveyed were monitoring employees' Internet connections and 65 percent used blocking software), *available at* http://www.pewinternet.org/2008/09/24/snapshots-of-the-wired-workforce/, (citing AMA/ePolicy Institute's *2007 Electronic Monitoring & Surveillance Survey*), *available at* http://press.amanet.org/press-releases/177/2007-electronic-monitoring-surveillance-survey/.

[6] Employers likely already know this, given that an employer survey from 2003 showed that 92 percent of surveyed employers already allowed their employees some personal use of company email. *See* National Workrights Institute *Amicus* brief at 4, filed in *Register Guard* (citing *Survey of Companies' E-mail and Internet Monitoring, Business and Society Review* 108:3 285-307 (2003)).

4. The Availability of Personal Electronic Devices Should Not Affect the Proper Balance to be Struck Between Employers' and Employees' Rights

The availability of alternative means of employee-to-employee communication is not relevant in determining whether employer restrictions on Section 7 communications are unlawful. *See Beth Israel*, 437 U.S. at 505; *NLRB v. Babcock & Wilcox,* 351 U.S. 105, 112-13 (1956); *Republic Aviation*, 324 U.S. at 798-99 (upholding employees' Section 7 right to engage in workplace discourse even where there was no "evidence or a finding that the plant's physical location made solicitation away from company property ineffective"). Thus, the fact that employees in technological workplaces may have personal electronic devices, social media accounts, or personal email accounts does not diminish their Section 7 right to engage in electronic communication on the employer's systems any more than the fact that the employees in *Republic Aviation* could speak by telephone or meet off the premises diminished their right to engage in solicitation at the plant.

In any case, employees' personal devices and personal email or social media accounts are not an effective alternative to an employer's system for multiple reasons, including the fact that not all employees have personal devices or know each others' personal email addresses or phone numbers, communications like texting are often limited by length of message or number of characters, and the financial cost of using one's own device and data plan would likely deter employee discourse. *See, e.g.*, *Beth Israel*, 437 U.S. at 489-90 (employer's locker areas were not an alternative to hospital cafeteria because not all employees had access to lockers and locker areas were not generally used as an employee gathering place). In short, notwithstanding some employees' use of personal cell phones or other devices, a ban on using work email for personal

use would effectively nullify employees' Section 7 right to communicate in the workplace's "natural gathering place." *See id.* at 490.[7]

IV. Conclusion

The right of employees to communicate about their terms and conditions of employment and collective activity is at the heart of the Act, and today electronic communication is a primary means of discourse among employees in many workplaces. Following the Supreme Court's clear instructions to balance employees' Section 7 rights with employers' management interests with as little destruction to either as possible and to develop new, rational accommodations for substantially different work environments, the Board should overrule *Register Guard* and strike a new balance addressing employee-to-employee electronic communications. In striking this balance, the Board should conclude that bans on all personal email abridge employees' fundamental right to engage in Section 7 workplace discourse during nonwork time and are presumptively unlawful. The Board should hold that employees who use their employer's email for work purposes have a statutory right to use it for Section 7 activity during nonwork time, absent a showing of special circumstances relating to the employer's need to maintain production and discipline.

In this case, the Board should conclude that the Employer's rule prohibiting all personal use of its computers and electronic communications systems violates Section 8(a)(1) because it interferes with employees' ability to engage in workplace discourse crucial to the exercise of their Section 7 rights. The Employer has not shown any managerial interests in maintaining its

[7] We further note that requiring employees to use personal devices for Section 7 communications could have the anomalous effect of interfering with the employer's efforts to manage employees and their productivity. *See* Cilliers, 40 N. Ky. L. Rev. at 572 (noting the difficulties of an employer's ability to monitor employees' use of personal devices where employees can "spend hours online" without employer's knowledge).

rule, let alone special circumstances relating to productivity or discipline that would outweigh employees' right to use the Employer's systems. And, as discussed above, the fact that some employees may have personal electronic devices is irrelevant to employees' statutory right to use the Employer's systems. Finally, we note that the Employer's rule not only prohibits use of the Employer's computers, but also prohibits use of the Employer's "email systems," which would include even the sending of email from a personal computer to a work email address accessed by the recipient from his own personal device. That imposes a particularly stringent limitation on Section 7 communications and does not even arguably implicate any property interest in "equipment."[8]

Respectfully submitted,

s/ Kayce R. Compton
Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1099 14th Street, NW
Washington, D.C. 20570
(202) 273-2491

Dated: June 16, 2014

[8] While an employer may claim a property interest in its email system because it provides and pays for that technology, it cannot claim to own cyberspace through which an email must travel from sender to recipient. *See Register Guard*, 351 NLRB at 1126 (Members Liebman and Walsh, dissenting), citing *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (email and the web "constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet").

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief of the General Counsel in Cases 21-CA-095151, 21-RC-091531, and 21-RC-091584 was served in the manner indicated to the parties listed below on this 16th of June, 2014.

Robert J. Kane, Esq. Stuart Kane 620 Newport Center Dr., Suite 200 Newport Beach, CA 92660	Electronic mail rkane@stuartkane.com
David A. Rosenfeld, Esq. Weinberg Roger & Rosenfeld 1001 Marina Village Pkwy., Suite 200 Alameda, CA 94501-6430	Electronic mail drosenfeld@unioncounsel.net
Lisl R. Duncan, Esq. Weinberg Roger & Rosenfeld 800 Wilshire Blvd., Suite 1320 Los Angeles, CA 90017-2623	Electronic mail lduncan@unioncounsel.net
Mary K. O'Melveny, General Counsel CWA, AFL-CIO 501 Third Street, NW Washington, D.C. 20001-2797	Electronic mail maryo@cwaunion.org
Laura Reynolds, Vice President CWA, District 9, AFL-CIO 12215 Telegraph Rd., Suite 210 Santa Fe Springs, CA 90670-3344	Electronic mail lreynolds@cwa-union.org

John Doran, Assistant to the Vice President
CWA, District 9, AFL-CIO
2804 Gateway Oaks Dr., Suite 150
Sacramento, CA 95833-4349

Electronic mail
jweitkamp@cwa-union.org

Judith G. Belsito, District Counsel
CWA, District 9, AFL-CIO
12215 Telegraph Rd., Suite 210
Santa Fe Springs, CA 90670-3344

Electronic mail
jbelsito@cwa-union.org

Olivia Garcia, Regional Director
Region 21
National Labor Relations Board
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017-5449

Electronic mail
olivia.garcia@nlrb.gov

Cecilia Valentine, Attorney
Region 21
National Labor Relations Board
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017-5449

Electronic mail
cecilia.valentine@nlrb.gov

s/ Kayce R. Compton
Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1099 14th Street, NW
Washington, D.C. 20570
(202) 273-2491
kayce.compton@nlrb.gov