UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC.	)	
	)	
	)	
and	)	
	)	Cases 21-CA-095151
	)	21-RC-091531
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	)	21-RC-091584
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BRIEF TO THE NATIONAL LABOR RELATIONS BOARD BY AMICUS CURIAE PROFESSOR JEFFREY M. HIRSCH

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STATEMENT OF INTEREST

My interest in the issues presented in this case stems from my career in labor law, as well as my research that specifically addresses the National Labor Relations Board's (NLRB or Board) regulation of electronic communications. Following four years as an attorney in the NLRB's Appellate Court Branch, I have taught and researched labor and employment law for ten years.

My research includes several pieces related to the questions at issue in this case. I have explored the important role that communications play in ensuring employees' ability to exercise their statutory right to engage in collective action, as well as the potential conflicts between employees' communications and employers' property interests. *See Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091 (2011); *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891 (2006). More specifically, I have written extensively on the NLRB's regulation of electronic communications. *See E-Mail and the Rip Van Winkle of Agencies: The NLRB's* Register-Guard *Decision*, *in* WORKPLACE PRIVACY: HERE AND ABROAD—PROCEEDINGS OF THE NEW YORK UNIVERSITY 61ST ANNUAL CONFERENCE ON LABOR (Jonathan Nash ed., 2010); *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262 (2008). Much of this brief is derived from this scholarship.

SUMMARY OF ARGUMENT

In *Guard Publishing Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007), *enforced in part, enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009), the NLRB gave employers expansive authority to restrict employees' use of electronic communications. This decision, however, directly conflicts with United States Supreme Court precedent and basic tenets of property law. As a result, the Board should abandon *Register-Guard*—not as a matter of agency discretion, but

in recognition of the clear directive of relevant law. In its place, the Board should consider a new rule under which employees would have a presumptive right to use their employers' electronic communications for Section 7 purposes—a presumption that employers could rebut by demonstrating a valid business justification for restricting employees' use of employer communications.

The Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), long ago confirmed that employers' real property interests are not absolute. In particular, these property interests cannot completely eliminate employees' important need to communicate about matters of mutual aid and protection at the workplace. Under *Republic Aviation*, employers can establish rules restricting communications that serve operational and disciplinary interests, but they cannot forbid all workplace communications. The NLRB's decision in *Register-Guard* directly conflicts with *Republic Aviation* by allowing employers to restrict all employee use of workplace electronic communications.

The NLRB in *Register-Guard* attempted to avoid the mandate of *Republic Aviation* by noting that the former case involved personal, rather than real, property. Although the distinction was genuine, the Board in *Register-Guard* turned its significance on its head by concluding that employer's personal property interests usurped employees' Section 7 right to communicate ate work. This conclusion is erroneous because the real property at issue in *Republic Aviation* is entitled to *more* protection than the personal property at issue in *Register-Guard*. Accordingly, employers have a weaker—not a stronger—legal interest in restricting electronic communications.

The NLRB was led to this incorrect conclusion by Board and judicial precedent involving employers' restrictions on the use of their personal property. But this precedent consists solely

of a series of circular and conclusory citations that made no attempt to provide a substantive basis for providing employers virtually unchecked authority to control employees' use of electronic communications and other personal property.

In addition to the mandates of *Republic Aviation* and the weakness of *Register-Guard's* case support, the policies of the NLRB are best served by limiting employers' ability to restrict use of electronic communications. These types of communications, while not perfect, provide an inexpensive means for employees to discuss matters that are central to their statutory right to engage in collective action. Indeed, electronic communications will usually be less intrusive on workplace operations than oral solicitations and written distributions. The Board—as well as employers—should be encouraging these type of low-cost communications, not erecting barriers to their use.

ARGUMENT

I. *REGISTER-GUARD* CONFLICTS WITH THE SUPREME COURT'S *REPUBLIC AVIATION* DECISION

The facts of *Register-Guard*—which involve an employee's communication with fellow employees about matters of mutual aid and protection—fit squarely under the Supreme Court's *Republic Aviation* standard. In both cases, employees used their employers' property to communicate with other employees about Section 7 topics. In rejecting the *Republic Aviation* analysis, the Board in *Register-Guard* relied on a single factual difference: the employee's use of the employer's electronic communication system rather than the employer's real property. That difference, however, does not support giving employer greater leeway to restrict electronic communications. To the contrary, under *Republic Aviation* and basic principles of property law, employers should have less authority to restrict employees' use of their electronic and other personal property.

In *Register-Guard*, the Board majority ignored the logical inference that *Republic Aviation* and property law demanded. It did so based on a series of NLRB and court decisions that stated, without substantive support, that employers had authority to control use of their personal property without considering the impact of employees' rights under the National Labor Relations Act (NLRA). However, these statements do not deserve the weight given to them in *Register-Guard* and should not be used to trump the dictates of the Supreme Court and property law.

A. In *Republic Aviation*, the Supreme Court Recognized Employees' Right to Communicate in the Workplace

In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Supreme Court approved the NLRB's regulation of employer attempts to preclude employee communications in the workplace. Key to *Republic Aviation* was the Court's holding that employers' right to control use of their real property is not absolute. In particular, employers' property interests must be balanced with employees' exercise of their NLRA rights. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *NLRB v. Magnavox Co.*, 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. . . . [B]anning [employee solicitations at work] . . . might seriously dilute [Section] 7 rights.").

Republic Aviation explicitly recognized that employees have a right to discuss unionization and other Section 7 matters. *Id.* at 801, 803. When employees' Section 7 rights conflict with an employer's nondiscriminatory attempt to control use of its real property, *Republic Aviation* confirms that the employer's property interests do not trump the employees' rights. *Id.* at 797-98, 802 n.8. Instead, the employer's and employees' interests must be balanced under a shifting presumption test. *Id.* at 803 n.10. This central holding of *Republic Aviation*, by itself, demonstrates that the Board in *Register-Guard* had no basis for concluding that "the employees

[in the case] had no statutory right to use the [employer's] e-mail system for Section 7 matters." 351 N.L.R.B. at 1114. But other aspects of *Republic Aviation* and its progeny also undermine *Register-Guard*.

Republic Aviation and subsequent Board cases created a presumption that prohibits an employer from restricting employees' oral solicitations about Section 7 topics during nonwork time and in nonwork areas. *See LeTourneau Co.*, 54 N.L.R.B. 1253, 1260 (1944), *affirmed sub nom. Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *see also TeleTech Holdings, Inc.*, 333 N.L.R.B. 402, 403 (2001); *Peyton Packing Co.*, 49 N.L.R.B. 828, 843–44 (1943). An employer can rebut this presumption by showing that extra restrictions are justified by special circumstances, such a production or disciplinary needs. *See NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 110 (1956) (citing *LeTourneau*, 54 N.L.R.B. at 1262)

The *Republic Aviation* presumption is largely flipped when employees' workplace communications involve written material. Under Board precedent, employers can presumptively prohibit employees' written distributions at work—even during nonwork time—as long as employees retain some means to distribute the material. *See Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 617, 620 (1962).

The Court has made clear that the *Republic Aviation* analysis is necessary to protect *employee* communications, which were at issue in *Purple Communications* and *Register-Guard.* In contrast, the Court has given far less protection to *nonemployee* communications. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Court held that an employer can exclude nonemployees from its real property in a nondiscriminatory fashion, except where there are "unique obstacles" to accessing employees. *Id.* at 535, 538, 540-41. The Court stressed that this holding resulted from the "distinction 'of substance,' between the union activities of employees

and nonemployees." *Id.* at 537 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)). Thus, the combination of *Lechmere* and *Republic Aviation* establish that, unlike nonemployee communications, when *employees* are discussing Section 7 topics, employers' property interests are not paramount; rather, these property interests must be balanced against employees' NLRA right to communicate with each other. *See id.* at 113; *Metro. Dist. Council v. NLRB*, 68 F.3d 61, 75 (3d Cir. 1995); *Leslie Homes, Inc.*, 316 N.L.R.B. 123, 125, 129 (1995); *see also UFCW v. NLRB* (*Oakland Mall II* and *Loehmann's Plaza II*), 74 F.3d 292, 298-99 (D.C. Cir. 1996). In *Register-Guard*, the NLRB abandoned this clear authority.

What is especially troubling about this rejection of Supreme Court precedent in *Register-Guard* is that the NLRB majority did not adequately explain why the employees' electronic communications deserve such inferior protection compared to all other forms of workplace communication. Instead, the Board hinged its decision on the fact that the electronic communications used the employer's personal, rather than real, property. But, as discussed below, this conclusion conflicts with basic property law.

B. Employers' Personal Property is Entitled to Less Protection than their Real Property

The basic premise of *Register-Guard* is that employers can restrict access to electronic and other personal property to whatever degree they desire—with the exception of discrimination—even if the restriction bars Section 7 protected employee communications. *See Register-Guard*, 351 N.L.R.B. at 1114, 1116; *see also Shadyside Hosp.*, Case 06-CA-081896, at *10-16 (NLRB A.L.J. Apr. 19, 2013) (distinguishing lawfulness of employer's computer use policies under *Register-Guard* based on possibility that employees would reasonably view the policies as distinguishing among viewpoints rather than banning all nonwork electronic

communications). In addition to conflicting with the Supreme Court's recognition of employees' communication rights in the workplace, this ruling turned property law on its head.

In *Republic Aviation*, the Court unambiguously held that an employer's ability to restrict use of its real property must give way in certain circumstances to employees' right to communicate about Section 7 issues. 324 U.S. at 802 (holding that "[i]nconvenience or even some dislocation of property rights[] may be necessary in order to safeguard the right to collective bargaining") (internal quotation marks omitted). By granting employers vastly more authority to restrict employees' use of their employers' electronic and other personal property—even when there is no business justification—the Board in *Register-Guard* claimed that personal property is entitled to more protection than real property. *See Register-Guard*, 351 N.L.R.B. at 1114 (stating that "there is no statutory right . . . to use an employer's equipment or media as long as the restrictions are nondiscriminatory") (internal quotation marks omitted). But property law says the opposite.

Electronic communication systems, like other personal property, are considered "chattel." Unlike a real property claim, which assumes harm in all instances of trespass, a successful trespass of chattel claim requires proof that the trespass caused harm. *See Intel Corp. v. Hamidi*, 71 P.3d 296, 302-03 (Cal. 2003) (citing RESTATEMENT (SECOND) OF TORTS § 218, which permits liability for trespass of chattel only if chattel is dispossessed, harmed, or deprived of use for a substantial period of time), and W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 87, 90 (5th ed. 1984)). In particular, the Restatement of Torts states that when an individual merely uses another's chattel, as opposed to taking possession of it, there is no liability unless the use was "for a time so substantial that it is possible to estimate the loss caused thereby. A mere momentary or theoretical deprivation of use is not sufficient . . . ."

RESTATEMENT (SECOND) OF TORTS § 218, cmt. i. Accordingly, it should be more difficult for employers to argue that unauthorized use of their personal property interferes with their property interests than unauthorized use of their real property.

Employee communication cases are apt illustrations of why this distinction between personal and real property exists. In *Republic Aviation* and *Lechmere*, use of employers' real property is a physical invasion that necessarily involves some interference with others use of the property in question. *See Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 426, 435 (1982) (holding that even minor physical invasions of property is an unconstitutional deprivation or taking of that property); 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, 47-48 (2000) (discussing differences between in-person solicitations at work and electronic solicitations). In contrast, electronic communications do not involve physical invasions. Moreover, with rare exceptions, employees' use of an employer's e-mail system does not interfere with other uses of that system. *Compare Hamidi*, 71 P.3d at 308 (holding that e-mails at issue did not cause "any physical or functional harm or disruption" to the employer's computer system), *with CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1019 (S.D. Ohio 1997) (noting that massive volumes of e-mail could place significant burden on network equipment).

In *Register-Guard*, the Board argued that employers should be able to restrict employees' use of e-mail because of the need to preserve "server space, protect[] against computer viruses and dissemination of confidential information, and avoid[] company liability for employees' inappropriate e-mails." *Register-Guard*, 351 N.L.R.B. at 1114. However, no evidence existed that employee use of the employer's electronic communications systems impaired business

operations. Indeed, that argument is difficult to make given the ubiquitous nature of e-mails in many workplaces. The Board's reliance on cases involving other types of personal property—such as telephones, bulletin boards, and photocopiers—to make its point does not help either. To the contrary, e-mail and other electronic communications will almost always involve far less interference than use of these other types of personal property. Employees' use of a photocopier or these other types of personal property could temporarily restrict others' use of the property. But the same is not true of electronic communications, except in the rarest of cases. Sending or receiving e-mail is a regular occurrence in many workplaces and involves no additional costs to the employer or measurable effect on business operations. *See Hamidi*, 71 P.3d at 308 (holding that unauthorized e-mail was not a trespass because, among other reasons, "[t]hese occasional transmissions cannot reasonably be viewed as impairing the quality or value of [the employer's] computer system."). In those rare cases where use of electronic communications does involve significant costs, an employer can argue for increased restrictions under a business justification exception. *See Register-Guard*, 351 N.L.R.B. at 1123-24 (Liebman and Walsh, Members, dissenting in part).

The fact that personal property is entitled to less protection than real property, in addition to *Republic Aviation's* unambiguous requirement that employers' real property interests be balanced with employees' NLRA right to communicate, demonstrate that *Register-Guard* was misguided. The only way to avoid conflicts with Supreme Court and property law is to give electronic communications as much—if not more—protection as other types of workplace communications.

C. The NLRB's Flawed Personal Property Precedent

The Board's sole legal rationale in *Register-Guard* for ignoring the dictates of *Republic Aviation* and property law was its conclusion that granting employers virtually unfettered authority to restrict use of electronic communications was a "well-settled principle" that was "[c]onsistent with a long line of cases governing employee use of employer-owned equipment." 351 N.L.R.B. at 1114. Although these cases do suggest such a restrictive view of employees' right to use employers' personal property, they are far too weak of reeds to ignore the dictates of *Republic Aviation* and the basic tenets of property law.

A representative example of the cases relied upon by the Board in *Register-Guard* is the Sixth Circuit's statement in *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983), that an employer "*unquestionably* had the right to regulate and restrict" employees' use of a workplace bulletin board. But, as demonstrated below, that and other similar conclusions are built upon unsupported statements in cases that originally addressed a different issue.

It is curious that the Sixth Circuit was so quick to determine that there was an "unquestionable" right to restrict Section 7 uses of employer personal property because neither the NLRB nor courts had ever considered the question in a meaningful way. That lack of analysis is typical, for every single case cited by the majority in *Register-Guard* failed to engage in any substantive discussion of the extent to which employers should be allowed to limit employees' use of employers' personal property.[1] The only justification for that conclusion in those cases was a citation to another case that lacked any rationale.[2]

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[1] Based on the author's review of every relevant case cited in *Register-Guard*, and every case cited by those cases or subsequently cited cases, there has been no substantive examination of this issue. *See Johnson Tech., Inc.*, 345 N.L.R.B. 762, 763 (2005); *Mid-Mountain Foods*, 332 N.L.R.B. 229, 230 (2000), *enforced*, 269 F.3d 1075 (D.C. Cir. 2001); *Eaton Techs.*, 322 N.L.R.B. 848, 853 (1997); *Champion Int'l Corp.*, 303 N.L.R.B. 102, 109 (1991); *Churchill's Supermarke*t, 285 N.L.R.B. 138, 155-56 (1987) *enforced* 857 F.2d 1474 (6th Cir. 1988) (Table); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986); *Honeywell, Inc.*, 262 N.L.R.B. 1402, 1402 (1982), *enforced*, 722 F.2d 405 (8th Cir. 1983); *Allied Stores of New York,* 262 N.L.R.B. 985, 985 n.3 (1982); *Union*

Given the clear direction from *Republic Aviation* and property law, this analytical failure is not surprising. However, this failure to examine the supposed source of employer's free reign to restrict Section 7 uses of personal property has caused more complication than necessary. This is because the original cases supporting employers' more expansive ability to restrict the use of personal property addressed employers' alleged discrimination in restricting access. *See Nugent Serv., Inc.*, 207 N.L.R.B. 158, 161 (1973); *Tempco Mfg. Co., Inc.*, 177 N.L.R.B. 336, 348 (1969); *Challenge Cook Bros. of Ohio, Inc.*, 153 N.L.R.B. 92, 99 (1965). That issue, of course, involves a very different analysis than cases involving employees' basic right to use employer property for Section 7 purposes. Despite this contrast, the Board subsequently cited the discrimination cases to support the very different conclusion that employers can prohibit employees from ever using employers' personal property for Section 7 purposes. *See Honeywell, Inc.*, 262 N.L.R.B. 1402 (1982), *enforced*, 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 N.L.R.B. 318 n.2 (1979), *enforced*, 649 F.2d 1213 (6th Cir. 1981) (per curiam).

The cases cited by *Register-Guard* ultimately arose from these discrimination cases and their inapposite citations. The result is a total lack of substantive justification for abandoning

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Carbide Corp., 259 N.L.R.B. 974, 980 (1981), *enforced in relevant part*, 714 F.2d 657, 663-664 (6th Cir. 1983); *Axelson, Inc.*, 257 N.L.R.B. 576 (1981); *Arkansas-Best Freight Sys., Inc.*, 257 N.L.R.B. 420 (1981); *Container Corp.*, 244 N.L.R.B. 318, 318 n.2 (1979), *enforced*, 649 F.2d 1213 (6th Cir. 1981) (per curiam); *Group One Broadcasting Co., W.*, 222 N.L.R.B. 993, 998 (1976); *Vincent's Steak House*, 216 N.L.R.B. 647, 647 (1975); *Eastex, Inc.,* 215 N.L.R.B. 271, 272 (1974); *Nugent Serv., Inc.,* 207 N.L.R.B. 158, 161 (1973); *Heath Co.*, 196 N.L.R.B. 134, 135 (1972); *Tempco Mfg. Co., Inc.*, 177 N.L.R.B. 336, 348 (1969); *Challenge Cook Bros. of Ohio, Inc.*, 153 N.L.R.B. 92, 99 (1965).

[2] To the author's knowledge, the first of this line of cases is *Challenge Cook Bros. of Ohio, Inc.*, 153 N.L.R.B. 92 (1965). In that decision, the ALJ stated the following, with no citation support:

> I have no doubt that if the Respondent had consistently not allowed its employees to use the bulletin boards to publicize their personal affairs, the Respondent could properly have prohibited the posting of notices of
> I have no doubt that if the Respondent had consistently not allowed its employees to use the bulletin boards to publicize their personal affairs, the Respondent could properly have prohibited the posting of notices of union meetings. But that is not our set of facts. The question, I believe, is whether the Respondent, having made its bulletin boards available to employees for posting of notices relating to social and religious affairs, as well as meetings of charitable organizations, could validly discriminate against notices of union meetings which employees had posted.

Id. at 99.

Republic Aviation and basic property law to give employers more power to restrict use of electronic and other personal property than real property. As demonstrated above, any differences between the two types of property suggests that employers should have less—not more—authority to restrict use of electronic communications.

II. A MODIFIED *REPUBLIC AVIATION* ANALYSIS FOR ELECTRONIC COMMUNICATIONS

Although the rationale of *Republic Aviation* squarely applies to employees' use of electronic communications, the current *Republic Aviation* analysis is not a perfect fit. In particular, the growth of electronic communications and other changes in the workplace over the past several decades makes, at times, the NLRB's *Republic Aviation* analysis less suitable than it once was.[3] But there are easy fixes to this problem that do not disturb *Republic Aviation's* underlying holding that employees possess a Section 7 right to communicate at work.

Employees' ability to communicate with each other is vital to their ability to engage in Section 7 activity. *See* Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091 (2011). Although electronic communications are not a perfect substitute for in-person discussions, s*ee id.* at 1107-08, electronic communications have become an increasingly important and cost-effective means of fulfilling their Section 7 rights. *See id.* at 1106, 1119; Hirsch, *Silicon Bullet*, at 275-77,

[3] *See* Pew Research Center, *The Web at 25 in the U.S.* 19, 31-32 (2014) (describing survey results showing that, among 82% of respondents who used the Internet or e-mail on a given day, 44% of them went online from work), *available at* http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf; UNITED STATES DEPARTMENT OF COMMERCE, *Current Population Survey (CPS), Internet Use 2010*, Table 8 (2010) (showing results of large survey in which 40% of all respondents—including those who do not use Internet at all—access the Internet at their workplace), *available at* http://www.ntia.doc.gov/files/ntia/data/CPS2010Tables/t11_8.txt; *CPS, Internet Use 2010, supra*, Tables 1 & 8 (showing that among respondents who report using the Internet anywhere (in Table 1), 56% report doing so at their workplace); *see also* Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes* 2-5, 10-11 (Nat'l Bureau of Econ. Research, Working Paper No. 11298, 2005) (discussing unions' increased use of Internet).

297 (noting growth of electronic communications, increased number of co-workers in different geographic locations, and fact that electronic communications can counter restrictions on unions' and other nonemployees' access to the workplace); *see also* General Counsel, Division of Operations-Management, Memoranda OM 12-59 (May 30, 2012); OM 12-31 (Jan. 24, 2012), and OM 11-74 (Aug. 18, 2011) (summarizing social media cases pending in General Counsel's office); William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must be Honest*, 12 EMP. RTS. & EMP. POL'Y J. 49, 97 (2008) (noting that *Register-Guard* will have greatest effect on employee attempts to organize). Accordingly, the Board should fashion a rule that reflects modern workplaces' reliance on electronic communications, while still respecting employees' right to discuss Section 7 matters with each other at work.

A. ELECTRONIC COMMUNICATIONS UNDER *REPUBLIC AVIATION*

Two aspects of the *Republic Aviation* framework are increasingly unsuitable in modern workplaces, especially in scenarios involving electronic communications. In particular, the Board's stress on the distinction between work/nonwork time and work/nonwork areas, as well as oral solicitations and written distributions, do not fit well with electronic communications and workplaces that lack discrete working times and areas. *See City of Ontario, Cal. v. Quon*, 560 U.S. 746, 766 (2010) (Stevens, J., concurring) ("[I]t is particularly important to safeguard 'a public employee's expectation of privacy in the workplace' in light of the 'reality of work in modern time,' which lacks 'tidy distinctions' between workplace and private activities.") (quoting *O'Connor v. Ortega,* 480 U.S. 709, 739 (1987) (Blackmon, J., dissenting); *see generally* Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 286-287 (2008).

1. Work Time and Work Areas in the Modern Workplace

In *Republic Aviation*, the Court approved the NLRB's presumption that employers can ban oral solicitations during work time and in work areas, but not during nonwork time or in nonwork areas. 324 U.S. at 803 n.10 (citing *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943)). The distinction between work and nonwork time, and work and nonwork areas, made sense in most workplaces in the 1940s, but the same is not true for many modern workplaces. This is especially true for workplaces where the use of electronic communications is prevalent. *See* General Counsel Advice Memorandum, *Pratt & Whitney*, Case Nos. 12-CA-18446, -18722, -18745, -18863, at *6 (Nat'l Labor Relations Bd. Feb. 23, 1998).

In many modern workplaces, there may not be any designated nonwork areas. Similarly, the distinction between nonwork and work time may be fuzzy or nonexistent. Instead, many employees will use electronic equipment in their office throughout the day, for both personal and business reasons. The same may also be said about more traditional types of communications when employees lack defined nonwork areas or nonwork times. Thus, in many workplaces, it is difficult to apply the *Republic Aviation* work time and work area presumptions. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 510–11 (1978) (Powell, J., concurring) (noting that the validity of the *Republic Aviation* presumption does not automatically apply to non-industrial or manufacturing workplaces).

Because of this reality, the NLRB should consider abandoning the work time and work area presumption for all types of employee communications—at least in workplaces that lack clear distinctions between these categories. Short of that change, the need for a new presumption when electronic communications are at issue is especially justified. In workplaces where employees frequently use electronic communications, the need for the traditional *Republic*

Aviation presumption is at its nadir. Employees in those workplaces must frequently deal with both work and nonwork related electronic communications throughout their workday. Trying to classify minute portions of time doing either task is a fool's errand. Rather, the NLRB should consider a new rule that reflects the reality of these modern workplaces.

One such rule would replace the *Republic Aviation* work time and work area presumptions with a single rebuttable presumption that all employer restrictions on electronic communications violate Section 8(a)(1), 29 U.S.C. § 158(a)(1). *Cf.* General Counsel Advice Memorandum, *Computer Assocs. Int'l*, Case No. 1-CA-38933, 2001 WL 34399637, at *3-*4 (Nat'l Labor Relations Bd. Oct. 26, 2001) (recommending rule that would prohibit employers from broadly restricting all nonwork e-mails if the employer's computers can be considered a "virtual work area"). An employer could rebut this presumption by showing that its restrictions are based on a valid, nondiscriminatory business justification. Examples of such justifications might include a past history of employees excessively reading and writing nonwork e-mails, security concerns, or messages that impose unusual disruptions. *See, e.g.*, *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022–23 (S.D. Ohio 1997) (excessive number of e-mails); *Washington Adventist Hosp., Inc.*, 291 N.L.R.B. 95, 102-03 (1988) (e-mails stayed on screen until recipients deleted message). This straightforward presumption could also wholly replace the *Republic Aviation* set of presumptions, as employers could almost always justify a rule limiting nonwork communications to well-defined nonwork areas and nonwork times, just as they do under current law. *See* Hirsch, *Silicon Bullet*, 287-288, 293-295 (arguing for new general presumption rule). Whether limited to electronic communications or applied more broadly, this new presumption would emphasize employees' right to communicate for Section 7 purposes, while still allowing employers to implement valid business-related restrictions.

2. Ending the Distinction Between Oral and Written Communications

In addition to the *Republic Aviation* work time and work area presumptions, the NLRB long ago added a new presumption under which employers can largely ban employees' written distributions from the workplace. *See Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 620 (1962). Under *Stoddard-Quirk*, the protection given to the oral solicitations in *Republic Aviation* does not apply when written distributions are involved. Instead, employers can restrict almost all Section 7-related written distributions from their workplace, even during nonwork time and in nonwork areas. *See id.* at 616, 620 (requiring only that employees have access at some point to a nonwork area to distribute Section 7 literature). Even from its creation, the significance given to distinction between oral and written communications has never made much sense, and the NLRB would be well-advised to consider abandoning the rule in its entirety. *See id.* at 628–29 (Fanning & Brown, Members, dissenting in part). However, even if *Stoddard-Quirk* remains, it should have no application to electronic communications.

E-mail and other types of electronic communications cannot be easily classified as either oral solicitations or written distributions. The Division of Advice has made attempts, as it must, to apply *Stoddard-Quirk* to electronic communications. But the unwieldiness of those attempts shows how ill-equipped *Stoddard-Quirk* is to govern electronic communications.

In several memoranda, the Division of Advice recognized that, on their face, electronic communications fit neither classification well.[4] In particular, the Division recognized that the NLRB in *Stoddard-Quirk* gave less protection to written distributions because of the "potential of littering the employer's premises" and because, unlike oral solicitations, written distributions

[4] *See, e.g.*, General Counsel Advice Memorandum, *Computer Assocs. Int'l*, Case No. 1-CA-38933 (Nat'l Labor Relations Bd. Oct. 26, 2001); General Counsel Advice Memorandum, *Bureau of Nat'l Affairs*, Case No. 5-CA-28860 (Nat'l Labor Relations Bd. Oct. 3, 2000); General Counsel Advice Memorandum, *Pratt & Whitney*, Case Nos. 12-CA-18446, -18722, -18745, -18863 (Nat'l Labor Relations Bd. Feb. 23, 1998).

could be read later and therefore did not need face-to-face contact to be effective. *Stoddard-Quirk,* 138 N.L.R.B. at 619-20. The problem is that electronic communications share similarities with both traditional types of communications. For instance, e-mails, like traditional distributions under *Stoddard-Quirk*, are written. However, e-mails, like oral communications, do not raise the potential for litter. Moreover, in some situations employees can access e-mails at a later time, much like written distributions. But in other situations—such as when employees only have e-mail through work and their employer heavily restricts use of its computer systems—treating e-mail like written distributions would almost totally eliminate employees' ability to use e-mail for Section 7 purposes.

Faced with this conundrum, the Division of Advice recommended a case-specific approach. Under this proposed analysis, the NLRB would examine individual e-mails to determine whether the sender reasonably expected a response by the recipient—in which case the e-mails would be treated like oral solicitations under *Republic Aviation*—or whether they were intended to act as one-way communications—in which case the e-mails would be treated like written distributions under *Stoddard-Quirk*. *See, e.g.*, General Counsel Advice Memorandum, *Bureau of Nat'l Affairs*, Case No. 5-CA-28860, 2000 WL 33941886, at *3 (Nat'l Labor Relations Bd. Oct. 3, 2000).

Although a valiant effort at fitting a square peg in a round hole, the Division's proposed analysis is impractical and demonstrates why *Stoddard-Quirk* should not apply at all to electronic communications. In particular, under the Division's framework, the NLRB would have to spend significant time trying to decipher the intent behind individual e-mails. Even if the NLRB could determine that intent, it is unclear how the Board should treat e-mails that contain multiple messages with different expectations for a response. Moreover, this analysis makes it

difficult for employees and employers to know ahead of time how the NLRB will treat relevant electronic communications.

A far better approach would be to abandon *Stoddard-Quirk*—if not in totality, then at least with regard to electronic communications. Treating electronic communications like oral solicitations under the modified *Republic Aviation* presumption described in the previous subsection would be most consistent with the Court's and the NLRB's concerns about employees workplace communications. *See* Hirsch, *Silicon Bullet*, at 293-94. In addition to the basic communication and property issues discussed above, the realities of electronic communications demonstrate that they are best regulated as oral solicitations. As e-mail and electronic communications has become widespread in many workplaces, their use—even for nonwork reasons—imposes few, if any, costs on employers. *See Intel Corp. v. Hamidi*, 71 P.3d 296, 308 (Cal. 2003) (stressing that "occasional [e-mail] transmissions cannot reasonably be viewed as impairing the quality or value of [the employer's] computer system"); Hirsch, *Silicon Bullet*, at 290. Employees are also adept at ignoring or quickly dispensing with e-mails, especially compared to the interaction required by oral solicitations or the tangible nature of written distributions. Thus, if employers have a genuine concern about disruptions in the workplace because of Section 7 communications, electronic communications should be a more attractive form than more traditional communications, such as oral solicitations and written distributions. Creating a rule that would allow employees to use electronic communications for Section 7 purposes unless employers can show a valid business justification for restrictions would recognize the importance of electronic communications in the modern workplace and impose few costs on employers.

CONCLUSION

Electronic communications have become commonplace in modern workplaces because they are both effective and inexpensive. Although in-person communications are ideal, for many employees, electronic interactions remain an extraordinarily important, if not the sole, opportunity to discuss topics of mutual interest. Employers should be able to control such communications in the rare instances when they impact business operations. However, employers should not be permitted to raise relatively weak personal property interests to justify general bans on electronic communications. Indeed, except for employers who simply want to eliminate all opportunities for their employees to discuss Section 7 topics, businesses should prefer electronic communications over more traditional forms. The NLRB, therefore, should establish a rule—such as the presumption proposed here—that reflects this reality, as well as the mandates of the Supreme Court and basic property law.

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June 13, 2014

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC.	)	
	)	
	)	
and	)	
	)	Cases 21-CA-095151
	)	21-RC-091531
COMMUNICATIONS WORKERS OF	)	21-RC-091584
AMERICA, AFL-CIO	)	
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CERTIFICATE OF SERVICE

The undersigned certifies that 1 copy of the amicus brief of Jeffrey Hirsch in the above-captioned case has this day been sent by e-mail to the following counsel at the electronic addresses listed below:

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