ORAL ARGUMENT NOT YET SCHEDULED

No. 17-71493 consolidated with Nos. 17-70648 and 17-71570

In the United States Court of Appeals

for the Ninth Circuit

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,

Petitioner/Intervenor/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

SARA PARRISH,

Petitioner

ON PETITION FOR REVIEW OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF *AMICI CURIAE* IN SUPPORT OF POSITION OF THE CELLCO PARTNERSHIP D/B/A/ VERIZON WIRELESS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, and Circuit Rule 29(c), the *Amici* hereby certify that they are trade associations, with a general purpose including the objective of preserving and protecting the rights of employers under the National Labor Relations Act. The *Amici* hereby certify that they have no outstanding shares or debt securities in the hands of the public. They further certify that none of them has any parent companies, nor does any publicly held company have a 10% or greater ownership interest in the *Amici*.

Dated: November 16, 2017

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STATEMENT ON PARTY COUNSEL AND FUNDING

No party, party's counsel, or person other than the *Amici*, their members, and their counsel, has: (1) authored this brief in whole or in part or (2) contributed money that was intended to fund preparing or submitting the brief.

IDENTITY AND INTERESTS OF THE *AMICI*

The joint *Amici* collectively represent millions of employers and virtually every industry covered by the National Labor Relations Act ("NLRA" or "Act"), and have received the consent of all parties to file this *amicus* brief in support of the Petitioner, Cellco Partnership d/b/a Verizon Wireless ("Verizon" or the "Company") .

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. The membership of the NAM includes a wide-range of employers who employ both union-represented and unrepresented workers. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of 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.

The NAM's labor policy is based on the principle that both manufacturers and their employees rely on fairness and balance in our labor law system, and that maintaining the time-tested balance between employee rights and employers is critical to economic growth and job creation. For several decades, the NAM has participated as *amicus curiae* in many significant labor cases before the Supreme Court, federal courts and the NLRB.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The Coalition for a Democratic Workplace consists of over 600 member organizations and employers, who in turn represent millions of additional employers, the vast majority of whom are covered by the NLRA or represent organizations covered by the NLRA.

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 ten million employees in the United States, nearly nine 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.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of

about $500,000 a year. The NFIB membership is a reflection of American small business. 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.

This case presents two issues of enormous practical importance to *amici* and their members: (1) whether employers can impose a neutral rule barring employees from using the employer's email system for non-business purposes, and (2) the standard for determining whether an employer's workplace rule, policy, or handbook provision violates the National Labor Relations Act ("NLRA"). The National Labor Relation Board's ("NLRB" or "Board") decision makes it extremely difficult for small and large businesses to establish neutral conduct rules, maintain a civil workplace environment, and ensure productivity.

SUMMARY OF ARGUMENT

The Board's decision in this case presents legal and practical problems for employers of all sizes. The decision ignores the protected right of employers to establish a safe and productive workplace and to protect the civil rights of all employees through non-discriminatory workplace policies. In addition to discounting these employer responsibilities, the Board continues to ignore Supreme Court requirements that it balance substantial business interests against the possible infringement on employees' Section 7 rights when considering the lawfulness of employer rules.

In particular, the Board's decision in this case arbitrarily infringes on the right of employers to control access to their own private electronic communications systems and to maintain the confidentiality of private business records, as well as to protect against disparagement and misrepresentation of its products and employees. This Court should therefore deny enforcement of the Board's order and apply long-standing court and Board precedent recognizing the legitimate justifications for the Petitioner's workplace policies.

ARGUMENT

I. THE BOARD ERRED BY APPLYING ITS ERRONEOUS NEW HOLDING IN *PURPLE COMMUNICATIONS* TO VERIZON'S RULE LIMITING EMPLOYEE USE OF COMPANY EMAIL SYSTEMS .

In the present case, the Board found that the Administrative Law Judge properly applied the standard in *Purple Communications, Inc.,* 361 NLRB No. 126 (2014) to the employer's Code of Conduct rules prohibiting employees from using its company systems, including email, instant messaging, intranet or internet, for unlawful purposes, purposes that violate company policies, unauthorized mass distributions or for communications on behalf of outside organizations directed to a group of employees inside the company. *Cellco Partnership dba Verizon Wireless and Sarah Parrish,* 365 NLRB No. 38 (2017).

The Board's application of *Purple Communications* here should be set aside because *Purple Communications* itself is inconsistent with long-standing Board precedent and is currently being challenged in this Circuit. *See NLRB v. Purple Communications,* Case Nos. 17-71948, 17-71062 and 17-71276 (9th Cir. appeal pending). Several of the *Amici* in this case have also filed briefs in support of Purple Communications, Inc. advocating that the Board's order in that case regarding employee use of employer email be overturned. As the *Amici* have argued in that appeal, under established Board precedent, employers have the right to impose neutral rules that regulate and restrict employee use of employer-owned

property.

The *Amici's* member businesses across the country invest substantial resources in developing, maintaining, and monitoring their email systems. Business email systems exist solely to advance business interests and serve the needs of the company, just like all other forms of employer property. To further its legitimate business needs, and protect against unlawful harassment and discrimination, Verizon established reasonable and neutral regulations governing employees' use of its email systems.

Prior to the Board's decision in *Purple Communications,* for all other types of employer property, the NLRB had recognized the right of employers to regulate the use of their business property by employees. Contrary to that longstanding precedent, the Board decisions in *Purple Communications,* and in this case, improperly eliminate employers' rights to prohibit non-business use of their email and communications systems. Even though there are a wide range of digital platforms that allow employees to communicate separate and apart from their employers' email systems, the Board has unfairly elevated the mere possibility of infringement on employees' ability to communicate over an employer's right to regulate the use of its own email systems for legitimate business purposes.

A. Employers Have a Right to Regulate and Restrict Use of Their Email Systems

For many years, the Board held that employees have no NLRA-protected right to use an employer's email system for Section 7 communications because the employer has a "basic right" to impose neutral regulations and restrictions on employees' use of its property. *Register Guard Publishing Co.*, 351 NLRB 1110 (2007) *enforcement denied on other grounds* 571 F.3d 53 (D.C. Cir. 2009). The Board has consistently upheld the right of employers regarding every type of employer communication, including employer-owned telephones, bulletin boards, televisions, copy machines, and email systems. *See, e.g., Register Guard,* 351 NLRB 1110 (email system); *Mid-Mountain Foods*, *Inc.,* 332 NLRB 229, 230 (2000) *enforced* 11 Fed.Appx. 372 (4th Cir. 2001) (bulletin boards); *Champion International Corp*., 303 NLRB 102, 109 (1991) (copy machines); *Churchill's Supermarkets*, *Inc.* 285 NLRB 138, 155 (1987) *enforced* 857 F.2d 1474 (6th Cir. 1988) (corporate telephones); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981) *enforced in relevant part* 714 F.3d 651 (6th Cir. 1983) (public address systems). The NLRB has no justifiable basis for distinguishing employer owned email systems from other company owned business equipment.

B. The Board Failed to Properly Balance The Substantial Impact On Employers' Business Interests Against the Negligible Impact On Protected Employee Rights in Restricting Access to Their Email Systems

Under Supreme Court precedent, the Board's order must be reversed because the Board failed to properly balance this substantial infringement on employer property rights with the minimal impact on employees' ability to make Section 7 communications on their non-working time. *Republic Aviation v. NLRB*, 324 U.S. at 797-98. As noted by the Board in *Register Guard*, *Republic Aviation* only requires an employer to yield its property interests to the extent necessary to ensure that employees will not be "entirely deprived" of their ability to engage in Section 7 communications in the workplace on their own time. 351 NLRB at 1114. In the present case, as in *Purple Communications* itself, the Board improperly exaggerated the impact on employee rights of the employer's regulation of its proprietary corporate email system, while unfairly minimizing the substantial impact on employers of the new *Purple Communications* standard. For both reasons, as further discussed below, the Board's decision should be denied enforcement.

1. Verizon's Rule Does Not Deprive Employees Of Their Ability To Engage In Section 7 Protected Communications.

It is well settled that the Act "does not require the most convenient or most effective means of conducting [employee] communications, nor does it hold that

employees have a statutory right to use an employer's equipment or devices for Section 7 communications." *Register Guard*, 351 NLRB at 1114. Almost all employees have their own personal devices and email accounts available to them at the workplace. In addition, employees have a wide variety of other personal communications technology available, including social media, snap chat, blogs, and text messaging. Even without access to employers' business email systems, employees have extensive opportunities to conduct Section 7-protected communications during their non-work time. [1] Thus, employees have more than adequate opportunities to engage in Section 7-protected communications with one another during their non-work time. Verizon's policy against "unauthorized mass distributions" does not interfere with employee's Section 7 communications in any way.

2. The Board Failed to Consider the Adverse Practical Implications of Its Holding on Employer Email Systems

The Board has long recognized that employers have the right to ensure that employees are productive during working time. *See, e.g., Peyton Packing Co., Inc.*, 49 NLRB 828, 843 (1943). In addition, employers monitor their business email

[1] *See Purple Communications, Inc.,* 361 NLRB No. 126 (2014) (Member Miscimarra dissenting) ("[T]he many avenues of communication already available to employees [text messaging, social media, personal email, and face-to-face conversation] provide ample opportunities for employees to engage in Sec. 7 communications. * * * Such alternative means must clearly be taken into account under *Republic Aviation*, and they just as clearly negate any need for the statutory right created by the majority today.").

systems to ensure quality control and protect against harassing and discriminatory behavior. The Board's decision in this case undoubtedly damages the employer's ability to make these assurances. If employees are permitted to use employer-provided email for Section 7-protected activity during non-work time, it may be difficult for an employer to determine whether employees are drafting non-work related emails during work time, which would unquestionably have an adverse effect on their productivity. Employees must review their emails during work hours, even if they do not relate to business purposes.

Additionally, under the requirements of the Fair Labor Standards Act, 29 U.S.C. § 201, an employer may be required to compensate its employees for work time spent sorting through its "non-business" emails, even if the email traffic in question occurred entirely during non-work time. The Board addressed this issue in *Purple Communications* by ruling that "employers have a [protected] right to ensure that employees are productive during working time," but held also that restrictions necessary to "maintain production or discipline" will only be justifiable in "rare" cases where the employer can demonstrate "special circumstances." *Id.* This minimizes the fact that employers remain vulnerable to non-productive time, as well as liabilities stemming from the use of employer-provided communication systems in discriminatory or hostile manners. *See e.g.*, *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000); *Amira-Jabbar v. Travel Services, Inc.*,

726 F.Supp.2d 77 (D.P.R. 2010).

Requiring employers to allow employees to use employer-provided email for non-work purposes restricts Verizon's ability to monitor email due to concerns that such monitoring may inadvertently surveil protected activity. The NLRA prohibits employers from engaging in surveillance – or giving the appearance of engaging in surveillance – of Section 7 activities. *Automotive Plastic Technologies, Inc.*, 313 NLRB 462, 466-67 (1993); *Avondale Industries*, 329 NLRB 1064, 1068 n.16 (1999). If left to stand, the Board's decision will hinder employers' ability to monitor their email systems because that monitoring could trigger allegations that the employer has engaged in unlawful surveillance under the Act.[2]

The Board failed adequately to consider these serious consequences both to Verizon, and to the business community at large, of unauthorized and unregulated use of company email systems. Over the course of a union organizing campaign, contract negotiations, or during grievance and arbitration processing, employees may share hundreds – if not thousands – of emails among themselves or third parties relating to protected activity. Opening up employer email systems to Section 7-protected activity increases the likelihood of those systems becoming

[2] The Board purported to address this concern by stating in *Purple Communications* that the new ruling would not "prevent" employers from monitoring computers for "legitimate management reasons" (slip op. at 15), but the Board did not explain how such monitoring of protected employee communications could be squared with extant Board law prohibiting employer surveillance of Section 7 conduct.

vulnerable to overloading and other complications, such as viruses. Employers may also be liable for employee misuse of email.

It should be noted that the Board has no particular expertise regarding the burdens of maintaining corporate email systems or the adverse impact on such systems that is likely to result from prohibiting employers from exercising control over their own communications devices. Certainly the Board is entitled to no deference in this regard. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44, 150 (2002). Verizon established legitimate business objectives served by its reasonable restrictions on employee use of the Company's email system, and the Board erred in failing to give those business considerations adequate weight, as against the negligible impact on employee rights.

3. The Board's Order Infringes on Verizon's Free Speech Rights

The Board's order also infringes on the free speech rights of employers, protected under Section 8(c) and the First Amendment. Under Supreme Court jurisprudence, the government is not permitted to require an employer to directly or indirectly indorse views with which it does not agree. *See, e.g.*, *Consolidated Edison Co of New York, Inc. v. Public Services Comm'n of New York*, 447 U.S. 530, 544 (1980); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The fact that these messages would be delivered via Verizon's email system inevitably creates the appearance

that the Company endorses the message. The Board's order forces Verizon to allow employees to use its own email system to communicate messages the employer does not endorse, which amounts to the government requiring the employer to speak when it would ordinarily not choose to do so.

A company's email systems are not an open forum. Indeed, the very genesis of the Board's holding in *Purple Communications* was that employers limit the use of their email systems to business purposes. Thus, *Purple Communications* and the Board's order in this case impose a content-based requirement that requires employers to allow their own email systems to be used to disseminate messages that employer does not wish to disseminate. *See National Association of Manufacturers v. NLRB*, 717 F. 3d 947, 956 (D.C. Cir. 2013); *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574-75 (1995). By compelling employers to allow employees to send unapproved non-business messages on the employers' own email systems, the Board is compelling the dissemination of speech by employers in a manner that is prohibited by Section 8(c) and the First Amendment.

4. The Board's Order Is Inconsistent with Its Rule Governing the Distribution of Written Materials

The Board's order subjects written employee communications to the same

standards that have previously governed only face-to-face verbal solicitations. Emails are a form of written material that should be encompassed within the standards applicable to other distributions of written material. In *Stoddard-Quirk Mfg. Co*., 138 NLRB 615, 621 (1962), and many cases since then, the Board has declared lawful employer policies prohibiting distribution of written materials by employees in working areas, even during non-working time. The Board acted arbitrarily in *Purple Communications* by refusing to allow employers to prevent unwanted personal email distributions from cluttering corporate email systems, which contrary to the Board's opinion, are clearly "work areas." There and here, the Board unreasonably restricted the company's ability to ensure that employees remain productive during working time in their cyberspace work areas. Thus, even if the Court accepts the Board's position that employees should be allowed to use work-provided email for Section 7-protected purposes generally, employers must be able to regulate that use to restrict non-business emails in working areas under the Board's longstanding distribution rule.

5. The Board's Decision Provides Little Guidance to Employers on How to Lawfully Regulate Their Business Email Systems

The Board's decision in this case, and in *Purple Communications,* provides virtually no guidance to employers on how to lawfully regulate their private

property email systems. It is unclear whether employees have unlimited access rights to all facets of an employer's email system, including the right to send mass emails to all users of the system. The Board found Verizon's prohibition against "unauthorized mass distributions" unlawful. On the other hand, the Board found that the policy lawfully allowed the employer to bar "offensive" and "harassing" content and "chain letters" because employees would not reasonably read those terms, as they are used in the rule, to encompass protected communications. It is entirely unclear from this ruling why a restriction on "chain letters" is lawful while restricting "mass distributions" is unlawful. Overall, the Board's Order provides little or no guidance on where employers may lawfully draw the line in regulating their email systems, and there is no clear rationale for the distinctions made between harassment, obscenity or pornographic materials, chain mail and mass emails. For these reasons as well, the Board's Order should be set aside. For this reason as well, the Board's decision should be denied enforcement.

II. THE BOARD'S APPLICATION OF ITS *LUTHERAN HERITAGE* STANDARD SO AS TO INVALIDATE ADDITIONAL WORKPLACE POLICIES IN THIS CASE IGNORES SUPREME COURT PRECEDENT AND FAILS TO ADEQUATELY CONSIDER LEGITIMATE BUSINESS JUSTIFICATIONS

In addition to the issues raised above regarding the application of *Purple Communications*, this case involves several other work rules of Verizon contained

in its Code of Conduct as a guide to ethical and lawful business practices for its employees. These rules protect private employee information, prohibit employees from advocating for the use of Verizon products when participating in certain outside organizations, and prohibit disparaging and misrepresentation of the company and its employees. These facially neutral rules were not enacted to restrict employees' Section 7 activity, were not promulgated in response to union activity, and have never been applied to restrict employees' Section 7 rights. Despite the facial neutrality of these rules, the Board found that Verizon's policies violated the Act because employees would "reasonably construe" them to prohibit protected activity, applying an erroneous legal standard first announced in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). As explained below, these rulings arbitrarily interfere with the ability of Verizon and many of the *amici's* members to adopt reasonable workplace policies, contrary to the plain language and intent of the Act.

A. The Board's Attack on Commonplace Employer Work Rules Interferes with Employers' Ability to Adopt Reasonable Workplace Regulations

Like Verizon, the overwhelming majority of the *amici*'s member businesses maintain employee handbooks and workplace policies whose purpose is to communicate a company's culture, mission and values and set employee expectations. Such handbooks are intended to ensure that workplace policies are

consistently articulated and comply with all state and federal laws. They are intended to provide an important source of employee information while also protecting the company from legal claims, not to infringe on any employee rights protected by Section 7 of the Act. In light of the recent focus on sexual harassment, employer polices encouraging workplace civility take on even more importance for protecting employees and employers. Policies similar to Verizon's work rules have been in place in thousands of businesses across the country for decades, without being construed by any reasonable employees to have either the purpose or effect of infringing on employee rights protected by Section 7.

In recent years, however, the Board has departed from its own precedent by arbitrarily declaring unlawful a wide variety of standard employer policies, based solely on their alleged (but unproven) "chilling" effect on Section 7 rights. Despite much criticism, both internal and external, the Board has increased its attacks on employer work rules in the last several years, to the point where no employer's workplace policies are safe from the Board's scrutiny.[3] Among the many

[3] *See* Bryan Arnaut and Chris Johlie, *California Here I Come, Right Back Where I Started From…Is Lutheran Heritage Still the Right Standard for Evaluating Workplace Rules? An Examination of the Recent William Beaumont Hospital and Whole Foods Cases,* ABA Section of Labor and Employment Law Committee on the Development of the Law Under the National Labor Relations Act (Midwinter Meeting 2017) at 11; Maurice Baskin, Michael Lotito, and Missy Parry, *Was the Obama NLRB the Most Partisan Board in History? The Obama NLRB Upended 4,559 Years of Precedent,* Coalition for a Democratic Workplace (December 6, 2016) available at www.myprivateballot.com; Arielle A. Dagen-Sunsdahl,

commonplace work rules that the Board has recently overturned are policies regulating communications with the media,[4] prohibitions on misuse of employer logos,[5] rules against false statements,[6] policies against workplace gossip,[7] rules prohibiting offensive[8] or disrespectful behavior,[9] prohibitions against disruptive conduct or negative attitudes, [10] rules requiring positive, harmonious or respectful conduct,[11] confidentiality rules,[12] rules requiring cooperation with internal investigations and/or keeping information confidential, [13] restrictions on workplace photography and recording, [14] and as previously discussed, bans on employee use of employer email for non-business purposes.[15]

Navigating Through Hills & Dales: Can Employers Abide by the NLRA While Maintaining Civil Work Environments?, 31 ABA J. Lab. & Emp. L. 363, 367 (2016).

[4] *DirecTV*, 362 NLRB No. 48 (2015).

[5] *Shadyside Hospital*, 362 NLRB No. 191 (2015).

[6] *Casino San Pablo*, 361 NLRB No. 148 (2014).

[7] *Ga. Auto Pawn*, 2017 NLRB LEXIS 34 (2017).

[8] *Spring Valley Hosp. Med. Ctr.*, 363 NLRB No. 178 (2016).

[9] *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), *vacated and remanded* 2014 U.S. App. LEXIS (D. C. Cir. 2014).

[10] *Daily Grill*, 364 NLRB No. 36 (2016).

[11] *T-Mobile USA*, 363 NLRB No. 171 (2016), enf. den. 865 F.3d 265 (5th Cir. 2017).

[12] *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011) , *rev. in part* 805 F.3d 309 (D.C. Cir. 2015).

[13] *Boeing Co.*, 362 NLRB No. 195 (2015), petition for review pending (9th Cir.).

[14] *Whole Foods Market*, 363 NLRB No. 87 (2015), *enfd.* 2017 US App LEXIS 9638 (2d Cir. 2017).

[15] *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), petition for review pending (9th Cir.).

The NLRB's current approach to employer rules often fails to take into account workplace realities. Although the Board in *Lutheran Heritage* claimed to apply a standard that would uphold rules that were "clearly intended to maintain order and avoid liability" and served "legitimate business purposes" to "ensure a 'civil and decent' workplace," the Board's subsequent application of *Lutheran Heritage* has strayed far from these objectives. In recent years, the Board has used this standard to greatly expand its analysis and proscription of employer policies beyond the legitimate purview of the Act.

The protection of employees' rights to engage in concerted activity is an important aspect of the Board's mission. But in recent years, the NLRB's inconsistent and overbroad rulings, declaring many common sense rules unlawful, has created a confusing web that ignores the realities of the modern workplace and exaggerates the impact of common business policies on the employee rights that the Act was intended to protect. As a result, a number of federal courts have denied enforcement of Board orders, like this one, where it was evident that the Board remained indifferent to the legitimate business reasons why employers adopt particular rules. In *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 27 (D.C. Cir 2001), for example, the D.C. Circuit found that the Board erred in finding an employer's rule banning "abusive or threatening language" overbroad. The court explained that the rule was intended to maintain order and avoid liability

for workplace harassment, and employees can be expected to understand the difference between lawful organizing activity, and "abusive or threatening" conduct directed at coworkers. *Id.* As noted by the D.C. Circuit, "it defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace." *Id.* at 28.

As the current Chair of the Board has further stated, the "reasonably construe" standard of *Lutheran Heritage,* as recently applied, improperly elevates NLRA protected rights over employers' legitimate interests. *William Beaumont Hospital,* 363 NLRB No. 162, slip op. at 8 (Miscimarra Dissent). The "reasonably construe" standard has been very difficult for employers to apply and "has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers." *Id.,* slip op. at 9.

As further pointed out by Chairman Miscimarra in his dissent in the present case, the Board's *Lutheran Heritage* "reasonably construe" standard is inconsistent with the Board's duty to strike a proper balance between the asserted business justification and the employee rights under the Act and should be repudiated by this Court. *Verizon Wireless,* 365 NLRB No. 38 (Miscimarra Dissent) citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) ("*Great Dane"*).[16]

[16] *See also Macy's, Inc.*, 365 NLRB No. 116 (2017) (Miscimarra Dissent); *G4S*

Under *Great Dane,* conduct that is inherently destructive of employee interests may be deemed unlawful without need for proof of an underlying improper motive. Even in such cases, however, the Board has a duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. *Great Dane,* 388 U.S. at 33. On the other hand, when "the resulting harm to employee rights is comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful," and an affirmative showing of improper motivation must be made. *Id.*

In the present case, the Board has failed to exercise its duty to conduct proper balancing of interests when examining Verizon's rules. The Board has instead concluded that any ambiguity in the employer's rule will automatically interfere with employees' protected rights, which completely short-circuits the balancing test required by the Supreme Court in *Great Dane.*

When considering employer rules, the Board must work out an adjustment between employees' organizational rights "and the equally undisputed right of employers to maintain discipline in their establishments.... Opportunity to organize and proper discipline are both essential elements in a balanced society." *Lafayette*

Secure Solutions, 364 NLRB No. 92 (2016), *enfd.* 2017 US App LEXIS 16829 (11th Cir. 2017) (Miscimarra Dissent); *William Beaumont Hosp.*, 363 NLRB No. 162 (2016) (Miscimarra Dissent).

Park Hotel, 326 NLRB 824, 825 (1998) *enforced* 203 F.3d 52 (D.C. Cir. 1999), citing *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945). Despite this clear instruction, the Board consistently uses the *Lutheran Heritage* standard to overturn rules based on its perception of how employees would reasonably interpret them, not on evidence of why they were instituted, how they are applied, or how employees *actually* interpreted them. The Board's views about what provisions employees would "reasonably construe" to interfere with employees' protected rights defies common sense and interferes with the efficient operation of union and non-union businesses.

B. Verizon's Rules Are Lawful under the Supreme Court's Balancing Test

1. Verizon's Rule Requiring the Protection of Employees' Private Information is Lawful under the Act

Verizon's Code of Conduct includes a rule requiring employees to take "appropriate steps to protect all personal information, including social security numbers, identification numbers, passwords, financial information and residential telephone numbers and addresses" retained in its normal course of operations. [17]

Nothing on the face of the rule prohibits the discussion of unions, or prohibits employees from sharing publicly known data about other employees. Instead, it limits the disclosure of the employer's private employee records kept for

employee identification, like I-9 forms, and the provision of employee benefits. The Board's decision is inconsistent with previous cases concerning information contained in employer files. [18]Similarly, the Board recognizes that employees must respect the confidentiality of an employer's information gained as a result of their position in the company.[19]

In this area of the law, it is clear that the Board has exceeded its authority by ignoring the weight of this legitimate and important business justification and presuming an unlawful motive. The balancing test required by *Great Dane* recognizes the *prima facie* legality of these rules and protects the overriding business interests in keeping employee private information confidential. The impact on employees' Section 7 rights from protecting private information is minimal. The rule only limits the employees' use of information maintained in Verizon's confidential records. The employer clearly has a substantial and legitimate business interest in protecting employees' private records, including

[18]*Int'l Business Machines Corp.*, 265 NLRB 638 (1982) (employee's termination for distributing internal wage data maintained in the employer's files upheld); *Flex Frac Logistics*, 360 NLRB 1004 (2014) (discharged employee deliberately disclosed information about confidential client rates); *Bullock's*, 251 NLRB 425 (1980) (employee lawfully discharged for copying confidential performance reviews in connection with challenge to employer's evaluation policy).

[19] *Asheville School*, 347 NLRB 877, 881 (2006) (discharged employee divulged confidential information gained by virtue of her position as an accountant); *Cook County Teachers Union*, 331 NLRB 118 (2000) (disciplined employee had custody of the official information that was disclosed).

social security numbers, identification numbers, passwords, financial information, and contact information. See *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (2016) (Miscimarra Dissent).

This court, and the Board, must continue to recognize the other legal and ethical obligations employers face requiring them to protect employees' private information. As it stands now, the Board's holding would require employers to allow workers to divulge almost any work-related confidential information to co-workers, to unions, or to the public at large. Businesses must be allowed to regulate these types of information and restrict access.

2. Verizon's "Outside Organization" Rule Lawfully Protects Against Conflicts of Interest

Verizon also maintained a rule governing employee conduct while participating in outside organizations, such as "local school board[s] or homeowners' association[s]." Employees would reasonably understand that this rule does not apply to their participation in labor organizations. In addition, this provision was contained in the "Integrity and Fairness" section covering separate employment, insider trading, government ethics, and lobbying. Viewed in this context, the employer's rule was clearly aimed at the legitimate business justification of avoiding conflicts of interest. The Board has previously upheld rules requiring employees to avoid conflicts of interest. *Tradesmen Int'l*, 338 NLRB 460 (2002). Given the company's substantial interest in preserving the

integrity of its business, this rule should be upheld.

3. Verizon Lawfully Prohibited the Disparagement and Misrepresentation of Its Products, Services and Employees

The Board concluded that Verizon's prohibition against "disparaging or misrepresenting the company's products or services or its employees" was unlawful. The Board has recognized that an employer may lawfully prohibit "intentional misrepresentation of information." *William Beaumont Hospital*, 363 NLRB No. 162. Employers maintain a significant business interest in protecting their brand and reputation. In addition, businesses have a significant interest, and a legal obligation, in prohibiting employees from disparaging other employees. Any impact on employees' rights to criticize or discuss working conditions, their managers, or supervisors would be minimal. Employees may engage in all these activities without reaching the level of disparagement or misrepresentation.

The standards for employer rules regarding disparagement, misrepresentation, and employee attitudes remain one of the most confusing and inconsistent areas of Board law. The Board finds language lawful in one policy and unlawful in another. For instance, the Board upheld a rule that required employees to avoid actions that might "discredit the Laboratory." *California Inst. of Tech. Jet Propulsion Laboratory*, 360 NLRB 504 (2014) (emphasis added). The Board found that the term "discredit" would not lead a reasonable employee to infer interference on Section 7 activity. However, in another case, the Board

decided that a rule prohibiting employees from engaging in conduct that "brings *discredit* on the System or Facility" was unlawful. *Spring Valley Hosp. Med. Ctr.*, 363 NLRB No. 178 (2016) (emphasis added).

The Board has upheld employer rules prohibiting conduct that will damage the reputation of the company. The Board found a rule prohibiting "off the job conduct which could have a negative effect on the company's reputation or operations" lawful. *Albertson's Inc.*, 351 NLRB 254 (2007). Similarly, the Board found a rule prohibiting "conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company" lawful. *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 (2001), *enforced on other grounds* 334 F.3d 99 (D.C. Cir. 2003). On the other hand, the Board has struck down almost identical rules. The Board found a rule prohibiting employees from conducting "oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company" unlawful. The Board distinguished the rule from lawful rules that were focused on "uncooperative, improper, unlawful or otherwise unprotected employee misconduct." *First Transit, Inc.*, 360 NLRB 619 (2014). Despite that explanation, the Board subsequently invalidated a rule prohibiting behavior that "violates common decency or morality or publicly embarrasses" a hotel because it was facially overbroad. *Remington Lodging & Hospitality d/b/a Sheraton Anchorage*,

362 NLRB No. 123 (2015).

This pendulum swing in the Board's interpretation of employer rules highlights the difficulty of applying a test based solely on whether employees would "reasonably construe" the language of the employer's rule, policy or handbook to prohibit Section 7 activity. The *Great Dane* balancing test is intended to inoculate the Board's rulings from these swings by recognizing the *prima facie* lawfulness of facially neutral rules and requiring a careful consideration of both the employees' Section 7 rights and the equally important right and obligation of employers to maintain order and productivity in their workplace. Employers have an ethical and legal obligation to maintain civility in their workplace and protect employees from unwanted harassment and discrimination.

Consistent with the Board's balancing duty, Verizon's facially neutral policies, which do not expressly restrict Section 7 activity, were not adopted in response to protected activity, and have not been applied to restrict protected activity, should be found lawful because the employer's legitimate justifications for maintaining the rules far outweigh any potential adverse impact on Section 7 activity.

CONCLUSION

For each of the reasons stated above and in Petitioner/Intervenor/Cross-Respondent's Brief, the Petition for Review should be granted and the Board's

decision should be denied enforcement.

Respectfully submitted,

November 16, 2017

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I hereby certify pursuant this brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1 and Fed. R. App. P. 29(a)(5). The brief is 5,548 words (less than one half of the 15,300 word limit for the Petitioner/Intervenor/Cross-Respondent's Principal and Reply brief pursuant to Fed. R. App. P. 28.1(e)(2)(B)(i) and the 16,500 limit under Ninth Circuit Rule 28.1-1(c)), excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

November 16, 2017 /s/ *Maurice Baskin*

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I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* in support of the position of the Cellco partnership d/b/a/ Verizon Wireless with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 16, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellant CM/ECF system.

Dated: November 16, 2017

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Signature of Attorney or Unrepresented Litigant /s/ Maurice Baskin

Date Nov 16, 2017

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