

CROSSED WIRES: OUTDATED PERCEPTIONS OF ELECTRONIC COMMUNICATIONS IN THE NLRB'S *PURPLE COMMUNICATIONS* DECISION

INTRODUCTION

The National Labor Relations Board (the NLRB or the Board) has recently emphasized the need to adjust to the rapid pace of change in modern society.¹ The recognition of employees' right to use employer-owned email systems for protected activities in its December 2014 *Purple Communications* decision purported to establish a central pillar of this effort.² *Purple Communications* reversed the NLRB's 2007 *Register Guard* holding that employees do not have the right to use employer-owned electronic resources for protected activities.³ However, the Board's rationale in *Purple Communications* reflected an understanding of electronic resources that was more suited to 2007 than to the lives of workers in late 2014. Consequently, an attempt to demonstrate adaptability resulted in a failure to respond to changed circumstances.

Part I of this Note describes the NLRB's role in protecting collective action in the workplace, as well as its responsibility to adapt its standards to changing social, economic, and technological circumstances. Part II explains that the tension between employees' collective action rights and employers' property rights represents one of the fundamental balancing acts the Board must perform as circumstances change. Next, Part III examines how the Board has performed that balancing act in the context of email, including its 2007 *Register Guard* and 2014 *Purple Communications* decisions. Part IV demonstrates that workers' utilizations of diverse electronic communications platforms grew significantly between 2007 and 2014. Part V argues that those changes should have factored into the Board's analysis in *Purple Communications*.

1. See, e.g., *Browning-Ferris Indus. of Cal., Inc. (BFI Newby Island Recyclery)*, 362 N.L.R.B. No. 186, at 11 (Aug. 27, 2015) (“[T]he primary function and responsibility of the Board . . . is that ‘of applying the general provisions of the Act to the complexities of industrial life.’ If the [Board’s] standards fail to adjust to changing circumstances,] the Board is failing in what the Supreme Court has described as the Board’s ‘responsibility to adapt the Act to the changing patterns of industrial life.’” (first citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); and then citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)) (internal citations omitted).

2. *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126 (2014).

3. *The Guard Publ'g Co. (Register Guard)*, 351 N.L.R.B. 1110 (2007), *enforced in relevant part and remanded sub nom. Guard Publ'g v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

I. THE ROLE OF THE NLRB IN CHANGING CIRCUMSTANCES

A. Interpretation and Enforcement of the National Labor Relations Act

The National Labor Relations Act (the “Act”) established the bedrock of national labor policy when President Franklin D. Roosevelt signed it into law on July 5, 1935.⁴ Congress’s primary goal when it enacted the Act was to encourage unionization and collective bargaining.⁵ Sections 7 and 8 of the Act protect employees engaged in union activities from employer retaliation.⁶ These two Sections also protect group actions by employees aimed at changing or protesting their terms and conditions of employment, even if no union organizing drive has been contemplated.⁷

The Act vests responsibility for application and enforcement of its mandates with the NLRB.⁸ The Board’s jurisdiction extends to all private-sector employers affecting interstate commerce.⁹ It performs a unique “quasi-judicial” (administrative and judicial) function to resolve unfair labor practice allegations.¹⁰ A presidentially appointed¹¹ General Counsel investigates unfair labor practice charges filed by employees, labor organizations, and employers through its Regional Offices.¹² The General Counsel then assumes an advocacy role and issues a complaint if it is determined that a charge has merit.¹³ Prosecution of the complaint initially occurs before an administrative law judge, whose decision is then

4. *Who We Are: The 1935 Passage of the Wagner Act*, NLRB.GOV (Oct. 25, 2015, 9:34 AM), <https://www.nlr.gov/who-we-are/our-history/1935-passage-wagner-act> [<https://perma.cc/HYW4-ZZGL>].

5. 29 U.S.C. § 151 (2012) (“It is hereby declared to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . .”).

6. 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3) (2012).

7. 29 U.S.C. § 158(a)(1). See *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948) (“A proper construction [of Section 7] is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated.”); see also Charles J. Morris, *NLRB Protection In the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1701 (1989).

8. 29 U.S.C. §§ 153–55.

9. *Id.* § 152(2) (defining “employer”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). An employer’s activity in interstate commerce must be more than *de minimis* for the Board to exercise jurisdiction over it. See, e.g., *Somerset Manor Inc.*, 170 N.L.R.B. 1647 (1968); *W. Carter Maxwell*, 241 N.L.R.B. 264 (1979).

10. *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 212 n.51 (1946); *Truserv Corp.*, 349 N.L.R.B. 227, 237 n.13 (2007); 51 C.J.S. *Labor Relations* § 692 (2015).

11. 29 U.S.C. § 153(d).

12. *Id.* § 153(b); *What We Do: Investigate Charges*, NLRB.GOV (last visited Oct. 25, 2015, 12:29 PM), <https://www.nlr.gov/what-we-do/investigate-charges> [<https://perma.cc/8GQH-ARJQ>].

13. *What We Do: Investigate Charges*, *supra* note 12.

reviewable by the five-member Board.¹⁴ The federal courts of appeals have jurisdiction to review Board decisions.¹⁵

The President appoints Board members with advice and consent from the Senate.¹⁶ Traditionally, the President appoints three Board members from the President's political party and two members from the opposing party.¹⁷ Board members typically vote in accordance with the labor or management preferences of their political party.¹⁸ As a result, Board standards often oscillate between pro-labor and pro-management positions as the White House changes hands.¹⁹

B. NLRB Responsiveness to Changing Circumstances

The Board has unquestionably faced an evolving landscape over time. Passage of the Act was motivated by the unique circumstances of the Great Depression and the massive worker dislocation that it caused.²⁰ The statutory language reflects the unique nature of that tumultuous period in

14. 29 C.F.R. § 101.11(b) (2015); *What We Do: Decide Cases*, NLRB.GOV (last visited Oct. 25, 2015, 12:32 PM), <https://www.nlr.gov/what-we-do/decide-cases> [<https://perma.cc/5AJG-HC8R>].

15. *What We Do: Decide Cases*, *supra* note 14. A party may request review of a Board decision from either a court of appeals for the jurisdiction in which it resides or transacts business, or from the Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f). Practically speaking, the multiplicity of parties' court of appeals review options means that Board and Supreme Court decisions are the only mandatory authority in charge investigations, administrative law judge decisions, and Board adjudications. *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 616 (1963).

16. 29 U.S.C. § 153(a).

17. WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR* 15 (2000); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 714 (2006).

18. See William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 241 (1995); William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539, 549 (1982).

19. Turner, *supra* note 17, at 717–51 (describing thirteen areas in which Board standards have been modified at least once as a result of changes in the political composition of the Board); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 171 (1985) (“[A]brupt changes in policy appear[] to rework in wholesale major areas of Board law, [and are] often undone three or four years later . . .”).

20. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937) (upholding the constitutionality of the Act and stating: “Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.”); *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 717 (2d Cir. 1966) (noting that the Act was “conceived during the Great Depression and founded upon a frank recognition that our boom-and-bust economy was attributable in part to labor-management unrest”); see also Brandon C. Janes, *The Illusion of Permanency for Mackay Doctrine Replacement Workers*, 54 TEX. L. REV. 126, 127 (1975) (observing that the Act was “part of the great economic reconstruction during the depression of the 1930’s”).

American history.²¹ However, the social, economic, and technological circumstances of that time differ vastly from the dynamic characteristics of the modern economy.²²

Perhaps the most noteworthy change in recent decades from the perspectives of labor, management, and the Board alike has been the precipitous decline in union membership. Private sector union density peaked at an estimated 35% to 37% in the mid-1950s.²³ That figure declined to 20.1% by 1983,²⁴ and reached 6.9% in 2010.²⁵ The Bureau of Labor Statistics' most recent studies place the current figure at just 6.7%.²⁶

Many supporters of the labor movement believe that unfavorable NLRB standards, particularly during the George W. Bush administration, have been partially responsible for the decline of unionization.²⁷ A common narrative of such criticisms has developed, categorizing pro-management outcomes as evidence that the agency is "largely irrelevant to the contemporary workplace,"²⁸ "ossified,"²⁹ dead on arrival,³⁰ and,

21. See, e.g., 29 U.S.C. § 151 ("The inequality of bargaining power . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.").

22. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 576 (2007) ("American labor law, enacted when the prototypical workplace was the factory, and the rotary telephone was 'the last word in desktop technology,' increasingly appears out of sync with changing workplace realities." (quoting Michael J. McCarthy, *Sympathetic Ear: Your Manager's Policy On Employees' E-Mail May Have a Weak Spot—Labor Board Takes On Rules That Restrict Discussion Of Workplace Concerns—Vindicated, but 'Gun-Shy'*, WALL ST. J., Apr. 25, 2000, at A1)).

23. David Broderdorf, *Overcoming the First Contract Hurdle: Finding a Role for Mandatory Interest Arbitration in the Private Sector*, 23 LAB. L. 323, 324 (2008).

24. Press Release, Bureau of Labor Statistics, Union Members in 2006 (Jan. 25, 2007), http://www.bls.gov/news.release/archives/union2_01252007.pdf [https://perma.cc/3N4V-2YWG].

25. Press Release, Bureau of Labor Statistics, Union Members—2010 (Jan. 21, 2011), http://www.bls.gov/news.release/archives/union2_01212011.pdf [https://perma.cc/LQ3Z-E9PT].

26. Press Release, Bureau of Labor Statistics, Union Members—2015 (Jan. 28, 2016), <http://www.bls.gov/news.release/union2.nr0.htm> [https://perma.cc/XWE3-SRXXM].

27. See Liebman, *supra* note 22, at 579–88; James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 248–55 (2005); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2020–43 (2009). However, it should be noted that few, if any, scholars have claimed that the decline in unionization has been *exclusively* due to Board jurisprudence. Failures by the labor movement itself, statutory limitations, and unfavorable Supreme Court decisions, among other factors, are often viewed as imposing equally, if not more, significant constraints on labor. See Liebman, *supra* note 22, at 576–80; Brudney, *supra*, at 227–34; Fisk & Malamud, *supra*, at 2044–53.

28. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 942 (1996).

29. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

30. Harry Sangerman, *NLRB: DOA?*, 33 EMP. REL. L.J. 74, 78 (2007).

generally, obsolete.³¹ Labor advocates, in sum, viewed the Bush Board as unresponsive to changing circumstances.³² This criticism specifically targeted perceived unresponsiveness to the growth of technology in the workplace.³³

However, many observers have conflated adaptability to changing circumstances with political decision-making by the Board.³⁴ This difficulty is amplified by the Board's frequent reliance, throughout its history, on purportedly new circumstances to arrive at conclusions that many view as politically motivated.³⁵ Accordingly, acknowledgment of the need to adapt to changing circumstances has not been limited to Boards controlled by the Democratic Party.³⁶

Nonetheless, the Board under the Obama administration has robustly responded to adaptability criticisms, particularly those regarding its approach to technology.³⁷ The Board has held during the Obama

31. See Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 263 (2008).

32. See *id.* at 282–85; Liebman, *supra* note 22, at 579; Fisk & Malamud, *supra* note 27, at 2068–77.

33. Nora L. Macey, *Proposals to Reinstate the Voluntary Recognition Bar and Rein in Captive Audience Speeches: A Rationale for Change at the National Labor Relations Board*, 87 IND. L.J. 177, 179 (2012) (asserting that “[c]hanges in technology, particularly in how work gets done and in how employers and workers communicate, are making old ways of thinking about labor management issues obsolete”); 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 (2000); Hirsch, *supra* note 31.

34. See Brudney, *supra* note 27, at 226 (“The Board’s recent performance has elicited sharp disapproval from legal academics as well as unions. Far from rendering the Act as effective as possible in modern circumstances . . . the Board has undermined a range of employee protections . . .”) (footnote omitted).

35. The Board’s recent decision on the standard for joint employer status in *Browning-Ferris Indus. of Cal., Inc. (BFI Newby Island Recyclery)*, 362 N.L.R.B. No. 186 (Aug. 27, 2015), provides one such example. The decision emphasized adaptation to changing circumstances as a major reason for an outcome that facilitates union organizing efforts. *Id.* at 11. However, management proponents complained that the decision was “a case study in unaccountable government.” *NLRB’s Joint Employer Attack: The Obama Labor Board Attacks the Franchise Business Model*, WALL ST. J. (Aug. 28, 2015), <http://www.wsj.com/articles/nlrbs-joint-employer-attack-1440805826>. Meanwhile, labor advocates were “sparked” by the decision because “it create[d] an incentive for workers to realize they have power.” Shan Li, *On the Record: UCLA’s Victor Narro Explains NLRB ‘Joint Employer’ Ruling*, L.A. TIMES (Sept. 3, 2015), <http://www.latimes.com/business/la-fi-qa-nlr-20150903-story.html>. See also Fisk & Malamud, *supra* note 27, at 2043–44 (arguing that changes in circumstances cannot be separated from ideology).

36. See, e.g., IBM Corp., 341 N.L.R.B. 1288, 1291 (2004) (pointing to “ever-increasing requirements” for employers to conduct discrimination and sexual harassment investigations, increases in workplace violence, and the aftermath of the September 11, 2001 terrorist attacks to support a holding that nonunion workers have no statutory right to representation in investigatory interviews that may result in discipline).

37. Timothy Noah & Brian Mahoney, *Obama Labor Board Flexes Its Muscles*, POLITICO (Sept. 1, 2015, 12:27 PM), <http://www.politico.com/story/2015/09/unions-barack-obama-labor-board-victories->

administration that employers may not retaliate against employees for union and other protected activities that occur on social media platforms.³⁸ It issued changes to its Rules and Regulations for union representation elections that rely heavily on email and E-Filing, including a new requirement that employers provide employees' personal and work email addresses to any union that petitions to represent them.³⁹ The Board and General Counsel have also announced that electronic signatures are now acceptable for showings of interest in support of representation petitions.⁴⁰ The Board has even attempted to bolster its public outreach efforts through the launch of a mobile app.⁴¹

II. THE TENSION BETWEEN PROPERTY RIGHTS AND SECTION 7

While the debate over utilization of employer-owned electronic systems and devices for protected activities presents novel issues, the underlying tension between employees' Section 7 rights and employers' property rights is as old as the Act itself.⁴² The Supreme Court has commented that the balance of employers' property interests and employees' Section 7 rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other."⁴³ Questions of how, when, and where employees must be permitted to engage in protected activities at the workplace often implicate these competing interests. The utilization of employers' communications systems for

213204 [<https://perma.cc/9SVN-45MV>] ("As a management-side lawyer for 40 years," said Michael Lotito of the law firm Littler Mendelson, "I certainly have not seen such an activist board as this one on behalf of labor. Nothing close." Larry Cohen, who recently stepped down as president of the Communications Workers of America, doesn't necessarily disagree. "The quality of this board is the best ever," he said. "The NLRB appointments is one place where President Obama would get a perfect score.").

38. *Three D, LLC*, 361 N.L.R.B. No. 31 (2014); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. 368 (2012).

39. *Compare* 29 C.F.R. § 102.60–63 (2015) (new requirements), *with* *Trustees of Columbia Univ.*, 350 N.L.R.B. 574 (2007) (holding petitioning union not entitled to employee email addresses, even though employees were isolated on research ship at sea).

40. Memorandum from Richard F. Griffin, NLRB Gen. Counsel, to All Regional Dirs., Officers-in-Charge, & Resident Officers (Sept. 1, 2015).

41. Press Release, NLRB, National Labor Relations Board Launches Mobile App (Aug. 30, 2013), <https://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-launches-mobile-app> [<https://perma.cc/DL99-MDMX>].

42. Congress recognized this tension in the text of the Act. Employees' Section 7 rights are protected under Section 8(a)(1)'s prohibition on employer actions that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. 158(a)(1) (2012). In 1947, Congress amended the Act to also protect employers' rights to use their property for their own free speech in Section 8(c). *Id.* § 158(c).

43. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

protected purposes implicates all three contextual questions, requiring a different balance.

A. *The Nature of Protected Activities*

Employers often advance at least one of two arguments claiming that purportedly protected activities were, in fact, unprotected. First, an employer may argue that the employee's conduct was individualized in nature, and thus not "concerted."⁴⁴ While concerted activities regarding terms and conditions of employment enjoy the Act's protection due to the policy concerns underlying Section 7, individualized complaints do not provide any justification for encroachment upon the employer's property interests.⁴⁵

Second, an employer may characterize such activities as unprotected misconduct because otherwise protected activities often run directly contrary to the employer's business interests.⁴⁶ Very serious misconduct, though otherwise protected, may so heavily burden the employer's property rights as to lose the protection of the Act.⁴⁷

B. *The Time for Protected Activities*

Long-standing Board precedent has maintained the maxim that "working time is for work."⁴⁸ The term "working time" is critical because

44. 29 U.S.C. § 157. The Board's test for concert is whether the activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.*, 281 N.L.R.B. 882, 885 (1986) (*Meyers II*) (internal quotations omitted), *aff'd sub nom.* *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

45. *See, e.g.*, *Tampa Tribune*, 346 N.L.R.B. 369, 371–72 (2006) (employee's complaints about favoritism not concerted because the employee "was speaking only for himself"); *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 684–85 (3d Cir. 1964) (finding, despite employee's repeated conversations with co-workers regarding holiday pay, vacations, and assignment practices, no evidence that such conversations "involved any effort on his or their part to initiate or promote any concerted action to do anything about [those matters]"); *see also Morris*, *supra* note 7, at 1684–86.

46. *See, e.g.*, *University Medical Center*, 335 N.L.R.B. 1318, 1320–21 (2001) (rule prohibiting "[i]nsubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual" found unlawful because such conduct could include "vigorous proselytizing for or against a union"), *enforcement denied in relevant part sub nom. Cmty. Hosp.s of Cent. Cal. v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003).

47. *Compare Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249 (1997) ("[The Employer], like any other employer, wants a friction free working environment. But . . . Section 7 activity may acceptably be accompanied by some impropriety."), *with Piper Realty Co.*, 313 N.L.R.B. 1289, 1290 (1994) ("[A]lthough employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect.").

48. *Our Way, Inc.*, 268 N.L.R.B. 394 (1983) (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943)).

“that term connotes periods when employees are performing actual job duties, periods which do not include the employees’ own time such as lunch and break periods.”⁴⁹ Therefore, employers’ rules against, and discipline for, employees engaging in protected activities (such as distributing union literature) during working time are presumptively valid.⁵⁰ However, employees may not be prohibited from engaging in protected activities during their own time, including breaks and lunches, because that time does not implicate employers’ property rights.⁵¹

C. *The Place for Protected Activities*

The Supreme Court recognized the Board’s authority to disallow employer prohibitions on protected activities in certain areas of its property in the seminal *Republic Aviation* case.⁵² The Court identified the fundamental tension between employees’ Section 7 rights and employers’ property rights as an important reason for deciding the case.⁵³ One of the issues, a prohibition on distribution related to concerns about littering and thefts from automobiles, prompted the Court to quote the Board’s balancing of interests with approval.⁵⁴

The distinction between working areas, where employers may generally prohibit Section 7 activities, and non-working areas has been one of the most important applications of *Republic Aviation*.⁵⁵ An

49. *Id.* at 395.

50. *Id.*

51. *See id.*; *Peyton Packing*, 249 N.L.R.B. at 843–44; *see also Nations Rent, Inc.*, 342 N.L.R.B. 179, 186 (2004); *Aluminum Casting & Eng’g Co.*, 328 N.L.R.B. 8, 9 (1999).

52. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

53. *Id.* at 797–98 (“These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the [NLRA] and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.”).

54. *Id.* at 802 n.8 (allowing that “[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining” (quoting *LeTourneau Co. of Ga.*, 54 N.L.R.B. 1259, 1260 (1944))). *LeTourneau* was consolidated with *Republic Aviation* before the Supreme Court. *Id.* at 797.

55. The Board first explicitly drew this distinction in *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962). There, the Board emphasized its reliance on the Supreme Court’s balancing of interests in *Republic Aviation*. *Id.* at 616–17. It applied a common sense balancing approach, noting the ability of employees to engage in protected activities “at company parking lots, at plant entrances or exits, or in other nonworking areas.” *Id.* at 620; *see also McBride’s of Naylor Road*, 229 N.L.R.B. 795, 795–96 (1977). Particularized standards have developed for various industries, such as distinctions between patient care and non-patient care areas in healthcare facilities. *See, e.g., Intercommunity Hosp.*, 255 N.L.R.B. 468, 471 (1981); *St. John’s Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150, 1150 (1976),

employer must demonstrate special circumstances in order to prohibit Section 7 activities in non-working areas.⁵⁶

The Court's approval of interest balancing in *Republic Aviation* provided a basis for subsequent similar decisions regarding the place for protected activities. The Court again balanced interests when it held, forty-five years later, that the Board may not compel employers to grant nonemployee union organizers access to employer-owned property unless "no reasonable means short of trespass" exist for organizers to reach the employees.⁵⁷

D. Protected Activities Using Employer-Owned Equipment

The Board has consistently held that employees do not possess a right to use employer-owned communications equipment, other than email systems, for Section 7 purposes.⁵⁸ Such property has ranged from communications equipment as rudimentary as bulletin boards,⁵⁹ to more advanced equipment like public address systems,⁶⁰ televisions,⁶¹ and copy machines.⁶² The Board also unequivocally stated in *Churchill's Supermarkets*⁶³ that "an employer ha[s] every right to restrict the use of company telephones to business-related conversations."⁶⁴

enforcement denied in part, 557 F.2d 1368 (10th Cir. 1977); *see also* *Marshall Field & Co.*, 98 N.L.R.B. 88, 95–96 (1952) (holding that protected activities must be permitted in department store's public eating area because it was not a sales area), *modified on other grounds and enforced*, 200 F.2d 375 (7th Cir. 1952).

56. *Republic Aviation*, 324 U.S. at 793–94.

57. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540 (1992).

58. *See infra* notes 59–64.

59. *Eaton Techs.*, 322 N.L.R.B. 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board."); *see also* *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986).

60. *Heath Co.*, 196 N.L.R.B. 134 (1972) (refusal to allow pro-union employees to respond to anti-union broadcasts did not interfere with the conduct of a free and fair representation election).

61. *Mid-Mountain Foods, Inc.*, 332 NLRB 229, 230 (2000) (finding no statutory right to use break room television to show pro-union video), *enforced*, 269 F.3d 1075 (D.C. Cir. 2001).

62. *Champion Int'l Corp.*, 303 N.L.R.B. 102, 109 (1991) (employer possesses "a basic right to regulate and restrict employee use of [copy machine]").

63. 285 N.L.R.B. 138 (1987), *enforced*, 857 F.2d 1474 (6th Cir. 1988).

64. *Id.* at 155; *Union Carbide Corp.*, 259 N.L.R.B. 974, 980 (1981) (employer "could unquestionably bar its telephones to any personal use by employees"), *enforced in relevant part*, 714 F.2d 657 (6th Cir. 1983).

III. THE BOARD'S TREATMENT OF EMPLOYER-OWNED EMAIL SYSTEMS

A. *The Early Approaches*

Despite the unambiguous background of “equipment cases,” the Board struggled early on to define the scope of employees’ Section 7 rights to use employer-owned email systems. As early as 1993, the Board ruled that an employer could not discriminatorily allow employees to use the email system for all types of communications except to organize a union.⁶⁵ However, that case turned on the clearly discriminatory treatment of the union organizers, rather than on non-discriminatory prohibitions.⁶⁶

Another early case, *Timekeeping Systems*,⁶⁷ involved a mass email sent by an employee that disputed the employer’s assertions about proposed changes to its holiday policies. The Board found that the employer unlawfully discharged the employee for this email.⁶⁸ However, the decision turned on the nature of the employee’s speech, rather than the forum in which it was communicated.⁶⁹

As employers began to assert in the late 1990s and early 2000s that the same standards applicable to copy machines, public address systems, and telephones should also apply to email systems, the NLRB General Counsel’s Division of Advice (the Division of Advice) issued Advice Memoranda in several cases.⁷⁰ The first such case was *Pratt & Whitney*⁷¹

65. E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 919 (1993).

66. *Id.* Consistent with this limited holding, the Board granted the employer’s motion to alter the cease and desist remedy from cease and desist from “prohibiting bargaining unit employees from using the electronic mail system for distributing union literature and notices” to cease and desist from “[d]iscriminatorily prohibiting bargaining unit employees from using the electronic mail system for distributing union literature and notices.” *Id.* at 897, 920 (emphasis added).

67. *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244 (1997).

68. *Id.* at 244.

69. *Id.* The administrative law judge in *Timekeeping Systems* did address the employer’s contention that the employee’s emails amounted to a “take-over” of the email system, as in *Washington Adventist Hospital*, 291 N.L.R.B. 95 (1988), where an employee had used emails to disrupt transmissions between that employer’s computer terminals. *Timekeeping Sys.*, 323 N.L.R.B. at 249. However, the judge distinguished *Washington Adventist* with reference to *American Hospital Association*, 230 N.L.R.B. 54 (1977), a case involving employee distribution of hard copy pamphlets. *Timekeeping Sys.*, 323 N.L.R.B. at 249.

70. The Division of Advice is an office of the General Counsel. Regional offices submit cases involving novel, complex, or otherwise significant cases to the Division of Advice for legal opinions on those matters. *Who We Are: Organization Chart*, NLRB.GOV (Nov. 14, 2015, 1:38 PM), <https://www.nlr.gov/who-we-are/organization-chart> [https://perma.cc/5UTT-NA5Y].

71. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, to Rochelle Kentov, Reg’l Dir., Region 12 (Feb. 23, 1998), <https://www.nlr.gov/case/12-CA-018446>.

in 1998. There, the employer prohibited all non-business use of its email system.⁷² The Division of Advice noted, “the evidence indicates that the employees in the instant cases use the Employer’s computers and computer network in such a way as to make them ‘work areas’ within the meaning of *Republic Aviation* and *Stoddard-Quirk*.”⁷³ The Division of Advice acknowledged, but rejected, the employer’s objections that email, like paper litter, “can take up cyberspace,” and that even emails sent during the sender’s non-working time are likely to appear during the recipient’s working time.⁷⁴

The Division of Advice subsequently relied on its *Pratt & Whitney* Memorandum when the issue arose,⁷⁵ but noted that in some circumstances, there exist disparate reasons to apply or decline to apply this analysis.⁷⁶ Some of these Memoranda stated, as early as 2004, that the Board would decide the issue in the pending *Register Guard* case.⁷⁷ The uncertain environment regarding employees’ use of employer email systems persisted until that case was decided.

B. The Bush Board Decides Register Guard—2007

The *Register Guard* case arose when Suzi Prozanski, an employee of a newspaper publisher and president of her local union, sent three emails to employees at their company email addresses regarding union business.⁷⁸

72. *Id.* at 1.

73. *Id.* at 3.

74. *Id.* at 4.

75. *See, e.g.*, Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, to Claude L. Witherspoon, Acting Reg’l Dir., Region 16 (Apr. 11, 2000), <https://www.nlr.gov/case/16-CA-020176>. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, to Martha Kinard, Acting Reg’l Dir., Region 16 (Oct. 18, 1999) (finding prohibition unlawful even though “TU Electric’s employees utilize their email system to a lesser extent than the Pratt & Whitney employees did.”), <https://www.nlr.gov/case/16-CA-019810>.

76. *See* Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, to James J. McDermott, Reg’l Dir.; Byron B. Kohn, Reg’l Attorney; Tony Bisceglia, Assistant to Reg’l Dir., Region 31 (Jan. 13, 2003) (warehouse and driving employees have limited access to email, so email system is not part of their working area), <https://www.nlr.gov/case/31-CA-025962>; Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, to James S. Scott, Reg’l Dir. Region 32 (Jan. 18, 2001) (same for employees performing driving, production, and maintenance work); Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, to Roberto G. Chavarry, Reg’l Dir., Region 13 (Nov. 26, 2004) [hereinafter *Banca di Roma* Memorandum] (recommending dismissal because blanket prohibition had been ignored by management and employees alike, and there was no indication that the policy would be enforced in the future), <https://www.nlr.gov/case/13-CA-041283>.

77. *See, e.g.*, *Banca di Roma* Memorandum, *supra* note 76.

78. *The Guard Publ’g Co. (Register Guard)*, 351 N.L.R.B. 1110, 1111–12 (2007). The first email, sent using an employer-owned computer, disputed an email sent to employees by the newspaper’s managing editor, which claimed that the police had notified the employer that anarchists

The employer issued written warnings to Prozanski for using the company's email system to conduct union business in violation of the employer's Communications Systems Policy (CSP).⁷⁹

The CSP prohibited employees from using the email system to solicit on behalf of outside organizations.⁸⁰ Management knew that employees sometimes used the email system for personal solicitation purposes, such as party invitations or requests for dog walkers, but the employer's periodic United Way campaign constituted the only solicitation for outside organizations that could be shown.⁸¹

The union filed unfair labor practice charges, and the General Counsel's Regional Office issued complaints, alleging that the employer's maintenance of the CSP violated Section 8(a)(1) of the Act, and that the written warnings issued to Prozanski violated Sections 8(a)(1) and (3).⁸² The administrative law judge found that the CSP was lawful as written,⁸³ but was discriminatorily applied to Prozanski's union activities because the employer allowed employees to use the email system for personal purposes other than union activities.⁸⁴

The Board, in a three-to-two decision along party lines, held that employees do not have a statutory right to use their employer's email system for Section 7 purposes.⁸⁵ The majority recognized that the issue was whether electronic communications had changed "the pattern of industrial life . . . to the extent that the forms of workplace communication sanctioned in *Republic Aviation* ha[d] been rendered useless and that employee use of the Respondent's e-mail system for Section 7 purposes

might attend a planned union rally. Prozanski's email attached an email from the police stating that it was the employer who had notified police that anarchists might attend. *Id.* at 1111. Prozanski's second email, sent from a computer in the union's office, asked employees to wear green to work in support of the union's position in contract bargaining. *Id.* at 1112. The third email, also sent from a union-owned computer, asked employees to participate in the union's entry in an upcoming parade. *Id.*

79. *Id.* at 1111–12.

80. *Id.* at 1111. The relevant provision of the policy stated:

Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

Id.

81. *Id.*

82. *Id.*

83. The judge observed, "The Board has yet to hold that an e-mail system owned by an employer constitutes a workplace where an employer is prohibited from limiting all employee Section 7 solicitation." *Id.* at 1136.

84. *Id.* at 1136–37.

85. *Id.* at 1110.

must therefore be mandated.”⁸⁶ The Board, in other words, once again engaged in the balancing of employer property rights against employee Section 7 rights.

While it acknowledged that “e-mail has, of course, had a substantial impact on how people communicate, both at and away from the workplace,” the Board found that the Section 7 interests served by employee utilization of email systems were minimal because “employees at the [employer]’s workplace have the full panoply of rights to engage in oral solicitation on nonworking time and also to distribute literature on nonworking time in nonwork areas, pursuant to *Republic Aviation* and *Stoddard-Quirk*.”⁸⁷ It reasoned that the continued existence of these rights matters because “*Republic Aviation* requires the 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.”⁸⁸ The Board also emphasized precedent holding that employers’ property interests in equipment such as televisions and telephones⁸⁹ outweigh employees’ interests in using such equipment for Section 7 purposes.⁹⁰

Similarly to employers’ legitimate business interests in that equipment, employers’ business interests in email systems include the system’s efficient operation, protection against viruses, diminished server space, dissemination of confidential information, and liability for employees’ inappropriate emails.⁹¹ As a result, the Board determined that the “basic property right” of employers to “regulate and restrict employee use of company property”⁹² applies to email systems in the same manner as it applies to other employer-owned equipment. The recognition of this right rendered inapplicable the *Republic Aviation* presumption that a blanket

86. *Id.* at 1116.

87. *Id.* at 1115–16.

88. *Id.* at 1115 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 n.6 (1945)).

89. *See supra* notes 59–64.

90. *Register Guard*, 351 N.L.R.B. at 1114. The majority acknowledged that: e-mail has some differences from as well as some similarities to other communications methods, such as telephone systems. For example, as the dissent points out, transmission of an e-mail message, unlike a telephone conversation, does not normally ‘tie up’ the line and prevent the simultaneous transmission of messages by others. On the other hand, e-mail messages are similar to telephone calls in many ways. Both enable virtually instant communication regardless of distance, both are transmitted electronically, usually through wires (sometimes the very same fiber-optic cables) over complex networks, and both require specialized electronic devices for their transmission.

Id. at 1116.

91. *Id.* at 1114.

92. *Id.* (quoting *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663–64 (6th Cir. 1983)).

ban on solicitation is unlawful absent special circumstances.⁹³ Accordingly, the Board determined that employees do not have a statutory right to use employer-owned email systems for Section 7 purposes.⁹⁴

Based upon this conclusion, the Board agreed with the administrative law judge that the employer's CSP did not violate Section 8(a)(1) of the Act on its face.⁹⁵ The Board also found that the first of Prozanski's disciplinary warnings violated Section 8(a)(1) and (3) as a discriminatory application of the CSP, but found no violation based on the warning for her second and third emails.⁹⁶

Democratic Members Liebman and Walsh dissented vehemently. They first argued that email had drastically changed workplace society:

Today's decision confirms that the NLRB has become the 'Rip Van Winkle of administrative agencies.' Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace. In 2007, one cannot reasonably contend, as the majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper. National labor policy must be responsive to the enormous technological changes that are taking place in our society.⁹⁷

Second, the dissent took aim at the majority's assertion that the employer's property interest in its equipment removes it from the *Republic Aviation* framework. It asserted that the issue pertained to "cyberspace," which is not owned by anyone, and not to "equipment."⁹⁸

Third, the dissent accused the majority of substituting the *Lechmere* standard (regarding facility access by non-employee union organizers) for

93. *Id.* at 1115.

94. *Id.* at 1110.

95. *Id.* at 1116.

96. *Id.* at 1119–20. The Board made these determinations pursuant to a new articulation of "discrimination" as drawing distinctions "along Section 7 lines." *Id.* at 1117–19. While beyond the scope of this Note, this important and often overlooked aspect of the *Register Guard* decision remains the Board standard even after *Purple Communications*. *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, at 5 n.13 (2014).

97. *Id.* at 1122 (Liebman & Walsh, Members, dissenting) (citations omitted) (quoting NLRB v. *Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992)).

98. *Id.* at 1126 ("[E]-mail, the 'World Wide Web,' and mail listing services '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.'" (quoting *Reno v. ACLU*, 521 U.S. 844, 850 (1997))).

the *Republic Aviation* standard for protected activity by employees.⁹⁹ This criticism targeted the majority's reliance on the fact that employees can still communicate with each other through other means, such as face-to-face contact, without using their employer's email system.¹⁰⁰

The D.C. Circuit reviewed the objections to *Register Guard*.¹⁰¹ The court agreed with the union that all of Prozanski's warnings violated Section 8(a)(1) and (3) because they were discriminatorily issued.¹⁰² The union did not challenge the CSP's facial validity.¹⁰³

C. Backlash to *Register Guard*

The Board's *Register Guard* decision provoked vociferous criticism from pro-labor advocates. One local union categorized the decision as part of an "all-out attack on the labor movement."¹⁰⁴ AFL-CIO General Counsel Jonathan Hiatt stated that the Board "has again struck at the heart of what the nation's labor laws were intended to protect—the right of employees to discuss working conditions and other matters of mutual concern" because "[a]nyone with e-mail knows that this is how employees communicate with each other in today's workplace."¹⁰⁵

Pro-labor scholars also accused the *Register Guard* Board of failing to adapt to changing circumstances. William Corbett, for example, argued that the Board "interpreted the NLRA in a restrictive way that threatens to make it irrelevant and obsolescent."¹⁰⁶ Jeffrey Hirsch expressed a similar perspective, describing the decision as a "disturbing . . . failure [that]

99. *Id.* at 1126–27 (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)).

100. *Id.* The majority disputed this characterization, clarifying that it only referred to alternative means in order to assess how email had changed the workplace. *Id.* at 1116 n.12 (citing *Lechmere*, 502 U.S. 527).

101. *Guard Publ'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

102. *Id.* at 59–61.

103. *Id.* at 58 ("The union states that, although it believes the company violated section 8(a)(1) by maintaining a policy that prohibited e-mail use for all 'non-job-related solicitations,' it does not seek review of the Board's ruling to the contrary."). According to AFL-CIO Associate General Counsel James Coppess, the union did not seek review of this issue because the court would likely view the issue as a policy choice within the Board's discretion. Susan J. McGolrick, *D.C. Circuit Rules Guard Publishing Illegally Disciplined Copy Editor for E-Mails*, BNA DAILY LAB. REP. No. 128 at AA-1 (July 8, 2009). Furthermore, since the 2008 election had occurred in the interim, the union felt optimistic that a Board appointed by President Obama would reverse *Register Guard* at its first opportunity. *Id.*

104. *The Bush NLRB and What It Has Done to American Workers*, TEAMSTERS LOCAL 19, http://www.teamsterslocal19.org/NLRB_Flyer-basic_with_cites_1.pdf [https://perma.cc/HE9H-JQUY].

105. Steven Greenhouse, *Labor Board Restricts Union Use of E-Mail*, N.Y. TIMES (Dec. 23, 2007), http://www.nytimes.com/2007/12/23/us/23labor.html?_r=0.

106. William R. Corbett, *Awaking Rip Van Winkle: Has the National Labor Relations Act Reached a Turning Point?*, 9 NEV. L.J. 247, 252 (2009).

highlights the fact that the Board has yet again shown no inclination to reassess broadly its enforcement of the NLRA to reflect the nature of the modern economy.”¹⁰⁷ *Register Guard*, Hirsch argued, constituted significant evidence of the Act’s “obsolescence.”¹⁰⁸

Member Liebman also made it clear that these sentiments were shared by the Board’s Democratic appointees. In a speech at the University at Buffalo Law School, she referred to *Register Guard*, stating, “This case I sometimes subtitle ‘The Act is Surely Dead,’ if the majority could not find a way to accommodate employees’ rights to communicate with each other at the workplace through this new technology.”¹⁰⁹

President Obama appointed Lafe Solomon, one of outgoing Chairman Liebman’s staff members, as Acting General Counsel on June 21, 2010.¹¹⁰ Ten months later, Solomon issued a General Counsel Memorandum identifying cases that regional offices must send to the internal Division of Advice for evaluation as potential policy priorities.¹¹¹ Solomon listed “[c]ases involving the issue of whether employees have a Section 7 right to use an employer’s e-mail system” among the “[c]ases requiring development of a litigation strategy in light of adverse circuit court law or new Board precedent.”¹¹² The (Acting) General Counsel’s office thus officially announced its interest in providing the Obama Board with an opportunity to overturn *Register Guard*.¹¹³

107. Hirsch, *supra* note 31, at 278.

108. *Id.* at 262. Additionally, the title of Hirsch’s article, “The Silicon Bullet: Will the Internet Kill the NLRA?” asks a question that demonstrates the depth of pro-labor scholars’ dissatisfaction with *Register Guard* and other NLRB decisions related to technology. See also Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1121–22 (2011).

109. Wilma B. Liebman, *Values and Assumptions of the Bush NLRB: Trumping Workers’ Rights*, 57 BUFF. L. REV. 643, 647 (2009) (transcript of remarks at a September 19, 2008 symposium). Four months later, President Obama appointed her as the first Board Chairman of his presidency. Press Release, NLRB, Wilma Liebman Designated NLRB Chairman (Jan. 22, 2009), <https://www.nlr.gov/news-outreach/news-releases> [<https://perma.cc/4HHT-G88E>].

110. *Who We Are: The General Counsel—Lafe Solomon*, NLRB.GOV, <https://www.nlr.gov/who-we-are/general-counsel/lafe-solomon> [<https://perma.cc/U4NQ-XNCN>]. Solomon served in this capacity until November 2013, though the Senate never confirmed his appointment as General Counsel. *Obama’s Lawless Labor Board*, WALL ST. J. (Aug. 11, 2015), <http://www.wsj.com/articles/obamas-lawless-labor-board-1439336842>.

111. Memorandum from Lafe E. Solomon, Acting Gen. Counsel, to All Reg’l Dirs., Officers-in-Charge, & Resident Officers (Apr. 12, 2011), Memorandum from Lafe E. Solomon, Acting Gen. Counsel, to All Reg’l Dirs., Officers-in-Charge, & Resident Officers (Apr. 12, 2011), <https://www.nlr.gov/reports-guidance/general-counsel-memos> (select GC 11-xx from the drop box, then select the document).

112. *Id.* at 2–3.

113. No such vehicle to challenge *Register Guard* reached the Board during Solomon’s tenure as Acting General Counsel. As a result, this mandate was reiterated by newly-appointed (and confirmed)

D. Purple Communications—December 11, 2014

The opportunity to re-examine this issue came before the Board in late 2014. The employer in that case, Purple Communications, provided sign language interpretation services at sixteen southern California video call centers.¹¹⁴ The union, Communications Workers of America, filed petitions to represent seven of those facilities in the autumn of 2012.¹¹⁵ The union, after failing to win elections at two of the facilities, filed objections to those elections, alleging that the employer's rules restricting email usage interfered with employees' free choice in the elections.¹¹⁶ The union also filed an unfair labor practice charge in support of those objections.¹¹⁷

Three of the employer's handbook rules implicated *Register Guard* issues. The first such rule stated that the employer's electronic equipment, Internet access, and email system "should be used for business purposes only."¹¹⁸ The second and third rules prohibited using the employer's equipment, internet, or email for "[e]ngaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company" or "[s]ending uninvited email of a personal nature."¹¹⁹ The administrative law judge, relying on *Register Guard*, dismissed these allegations.¹²⁰ The General Counsel then sought review from the Board.¹²¹

The Board framed its analysis as a reevaluation of the balancing of interests examined in *Register Guard* by identifying three arguments, which, taken together, encompass both sides of the balance of interests.¹²² The majority first generally asserted that *Register Guard* had "undervalued employees' core Section 7 right to communicate in the workplace about their terms and conditions of employment, while giving too much weight

General Counsel Richard Griffin in his first such memorandum. Memorandum from Richard Griffin, Jr., Gen. Counsel, to All Reg'l Dir.s, Officers-in-Charge, & Resident Officers (Feb. 25, 2014).

114. Purple Commc'ns, Inc., 361 N.L.R.B. No. 126, at 2 (Dec. 11, 2014).

115. *Id.* at 3.

116. *Id.*

117. *Id.*

118. *Id.* at 2.

119. *Id.* at 3.

120. *Id.* at 63. As the administrative law judge acknowledged, he was bound to abide by Board precedent and to allow the Board itself to consider the merits of overturning its precedent. *Id.* (citing Pathmark Stores, 342 N.L.R.B. 378, 378 n.1 (2004); Hebert Indus. Insulation Corp., 312 N.L.R.B. 602, 608 (1993); and Lumber & Mill Emp'rs Ass'n., 265 N.L.R.B. 199, 199 n.2 (1982), *enforced*, 736 F.2d 507 (9th Cir. 1984), *cert. denied*, 469 U.S. 934 (1984)).

121. *Id.* at 3.

122. *Id.* at 4–5.

to employers' property rights."¹²³ Second, the Board argued that *Register Guard* had undervalued the importance of email to employee communications.¹²⁴ Third, the majority attacked *Register Guard* as relying too heavily on earlier Board decisions discussing employers' property rights to their equipment.¹²⁵

The Board focused its argument about the importance of workplace email to employees' Section 7 rights on the workplace as the *locus* of protected activities.¹²⁶ The Board argued that this focus motivated the Supreme Court's articulation of the "special circumstances" standard in *Republic Aviation*.¹²⁷

Next, the Board relied on several studies showing the pervasive role of email in the workplace.¹²⁸ It pointed to the decreased costs of email due to ever-increasing processor and hard drive capabilities,¹²⁹ as well as the development that "[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency."¹³⁰ Furthermore, telework arrangements have accompanied increases in technological capabilities.¹³¹ Based on

123. *Id.* at 4.

124. *Id.* at 4–5.

125. *Id.* at 5.

126. *Id.* ("The workplace is 'a particularly appropriate place for [employees to exercise their Section 7 rights], because it is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'" (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978))).

127. *Id.* at 6 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–04 (1945)).

128. *Id.* at 6–7. The Board relied on the Radicati Group's April 2014 conclusions that "[e]mail remains the most pervasive form of communication in the business world" and "that work-related email traffic will continue to increase." *Id.* at 6–7 (quoting THE RADICATI GROUP, INC., EMAIL STATISTICS REPORT, 2014–2018, at 2, 4 (Sara Radicati ed., 2014), <http://www.radicati.com/wp/wp-content/uploads/2014/01/Email-Statistics-Report-2014-2018-Executive-Summary.pdf>). Additionally, a 2008 Pew Research Center Study showed that "96 percent of employees used the internet, email, or mobile telephones to keep them connected to their jobs, even outside of their normal work hours." *Id.* at 6 (citing MARY MADDEN & SYDNEY JONES, NETWORKED WORKERS, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT 1 (2008), <http://www.pewinternet.org/2008/09/24/networked-workers>).

129. *Id.* at 7 n.24.

130. *Id.* at 7 (quoting *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010)). It should be noted that the *Quon* case involved text messages on a pager, rather than an email system. *Quon*, 560 U.S. 746 at 750.

131. *Purple Commc'ns*, at 7 (citing *Latest Telecommuting Statistics*, GLOBAL WORKPLACE ANALYTICS (Sept. 2013), <http://globalworkplaceanalytics.com/telecommuting-statistics>; Dinah Wisenberg Brin, *Telecommuting Likely to Grow, Despite High-Profile Defections*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (July 24, 2013), <https://www.shrm.org/resourcesandtools/hr-topics/technology/pages/telecommuting-likely-to-grow-bans.aspx>; Larry Dignan, *2014 Enterprise Trends: BYOD pain, HTML5 Apps, Hybrid Cloud, SDx, ZDNET* (Oct. 8, 2013), <http://www.zdnet.com/2014enterprise-trends-byod-pain-html5-apps-hybrid-cloud-sdx-7000021705>).

these developments, the Board likened email communications to workplace cafeterias as “‘the natural gathering place’ for employees to communicate with each other.”¹³² As a result, it described *Register Guard’s* “reluctance” to “fully acknowledge” email’s role in the modern workplace as “a failure ‘to adapt the Act to the changing patterns of industrial life.’”¹³³

The Board then turned to *Register Guard’s* reliance on “equipment” cases.¹³⁴ This analysis focused first on the property rights aspect of the balancing of interests, emphasizing that one person’s use of email does not interfere with another’s use, or add significant costs, particularly in light of increased computing capacities.¹³⁵ Even though telephones are comparable to email systems in many respects, the majority decided to draw a line between these two types of equipment by categorizing them as “distant cousins.”¹³⁶

The Board also rejected, in a footnote, the dissent’s contention that increased use of other forms of technology, including personal email, texting, and social media, tipped the balance of interests in favor of employers’ property rights because these developments made employees’ use of employer-owned email systems less necessary to Section 7 activities.¹³⁷ The majority premised this rejection on the value that precedent placed on communications “*in the workplace*”¹³⁸ and explained that employees view Section 7 communications as work-related, rather than personal, in nature.¹³⁹ While agreeing that these other forms of technology facilitate communications amongst groups of people, the Board reasoned, “[e]mployees do not share all of the same private media options, due to the cost and variety of those options; some employees do not privately use any electronic media.”¹⁴⁰ As a result, employees who work at different facilities, on different shifts, or in different departments, may be “virtual strangers” to one another with “no practical way to obtain

132. *Id.* at 8 (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978)).

133. *Id.* (quoting *Hudgens v. NLRB*, 424 U.S. 521, 523 (1976)).

134. *Id.*

135. *Id.* at 8–9.

136. *Id.* at 9. The Board noted that the General Counsel had argued for reversal of the Board’s prior telephone cases in addition to *Register Guard*. However, since that issue was not directly presented in this case, the Board declined to decide the telephone issue. *Id.* at 9 n.38.

137. *Id.* at 6 n.18.

138. *Id.* (emphasis in original) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978); *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974)).

139. *Id.*

140. *Id.*

each other's email addresses, social media account information, or other information necessary to reach each other."¹⁴¹

Furthermore, the majority, like the *Register Guard* dissent, asserted that the Republican Board members' argument inappropriately applied the reasonable alternative means standard for non-employee access to facilities.¹⁴² Consequently, its decision did not "turn on the current availability of alternative communication options using personal electronic devices and other electronic media—e.g., Facebook, Twitter, YouTube, blogging, or personal email accounts."¹⁴³ The Board's justification for disregarding other means of communication relied largely on a statement by Justice Brennan in *Beth Israel* that, "outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry."¹⁴⁴ As a result, the Board concluded that alternative means of engaging in protected activities are only relevant for non-employees.¹⁴⁵

The Board thus decided that the *Republic Aviation* standard that protected activities must be permitted absent "special circumstances" applied to employees' use of employer-owned email systems.¹⁴⁶ It viewed this determination as "consistent with the purposes and policies of the Act, with our responsibility to adapt the Act to the changing work environment, and with our obligation to accommodate the competing rights of employers and employees."¹⁴⁷

The majority also decided that it would apply this new standard retroactively.¹⁴⁸ However, retroactivity required that the case be remanded to the administrative law judge in order to allow for the application of the new standard to these facts.¹⁴⁹ The case, as of this writing, remains

141. *Id.*

142. *Id.* at 14.

143. *Id.*

144. *Id.* at 13 n.62 (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978)).

145. *Id.* at 14 (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540 (1992)).

146. *Id.* The majority acknowledged that this standard makes it possible for an employer to establish special circumstances warranting a prohibition of employee use of an employer-owned email system for protected activities, but viewed such circumstances as a "rare case." *Id.*

147. *Id.* The Board also clarified that employers continue to possess the ability to monitor their email systems for legitimate business reasons without being vulnerable to allegations that they unlawfully surveilled employees' protected activities. *Id.* at 15–16 ("[T]hose who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them." (quoting *Eddyleon Chocolate Co.*, 301 N.L.R.B. 887, 888 (1991))).

148. *Id.* at 16–17. The Board applies new standards retroactively unless doing so will cause a "manifest injustice." *Id.* at 16 (quoting *Pattern Makers (Michigan Model Mfrs.)*, 310 N.L.R.B. 929, 931 (1993)).

149. *Id.* at 17.

pending.¹⁵⁰ As a result, no Court of Appeals has yet had occasion to address the Board's *Purple Communications* holding.¹⁵¹

Dissenting Member Philip Miscimarra began by attacking the majority's refusal to consider how other forms of electronic communication have changed interpersonal communications.¹⁵² He also asserted that evaluation of alternatives is appropriate beyond non-employee access cases based on the manner in which the Board and the Supreme Court have balanced interests in the past.¹⁵³ He noted that the majority's argument on this point was particularly wanting because it relied on the premise that activities at the workplace were especially valuable but discounted other means of communication such as text messaging and social media.¹⁵⁴

Miscimarra then argued that, because the majority had overvalued the importance of access to employer-owned email systems to employees' Section 7 rights, its balancing of employer property rights and employee rights was fundamentally flawed.¹⁵⁵ He noted that the Board had recently decided many cases in which employees, without a statutory right to use their employers' email systems, had nonetheless utilized other technological developments to further protected activities.¹⁵⁶ Miscimarra

150. The administrative law judge found on March 16, 2015 that special circumstances justifying the employer's rule did not exist, and thus that it violated Section 8(a)(1) of the Act by maintaining these rules. *Purple Commc'ns, Inc.*, No. 21-CA-095151, 2015 WL 1169344 (N.L.R.B. Div. of Judges Mar. 16, 2015). The parties filed exceptions and cross-exceptions with the Board, and the final briefs regarding these exceptions were filed on July 7, 2015. *Docket Activity*, NLRB.GOV, <https://www.nlr.gov/case/21-CA-095151> [<https://perma.cc/G29B-3RRS>]. The Board has not yet issued a decision regarding these exceptions. *Id.*

151. The *Purple Communications* decision has, however, been applied to other Board cases, one of which may reach a Court of Appeals before *Purple Communications* does. One such case was decided on August 27, 2015. *UPMC*, 362 N.L.R.B. No. 191 (2015). *UPMC*, extending *Purple Communications* to the healthcare industry and appearing to represent a strong candidate case, is currently pending a motion for reconsideration filed by the employer to the Board on October 2, 2015. *Docket Activity*, NLRB.GOV, <https://www.nlr.gov/case/06-CA-081896> [<https://perma.cc/ZAP3-VXMG>]. However, even multiple adverse rulings from the courts of appeals will not alter regional office charge investigations, administrative law judge decisions, or Board adjudications, until and unless either the Supreme Court or the Board itself alters the *Purple Communications* standard. *See Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 616 (1963).

152. *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, at 18 (Dec. 11, 2014) (Miscimarra, Member, dissenting).

153. *Id.* at 20. Member Miscimarra relied particularly on the balancing of interests conducted by the Supreme Court in both *Republic Aviation* and in *Beth Israel*. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 489–90 (1978) (upholding employee rights to engage in protected activities in cafeteria, in part, because employee locker rooms provided insufficient opportunities to exercise rights).

154. *Purple Commc'ns, Inc.*, at 21 n.29.

155. *Id.* at 22–24.

156. *Id.* at 22–23 (citing *Triple Play Sports Bar & Grille*, 361 N.L.R.B. No. 31 (2014) (employee used Facebook); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (2012) (same); *Laurus Tech.*

also pointed to the power of social media, video websites, and mobile devices in the Arab Spring uprisings.¹⁵⁷

He then turned to the importance of employers' property rights, criticizing the majority's assertions that employees' emails impose few costs on employers as "the perspective of someone who misunderstands the nature of property rights or is determined to disregard them."¹⁵⁸ He likened the majority's standard to a requirement that any employer maintaining a company car must permit its employees to take the car wherever they wish.¹⁵⁹

Finally, Miscimarra emphasized that the 1937 Supreme Court case that established the Act's constitutionality relied on a balancing of employees' collective action and employers' property rights.¹⁶⁰ Even then, he argued, the Court validated the Act because the statute, "instead of being an invasion of the constitutional rights of either [employers or employees], was based on the recognition of the rights of both."¹⁶¹

Member Miscimarra concluded his argument by objecting that the Board's new standard would be difficult for all parties to administer and understand, particularly with regard to "working time" and "work[ing] area" requirements.¹⁶² Based upon all of these considerations, Miscimarra asserted that "the Board cannot reasonably conclude . . . given the current state of electronic communications[,] that an employer-maintained email system devoted exclusively to business purposes constitutes an 'unreasonable impediment to self-organization.'"¹⁶³

Member Johnson's dissent expanded even further on Member Miscimarra's reliance on other forms of electronic communications available to employees.¹⁶⁴ However, Johnson also made an argument that

Inst., 360 N.L.R.B. No. 133 (2014) (employee used text messages); *Salon/Spa at Boro, Inc.*, 356 NLRB 444 (2010) (same).

157. *Id.* at 23 (citing Philip N. Howard et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?* 8–13 (Project on Info. Tech. & Pol. Islam, Working Paper no. 2011.1, 2011), <http://philhoward.org/opening-closed-regimes-what-was-the-role-of-social-media-during-the-arab-spring/>).

158. *Id.* at 23–24.

159. *Id.* at 24.

160. *Id.* (discussing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

161. *Id.* (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. at 33–34).

162. *Id.* at 24–26.

163. *Id.* at 28 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 n.6 (1945)).

164. *Id.* at 29 (Johnson, Member, dissenting) ("The question presented here is whether the [Act] requires an employer to surrender possession and control of *its own email network* so that employee communications about [protected] activities related to their employment, may be made as a matter of right across that network *at any time*, effectively including *on working time* paid for by the employer, even when . . . there are *multiple other* electronic communications networks that employees could use

Miscimarra had not explicitly articulated: that the electronic communications environment had changed significantly since *Register Guard*.¹⁶⁵

Johnson relied on a variety of statistics in support of his assertion that “[s]ince *Register Guard* issued in 2007, there has been [a] dramatic change in how individuals communicate with each other.”¹⁶⁶ He pointed out, for example, that significant changes in device utilization had taken place.¹⁶⁷ Mobile phones were owned by 90 percent of Americans by 2014, at which point 58 percent owned smartphones and 42 percent owned tablet computers.¹⁶⁸ Furthermore, smartphone ownership was expected to increase to 68 percent by 2017.¹⁶⁹

Similarly, Johnson noted that personal email accounts allow for virtually unlimited messaging and mass emailing capacities.¹⁷⁰ Users utilize these capacities on an extremely regular basis, as shown by the 87.6 billion personal emails sent per day worldwide.¹⁷¹ Consequently, “people have at least an equal opportunity to use email in their personal lives as they do in their professional ones.”¹⁷²

for such kinds of statements and discussions on their own time, including employees’ own personal email . . .”).

165. *Id.* at 30 (arguing that the majority “failed to consider the revolutionary social networking developments that have occurred since *Register Guard* issued, which make access to employer email systems even more unnecessary for employees to engage in Section 7 activity.”).

166. *Id.* at 41.

167. *Id.* at 40.

168. *Id.* (citing *Mobile Technology Fact Sheet*, PEW RESEARCH CTR. (June 9, 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> [https://perma.cc/R5TC-TDY6]).

169. *Id.* (citing INT’L DATA CORP., ALWAYS CONNECTED FOR FACEBOOK (2013), https://www.idc.com/prodserv/custom_solutions/download/case_studies/PLAN-BB_Always_Connected_for_Facebook.pdf [https://perma.cc/KXR2-RPYZ]).

170. *Id.* Johnson specifically noted that each of the three major personal email providers provided vast amounts of free storage space. Microsoft, for example, provided 15 gigabytes of free document storage at the time. *Id.* (citing MICROSOFT, <https://onedrive.live.com/about/en-us/plans/>). As of January 2016, the website claimed that Microsoft provided a full terabyte of storage. *See* MICROSOFT, <https://onedrive.live.com/about/en-us/plans/> (last visited Jan. 16, 2016 11:18 AM). Yahoo! already provided a terabyte at the time of the decision. *Purple Commc’ns, Inc.*, at 40 (citing YAHOO!, <https://overview.mail.yahoo.com>). Meanwhile, Google provided 15 gigabytes of free email storage. *Id.* (citing GOOGLE, <https://www.google.com/settings/storage>). Each gigabyte, he explained, facilitates 62,782 pages of word processor format text and 100,099 pages of email file format. *Id.* (citing *How Many Pages in a Gigabyte?*: LEXIS/NEXIS, https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf).

171. *Purple Commc’ns, Inc.*, at 40 (citing THE RADICATI GRP., INC., *supra* note 128, at 2–3). Johnson emphasized that the majority had cited this report as evidence of the extensive use of business emails (109 billion emails per day), but that the number of personal emails sent per day is nearly as large. *Id.*

172. *Id.* at 41.

Furthermore, while less than 10% of adult Internet users utilized social media in 2005, that figure had ballooned to 72% by September 2013.¹⁷³ The total number of social media accounts had reached 3.6 billion in 2014, and is expected to reach 5.2 billion accounts by the end of 2018.¹⁷⁴ Johnson described social media websites such as Facebook, LinkedIn, and Twitter as “gigantic,”¹⁷⁵ citing examples such as the 17 million Facebook posts related to the 2014 ALS “ice bucket challenge,”¹⁷⁶ LinkedIn’s 300 million members,¹⁷⁷ and the 271 million monthly active Twitter users.¹⁷⁸ Furthermore, 42 percent of social media users utilize multiple platforms.¹⁷⁹ He also pointed to the extensive use that unions have made of social media as an organizational tool as evidence of the effectiveness of social media for protected activities.¹⁸⁰ Consequently, Johnson asserted that “most employees *already* have access to technology which they can use to communicate with one another about protected concerted activity without needing to use their employer’s business email system.”¹⁸¹

Johnson further disputed the majority’s dismissal of these other communication platforms on the basis that employees may be “virtual strangers” with one another.¹⁸² Not only do social media websites allow users to search for others, but sites such as Facebook and LinkedIn also use complex algorithms that enhance search capabilities and suggest

173. *Id.* (citing *Social Networking Fact Sheet*, PEW RESEARCH CTR. (Jan. 2014), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet> [<https://perma.cc/VVE9-Q4TP>]).

174. *Id.* (citing THE RADICATI GRP., INC., *supra* note 128).

175. *Id.*

176. *Id.* at 41 n.30 (citing *The Ice Bucket Challenge on Facebook*, FACEBOOK (Aug. 18, 2014), <http://newsroom.fb.com/news/2014/08/the-ice-bucket-challenge-on-facebook> [<https://perma.cc/GME6-SMNV>]).

177. *Id.* (citing LINKEDIN, <http://www.linkedin.com/about-us> (last visited by Johnson Sept. 15, 2014)). Consistent with Johnson’s point that these technologies will continue to grow, the LinkedIn website, as of January 2016, had been updated to claim 400 million members. LINKEDIN, <http://www.linkedin.com/about-us> (last visited Jan. 14, 2016 7:47 PM).

178. *Purple Commc’ns, Inc.*, at 41 n.30 (citing TWITTER, <https://about.twitter.com/company> (last visited by Johnson Sept. 15, 2014)). As with LinkedIn, Twitter usage has continued to grow. As of January 2016, the Twitter website stated that Twitter had 321 million monthly active users. TWITTER, <https://about.twitter.com/company> (last visited Jan. 14, 2016 7:58 PM).

179. *Purple Commc’ns, Inc.*, at 41 (citing MAEVE DUGGAN & AARON SMITH, PEW RESEARCH CTR., *SOCIAL MEDIA UPDATE 2013 1–2* (2013), http://www.pewinternet.org/files/2013/12/PIP_Social-Networking-2013.pdf).

180. *Id.* at 42 (citing Robert Quackenboss, *Technology: Friending the Unions*, INSIDE COUNSEL (Apr. 20, 2012), <http://www.insidecounsel.com/2012/04/20/technology-friending-the-unions>).

181. *Id.* at 41. Johnson subsequently noted the increased role of text messages in communications, noting that 81% of mobile phone users sent or received text messages as of May 2013. *Id.* at 42 (citing *Mobile Technology Fact Sheet*, PEW RESEARCH CTR., <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> [<https://perma.cc/R5TC-TDY6>]). Elsewhere, he asserted that personal email accounts perform a similar function. *Id.* at 40–41.

182. *Id.* at 55–56.

potential connections.¹⁸³ Importantly, users can easily search for one another by the “employer” field on these sites.¹⁸⁴

Johnson, in addition to advancing the argument that circumstances had changed since *Register Guard* and expanding on many of Member Miscimarra’s points,¹⁸⁵ also addressed the “reasonable alternative means” issue in a section entitled, “The Role of Alternative Means of Communication: The Majority’s Dispute with Me, and Why They Are Wrong.”¹⁸⁶ He first explained that his emphasis on other means of communication did not refer to a reasonable alternative means test in the vein of non-employee access cases.¹⁸⁷ Instead, alternative means constitute essential aspects of the balancing test endorsed by *Republic Aviation*.¹⁸⁸

Second, Johnson argued that *Republic Aviation*’s consideration of “the availability of alternative areas [of communication of the facility] in which § 7 rights effectively could be exercised” suggests that such analysis is appropriate in weighing employees’ rights.¹⁸⁹ Johnson then distinguished cases cited by the majority purporting to hold to the contrary.¹⁹⁰ While he agreed with the majority that employees need not show that solicitation or

183. *Id.* at 41.

184. *Id.* (citing *Creating a Killer LinkedIn Profile: Tips from Link Humans*, LINKEDIN OFFICIAL BLOG (July 1, 2014), <http://blog.linkedin.com/2014/07/01/creating-a-killer-linkedin-profile-tips-from-link-humans>).

185. Johnson elaborated on Miscimarra’s argument that employee use of employer-owned email systems for personal purposes infringes on employers’ property rights. He pointed out that email discussions are not analogous to “water cooler” discussions because emails, which may arrive at any time while an employee is working, can materially interfere with productivity. *Id.* at 31–34. He also asserted that the Board’s equipment cases must apply, and that employee convenience does not require a contrary conclusion. *Id.* at 34–36. Johnson compared the majority’s rationale to “adverse possession through . . . work usage.” *Id.* at 36. Additionally, he viewed the fact that personal emails can be authored and received on working time as fundamentally bearing on the interference with employers’ property rights within the balancing test due to *Republic Aviation*’s affirmation that “working time is for work.” *Id.* at 49–51 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945)). Furthermore, he asserted that, by requiring employers to “subsidize hostile speech,” that the majority’s holding violated the First Amendment. *Id.* at 56–59. Finally, Johnson strongly emphasized many of the practical workability issues identified by Miscimarra’s dissent. *Id.* at 59–60.

186. *Id.* at 51.

187. *Id.* at 52.

188. *Id.* (citing *Republic Aviation*, 324 U.S. at 802).

189. *Id.* (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 506 (1978)). The Board, in the consolidated *LeTourneau* case, 54 N.L.R.B. 1253 (1944), reasoned that the location and layout of the employer’s facility made off-site solicitation very difficult. *Id.* at 1260–61.

190. *Purple Commc’ns, Inc.*, at 53. Johnson focused on Justice Brennan’s statement in *Beth Israel* that “outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry.” *Id.* (quoting *Beth Israel*, 437 U.S. at 505). Johnson noted that this statement did not pertain to physical spaces. *Id.* More importantly, the Supreme Court’s analysis in *Beth Israel*, *Republic Aviation*, and other cases cited by the majority all take the overall context of employees’ abilities to exercise Section 7 rights into account. *Id.* at 53–54.

distribution off of their employer's property would be "ineffective" in order for the balance to tip in their favor, "that does not answer the question presented, for various reasons, including that this case does not involve solicitations or distributions in physical space."¹⁹¹

As a result, Johnson viewed the further growth of mobile devices, personal email, text messaging, and social media as weighing heavily in favor of finding that the balance of interests tips in favor of employers' property rights.¹⁹² He concluded, in a forceful echo of the criticisms leveled against the *Register Guard* majority, by arguing:

My colleagues accuse the *Register Guard* majority of being Rip Van Winkle. But, in ignoring all the changes in social media since *Register Guard*, we need to ask who is the Rip Van Winkle here. . . . The Board should get with the present, and concern itself with protecting Section 7 rights on that new [technological] frontier. It should not be burning up government resources and its claim to institutional deference by refighting a war over terrain that indisputably no longer matters today to Section 7¹⁹³

IV. CHANGES IN TECHNOLOGY USAGE SINCE 2007

The *Purple Communications* majority and *Register Guard* dissent both correctly argued that email has drastically changed the nature of interpersonal communications.¹⁹⁴ While communications have been characterized by telephones, traditional mail, and fax machines for most of the Act's history, the rise of email during the last quarter century truly has "revolutionized" the manner in which all Americans, including coworkers, communicate with one another.¹⁹⁵

However, as Members Miscimarra and Johnson explained, the revolution has continued to evolve since 2007.¹⁹⁶ As the *Purple Communications* majority acknowledged, "technological changes are continuing; indeed, they are accelerating."¹⁹⁷ Evidence of these developments can be found throughout modern society. One reflection of continued technological change can be found in the development of the

191. *Id.* at 55.

192. *Id.* at 61.

193. *Id.*

194. *Id.* at 6; *Register Guard*, 351 N.L.R.B. 1110, 1121 (2007) (Liebman & Walsh, Members, dissenting).

195. *Register Guard*, 351 N.L.R.B. at 1121 (Liebman & Walsh, Members, dissenting).

196. *Purple Commc'ns, Inc.*, at 18–41.

197. *Id.* at 17.

American Management Association study relied upon by the *Register Guard* dissenters.¹⁹⁸ The 2004 version of the study focused exclusively on email and instant messaging.¹⁹⁹ However, the 2009 version of the same study addressed social media, Twitter, blogs, smartphones, texting, video sharing, and personal email, in addition to business email and instant messaging.²⁰⁰

Personal email provides the avenue for protected activities that is most directly comparable to employer-owned email. As Member Johnson noted, the sheer volume of personal emails sent or received per day, 87.6 billion, is staggering.²⁰¹ This volume reflects a sharp growth in the utilization of personal email spanning the time periods before and after *Register Guard*.²⁰² Furthermore, the average consumer now maintains 3.9 personal email accounts, more than twice as many as the average number of business email accounts (1.7).²⁰³ Consumers log into personal email accounts 3.8 times per day.²⁰⁴ Given the extensive role of personal email in modern life, it seems disingenuous to argue that employees must have access to *their employer's* email system in order to effectively exercise their Section 7 rights.

However, even if personal email accounts are insufficient, numerous other platforms for interpersonal electronic communications have grown explosively in recent years. Text messaging provides one such example. While 58 percent of cell phone owners used those phones for text

198. AM. MGMT. ASS'N & EPOL'Y INST., 2004 WORKPLACE E-MAIL AND INSTANT MESSAGING SURVEY SUMMARY (2004), <http://www.epolicyinstitute.com/2004-workplace-e-mail-and-instant-messaging-survey-summary> [https://perma.cc/8L5P-XTM2].

199. *Id.*

200. AM. MGMT. ASS'N & THE EPOL'Y INST., 2009 ELECTRONIC BUSINESS COMMUNICATION POLICIES & PROCEDURES SURVEY (2009), <http://www.epolicyinstitute.com/2009-electronic-business-communication-policies-procedures-survey-results> [https://perma.cc/M3VR-9NGT]. The organization's website states that it "anticipate[s] conducting our next [survey] in 2015," but 2015 results have not been released as of the date of this writing. *American Management Association/ePolicy Institute Surveys*, AM. MGMT. ASS'N & THE EPOL'Y INST., <http://www.epolicyinstitute.com/american-management-association-surveys> [https://perma.cc/4HZZ-MQ86].

201. *Purple Commc'ns, Inc.*, at 40 (Johnson, Member, dissenting) (citing THE RADICATI GRP., INC., *supra* note 128).

202. Approximately 55 percent of online Americans used email in 2002, and 49 percent of those people did so every day. Those numbers increased to 70 percent and 60 percent, respectively, by 2011. Kristen Purcell, *Search and Email Still Top the List of Most Popular Online Activities*, PEW RESEARCH CTR. (Aug. 9, 2011), <http://www.pewinternet.org/2011/08/09/search-and-email-still-top-the-list-of-most-popular-online-activities/> [https://perma.cc/MWS5-G5G6].

203. BLUEHORNET, BLUEHORNET REPORT: 2014 CONSUMER VIEWS OF EMAIL MARKETING 5 (2015), http://www.bluehornet.com/wp-content/uploads/2014-BH-Consumer-Views-Report_02.pdf.

204. *Id.*

messaging in 2007, that number had grown to 80 percent by 2012.²⁰⁵ Messaging apps such as WhatsApp, SnapChat, and Livetext offer other platforms through which individuals can communicate quickly and easily.²⁰⁶ Even employees who work at distant facilities can now engage in virtually face-to-face conversations through videochat platforms such as Skype, FaceTime, and ooVoo.²⁰⁷

Perhaps even more importantly, social media has become ubiquitous in recent years. Johnson provided many statistics showing this growth and the massive presence established by social media sites.²⁰⁸ Additionally, the Pew Research Center issued a new report in 2015 detailing the growth of social media since 2005.²⁰⁹ This report shows that, while only 7 percent of American adults used social media in 2005, 65 percent did so in 2015.²¹⁰ Furthermore, social media usage will almost certainly continue trending upwards amongst the working population due to major differences between demographic groups. The proportion of Americans between the ages of 18 and 29 who used social media in 2015 was 90 percent, while 77 percent of those between 30 and 49 did so.²¹¹ However, those who are currently aged 50–64, and will thus soon reach retirement age, only used social media at a rate of 51 percent in 2015.²¹²

205. Maeve Duggan & Lee Rainie, *Cell Phone Activities 2012*, PEW RESEARCH CTR. (Nov. 25, 2012), <http://www.pewinternet.org/2012/11/25/cell-phone-activities-2012/> [https://perma.cc/AJ45-RJ89].

206. The Pew Research Center reports that 36 percent of smartphone users utilized such apps as of April 2015. *Messaging Apps Appeal to Smartphone Owners*, PEW RESEARCH CTR. (Aug. 17, 2015), http://www.pewinternet.org/2015/08/19/mobile-messaging-and-social-media-2015/2015-08-19_social-media-update_01/ [https://perma.cc/D2J6-HUPB]. This study also reported a feature of such apps that should be particularly interesting to employees concerned that their employers will discover their protected activities: 17 percent of smartphone users use apps that delete messages upon reading. *Id.*

207. The Pew Research Center reported in 2010 that 19 percent of Americans had video chatted. Lee Rainie & Kathryn Zickuhr, *Video Calling and Video Chat*, PEW RESEARCH CTR. (Oct. 13, 2010), <http://www.pewinternet.org/2010/10/13/video-calling-and-video-chat/> [https://perma.cc/632N-L899]. Since that time, video chat providers have continued to grow. Skype, for example, set a record (based on numbers publicly viewable in its application) in 2011 by having 27 million users online simultaneously. Vlad Savov, *Skype Hits New Record of 27 Million Simultaneous Users in Wake of iOS Video Chat Release*, ENGADGET (Jan. 11, 2011), <http://www.engadget.com/2011/01/11/skype-hits-new-record-of-27-million-simultaneous-users-in-wake-of/> [https://perma.cc/6F23-B38L]. That record had grown to 50 million by 2013. Jean Mercier, *50 Million Concurrent Users Online!*, SKYPE NUMEROLOGY (Jan. 21, 2013, 8:19 PM), <http://skypenumerology.blogspot.se/2013/01/50-million-concurrent-users-online.html> [https://perma.cc/G49P-FP2U].

208. *See supra* notes 173–80 and accompanying text.

209. Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RESEARCH CTR. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> [https://perma.cc/QH35-XHP7].

210. *Id.*

211. *Id.*

212. *Id.* To the extent that many individuals over age 65 continue to work, it is noteworthy that only 35% of that age group's members used social media in 2015. *Id.*

Social media platforms also provide many features that are useful for organizing purposes, which email systems simply cannot match.²¹³ A video of a union rally, for example, could be both posted on Facebook and sent to coworkers via email. The video sent via email may be deleted immediately. However, the video posted on Facebook will appear on the employee's News Feed, even if the employee has logged onto Facebook for reasons completely unrelated to work. In fact, if the employee's "autoplay" feature is enabled (per Facebook's default settings), the video will begin playing (without audio), even if the employee has not clicked on it.²¹⁴

Furthermore, smartphone utilization has also grown significantly in recent years.²¹⁵ The proportion of American adults who own smartphones reached 64 percent in 2015, a major increase from the 35 percent who did so in 2011.²¹⁶ Similar to social media, those who have the longest remaining careers ahead of them are the most likely to own a smartphone.²¹⁷ Smartphones now permeate virtually all aspects of society, with many Americans using them for purposes such as finding medical information, banking, reviewing real estate listings, job searches, pursuing government services, and education.²¹⁸ In fact, many employers now actually require that employees have their personal smartphones at work through "Bring Your Own Device" policies.²¹⁹

Smartphones are especially important because they provide a sort of multiplier effect to the importance of other forms of electronic communication by allowing all of them to be used anywhere the owner goes. Smartphones are used to send and receive personal email by 82.4

213. See, e.g., *10 Features That Made Facebook the Most Used Social Media Site*, VENTURE CAPITAL POST (Sept. 25, 2014, 11:29 PM), <http://www.vcpost.com/articles/27824/20140925/10-features-made-facebook-used-social-media-site.htm> [<https://perma.cc/P93Z-UNYM>].

214. See *I See Videos Playing Silently When I Scroll Through News Feed. How Does This Work with My Mobile Data Plan?*, FACEBOOK, <https://www.facebook.com/help/633446180035470> [<https://perma.cc/7Y49-BEQD>].

215. See AARON SMITH, PEW RESEARCH CTR., U.S. SMARTPHONE USE IN 2015 (2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/> [<https://perma.cc/RS9T-PFBC>].

216. *Id.* at 2.

217. Americans aged 18–29 own smartphones at a rate of 85%, and 79% of those aged 30–49 do so. Meanwhile, only 54% of Americans aged 50–64 own them, and only 27% of those over age 65 use smartphones. *Id.* at 13.

218. *Id.* at 5.

219. Melinda L. McLellan et al., *Wherever You Go, There You Are (With Your Mobile Device): Privacy Risks and Legal Complexities Associated with International "Bring Your Own Device" Programs*, 21 RICH. J.L. & TECH. 1 (2014); Raphael Rajendra, *Employee-Owned Devices, Social Media, and the NLRA*, 30 A.B.A. J. LAB. & EMP. L. 47 (2014).

percent of their owners, to send and receive texts by 90.6 percent, and to participate in social media by 66.6 percent.²²⁰

All of these developments show that communication through means other than business email has changed significantly since 2007. Changes of this magnitude lend a great deal of credence to Johnson's assertion that the "turf" of employer-owned email systems "has grown even more nonessential to Section 7 rights."²²¹

V. THE RELEVANCE OF ALTERNATIVE MEANS OF COMMUNICATION

The *Purple Communications* majority, while acknowledging that it engaged in a balancing of employees' Section 7 rights with employers' property rights,²²² also asserted that alternative means of communication are irrelevant to that analysis.²²³ Instead, the majority accused the *Register Guard* Board and the *Purple Communications* dissent of applying a reasonable alternative means analysis that is only appropriate for non-employee access.²²⁴ The majority's support for this proposition appears suspect when the Supreme Court cases that it relied upon are examined more closely. Johnson offered two reasons to reject the majority's refusal to consider alternative means of communication.²²⁵

First, he argued that Justice Brennan's statement in *Beth Israel* had "no bearing on the argument here" because it pertained to face-to-face interactions in physical space.²²⁶ Johnson may have overreached in this characterization of Supreme Court precedent. This history must, as a matter of *stare decisis* and judicial hierarchy, have at least some bearing on the Board's decision-making, even in cases involving novel issues.²²⁷ However, Johnson's overall point that this issue requires a fresh look at the balance of interests does appear to be sensible due to the rapidly evolving nature of electronic communications.²²⁸

220. See *supra* note 203, at 21.

221. *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, at 61 (2014) (Johnson, Member, dissenting).

222. *Id.* at 14 (concluding that the framework adopted is "consistent with . . . our obligation to accommodate the competing rights of employers and employees").

223. See *supra* notes 143–45 and accompanying text.

224. See *supra* note 145 and accompanying text.

225. See *supra* notes 186–91 and accompanying text.

226. *Purple Communications*, at 53 (Johnson, Member, dissenting).

227. Furthermore, the Board has successfully applied traditional approaches to the electronic world in other contexts. See, e.g., *Three D, LLC*, 361 N.L.R.B. No. 31 (Aug. 22, 2014); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (Dec. 14, 2012). (applying traditional analytical framework for retaliation to cases involving protected activities on social media).

228. The Board has not hesitated to re-engage in this balance of interests regarding other topics, such as off-duty and off-site employee access. See *Tri-County Med. Ctr.*, 222 N.L.R.B. 1089 (1976)

Johnson's second response, that existing Supreme Court precedent does not rule out consideration of alternative means of engaging in Section 7 activities, is an even stronger argument. The Supreme Court has never held that alternative means of engaging in protected activities are irrelevant to the balance of employers' and employees' interests. Most notably, Justice Brennan's statement that "alternative means of communication is not, with respect to employee organizational activity, a *necessary* inquiry"²²⁹ is not the same as holding that it is an *improper* inquiry.

Additionally, Justice Brennan's statement relied upon the comment by the Supreme Court in *Babcock & Wilcox* that "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves."²³⁰ However, *Babcock & Wilcox* pertained to non-employee access, and this statement only illustrated the importance of the distinction between employees and non-employees.²³¹ Thus, the relied-upon statement was dictum. Furthermore, this statement in *Babcock & Wilcox* relied upon a portion of *Republic Aviation* that merely expressed the Court's approval of the Board's balancing of interests, arriving at the "working time is for work" maxim of *Peyton Packing*.²³²

Finally, the manner in which the Supreme Court has analyzed cases shows that alternative means do matter. *Beth Israel* itself, for example, considered the inadequacy of employee locker rooms for protected activities in upholding the right to engage in those activities in the cafeteria.²³³ *Babcock & Wilcox* proclaimed, in a statement necessary to its holding, that the balancing of interests requires "as little destruction of one as is consistent with the maintenance of the other."²³⁴ The extent to which one interest is destroyed, and another maintained, necessarily implicates the alternative means of maintaining each party's interest. Likewise, the Supreme Court approved the Board's reliance on the absence of other means to engage in protected activities in *Republic Aviation*.²³⁵ These

(balancing interests in test for off-duty employee access); First Healthcare Corp. (Hillhaven Highland House), 336 N.L.R.B. 646, 648 (2001) (balancing interests in rationale regarding off-site employee access).

229. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978) (emphasis added).

230. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

231. *See id.*

232. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

233. *Beth Israel*, 437 U.S. at 489–90.

234. *Babcock & Wilcox*, 351 U.S. at 112.

235. 324 U.S. at 803 n.10.

examples provide significant support for the dissenting members' positions that alternative means should be considered.²³⁶

However, even putting Johnson's arguments aside, it is nonsensical to suggest that competing interests can be weighed without consideration of the alternatives. Both employees' Section 7 rights and employers' property rights must, in some manner, be assessed a value in the decision-maker's mind in order to be compared to one another. It is impossible to assign a value to anything without reference to its alternatives. In fact, the consideration of alternatives constitutes the fundamental concept of "opportunity cost," a basic principle of economic theory.²³⁷ Furthermore, any item's value is based primarily on other buying opportunities available to its buyers (supply), and other selling opportunities available to its sellers (demand).²³⁸ These principles apply not only to the economic realm, but also to all decision-making processes.²³⁹ As a result, in order to weigh employees' Section 7 rights against employers' property rights, consideration of employees' other means to engage in protected activities is both logical and necessary.

The majority's refusal to consider other forms of electronic communications in *Purple Communications* thus stands in stark contrast to the vehement complaints of the *Register Guard* dissent,²⁴⁰ unions,²⁴¹ and pro-labor academics²⁴² that *Register Guard* demonstrated a failure to adapt to changing circumstances. The justifications that the Board offered for minimizing the importance of other forms of electronic communication further highlighted this contrast because its reasoning ignored some of the essential capabilities of these tools.

The majority's emphasis on the ability to engage in protected activities *in the workplace* seems to suggest that media such as personal email and social media cannot be accessed at work.²⁴³ However, employees can log

236. It should also be noted that other cases cited by the majority in support of its position, *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) and *NLRB v. Baptist Hosp.*, 442 U.S. 773 (1979), both asked the Supreme Court to draw lines between working and nonworking areas in particular industries. As Member Johnson explained, this exercise "inherently incorporates a consideration of alternative means of communication (e.g. distribution in nonwork areas only versus distribution throughout premises)." *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, at 54 (Dec. 11, 2014) (Johnson, Member, dissenting).

237. PAUL KRUGMAN & ROBIN WELLS, *MICROECONOMICS* 7–8 (2d ed. 2009).

238. *Id.* at 79–82.

239. See, e.g., EUGENE BARDACH, *A PRACTICAL GUIDE FOR POLICY ANALYSIS: THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING* 15–25 (2d ed. 2005) (describing the importance of alternative options to effective policymaking processes).

240. See *supra* note 97 and accompanying text.

241. See *supra* notes 104–05.

242. See *supra* notes 106–08.

243. See *supra* notes 136–38 and accompanying text.

on to these accounts without using a business email system and, more and more commonly, can do so on their own smartphones.²⁴⁴ Likewise, as Johnson pointed out, the Board’s assertion that employees might be “virtual strangers”²⁴⁵ with one another ignores the significant search capabilities offered by social media websites and common search engines.²⁴⁶

The majority concluded its opinion in *Purple Communications* by declaring:

The *Register Guard* dissenters viewed the decision as confirming that the Board was **“the Rip Van Winkle of administrative agencies,”** by **“fail[ing] to recognize that e-mail ha[d] revolutionized communication both within and outside the workplace”** and by unreasonably contending **“that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper.”** . . . In overruling *Register Guard*, we seek to make **“[n]ational labor policy . . . responsive to the enormous technological changes that are taking place in our society.”**²⁴⁷

However, the development of other forms of electronic communications in the interim means that the majority’s rationale, which would have been far more convincing in 2007, is not reflective of more recent circumstances. As a result, in its attempt to stay modern and relevant, the Board got its wires crossed and actually failed to adjust to changes in circumstances between 2007 and December 2014.²⁴⁸

244. See *supra* notes 214–19 and accompanying text.

245. See *supra* notes 139–40 and accompanying text.

246. See *supra* notes 182–83 and accompanying text.

247. *Purple Commc’ns, Inc.*, 361 N.L.R.B. No. 126, at 17 (Dec. 11, 2014) (quoting *Register Guard*, 351 N.L.R.B. 1110, 1121 (2007)).

248. This Note expresses no opinion regarding whether the Board’s 2007 *Register Guard* decision was correct given the circumstances of the time. *Register Guard* dissenting Members Liebman and Walsh may well have been correct in their argument that access to employer-owned email was necessary because it offered characteristics that, at the time, were “unique” and “sophisticated.” *Register Guard*, 351 N.L.R.B. at 1125. On the other hand, the *Register Guard* majority may have correctly concluded that “e-mail has not changed the pattern of industrial life . . . to the extent that . . . employee use of [employers’] e-mail system[s] for Section 7 purposes must . . . be mandated.” *Id.* at 1116. Regardless of which perspective better reflected the realities of the workplace in 2007, this Note argues only that the growth of personal electronic communications between 2007 and 2014 tipped the scales much further towards protection of property rights.

CONCLUSION

Future developments in this area, including possible reversal of *Purple Communications*, will depend on the views of the federal courts and the political composition of the Board. Any such reversal would likely cite the evolving role of technology in the personal and work lives of Americans. Reliance on trends such as extensive use of personal email, text messaging, video chatting, social media, and smartphones would be justified based on recent societal developments. For now, the Board's refusal to consider major recent technological changes stands, and represents a failed attempt to show adaptability.

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* J.D. (2017), Washington University in St. Louis; M.P.P. (2010) University of California, Los Angeles; B.S. (2008) Cornell University; Field Examiner, National Labor Relations Board (2009–2014). I would like to thank the editors of the *Washington University Law Review*—particularly Steven J. Alagna, Ellis Herington, Tori Bliss, and Brittany Sanders—for their hard work and dedication to the process. Thank you also to my friends and family for their incredible support over the years. Special thanks to practitioners Rochelle Balentine and Daniel Begian for their valuable intellectual contributions. Please note that the views expressed in this Note—as well as all errors—are attributable solely to the author, and not to any other person, agency, or organization.