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Purple Communications, Inc. *and* Communications Workers of America, AFL–CIO. Cases 21–CA–095151, 21–RC–091531, and 21–RC–091584

December 11, 2014

DECISION AND ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

At issue in this case is the right of employees under Section 7 of the National Labor Relations Act to effectively communicate with one another at work regarding self-organization and other terms and conditions of employment.[1] The workplace is "uniquely appropriate" and "the natural gathering place" for such communications,[2] and the use of email as a common form of workplace communication has expanded dramatically in recent years. Consistent with the purposes and policies of the Act and our obligation to accommodate the competing rights of employers and employees, we decide today that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems. We therefore overrule the Board's divided 2007 decision in *Register Guard*[3] to the extent it holds that employees can have no statutory right to use their employer's email systems for Section 7 purposes.[4] We believe, as scholars have pointed out,[5] that the *Register Guard* analysis was clearly incorrect. The consequences of that error are too serious to permit it to stand. By focusing too much on employers' property rights and too little on the importance of email as a means of workplace communication, the Board failed to adequately protect employees' rights under the Act and abdicated its responsibility "to adapt the Act to the changing patterns of industrial life."[6]

Our decision is carefully limited. In accordance with longstanding Board and Supreme Court precedent, it seeks to accommodate employees' Section 7 rights to communicate and the legitimate interests of their employers.[7] First, it applies only to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide such access. Second, an employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline. Finally, we do not address email access by nonemployees, nor do we address any other type of electronic communications systems, as neither issue is raised in this case.

I. PROCEDURAL HISTORY

On October 24, 2013, Administrative Law Judge Paul Bogas issued the attached decision.[8] The Respond-

[1] Employees' exercise of their Sec. 7 rights "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491–492 (1978).

[2] *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978); *Beth Israel*, 437 U.S. at 505.

[3] *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

[4] The Respondent maintained an electronic communications policy limiting employee use of its email and other electronic systems to "business purposes only" and "specifically prohibit[ing]" certain uses by employees. Acknowledging that the Respondent's policy comports with current law, the General Counsel and the Charging Party ask the Board to overrule *Register Guard* and find that the Respondent's policy violates the Act.

[5] See, e.g., Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. Davis L. Rev. 1091, 1151 (2011) ("[T]he regulation of workplace discourse has become so far adrift that the NLRB now views e-mail as an affront to employer interests, rather than a low-cost, effective means for employees to exercise their right to collective action."); William R. Corbett, *Awakening Rip Van Winkle: Has the National Labor Relations Act Reached a Turning Point?*, 9 Nev. L.J. 247, 252 (2009) (*Register Guard* "elevated employers' property interests over employees' rights, and interpreted the NLRA in a restrictive way that threatens to make it irrelevant and obsolescent"); Christine Neylon O'Brien, *Employees On Guard: Employer Policies Restrict NLRA-Protected Concerted Activities On E-Mail*, 88 Ore. L. Rev. 195, 222 (2009) (*Register Guard's* "overemphasis on the employer's property interests at the expense of the employees' section 7 rights undermines the credibility of the majority opinion"); Dube, *Law Professors Speaking at ABA Conference Criticize NLRB's Register-Guard Decision*, BNA Daily Labor Report (May 6, 2008).

[6] *Hudgens v. NLRB*, 424 U.S. 507, 523 (1976) (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

[7] *Hudgens v. NLRB*, 424 U.S. at 521 ("Accommodation between employees' § 7 rights and employers' property rights . . . 'must be obtained with as little destruction of one as is consistent with the maintenance of the other'") (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). See also *Republic Aviation*, 324 U.S. 793, 803 fn. 10 (1945) (quoting *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943)).

[8] The judge's decision addressed the lawfulness not only of the electronic communications policy but also of a handbook rule prohibiting employees from "[c]ausing, creating or participating in a disruption of any kind during working hours on Company property." In addition, the judge addressed objections to elections at two of the Respondent's facilities based on the no-disruptions rule, the electronic communications policy, and various statements made by the Respondent's presi-

ent/Employer filed exceptions and a supporting brief, and the General Counsel filed an answering brief. In addition, the General Counsel filed limited exceptions and a supporting brief, the Union filed cross-exceptions and a supporting brief, and the Respondent/Employer filed an answering brief to each.

On April 30, 2014, the National Labor Relations Board issued a notice and invitation to the parties and interested amici curiae to file briefs. The notice requested that the parties and amici address specific questions concerning employees' use of their employer's email and other electronic communications systems for the purpose of communicating with other employees about union or other Section 7 matters. The Board's questions included the following:

- whether the Board should reconsider its conclusion in *Register Guard* that employees do not have a right to use their employer's email systems (or other electronic communications systems) for Section 7 purposes;
- what standard should apply if the Board were to overrule *Register Guard* and what restrictions could employers then place on employee access;
- to what extent and how the impact of employees' use of electronic communications technology on the employer should affect the issue;
- what effect employees' personal electronic devices, social media accounts, and personal email accounts should have on the balance between employees' and employers' rights; and
- what technological issues the Board should consider, including changes since the *Register Guard* decision.

The Board also requested that parties and amici submit empirical and other evidence. The General Counsel, the Charging Party, the Respondent, and various amici filed briefs in response to the Board's notice.[9]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. We remand the issue to the judge for him to reopen the record and afford the parties an opportunity to present evidence relevant to the standard we adopt today, and for the judge to prepare a supplemental decision containing findings of fact, conclusions of law, and a recommended Order, consistent with this Decision and Order.

II. FACTS

The Respondent provides sign-language interpretation services. Its employees, known as video relay interpreters, provide two-way, real-time interpretation of telephone communications between deaf or hard-of-hearing individuals and hearing individuals. The interpreters typically use an audio headset to communicate orally with the hearing participant on a call, leaving their hands free to communicate in sign language, via video, with the deaf participant. The interpreters work at 16 call centers that process calls on a nationwide, around-the-clock, "first come, first served" basis.

Since June 2012, the Respondent has maintained an employee handbook that contains its electronic communications policy. That policy states:

> INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY
>
> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by the [sic] Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.
>
> . . . .
>
> **Prohibited activities**
>
> Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:
>
> . . . .

dent/CEO. In *Purple Communications*, 361 NLRB No. 43 (2014), we severed and resolved all issues other than those implicating the electronic communications policy.

[9] The General Counsel and the Charging Party each filed an initial brief and a brief in response to amici's briefs. The Respondent filed a brief in response to the General Counsel's, the Charging Party's, and amici's briefs. Amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), Service Employees International Union (SEIU), labor law professor Jeffrey M. Hirsch, the United States Chamber of Commerce (Chamber of Commerce), the Council on Labor Law Equality (COLLE), a group of entities consisting of the Coalition for a Democratic Workplace and nine other amici ("CDW et al."), the Employers Association of New Jersey (EANJ), the Equal Employment Advisory Council (EEAC), the American Hospital Association (AHA), the Retail Litigation Center (RLC), the National Grocers Association (NGA), the Food Marketing Institute (FMI), the United States Postal Service (USPS), the Arkansas State Chamber of Commerce (ASCC), and the National Right to Work Legal Defense Foundation (NRTW). In addition, the Charging Party submitted a letter bringing new precedent to the Board's attention.

> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
>
> . . . .
>
> 5. Sending uninvited email of a personal nature.

The Respondent assigns its interpreters individual email accounts on its email system, and they use those accounts every day that they are at work. They are able to access their company email accounts on the computers at their workstations, as well as on computers in the call centers' break areas and on their personal computers and smartphones. The interpreters have access to the internet on the break-area computers but very limited access at their workstations. The record is sparse regarding the extent to which the interpreters have used the Respondent's email for nonbusiness purposes or have been disciplined for a violation of the electronic communications policy.

In the fall of 2012,[10] the Charging Party filed petitions to represent the interpreters that resulted in Board elections at seven of the Respondent's call centers. The Charging Party filed objections to the results at the Respondent's Corona and Long Beach facilities, including an objection asserting that the electronic communications policy interfered with the interpreters' freedom of choice in the election. The Charging Party also filed an unfair labor practice charge regarding the policy, leading to the issuance of the complaint allegation now before us.

III. THE JUDGE'S DECISION

The judge found the Respondent's electronic communications policy lawful under *Register Guard*, supra. Accordingly, he dismissed the General Counsel's allegation based on the electronic communications policy and overruled the Charging Party's related objection. The General Counsel and Charging Party filed exceptions.

IV. POSITIONS OF THE PARTIES AND AMICI

A. The General Counsel

Relying on the importance of employee discourse to the exercise of Section 7 rights and the increasingly entrenched use of email as the primary means of workplace discourse, the General Counsel argues that broad prohibitions on employees' personal use of electronic communications, although authorized by *Register Guard*, substantially interfere with Section 7 activity. The General Counsel therefore argues that the Board should overrule *Register Guard* and, applying the framework of *Republic Aviation*, 324 U.S. 793 (1945), hold that employees who use electronic communications systems for their work have a statutory right to use those systems during nonworking time for Section 7 purposes, absent a particularized showing of special circumstances regarding the employer's need to maintain production and discipline.

The General Counsel further argues that *Register Guard* erred in balancing employees' Section 7 rights against the employer's property interests, rather than its managerial interests, because employees permitted to use their employer's email systems are rightfully present on the employer's property; thus, under *Republic Aviation*, the employees' right to use those systems should be limited only as required by management interests in production and discipline.[11] In addition, the General Counsel contends, Board precedents regarding use of employer-provided equipment, on which *Register Guard* relied, involved materially different kinds of equipment, and their broad statements about employers' rights to prohibit employee use of the equipment were not necessary to their narrow holdings.

B. The Charging Party

The Charging Party argues that the Board should adopt a presumption that employees may access employer email or other communications systems to communicate about Section 7 matters if their employer generally allows them access to the system and uses it to communicate with them about wages, hours, or working conditions. The Charging Party would allow an employer to rebut the presumption by showing that it expressly limits use of the email system to specific and defined business purposes. The Charging Party also distinguishes solicitation from other Section 7 communications.

The Charging Party argues that *Register Guard* failed to recognize that the Board's equipment cases, by holding that employers could not preclude employee use for Section 7 reasons if they allowed such use otherwise, actually applied the framework of *Republic Aviation* and *Eastex*; accordingly, that framework should apply to email and other electronic communications systems.

The Charging Party contends that the Board should take account of the fact that email communication is often less time consuming or disruptive to work of the recipient than face-to-face discussion, less likely to crowd out production-related matter than bulletin board postings, and less likely than other technologies to involve incremental usage costs. Employers' controls over their communications systems that have a clearly stated business purpose and are strictly enforced and nondiscriminatory would be permissible under the Charging Party's

[10] All dates are in 2012 unless stated otherwise.

[11] See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

proposal. The Charging Party further argues that the availability of alternative means of communication among employees is not relevant to assessing the nature and strength of the employees' (as opposed to nonemployees') Section 7 rights.

C. The Respondent

The Respondent encourages the Board to retain *Register Guard* and adopt the judge's findings that its electronic communications policy was neither unlawful nor objectionable. The Respondent maintains that Board precedents regarding the use of other types of equipment establish a strong property interest that outweighs employees' interest in using their employer's email to engage in Section 7 communications. Employees' need for such use has weakened since *Register Guard*, according to the Respondent, because the availability of personal email accounts and smart phones has greatly expanded their ability to communicate with one another. Further, the Respondent disputes various points in the *Register Guard* dissent, including the characterization of email as the "new water cooler."

The Respondent describes various ways in which personal email use could interfere with employees' work and undermine an employer's solicitation and distribution policies. The Respondent rejects the limited restrictions and other measures suggested by the General Counsel as inadequate substitutes for a broad ban on personal use of email; those measures would not effectively address employers' interests in maintaining production and discipline, protecting confidential information, preventing computer viruses, and ensuring that worktime is used for work. The Respondent also raises potential practical considerations, including how it can exercise its right to keep nonemployees off its communications systems if employees contact them. Finally, the Respondent downplays the evidence noted by the General Counsel and the AFL–CIO that interpreters did, in fact, use its email system for nonwork communications.

D. Amici

Generally, amici supporting the General Counsel and Charging Party argue that the Board should overrule *Register Guard* and, applying a *Republic Aviation*-based analytical framework, balance the parties' interests and find that broad bans on nonbusiness use of email are unlawful absent a particularized showing of need by the employer based on production or distribution. They contend that email and other electronic communication systems have become the predominant means of workplace communication for both business and personal purposes, and that in cases involving Section 7 activity by employees rightfully using the employer's communication systems, the employees' rights must be balanced against the employer's management interests rather than its property interests.

Amici supporting the Respondent argue that the Board should leave the *Register Guard* rule in place.[12] They focus on the employer's property interest, arguing that employers may impose nondiscriminatory restrictions on employees' nonbusiness use of equipment and that an email system should be treated like other employer equipment. Several amici contend that *Republic Aviation* applies only where an employer's restriction would totally deprive employees of opportunities to communicate about Section 7 matters. Several amici also urge the Board to avoid the constitutional compelled speech issues that they see arising out of a governmentally imposed obligation to allow employee speech on employer email systems. Some amici argue that employers must be permitted to impose nondiscriminatory, content-neutral limits regarding such matters as the size of messages and the inclusion of attachments. Finally, many amici also address employers' need to monitor email for employee productivity and misconduct, even when the email may include Section 7-related content.

V. DISCUSSION

In *Register Guard*, the Board, over the dissent of two Members, held that an employer may completely prohibit employees from using the employer's email system for Section 7 purposes, even if they are otherwise permitted access to the system, without demonstrating any business justification, so long as the employer's ban is not applied discriminatorily. The twin premises of that decision were that email systems are the equivalent of other employer communications-related equipment, including bulletin boards, copy machines, public address systems, and telephones, and that employers are free under the Act to ban any nonwork use of such equipment by employees. As detailed below, we conclude that the *Register Guard* majority's analysis was incorrect in several significant respects. First, we find that the *Register Guard* decision undervalued employees' core Section 7 right to communicate in the workplace about their terms and conditions of employment, while giving too much weight to employers' property rights. Second, the *Register Guard* majority inexplicably failed to perceive the importance of email as a means by which employees engage in protected communications, an importance that has increased dramatically during the 7 years since *Reg-*

[12] Taking no position on whether the Board should find that employees have a Sec. 7 right to use employer email systems for nonjob-related communications, NRTW argues only that whatever rule the Board adopts must treat employees' prounion and antiunion activity alike.

ister Guard issued. Finally, the *Register Guard* majority mistakenly placed more weight on the Board's equipment decisions than those precedents can bear. For those reasons, we overrule *Register Guard*'s holding that, under ordinary circumstances, even employees who have been given access to their employer's email system have no right to use it for Section 7 purposes.[13]

Instead, we adopt an analysis, consistent with longstanding Board and Supreme Court precedents, that seeks to accommodate employees' Section 7 rights and their employers' legitimate interests.[14] As the Supreme Court did in *Republic Aviation*, the leading case addressing employees' right to communicate on their employer's property about their working conditions, we adopt a presumption that employees who have been given access to the employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions.[15] We recognize that the types of circumstances that arise in the context of email systems may be different from those arising in the context of employees' conduct on their employer's real property. Thus, an assertion of special circumstances will require that the employer articulate the interest at issue and demonstrate how that interest supports the email use restrictions it has implemented.

A. The Centrality of Employees' Workplace Communication to their Section 7 Rights

The necessity of communication among employees as a foundation for the exercise of their Section 7 rights can hardly be overstated. Section 1 of the Act unequivocally states:

> It is 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, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

National Labor Relations Act, 29 U.S.C. § 151. Section 7 of the Act thus grants employees the "right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Such collective action cannot come about without communication. As the Supreme Court stated in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972):

> [Section 7] organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights.

Id. at 542–543, quoted in *Beth Israel Hospital v. NLRB*, 437 U.S. at 491 fn. 9.[16] Thus, employees' exercise of their Section 7 rights "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel*, 437 U.S. at 491–492. 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." *Eastex, Inc. v. NLRB*, 437 U.S. at 574 (internal quotations omitted). Employees' need to share information and opinions is particularly acute in the context of an initial organizing campaign, like the one that was occurring in this case.[17] And, as the Supreme Court has repeatedly recognized, "the place of work is a place uniquely appropriate for dissemina-

[13] We do not reach *Register Guard*'s definition of discrimination, because no party has asked us to reconsider it here, and doing so is not necessary to our decision.

[14] See *Hudgens v. NLRB*, 424 U.S. at 521 ("Accommodation between employees' § 7 rights and employers' property rights . . . 'must be obtained with as little destruction of one as is consistent with the maintenance of the other'") (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112).

[15] Contrary to our colleague Member Miscimarra's dissent, today's decision does not create a new statutory right. Employees' statutory right to communicate in the workplace was recognized by the Supreme Court almost 70 years ago in *Republic Aviation*, 324 U.S. 793 (1945). We are simply addressing the exercise of that right in a new context.

[16] See also *LeTourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944) ("[E]mployees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization."), affd. sub nom. *Republic Aviation v. NLRB*, 324 U.S. 793 (1945). Commentators have similarly noted that "workplace discourse plays a vital role in determining whether employees are able to act together to promote their common interests." Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. Davis L. Rev. 1091, 1101 (April 2011).

[17] See, e.g., Hirsch, supra at 1124 ("Throughout the representation process—from the initial stages of employees' contemplating the desirability of collective representation to the later steps of ultimately choosing a specific representative—discourse and access to certain types of information is crucial.").

tion of views" about such matters. *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974).[18]

Accordingly, the Court, in *Republic Aviation,* long ago approved the Board's established presumption that a ban on oral solicitation on employees' nonworking time was "an unreasonable impediment to self-organization," and that a restriction on such activity must be justified by "special circumstances" making the restriction necessary in order to "maintain production or discipline." 324 U.S. at 803–804.

B. The Nature and Common Use of Business Email

There is little dispute that email has become a critical means of communication, about both work-related and other issues, in a wide range of employment settings. Indeed, even the *Register Guard* majority acknowledged that "e-mail has, of course, had a substantial impact on how people communicate, both at and away from the workplace." 351 NLRB at 1116. The *Register Guard* dissent noted that, according to a 2004 survey, over 81 percent of employees spent an hour or more on email during a typical workday, with about 10 percent spending at least 4 hours. 351 NLRB at 1125 (citing American Management Association, *2004 Workplace E-Mail and Instant Messaging Survey* (2004)).[19] The same survey found that about 86 percent of employees sent and received nonbusiness-related email at work. Id. The *Register Guard* dissent's expectation that those percentages were increasing has been borne out by subsequent empirical research.[20] Thus, according to a 2008 survey, 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. Mary Madden & Sydney Jones, *Networked Workers*, Pew Research Center's Internet & American Life Project (September 24, 2008), at 1, available at http://www.pewinternet.org/2008/09/24/networked-workers/.[21] Eighty percent of those workers reported that those technologies both improved their ability to do their jobs and expanded the number of people they communicated with, and 73 percent reported that the technologies had improved their ability to share ideas with coworkers. Madden & Jones, supra, at 1, 6.

Reflecting more recent trends, an April 2014 report found that "[e]mail remains the most pervasive form of communication in the business world"[22] and predicted

[18] See also *Republic Aviation*, 324 U.S. at 801 fn. 6.

Our dissenting colleagues contend that social media, texting, and personal email accounts constitute adequate alternative means for employee communications. Even if we agreed that alternative means were germane to the analysis here—which, as discussed below, we do not—the Respondent and amici here have not shown that our presumption would impinge more than minimally upon employers' property rights, and therefore there is no need to go any further in accommodating them. In any event, we would not agree that such personal communication options are adequate, in light of the high value our precedents place on communication *in the workplace*. See, e.g., *Eastex*, supra; *Magnavox Co.*, supra. Although some employers may view employees' discussions of union organizing, compensation, or working conditions as "nonwork" communications and thus to be relegated to personal communications options, employees themselves generally see such concerns as inextricable from their work lives and most appropriately dealt with at the workplace. Further, social media, texting, and personal email accounts, however commonly they may be used for communications unrelated to the workplace, simply do not serve to facilitate communication among members of a particular work force. Member Johnson asserts that such electronic communications networks "came about *exactly because they facilitate communication among discrete groups of people*, be they work forces or not" (emphasis in original). We agree, but we cannot disregard the irrefutable corollary that work email networks came about—and thrive—exactly because they facilitate communication among the employees in particular work forces. Employees 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. Employees may also be virtual strangers to each other, separated by facility, department, or shift. They may have no regular face-to-face contact with each other at work, and no practical way to obtain each other's email addresses, social media account information, or other information necessary to reach each other individually or as a discrete group (as distinct from the general public) by social media, texting, or personal email. Member Johnson cites an "employee's YouTube production complaining of work conditions" and notes that the video's million-plus views demonstrate the power of social media to "spread a single employee's message." But an individual's ability to communicate with the general public does not demonstrate that he has adequate and effective means of making common cause *with his coworkers*. In short, these supposed alternative means are simply not natural gathering places for employees of a particular employer in the same way that their employer's email network is.

[19] Member Johnson makes a leap from those survey findings to posit that employees with workplace email access may be spending an hour a day on Sec. 7-protected email communications, and then predicts that the amount will increase as a result of today's decision. The study, however, simply measured employees' *work-related* email use.

[20] "Although the disparity in these numbers [comparing two studies from 2003 and 2004] indicates the challenges in measuring e-mail use, the studies reveal a substantial reliance on workplace electronic communications, which has almost certainly increased in the intervening years." Hirsch, supra, at 1105–1106.

[21] The Madden & Jones survey found that 62 percent of employees used email at work. Although that number is obviously lower than the 2004 finding that 81 percent of employees spent an hour or more on email daily, it likely reflects both "the challenges in measuring e-mail use," see fn. 20 above, and the study's finding that certain employees rarely or never use the internet (and, we presume, email) at work. Madden & Jones, supra, at 1 ("Workplace internet users tend to either use the internet every day or not at all. A large majority of the population can be found at either end of the spectrum—using the internet at work every day (60%) or never (28%). By contrast, few (5%) use the internet just once every few days at work and only 6% use it occasionally, but even less often than that."). Fifty-nine percent of employed adults had at least one work email account. Id. at 4. This is consistent with the assertions of amici NGA and RLC that most grocery and retail employees do not have access to their employers' email systems.

[22] *Email Statistics Report, 2014-2018, Executive Summary*, The Radicati Group, Inc., at 2, available at http://www.radicati.com/wp/wp-content/uploads/2014/01/Email-Statistics-Report-2014-2018-Executive-Summary.pdf. Even though "other technologies such as

that work-related email traffic will continue to increase.[23] Not coincidentally, the increased use of email has been paralleled by dramatic increases in transmission speed and server capacity, along with similarly dramatic decreases in email's costs.[24]

Some personal use of employer email systems is common and, most often, is accepted by employers. The Supreme Court recently acknowledged, in a case involving an employee's use of his work pager for personal texts, that "[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency." *City of Ontario, California v. Quon*, 560 U.S. 746, 759 (2010).[25] See also *Schill v. Wisconsin Rapids School District*, 786 N.W.2d 177, 182–183 (Wisc. 2010) (finding "good reasons" for employers "to allow their employees to send and receive occasional personal messages on the employer's e-mail system," including that "[e]-mail can enhance a worker's productivity. It is often the fastest and least disruptive way to do a brief personal communication during the work day, and employees who are forbidden or discouraged from occasional personal use of e-mail may simply need to take more time out of the day to accomplish the same tasks by other means.").

In addition, the number and percentage of employees who telework is increasing dramatically, resulting in more employees who interact largely via technology rather than face to face. Statistics gathered by the Global Workplace Analytics and Telework Research Network reflect that, as of 2012, 3.3 million employees teleworked at least 50 percent of the time.[26] The research also shows that telework increased 79.7 percent between 2005 and 2012, compared to a 7.1 percent increase in the work force of individuals who were not self-employed.[27] Extrapolating from prior data, the study estimated that, as of 2014, perhaps 25 million employees would telework at least 1 day per month.[28] Telework is expected to continue increasing rapidly, with predictions that 63 million employees will telework at least occasionally by 2016.[29]

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social networking, instant messaging (IM), mobile IM, and others are also taking hold, email remains the most ubiquitous form of business communication." Id.

Member Johnson acknowledges the unique aspects and conversational nature of email, and that the same features of email that make it important for business also "make it convenient and attractive for employees for personal use." But he contends, contrary to The Radicati Group's data, that email is obsolete and that its use is plummeting, relative to the use of other communications technologies. His dissent incorporates a chart showing a decline in the percentage of online traffic attributable to email. Although the chart fails to identify the units on which its percentages are based, it is reasonable to assume that they are data units; the chart thus shows that email consumes a minuscule and shrinking fraction of the data units transmitted through the internet. It is hardly breaking news that email uses bandwidth much more efficiently than such resource-hogging technologies as streaming video, peer-to-peer music sharing, and advertisement-laden web surfing. If anything, email's efficiency supports our conclusion that the marginal increase in the use and cost of email due to Sec. 7 activity will be de minimis. Our dissenting colleagues, therefore, should have little reason to fear the catastrophic effects on productivity and operating costs that they prophesy. And, as discussed below, we find other communications technologies—whether or not their use is expanding—to be neither necessary nor sufficient substitutes for work email in the only context at issue here: employees' Sec. 7 communications. In short, the overall use of email by percentage of internet data traffic speaks more to the minimal burden it places on a data network than to its utility as a communication medium. In any event, what matters with respect to employees' rights under the Act is whether the employees use email in their particular workplace. If they do, then their right to do so for Sec. 7 purposes deserves protection, regardless of whether the amount of email use in their workplace is more or less than the statistical norm. If they do not use email, our holding will not affect them or their employer.

[23] "In 2014, the majority of email traffic comes from the business world, which accounts for over 108.7 billion emails sent and received per day. . . . Email use is growing in the business sector and by 2018, business email will account for over 139.4 billion emails sent and received per day." Id. at 3. The report also found that "[b]usiness users send and receive on average 121 emails a day in 2014, and this is expected to grow to 140 emails a day by 2018." Id. at 4.

[24] For over 40 years, according to the technology community, computer processor performance has doubled about every 18 months. See Michael Kanellos, *Moore's Law to roll on for another decade*, CNET News (February 10, 2003), available at http://news.cnet.com/2100-1001-984051.html ("Moore's Law" —that the number of transistors on a chip would double every two years—was reframed by David House, based on additional factors, to refer to processor speed). Hard-drive capacities also multiplied repeatedly before 2005, and further dramatic increases in storage capacity have occurred since then. See Chip Walter, *Kryder's Law*, Scientific American (July 25, 2005), available at http://www.scientificamerican.com/article/kryders-law/. Storage costs have plummeted as capacity has increased. See Daley, *Remember When One Gigabyte of Storage Cost $700,000?*, EdTech (December 4, 2012), available at http://www.edtechmagazine.com/higher/article/2012/12/remember-when-one-gigabyte-storage-cost-700000.

[25] In *Quon*, the city initially allowed the employee's personal text-messaging on his employer-provided pager, until the quantity of messages that he sent and received became so excessive as to warrant further investigation.

[26] *Latest Telecommuting Statistics*, Global Workplace Analytics (September 2013) at Table 6, available at http://globalworkplace analytics.com/telecommuting-statistics. Of those 3.3 million teleworking employees, just over 2.5 million were employed by for-profit companies, reflecting an increase from 2005 to 2012 of over a million employees of for-profit employers working primarily from home. Id. The study considered self-employed individuals separately from employees.

[27] Id. at Table 2 and text summary of September 2013 update, available at http://globalworkplaceanalytics.com/telecommuting-statistics.

[28] Id.

[29] See Brin, *Telecommuting Likely to Grow, Despite High-Profile Defections* (July 24, 2013), available at http://www.shrm.org/hrdisciplines/technology/articles/pages/telecommuting-likely-to-grow-bans.aspx (noting 2009 study by Forrester Research that found that "more than 34 million U.S. adults telecommuted at least occasionally, and predicted the ranks would reach 63 million by 2016, fueled by technology and growing management experience"); Dignan, *2014*

In short, in many workplaces, email is a large and ever-increasing means of employee communication for a wide range of purposes, including core production goals, non-production but work-related purposes, and often nonwork purposes. In offices that rely exclusively or heavily on telework, it seems likely that email is the predominant means of employee-to-employee communication.

The Board and the Supreme Court have recognized the workplace, and, when appropriate, a particular location in the workplace, as "the natural gathering place" for employees to communicate with each other.[30] In *Beth Israel*, the Court agreed with the Board that the hospital's cafeteria was such a natural gathering place, in part because it was one of few places at or near the hospital where the employees had the opportunity to congregate and discuss nonwork-related matters, and because the employer had used and permitted use of the cafeteria for other solicitation and distribution. Id. at 490. In many workplaces, email has effectively become a "natural gathering place," pervasively used for employee-to-employee conversations.[31] Neither the fact that email exists in a virtual (rather than physical) space, nor the fact that it allows conversations to multiply and spread more quickly than face-to-face communication, reduces its centrality to employees' discussions, including their Section 7-protected discussions about terms and conditions of employment. If anything, email's effectiveness as a mechanism for quickly sharing information and views *increases* its importance to employee communication.[32] The reluctance of the *Register Guard* majority to fully acknowledge the major role that email had already come to play in employees' workplace communication—including communication protected by Section 7—reflects a failure "to adapt the Act to the changing patterns of industrial life."[33] But failure or not, we see no reason to perpetuate that now even more outmoded assessment of workplace realities.

enterprise trends: BYOD pain, HTML5 apps, hybrid cloud, SDx, ZDNET (Oct. 8, 2013), available at http://www.zdnet.com/2014-enterprise-trends-byod-pain-html5-apps-hybrid-cloud-sdx-7000021705/ ("By 2018, the size of the mobile workforce will double or triple.").

[30] *Beth Israel*, 437 U.S. at 505.

[31] See 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, 17 (Nov. 2000).

[32] See Hirsch, supra, at 1106 ("[F]or employees with access to their co-workers' e-mail addresses, electronic communications provide an easy and effective way to distribute information to a large number of people, many of whom may be difficult to reach by traditional means.") (footnotes omitted).

[33] *Hudgens v. NLRB*, 424 U.S. at 523 (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 266).

C. The Board's "Equipment" Precedents

As explained, the *Register Guard* majority accepted the employer's contentions there that an email system is analogous to employer-owned equipment and that prior cases had established that employers could broadly prohibit nonwork use of such equipment.[34] But *Register Guard*'s analysis of both those issues is badly flawed. First, we conclude that email systems are different in material respects from the types of workplace equipment the Board has considered in the past. As the *Register Guard* dissent persuasively explained:

> None of those "equipment" cases . . . involved sophisticated networks designed to accommodate thousands of multiple, simultaneous, interactive exchanges. Rather, they involved far more limited and finite resources. For example, if a union notice is posted on a bulletin board, the amount of space available for the employer to post its messages is reduced. . . . If an employee is using a telephone for Section 7 or other nonwork-related purposes, that telephone line is unavailable for others to use. . . . One or more employees using the e-mail system would not preclude or interfere with simultaneous use by management or other employees. Furthermore, unlike a telephone, e-mail's versatility permits the sender of a message to reach a single recipient or multiple recipients simultaneously; allows the recipients to glimpse the subject matter of the message before deciding whether to read the message, delete it without reading it, or save it for later; and, once opened, allows the recipient to reply to the sender and/or other recipients, to engage in a real-time "conversation" with them, to forward the message to others, or to do nothing. Neither the telephone nor any other form of "equipment" addressed in the Board's prior cases shares these multidimensional characteristics.[35]

We agree with the *Register Guard* dissenters that email's flexibility and capacity make competing demands on its use considerably less of an issue than with earlier forms of communications equipment the Board has addressed. Employee email use will rarely interfere with others' use of the email system or add significant incremental usage costs, particularly in light of the

[34] See *Register Guard*, 351 NLRB at 1114–1115 (citing *Eaton Technologies*, 322 NLRB 848 (1997) (bulletin board); *Champion International Corp.*, 303 NLRB 102 (1991) (copy machine); *Churchill's Supermarkets*, 285 NLRB 139 (1987), enfd. 857 F.2d 1474 (6th Cir. 1988) (telephone); *Union Carbide Corp.*, 259 NLRB 974 (1981), enfd. in relevant part 714 F.2d 657 (6th Cir. 1983) (same); and *Heath Co.*, 196 NLRB 134 (1972) (public address system)).

[35] *Register Guard*, 351 NLRB at 1125–1126 (footnotes omitted) (dissenting opinion).

enormous increases in transmission speed and server capacity.[36] In contrast, bulletin boards have a finite amount of space for postings to convey information to employees. Copy machines—even current, high-speed models—process print jobs sequentially and can become backed up by heavy use. Public address systems, obviously, can convey only one message at a time. Given their vastly greater speed and capacity, email systems function as an ongoing and interactive means of employee communication in a way that other, older types of equipment clearly cannot.

Telephone systems are, in some respects, more comparable to email. The *Register Guard* majority recognized certain similarities, comparing the two systems' large impacts on business communications. But it ultimately concluded that, just as the effects of the telephone had not justified granting employees a general right to use their employer's telephone system for Section 7 communications, the same was true of email. *Register Guard*, 351 NLRB at 1116. This reasoning is unpersuasive. The telephone systems of 35 years ago, which the Board's decisions addressed,[37] are, at best, distant cousins of the sophisticated digital telephone systems that are now prevalent in the workplace.[38] Moreover, workplace use of even the newly sophisticated telephone systems is clearly different from employees communicating via email. In sum, we find that the *Register Guard* majority erred when it disregarded the material factual differences between email and other types of communications equipment that the Board has considered.[39]

In any event, we question the broad pronouncements in the equipment cases, to the effect that employers may prohibit all nonwork use of such equipment. Those pronouncements are best understood as dicta. In nearly every case that the *Register Guard* majority cited for the broad proposition,[40] a closer look reveals that the broad language went beyond the principles on which the Board's decision actually turned. For example, in *Eaton Technologies*, 322 NLRB at 853, *Champion International Corp.*, 303 NLRB at 109, *Churchill's Supermarkets*, 285 NLRB at 155, and *Union Carbide Corp.*, 259 NLRB at 980, the Board found that the employers at issue had applied their equipment-use rules discriminatorily. Thus, the Board found violations in each case without reaching the question whether an overarching ban on nonwork use would have been permissible if consistently applied.[41] Nor is it clear that the Board endorsed those broader statements.[42]

[36] See fn. 24 and accompanying text. Those trends undercut the Chamber of Commerce's concern, echoed by our dissenting colleagues, about employers' drastically increased costs for data storage, maintenance, and retrieval if employees may use employer email systems for Sec. 7 activity. Although employee use of work email for Sec. 7 activity—which is the only use at issue here—may not be entirely cost-free to the fraction of employers that do not already allow personal use, we expect that the incremental increase in usage resulting from Sec. 7 activity would, in most cases, have a minimal effect on costs. Employers need not store Sec. 7 messages any longer than they store others; they may delete or archive Sec. 7 messages consistently with their generally applied record-retention processes. As explained below, however, an employer may seek to demonstrate that its costs would increase to such an extent that they would constitute special circumstances. For these reasons, we view Member Johnson's characterization of today's decision as imposing an "unfunded mandate" as hyperbole.

[37] See *Churchill's Supermarkets*, supra (1987 Board decision arose out of 1980 events); *Union Carbide Corp.*, supra (1981 Board decision arose out of 1980 events).

[38] A 1980s telephone system, like the other equipment discussed above, had sufficiently limited capacity and function that concerns about "tying up the line" would have been widely understood as valid, as the *Register Guard* dissent recognized, and broad restrictions might reasonably have been warranted. The General Counsel relies on the substantial changes in telephone technology since the 1980s, and the resulting changes in the management interests at issue in regulating employee use of telephone systems, to argue that we should overrule *Churchill's Supermarkets* and *Union Carbide* to the extent that they can be read to uphold an employer's ban on personal use of an employer's telephone system. This case, however, does not present that issue, and we therefore decline to decide it here.

[39] Member Johnson claims that we "woodenly apply traditional rules to new technologies without seeing whether these rules still serve their intended goals." In our view, that is precisely the vice of *Register Guard*, which Member Johnson would leave intact. He further suggests that we have failed to ask, "does this still make sense?" Again, that is precisely the question we ask in reconsidering the rule of *Register Guard*.

[40] See *Register Guard*, 351 NLRB at 1114–1115.

[41] *Heath Co.*, 196 NLRB 134 (1972), also cited by the *Register Guard* majority, is distinguishable in several respects. First, the analysis in that case, which involved an election objection, turned on considerations inapplicable in the present unfair labor practice context. The objection related to the employer's denial of access to the public address system by prounion employees, after the employer had allowed access for antiunion broadcasts (including one by a nonsupervisory employee). In overruling that objection, the Board found that the employer provided prounion and antiunion employees generally comparable access to communicate with coworkers. In particular, the employer allowed prounion presentations by employees in the cafeteria during lunch, essentially offsetting the one antiunion public-address system broadcast by an employee. Even if we assume that the equivalent ability to communicate with coworkers by *some* means is a legitimate consideration in an objections case, where the ultimate question is whether the alleged conduct had an effect on the election's outcome, such rough equivalence of access is not relevant to the 8(a)(1) inquiry whether the employer interfered with, restrained, or coerced employees in the exercise of their Sec. 7 rights. And, even if we were to consider the Union's objection to the Respondent's electronic communications policy independently of the 8(a)(1) allegation, there is no evidence that the Respondent provided its employees an opportunity to communicate for Sec. 7 purposes that would counterbalance the broad prohibitions of its electronic communications policy.

[42] For example, in *Churchill's Supermarkets*, supra, the statement that an employer has the right to restrict equipment access appeared in the judge's decision, 285 NLRB at 155, as context for the applicable

Mid-Mountain Foods, 332 NLRB 229 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001), differs in certain respects from the other equipment cases on which the *Register Guard* majority relied. In *Mid-Mountain Foods*, the Board found that the employer did not violate Section 8(a)(1) by refusing to permit an employee to show a prounion video on its breakroom television, which the employer always kept tuned to a particular news channel. In our view, the decision's language strongly suggests that the dismissal turned primarily on the absence of discriminatory enforcement: the Board majority expressly found—and reiterated several times—that there was no history of employee use of the television to show videos (or even to watch any other channels), and it concluded that the prohibition was lawful "particularly in the circumstances of the instant case."[43] To be sure, *Mid-Mountain Foods* states that "there is no statutory right of an employee to use an employer's equipment or media."[44] It is therefore unsurprising that the *Register Guard* majority expressly relied on *Mid-Mountain Foods* in responding to the dissent's argument that *Churchill's Supermarkets* and *Union Carbide* addressed only discrimination violations and did not turn on any broader employer right to prohibit employee use of telephones.[45] Nonetheless, *Mid-Mountain Foods*, like the other cases stating the broad proposition,[46] does not explain or justify it, beyond bare citations to other cases that also lack any rationale. The supposed principle that employees have no right to use, for Section 7 purposes, employer equipment that they regularly use in their work is hardly self-evident. We reject its application here, and we question its validity elsewhere.[47]

General principles of property law also militate against a rule that employers may lawfully ban employee use of employer equipment for Section 7 purposes on nonworking time, regardless of the circumstances. Black-letter property law protects real property rights more absolutely than personal property rights.[48] Thus, liability for a trespass to land requires no showing of actual harm, but liability for a trespass to personal property will be found only upon a showing of particular types of harm.[49] See Restatement (Second) of Torts, Section 218 and comment i. Since 1945, the Supreme Court has held that,

Board rule that access must not be denied discriminatorily. The Board, in contrast, stated only that it "agree[d] with the judge that a no-solicitation rule was discriminatorily enforced with respect to [the employee's] use of the company telephone on his breaks." Id. at 139. Similarly, in *Eaton Technologies*, the Board articulated only its adoption of the judge's finding that the employer violated the Act "by discriminatorily removing and destroying union literature or otherwise disparately enforcing its bulletin board policy." 322 NLRB at 848.

[43] *Mid-Mountain Foods* cited *Union Carbide*, supra, and *Heath Co.*, supra, as well as *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983), and *Container Corp. of America*, 244 NLRB 318, 318 fn. 2 (1979), enfd. 649 F.2d 1213 (6th Cir. 1981) (per curiam). In *Honeywell* and *Container Corp.*, which both involved bulletin board access, the Board found the alleged violations based on the employers' discriminatory application of their posting rules, making the broader statements dicta, as they were in the cases discussed above.

[44] *Mid-Mountain Foods*, 332 NLRB at 230.

[45] In this regard, the majority stated that *Mid-Mountain Foods*, 332 NLRB at 230, cited and reaffirmed *Union Carbide* and thus made clear that "employees have no statutory right to use an employer's telephone for nonbusiness purposes." *Register Guard*, 351 NLRB at 1115.

[46] See, e.g., *Gertz*, 262 NLRB 985, 985 fn. 3 (1982) (cited in Member Johnson's dissent as *Allied Stores of N.Y.*) (relying on *Container Corp.*, supra, which stated, without rationale, "[i]t is well established that there is no statutory right of employees or a union to use an employer's bulletin board.").

[47] We reject the conclusion of a divided Board in *Johnson Technology*, 345 NLRB 762 (2005), that an employer's property rights in a sheet of its previously-used copier paper allowed it to prohibit an employee from using that paper for the protected purpose of making a flyer to publicize a union meeting. The Board majority's analysis of those facts subordinated an employee's actual exercise of his core Sec. 7 rights to the employer's minimal (at best) property rights. We also note, as the dissent in that case did, that the surrounding circumstances—including the fact that the employer had unlawfully removed a prior union-meeting notice from a breakroom bulletin board, motivating the employee to write a replacement notice on a piece of scrap paper—demonstrate that the employer's real concern was not protecting its property rights, but preventing union activity. The Board majority found irrelevant the de minimis value of the property at issue; in its view, the employer's asserted property right defeated the employee's Sec. 7 right with no need to accommodate the latter. Such an absolutist approach to property rights cannot be reconciled with the Act. Accordingly, we overrule *Johnson Technology* to the extent it held that the employer acted lawfully by prohibiting the employee from using a sheet of its used copier paper to notify his coworkers about a union meeting.

[48] See *Register Guard*, 351 NLRB at 1126 (dissenting opinion) (quoting Restatement (Second) of Torts, Sec. 218, cmt. e: "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel."). See also id. at 1126 fns. 13 and 14 (citing cases). In *Intel Corp. v. Hamidi*, 71 P.3d 296, 303–304 (Cal. 2003), also cited by the *Register Guard* dissent, the California Supreme Court concluded that an employee's use of his employer's electronic communications system to send six separate messages, each to thousands of recipients, was not a trespass, absent evidence that the employee "used the system in any manner in which it was not intended to function or impaired the system in any way."

[49] Sec. 218 of the Second Restatement of Torts enumerates the categories of harm that can give rise to liability: dispossession, harm to the property, or, if the trespass consists only of using the property, depriving the possessor of its use for a substantial time. The last of those categories seems most relevant to employees' use of their employer's email system (although a computer virus or other malware downloaded via an employee's nonwork email could also harm the system). Sec. 256 of the Restatement addresses the use of another's personal property with consent but in a manner exceeding the consent given (not unlike personal use of an employer's email system where the employer prohibits such use), stating that trespass liability for such use would be only for harm to the property, unless the use is so excessive that the possessor's right to control the property's use is seriously violated. See Restatement (Second) of Torts, Sec. 256 and comment b.

when employees seek to engage in Section 7 activity on their employer's land, even against the owner's wishes, the owner's property rights may have to yield to some extent to accommodate the employees' Section 7 rights.[50] Logically, the same must be true of the owner's property rights with regard to its equipment; if anything, an owner's rights regarding its personal property would seem relatively weaker as against competing Section 7 rights. A reading of Board precedent that would allow total bans on employee use of an employer's personal property, even for Section 7 purposes, with no need to show harm to the owner, is impossible to reconcile with these common-law principles.[51] In short, for all the foregoing reasons, we conclude that the Board's "equipment cases" cannot bear the weight that the *Register Guard* majority sought to place on them.

D. Adoption of a New Analytical Framework

Having concluded that *Register Guard*'s analysis fails "to adapt the Act to changing patterns of industrial life,"[52] is unsupported by the precedents on which it relies, and ultimately fails to protect employees' right to engage in activity protected by the Act while on nonworking time, we must formulate a new analytical framework for evaluating employees' use of their employer's email systems. For the reasons explained below, we agree with the General Counsel, the Charging Party, and others who maintain that *Republic Aviation* should be our starting point.

The Board has long held, with court approval, that the Section 7 right to organize and bargain collectively "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel*, 437 U.S. at 491. At the same time, the Board must recognize the employer's legitimate interest in managing its business:

> [The Board must adjust] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. 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.

Id. at 492 (quoting Republic Aviation, 324 U.S. at 797–798). Email, although not the same as other tools of communication in the workplace that the Board has previously considered, is fundamentally a forum for communication.

In *Republic Aviation*, the Board considered an employer policy banning all oral solicitation at any time on company property. At the time, the face-to-face oral communication at issue in the case was the norm, and both the Board and the Supreme Court naturally focused on conversation as the primary form of solicitation. In earlier cases, the Board had reasoned that an employer may make reasonable rules governing employee conduct on working time, but nonworking time "is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property." *Republic Aviation*, 324 U.S. at 803 fn. 10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943). And the Board had adopted a presumption that a ban on oral solicitation on employees' nonworking time was "an unreasonable impediment to self-organization," and that an employer wishing to restrict such activity must demonstrate "that special circumstances made the rule necessary in order to maintain production or discipline." Id. at 804 fn. 10. The Supreme Court approved the presumption as a legitimate accommodation of the employer's and the employ-

[50] See *Republic Aviation*, 324 U.S. at 802 fn. 8 ("Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."). Thus, we do not disagree with Member Miscimarra's contention that what is at issue is "the property owner's *right* to control the use of its property" (rather than liability for harm done to the property). Whether and when that right "must give way to competing Section 7 rights" is precisely what we analyze, consistent with *Republic Aviation* and numerous subsequent cases. As we have acknowledged in seeking an appropriate accommodation of Sec. 7 rights and property rights, "[a]ny rule derived from Federal labor law that requires a property owner to permit unwanted access to his property for a nonconsensual purpose necessarily impinges on the right to exclude. We must, and do, give weight to that fact." *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 10 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013). At the same time, however, we recognize that employees' status as trespassers, for property law purposes, when they engage in unwanted Sec. 7 activity on their employer's property "*cannot be dispositive* consistent with the well-established principle that state law property rights sometimes must yield to the imperatives of Federal labor law." Id. (emphasis added). In other words, the existence of a property right will not automatically trump a Sec. 7 interest. Or, as we explained in *New York New York*, the "inherent tension . . . between an employer's property rights and the Sec. 7 rights of its employees," id. fn. 37 (quoting *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), enfd. sub nom. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003)), "cannot be resolved merely by reference to the law of trespass," id. (quoting *ITT Industries v. NLRB*, 413 F.3d 64, 72 (D.C. Cir. 2005)).

[51] We do not suggest that labor law is necessarily constrained by the common law. We merely point out that the *Register Guard* majority's reliance on a principle so directly contrary to established common-law principles, in an area of labor law where those principles are appropriately considered, would seem to require more explanation and sturdier support than was provided.

[52] *Hudgens v. NLRB*, 424 U.S. at 523 (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 266).

ees' rights and affirmed the Board's application of the presumption in *Republic Aviation*. Id. at 804.[53]

In recognizing the Board's responsibility to accommodate the conflicting rights of employees and of employers, the Supreme Court recognized that the Act "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation*, 324 U.S. at 798. That approach was intended to accomplish "the dominant purpose of the legislation," and the Court specified that "[s]o far as we are here concerned that purpose is the right of employe[e]s to organize for mutual aid without employer interference. This is the principle of labor relations which the Board is to foster." Id.

The Court also observed in *Republic Aviation* that the underlying Board decision "was the product of the Board's appraisal of normal conditions about industrial establishments." Id. at 804. As "normal conditions" have evolved and changed, the Board has adjusted its analysis under *Republic Aviation* as needed to accommodate the rights at issue in particular factual variations.[54] Thus, for nearly 70 years, the Board has applied *Republic Aviation* to assess employee rights to engage in Section 7 activity on their employer's premises, i.e., real property. As the Court instructed, the Board has sought to accommodate the employees' Section 7 rights and the employers' property and management rights, consistent with the Court's recognition that "the locus of [the] accommodation [between the legitimate interests of employers and employees] may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Hudgens*, 424 U.S. at 522.[55] The Court also recognized that the employees' interests are at their strongest when "the [Section 7] activity [is] carried on by employees already rightfully on the employer's property." Id. at 521–522 fn. 10.

And, as discussed above, empirical evidence demonstrates that email has become such a significant conduit for employees' communications with one another that it is effectively a new "natural gathering place"[56] and a forum in which coworkers who "share common interests" will "seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Eastex*, 437 U.S. at 574 (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963)). For all these reasons, we find *Republic Aviation* to be a more appropriate foundation for our assessment of employees' communication rights than our own equipment precedents.

In doing so, we recognize that significant differences exist between an employer-owned email system, like that at issue here, and an employer's bricks-and-mortar facility and the land on which it is located, which were involved in *Republic Aviation* and many subsequent cases. Indeed, an email system is substantially different from any sort of property that the Board has previously considered, other than in *Register Guard* itself. Accordingly, we apply *Republic Aviation* and related precedents by analogy in some but not all respects.[57] In particular, we do not find it appropriate to treat email communication as either solicitation or distribution per se. Rather, an email system is a forum for communication, and the individual messages sent and received via email may, depending on their content and context, constitute solicita-

[53] As the Supreme Court explained in *Beth Israel*, the Board and the Court did not initially distinguish solicitation from distribution, effectively holding that neither could lawfully be prohibited during employees' nonworking time, absent special circumstances. The Board later concluded, however, that restrictions on distribution in work areas should not be presumed unlawful, even on nonworking time, unlike restrictions on solicitation. See *Beth Israel*, 437 U.S. at 493 fn. 10 (citing *Stoddard Quirk Mfg. Co.*, 138 NLRB 615 (1962)).

[54] See, e.g., *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (hospital employees' solicitation and distribution rights could be restricted in patient-care areas); *New York New York*, 356 NLRB No. 119 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013) (access rights of employees of contractor to location at which they regularly work); *Hillhaven Highland House*, 336 NLRB 646 (2001), enfd. sub nom. *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003) (access rights of employees who work at a different location of their employer); *Tri-County Medical Center*, 222 NLRB 1089 (1976) (validity of employer rules prohibiting access by off-duty employees; origin in *Republic Aviation* explained in *Saint John's Health Center*, 357 NLRB No. 170, slip op. at 4 (2011)).

[55] The Board's equipment decisions, discussed above in sec. 5.C., treat an employer's rights in its personal property as absolute; contrary to the Court's guidance in *Beth Israel*, they hold that employers' rights are "unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others [i.e., the employees] may place upon [the] employer. . . ." *Beth Israel*, 437 U.S. at 492.

[56] *Beth Israel*, 437 U.S. at 505.

[57] We disagree with Member Johnson's contention that precedents relating to physical space "have no bearing on the argument here." *Republic Aviation* (as well as its progeny) arose in the context of employee rights in physical space, but the decision's essential aspect is not physical space but employee-to-employee communication. It is therefore appropriate to apply the *Republic Aviation* presumption to email communications, notwithstanding the differences, because we are again addressing employee-to-employee communication and the employer's property. In any event, Member Johnson himself, in speculating that this decision could be seen as imposing a regulatory taking, demonstrates the relevance of physical-space precedents by relying on a case that *expressly* turned on the existence of a "permanent physical occupation of real property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). But whatever its *potential* legal relevance might be in the abstract, *Loretto*'s express terms distinguish it from the case before us.

tion, literature (i.e., information) distribution, or—as we expect would most often be true—merely communications that are neither solicitation nor distribution, but that nevertheless constitute protected activity.[58] We also find it unnecessary to characterize email systems as work areas or nonwork areas. In the vast majority of cases, an employer's email system will amount to a mixed-use area, in which the work-area restrictions permitted on literature distribution generally will not apply. See, e.g., *United Parcel Service*, 327 NLRB 317, 317 (1998).[59]

In addition, we reject contentions by the Respondent and amici supporting it, as well as our dissenting colleagues, that *Republic Aviation*'s analysis applies only to circumstances in which employees are "entirely deprived" of their rights to freedom of association.[60] In *Republic Aviation* itself, the Court observed that it could not "properly be said that there was evidence or a finding that the plant's physical location made solicitations away from company property ineffective to reach prospective union members." 324 U.S. 798–799.[61] Thus, Board and court cases following *Republic Aviation* apply its analysis to less-than-total bans on employees' opportunities to exercise their Section 7 communication rights. In *NLRB v. Baptist Hospital, Inc*., 442 U.S. 773, 784–785, 786–787 (1979), for example, the Court upheld the Board's finding that the hospital had unlawfully prohibited employee solicitation in certain areas of the hospital notwithstanding "evidence that solicitation on nonwork time is allowed in other areas." Similarly, the Court in *Beth Israel* upheld the Board's Section 8(a)(1) finding regarding the hospital's ban on employee solicitation in the cafeteria, even though such activity was allowed elsewhere in the hospital.[62] 437 U.S. 483. See also *Times Publishing Co*., 240 NLRB 1158 (1979) (rule prohibiting solicitation only in "public areas" of building unlawful), affd. 605 F.2d 847 (5th Cir. 1979); *Bankers Club, Inc*., 218 NLRB 22, 27 (1975) (restaurant's rule banning solicitation only in "customer areas" unlawful.) Thus, it is not determinative that an employer permits Section 7 communications in some areas of its facility—or, as Member Johnson states it, that employees have "adequate avenues of communication" elsewhere on its premises. Rather, it is the "nature of [the employer's] business" that determines whether "special circumstances" justify a ban on such communications at a particular lo-

[58] See, e.g., *Fremont Medical Center*, 357 NLRB No. 158, slip op. at 2–3 and fn. 9 (2011) (distinguishing "union talk" from solicitation; citing cases); *Jensen Enterprises*, 339 NLRB 877, 878 (2003) (same).

[59] In the early cases, the rules permitting restrictions on distribution of literature were justified by concern over the potential hazard to production that littering the work area with paper could create. Id. (citing *Stoddard Quirk Mfg. Co.*, 138 NLRB 615 (1962)).

[60] Consistent with this narrow view, Member Johnson argues that our decision relies on employee "convenience," rather than employee *need* for email access. But Member Johnson's approach derives from an ostensible accommodation of the competing rights that, like *Register Guard*, gives employee Sec. 7 rights practically no weight.

[61] The Court added that neither Republic Aviation's nor LeTourneau's property was "like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped." Id. at 799. Member Johnson argues that the Court, in *Babcock*, expressed approval of the Board's detailed factual analysis of the LeTourneau property layout; however, his suggestion that the Court thereby endorsed the consideration of alternatives even with regard to employees relies on dicta, given that *Babcock* involved only the rights of nonemployees and *expressly* distinguished those from the rights of employees. More importantly, Member Johnson's argument runs afoul of the Court's specific and directly on-point finding in *Republic Aviation* that the Board acted properly in applying a presumption favoring employees' exercise of their Sec. 7 rights on their employer's property, even where there was no evidence that those rights would otherwise be "seriously handicapped."

[62] Contrary to our dissenting colleagues' arguments, the Supreme Court's decision in *Beth Israel* does not support considering reasonable alternative means here. First and foremost, the Court there expressly stated 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." *Beth Israel*, 437 U.S. at 505 (citing *Babcock & Wilcox*, 351 U.S. at 112–113). Thus, the Court's statement in *Beth Israel* that "the availability of one part of a healthcare facility for organizational activity *might* be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility" was unequivocally limited to health care facilities. Id. (emphasis added). Further, although the scarcity of alternative opportunities for employee solicitation in *Beth Israel* made it a particularly compelling case for finding that solicitation could not be banned from the cafeteria, the Court's decision did not turn on that fact.

Nor do other Supreme Court decisions support considering alternative means here. When the Court decided *Lechmere*, 14 years after *Beth Israel*, it reiterated—and, crucially, relied on—*Babcock & Wilcox*'s longstanding distinction between employee and nonemployee activity; it did not suggest that employees' alternative means would be relevant in contexts other than healthcare. See *Lechmere*, 502 U.S. 527, 533 (1992), cited in *Register Guard*, 351 NLRB at 1126–1127 (dissenting opinion).

Finally, the Court's decisions in both *Republic Aviation* and *Eastex* affirmatively demonstrate that no alternative-means inquiry is required here. In *Eastex*, finding protected employees' distribution of a newsletter in nonwork areas of the employer's property during nonworking time, the Court looked to *Republic Aviation* for guidance and observed that the holding there "obtained even though the employees had not shown that distribution off the employer's property would be ineffective." 437 U.S. at 571 (citing *Republic Aviation*, 324 U.S. at 798–799). The *Eastex* Court further invoked the distinction between employee and nonemployee activity made in *Babcock & Wilcox*. Id. See also *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 13 ("Neither the Board nor any court has ever required employees to prove that they lacked alternative means of communicating with their intended audience as a precondition for recognition of their right, subject to reasonable restrictions, to communicate concerning their own terms and conditions of employment in and around their own workplace.").

cation at the workplace. *Marriott Corp.*, 223 NLRB 978, 978 (1976).[63]

Further, because our decision today applies only to *employees* who already have access to their employer's email system for work purposes, the right to use that system for Section 7 communications does not turn on the unavailability of traditional face-to-face discussion.[64] Nor does it 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—that the Respondent, its supporting amici, and our dissenting colleagues emphasize. As the Supreme Court has made clear, the factor of alternative options is relevant only with respect to *nonemployees* who seek access to an employer's property.[65] Our dissenting colleagues' strenuous efforts to import a "reasonable alternative means" standard into the context of *employee* Section 7 activity are thus contrary to longstanding Board and Court precedent.

We conclude that it is 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 for us to adopt a presumption in this case like the one that we adopted in *Republic Aviation*. Accordingly, we will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.[66] Because limitations on employee communication should be no more restrictive than necessary to protect the employer's interests,[67] we anticipate that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees. In more typical cases, where special circumstances do not justify a total ban, employers may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline.

We emphasize, however, that an employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction. The mere assertion of an interest that could theoretically support a restriction will not suffice.[68] And, ordinarily, an employer's interests will establish special circumstances only to the extent that those interests are not similarly affected by employee email use that the employer has authorized.[69]

Our decision today is a limited one. We address only email systems, not any other electronic communications systems, because only email systems are at issue in this case.[70] Our decision encompasses email use by employees only; we do not find that nonemployees have rights to access an employer's email system.[71] Nor do we re-

[63] Thus, Member Johnson's suggestion that our duty to accommodate the competing rights requires us to assess the "least destructive means" in each and every case is misplaced. Rather, we fulfill that duty (as well as the requirements of "good government" and "plain common sense"), consistent with *Republic Aviation*, by utilizing a generally applicable presumption and allowing employers to rebut it by showing that the general accommodation of rights is too destructive in their particular circumstances.

[64] See fn. 62 above; *Lechmere,* 502 U.S. at 533.

[65] See *Lechmere,* 502 U.S. at 533–534; *Beth Israel,* 437 U.S. at 505.

[66] An employer's interests in protecting its email system, for instance, from damage or from overloads due to excessive use, would of course be relevant. Cf. *New York New York*, 356 NLRB No. 119, slip op. at 13 (recognizing that access to property by onsite contractors' employees could raise concerns for property owner, such as significant interference with owner's use of property, that access by property owner's own employees might not present).

[67] *Beth Israel*, 437 U.S. at 502–503.

[68] The prior existence of an employer prohibition on employees' use of email for nonwork purposes will not itself constitute a special circumstance. And an employer's argument for the permissibility of applying a particular restriction even to employees' nonworking time will be strengthened significantly by showing that it adopted the restriction in order to protect the interests it asserts, instead of just citing certain interests, post hoc, to support a restriction that was not actually based on them.

[69] Cf. *Nova Southeastern University*, 357 NLRB No. 74, slip op. at 3 (2011) (rejecting asserted bases for restrictions on contractors' employees' literature distribution that relied on interests no different from those related to employees' work-related presence on property).

[70] Other interactive electronic communications, like instant messaging or texting, may ultimately be subject to a similar analysis, although we do not decide that. We also do not address what rights employees may have to communicate via their employer's social media accounts, an issue that was not raised in this case and regarding which no evidence was presented. Thus, Member Johnson's prediction that today's decision will inevitably apply to all workplace communications technology is, at a minimum, premature. Today's decision is based on the nature and use of workplace email and on the facts and arguments presented to us. If presented with cases regarding other kinds of communications systems, we would decide those cases based on their own facts.

[71] In this regard, our dissenting colleagues' reliance on *NLRB v. Steelworkers (NuTone)*, 357 U.S. 357 (1958), and *Electromation, Inc.*, 309 NLRB 990 (1992), is misplaced. In *NuTone*, cited in both dissents, the Court held that an employer's own solicitation did not preclude it from applying a no-solicitation rule if the labor organization seeking to solicit had adequate alternative means of communicating prounion messages to employees. 357 U.S. at 363–364. Although Member Miscimarra notes that the no-solicitation rule at issue addressed employee solicitation, the language that both he and Member Johnson quote makes clear that the Court's decision addressed the solicitation rights of labor organizations, not of employees. Member Johnson acknowledges that fact but contends that the result should be the same

quire an employer to grant employees access to its email system, where it has not chosen to do so. The presumption that we apply is expressly limited to nonworking time.[72] And, although we will presume that an employer that has granted such access for work purposes must allow access for Section 7 purposes as well, we permit the employer to rebut the presumption by showing that special circumstances make the presumption inappropriate in its workplace. Further, we do not prevent an employer from establishing uniform and consistently enforced restrictions, such as prohibiting large attachments or audio/video segments, if the employer can demonstrate that they would interfere with the email system's efficient functioning. See *Register Guard*, 351 NLRB at 1127 (dissenting opinion).

We acknowledge that employers who choose to impose a working-time limitation will have concerns about the extent to which they may monitor employees' email use to enforce that limitation. Our decision does not prevent employers from continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability.[73] The Respondent and some amici assert that such monitoring may make them vulnerable to allegations of unlawful surveillance of employees' Section 7 activity. We are confident, however, that we can assess any surveillance allegations by the same standards that we apply to alleged surveillance in the bricks-and-mortar world. Board

for employees themselves. We have already rejected the argument that an alternative means standard applies to employees' Sec. 7 activity, however.

Regarding *Electromation*, Member Miscimarra cites the Board's finding that an employer's 8(a)(2) violations included providing pencils, paper, and calculators to employees serving, during paid time, on workplace committees that constituted labor organizations, and he suggests that employers' provision of email access to employees for Sec. 7 activity could similarly violate Sec. 8(a)(2). It should be sufficient to point out that any employer that permits its employees to use its email system in order to comply with today's decision could not possibly thereby violate the Act. And, in any event, *Electromation* was concerned with employer-dominated labor organizations, and the footnote that Member Miscimarra cites expressly relied on the fact that "the [r]espondent's assistance was in furtherance of its unlawful domination of the Action Committees and cannot be separated from that domination." 309 NLRB at 998 fn. 31. Neither *Electromation* nor Sec. 8(a)(2) has any relevance here.

Member Miscimarra similarly speculates that a court "could conceivably" consider employee access to employer email for Sec. 7 activity to be a "thing of value" under LMRA Sec. 302, potentially subjecting the employer and employees to federal criminal liability. We regard the possibility of a Sec. 302 prosecution against anyone based on compliance with our decision here as exceedingly far-fetched. And the sole case cited by our colleague as support for this argument, *Caterpillar, Inc. v. Auto Workers*, 909 F. Supp. 254 (M.D. Pa. 1995), reversed, 107 F.3d 1052 (3d Cir. 1997), cert. granted 521 U.S. 1152 (1997), cert. dismissed 523 U.S. 1015 (1998), in which the court of appeals reversed the lower court's finding of a criminal violation on facts bearing no resemblance to this case, is not relevant here. We note that, despite the voluntary decisions of many employers to permit the forms of email access we direct here, we were unable to find any that led to 8(a)(2) or 302(a)(3) charges.

[72] Accordingly, contrary to our dissenting colleagues' contentions, we do not do away with the fundamental concept that "working time is for work." Member Johnson is simply incorrect when he declares that this decision "effectively requires employers to pay employees for the time reading and writing emails directly or even tangentially relating to terms and conditions of employment." Nor is Member Johnson's characterization of the issue, as whether an employer must "surrender possession and control of *its own email network* so that employee communications . . . may be made as a matter of right across that network *at any time*, effectively including *on working time* paid for by the employer" (emphasis in original), either accurate or reasonable.

We recognize, of course, that email use may be somewhat difficult to identify as occurring on working time or nonworking time. But the blurring of the line between working time and nonworking time of which our colleagues accuse us actually reflects far broader developments in technology (as Member Johnson acknowledges) and the structure of current workplaces (which enable not only the performance of personal business during working time but also the performance of work during nonworking time). Those developments are beyond our control, and we cannot turn the calendar back to a simpler era with clearer boundaries. What we can, and must, do is apply the Act to existing circumstances. Member Miscimarra would have us simply say no to employee use of the employer's email system. And no doubt, as he asserts, such a rule would be easier to apply than the policy that we announce today. But the Board's obligation is "to adapt the Act to the changing patterns of industrial life," *Weingarten*, 420 U.S. at 266, and to accommodate employees' organizational rights and employers' property rights "with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox*, 351 U.S. at 112. Our colleague's proposed solution does neither.

We are unpersuaded by our dissenting colleagues' dire predictions that an unstoppable flood of Sec. 7-related email messages will have a "debilitating impact on productivity" and deprive employees of their right to refrain from Sec. 7 activity. First, as we have made clear, the presumption we establish is limited to nonworking time, for which there is, by definition, no expectation of employee productivity. In addition, employees can, and do, promptly hit the "delete" button when they receive messages that are not relevant to their work or otherwise of interest. And, as explained, employers can monitor for misuse and reduced productivity. To state the obvious, many employers already permit personal use of work email, and the sky has not fallen. In contrast to our dissenting colleagues, we are confident that employers, whether or not they already allow nonwork email use by employees, have developed methods appropriate to their particular business for monitoring and measuring employee productivity, and we would not presume to tell them how to do so, as Member Johnson suggests we should. We note, however, that the failure of a legitimate working-time restriction on nonwork email to resolve productivity concerns would seem to reflect larger management problems in the workplace—issues that would exist regardless of employees' Sec. 7 rights and that, accordingly, should not be a basis to limit those rights.

[73] Cf. *City of Ontario, California v. Quon*, 560 U.S. at 760-761 (holding in Fourth Amendment search case that, even assuming employee whose texts were searched by employer had reasonable expectation of privacy in work-provided pager, search was justified at its inception because it was undertaken based on a "legitimate work-related rationale").

law establishes that "those who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them. The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not 'do something out of the ordinary.'"[74] An employer's monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists. Nor is an employer ordinarily prevented from notifying its employees, as many employers also do already, that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons and that employees may have no expectation of privacy in their use of the employer's email system.[75]

We reject the argument by the Respondent and several supporting amici that reversing *Register Guard* would infringe employers' rights under Section 8(c) or the First Amendment. We are simply unpersuaded that an email message, sent using the employer's email system but not from the employer, could reasonably be perceived as speech by, or speech endorsed by, the employer—particularly a message reflecting a view different from the employer's. Email users typically understand that an email message conveys the views of the *sender*, not those of the email account provider. They would no more think that an email message sent from a coworker via a work email account speaks for the employer (unless the message was sent by the employer's supervisor or agent) than they would think that a message they receive from a friend on their personal Gmail account speaks for Google.[76] Such a message also would not reasonably be perceived as speech by the *Government* that the employer is required to host, implicating the constitutional compelled-speech doctrine; it is simply speech by the employer's own employees, to whom the employer provided the forum. Nor would the employer's ability to speak or otherwise disseminate its own message be affected merely by providing access to employees.[77] As in *PruneYard*, employers may not only use their email systems to convey their own viewpoints, as they already do, they may also expressly dissociate themselves from viewpoints expressed by users of their email systems, if they find such a clarification necessary. Accordingly, we perceive no compelled-speech issues reasonably arising out of today's decision.[78]

E. Retroactivity and Application to This Case

Finally, after careful consideration, we find it appropriate to apply our new policy retroactively. The Board's usual practice is to apply new policies and standards "to all pending cases in whatever stage."[79] Accordingly, the Board applies a new rule to the parties in the case in which the rule is announced so long as doing so would not work a "manifest injustice."[80] In determining whether the retroactive application of a Board decision will cause manifest injustice, the Board balances three factors: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the

[74] *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991) (quoting *Metal Industries*, 251 NLRB 1523 (1980), and citing other cases).

[75] An employer that changes its monitoring practices in response to union or other protected, concerted activity, however, will violate the Act. See, e.g., *Lutheran Heritage Village*, 343 NLRB 646, 647 (2004) (employer's rule violates Sec. 8(a)(1) if, inter alia, "the rule was promulgated in response to union activity"); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1000 (10th Cir. 1977) (no-solicitation rule was "promulgated within hours after [respondent] became aware of [u]nion activity") (enfg. 220 NLRB 373 (1975)).

[76] In *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 88 (1980), the Supreme Court upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property. As the Court later stated, in *PruneYard* it had "explained that there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was 'not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view.'" *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) (quoting *PruneYard*, supra). Similarly, employees "can appreciate the difference between speech [their employer] sponsors and speech [it] permits because [it is] legally required to do so." *Rumsfeld*, 547 U.S. at 64–65.

[77] Id. at 64 (provision of access is "not inherently expressive" and accommodating the speech of others "d[id] not sufficiently interfere with any message of the [host]").

[78] Member Johnson, in dissent, contends that our approach improperly compels employers to financially support speech with which they may disagree. But the same argument could be made about employers' obligations under the Act regarding employee solicitation and distribution in break rooms and parking lots; nonetheless, employees' Sec. 7 rights require that accommodation. We have recognized that allowing employees to use work email for Sec. 7 activity may impose some additional costs on employers who do not already allow nonwork use by employees, but those incremental costs should generally be de minimis. See fn. 36 above. Member Johnson also cites *National Association of Manufacturers v. NLRB*, 717 F.3d 947, 956 (D.C. Cir. 2013), overruled in part by *American Meat Institute v. U.S. Dept. of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), in contending that we err here, as a panel of the D.C. Circuit Court found that the Board had erred there, by "telling people what they must say." But there is obviously a vast difference between "telling [employers] what they must say" and telling employers that they must let their employees speak.

[79] *Aramark School Services*, 337 NLRB 1063, 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)).

[80] *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993).

purposes of the Act; and (3) any particular injustice arising from retroactive application.[81]

Regarding the first factor, we acknowledge that in maintaining its electronic communications policy, the Respondent conformed to the Act as interpreted in *Register Guard*. There is no suggestion, however, that the Respondent, when it chose to grant access to its email system to the employees involved here, actually relied on the fact that it could lawfully prohibit their use of the system for Section 7 purposes on nonworking time as part of a complete ban on nonwork use.

Regarding the second factor, we conclude that retroactivity would significantly aid accomplishment of the purposes of the Act. Access to work email to engage in protected activity on nonworking time significantly promotes the core Section 7 rights of millions of employees who use that email for other purposes, for the reasons discussed above. In contrast, current prohibitions on such access deny employees their rights on a daily basis. Applying today's decision prospectively only would continue a far-reaching, wrongful denial of those rights, potentially for several more years in some pending cases.

Finally, with respect to the third factor, although we are adopting a new standard concerning whether certain conduct is unlawful, any particular injustice of applying today's decision retroactively is lessened by the fact that the presumption we adopt is rebuttable. In the present case, we will remand this issue to the judge to allow the Respondent to present evidence of special circumstances justifying the restrictions it imposes on employees' use of its email system. Other employers with email restrictions affected by today's decision will similarly have an opportunity to rebut the presumption. We also observe that the complaint does not allege that the Respondent unlawfully enforced its electronic communications policy against any employee, only that it maintained the policy; thus, the Respondent will not be subject to backpay liability or to a reinstatement obligation. If the Respondent's policy is ultimately found unlawful, its remedial obligations will be limited to rescission of the policy and standard notifications to employees.[82]

Balancing the factors considered above, we find that applying today's decision to this case and others currently pending, consistent with our usual practice, would not cause manifest injustice. As stated, however, we will remand this aspect of this case to the administrative law judge for further proceedings consistent with this decision, including allowing the parties to introduce evidence relevant to a determination of the lawfulness of the Respondent's electronic communications policy.

F. Conclusion

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." *Register Guard*, 351 NLRB at 1121 (dissenting opinion) (quoting *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992)). 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." Id.

We recognize that those technological changes are continuing; indeed, they are accelerating. Today's decision cannot resolve all the questions that will arise as a result of our recognizing the right of employees to use their employers' email systems for protected communications on nonworking time, let alone as a result of the still more advanced electronic communications systems now in existence and yet to come. We are, nonetheless, unwilling to avoid those questions by closing our eyes to the importance of electronic means of communication to employees' exercise of their rights under the Act. Nor do we find it tenable to smother employees' rights under a blanket rule that vindicates only the rights of employers. Accordingly, we undertake our obligation to accommodate the competing rights by applying and adapting the longstanding and flexible Supreme Court precedent of *Republic Aviation*, just as we have applied and adapted that decision over the intervening decades to address other unprecedented factual circumstances.

ORDER

IT IS ORDERED that the allegation that the Respondent violated Section 8(a)(1) by maintaining the Electronic Communication Policy and the election objection based on that policy are remanded to Administrative Law Judge Paul Bogas for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall afford the parties an opportunity to present evidence on the re-

[81] *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062, 1069 fn. 37 (2010).

[82] With regard to the election objections based on the electronic communications policy, we have already concluded that the two elections at issue must be set aside based on the Respondent's other objectionable conduct. See *Purple Communications*, 361 NLRB No. 43 (2014). But even if the elections were set aside because of the electronic communications policy, the Board has not generally found such a result to constitute manifest injustice warranting prospective application of a new rule. See, e.g., *SNE Enterprises*, 344 NLRB 673, 674 (2005).

manded issues and shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. December 11, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

When evaluating rights and obligations under the National Labor Relations Act (NLRA or Act), several principles are suggested by our long history, supplemented by guidance and occasional rebukes by the courts. The Supreme Court has held that the validity of any presumptions developed by the Board "depends upon the rationality between what is proved and what is inferred."[1] Presumptions are not favored as an alternative to clear standards, based on the need to give employees, unions, and employers reasonable "certainty beforehand" regarding what they may and may not do.[2] Especially when changing existing law, the Board should first endeavor to do no harm: we should be vigilant to avoid doing violence to undisputed, decades-old principles that are clear, widely understood, and easy to apply. And more directly relevant to the issue in this case, when the Board evaluates any conflict between protected employee conduct and employer property rights, we must strive to accommodate the two "'with as little destruction of one as is consistent with the maintenance of the other.'"[3]

The majority gives employees a statutory right to use employer email systems for nonbusiness purposes, such as communicating with other employees about union organizing and other matters in circumstances that trigger NLRA protection. I believe the right created by the majority represents an unfortunate and ill-advised departure from all of the above principles. Accordingly, for four reasons, I dissent from these newly created standards.

First, the majority decision improperly presumes that limiting an employer's email system to business purposes constitutes "an unreasonable impediment to self-organization."[4] Given the current state of electronic communications, there is no rational basis for such a presumption. National uprisings have resulted from the use of social media sites like Facebook and Twitter, for example, even when governments have used force to prevent such activities.[5] Also, unlike single-purpose business email systems, other electronic communication platforms such as social media sites, text messaging, and email services such as Gmail and Yahoo!Mail undergo near-constant development and expansion. Accordingly, these public forms of electronic communication have features that are more effective, more user-friendly, and more conducive to facilitating concerted activities than employer email systems. Indeed, employees now have more opportunities to conduct concerted activities relating to their employment than at any other time in *human* history (which, of course, makes *the Act's* history of nearly 80 years pale by comparison). These facts—and certainly the record currently before the Board in this case—render implausible any suggestion that employees are unreasonably prevented from engaging in NLRA-protected communications absent a statutory right to

[1] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945).

[2] *First National Maintenance Corp.*, 452 U.S. 666, 679 (1981).

[3] *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

[4] *Republic Aviation*, 324 U.S. at 803 fn. 10.

[5] See, e.g., Carol Huang, *Facebook and Twitter key to Arab Spring uprisings: report*, THE NATIONAL (June 6, 2011) ("Nearly 9 in 10 Egyptians and Tunisians surveyed in March [2011] said they were using Facebook to organise protests or spread awareness about them."), http://www.thenational.ae/news/uae-news/facebook-and-twitter-key-to-arab-spring-uprisings-report (last visited Sept. 8, 2014); Philip N. Howard et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?*, PITPI (PROJECT ON INFORMATION TECHNOLOGY & POLITICAL ISLAM) WORKING PAPER 2011.1 ("Summary: Social media played a central role in shaping political debates in the Arab Spring. A spike in online revolutionary conversations often preceded major events on the ground. Social media helped spread democratic ideas across international borders."), http://pitpi.org/wp-content/uploads/2013/02/2011_Howard-Duffy-Freelon-Hussain-Mari-Mazaid_pITPI.pdf (last visited Sept. 26, 2014); Jose Antonio Vargas, *Spring Awakening: How an Egyptian Revolution Began on Facebook*, THE NEW YORK TIMES (Feb. 17, 2012) (book review of Wael Ghonim, *The Power of the People Is Greater Than the People in Power: A Memoir* (Houghton Mifflin Harcourt 2012) ("Ghonim's memoir . . . . will also serve as a touchstone for future testimonials about a strengthening borderless digital movement that is set to continually disrupt powerful institutions, be they corporate enterprises or political regimes."), http://www.nytimes.com/2012/02/19/books/review/how-an-egyptian-revolution-began-on-facebook.html?pagewanted=all&_r=1& (last visited Sept. 8, 2014).

conduct such activities on the employer's business email system.

Second, the majority has come full circle from the Board's finding—a mere 20 years ago—that employers can *violate* the Act by providing "pencils," "paper," "telephones," and a "calculator" for employees to use during "paid time."[6] The majority now effectively requires employers to give many employees the Board-mandated use of computer systems and related equipment requiring investments ranging into the millions of dollars. Even if one could identify a colorable need for employees to use an employer's business email system to engage in union organizing and other concerted activities, I believe the majority's creation of such an employee right impermissibly fails to accommodate the substantial employer property rights associated with its computer resources, which typically involve substantial acquisition and maintenance costs. The majority implies that, once an employer grants employees access to its email system for any purpose, the employer's property right in its email system becomes irrelevant. In my view, *Republic Aviation*—the very decision upon which the majority principally relies—demonstrates the incorrectness of such a position. Moreover, the majority's balancing fails to recognize the many ways in which the Board-mandated use of employer email systems for NLRA-protected communications will cause other problems, as described more fully below.

Third, the majority's new statutory right adversely affects a significant number of other legal requirements, including many imposed by the Act. These problems include difficult questions regarding the Act's prohibition of employer surveillance of protected activities; the ever-increasing need for employers to carefully monitor email systems for unauthorized usage and security intrusions; and the need to search and retrieve emails for a host of reasons, including workplace investigations, subpoenas, and litigation-related discovery requests (mostly having nothing to do with NLRA-protected activities). And this new right will wreak havoc on the enforcement of one of the oldest, clearest, most easily applied of the Board's standards—"working time is for work."[7] The majority's new right—combined with the nature of email and computer usage in most workplaces—will make it all but impossible to determine whether or what communications violate lawful restrictions against solicitation during working time. The resulting confusion will be out of all proportion to whatever benefit the new standard might yield for NLRA-protected concerted activities.

Fourth, the majority today replaces a longstanding rule that was easily understood. In its place, the majority substitutes (i) a presumption giving all employees the right to engage in Section 7 activities using employer email systems to which they otherwise have access, and (ii) unspecified "special circumstances" that, if proven by the employer in after-the-fact Board litigation, will mean employees did *not* have the majority's presumed statutory "use-of-email" right.[8]

[6] *Electromation, Inc*., 309 NLRB 990, 991, 998 & fn. 31, 1017 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994). In *Electromation*, the Board held that an employer violated Sec. 8(a)(2) where, among other things, the employer gave a group of employees writing materials and a calculator to use during paid time when addressing employment-related complaints. Id. Sec. 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it," with a limited proviso that "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." Id. In *Electromation*, the employees participated in committees that, according to the Board, constituted a "labor organization" as defined in Sec. 2(5), which triggered the prohibition against unlawful assistance set forth in Sec. 8(a)(2). Cf. *E.I. du Pont de Nemours & Co*., 311 NLRB 893 & fn. 4 (1993) (employer found to violate Sec. 8(a)(2) and (5) in a unionized work setting by unlawfully dominating the formation and administration of employee safety committees and bypassing the union, but Board finds that ALJ provided an "overbroad remedy" by requiring the employer to permit the email distribution of union literature and notices, which the Board modified to require the employer only to cease and desist from the "discriminatory prohibition of the use of the electronic mail system for distributing union literature and notices"); *E.I. du Pont de Nemours & Co*., Cases 4–CA–18737–1 et al., slip op. at 35 (ALJ opinion 1992) (original ALJ order requiring employer to cease and desist from "prohibiting bargaining unit employees from using the electronic mail system for distributing union literature or notices"). The majority distinguishes *Electromation* on its facts and concludes that, because this case does not involve an employer-dominated labor organization, neither *Electromation* nor Sec. 8(a)(2) is relevant. This analysis ignores the underlying principle. If the Board requires an employer to make available its email system for employees to use, in part, for union-related communications, it is relevant to consider whether the Board or a court would find that this very conduct violates another provision in the Act or another federal law (for example, LMRA Sec. 302—see below), and thus whether the majority's construction of the Act must be rejected as leading to an absurd result. See, e.g., *Sheridan v. United States*, 487 U.S. 392, 402 fn. 7 (1988) ("[C]ourts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading."); *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940) (even a statute's plain meaning can be disregarded when it leads to "absurd or futile results" or is "plainly at variance with the policy of the legislation as a whole") (footnote and citation omitted).

[7] *Peyton Packing Co.,* 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944).

[8] The majority creates a statutory "presumption" that confers upon employees a right to use an employer's email system for NLRA-protected communications, although this presumptive right will not exist if the employer can prove that "special circumstances make [a] ban necessary to maintain production or discipline." Alternatively, "[a]bsent justification for a total ban," the presumptive right will be limited if the employer proves that "uniform and consistently enforced controls . . . are necessary to maintain production and discipline."

I credit my colleagues for recognizing the reality that many constraints preclude giving employees unqualified access to employer email systems. Although the majority's new standards are well intentioned, they are terribly suited to govern this very important area, which can quickly involve thousands of electronic communications even in small workplaces; where the debilitating impact on productivity and discipline will likely become clear only after the fact; and where virtually nobody will really understand—in real time—whether or when particular communications are protected. Many employees will undoubtedly exercise this new right to use their employer's email system to send what they *believe* are protected nonbusiness communications, only to learn, afterwards, that they face lawful discipline or discharge either because their communications did not constitute Section 7 activity,[9] or the employee's use of email violated a lawful business-only requirement based on the "special circumstances" exceptions created today by the Board majority. For similar reasons, unions and employers are likely to have great difficulty advising employees whether or when they can engage in nonbusiness uses of the employer email systems.

A. The Majority Invalidly Presumes that Employees Need to Use Employer Email Systems To Engage in NLRA-Protected Concerted Activities

Under the National Labor Relations Act, the Board is required to balance "the undisputed right of self-organization assured to employees" with "the equally undisputed right of employers to maintain discipline in their establishments."[10] The Supreme Court has observed that the "[o]pportunity to organize *and* proper discipline are both essential elements in a balanced society."[11] Consequently, the Board has long held—and parties have long understood—it is lawful for an employer to prohibit *all* "solicitation" during the "working time" of any employee involved in the solicitation (i.e., whether he or she was doing the soliciting or being solicited),[12] and employees can lawfully be disciplined if they violate such no-solicitation policies.[13]

In *Register Guard*,[14] the Board applied the settled principle that employees have "'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory."[15] The Board noted that employers have "a 'basic property right' to 'regulate and restrict employee use of company property.'"[16] As is true here, the Board recognized that "Respondent's communications system, including its e-mail system, is the Respondent's property and was purchased by the Respondent for use in operating its business."[17] And it was undisputed in *Register Guard*—as the majority here must concede—that an employer has "a legitimate business interest in maintaining the efficient operation of its e-mail system, and . . . employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails."[18] The Board concluded that employers could lawfully limit their email systems to business purposes, provided they did not discriminate against NLRA-protected activities while being more lenient towards other comparable nonbusiness uses. The Board reasoned:

> *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. *It does not require the most convenient or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications*.[19]

Today, the majority overrules *Register Guard* based on their conclusion that it affords too much protection to *employer* property rights and too little protection to NLRA-protected *employee* rights. I respectfully disagree with the majority's conclusion here on both counts.

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[9] Innumerable Board and court cases establish that Sec. 7 rights do not arise merely when an employee speaks or communicates with another employee. Rather, Sec. 7 protection exists only if two or more employees engage in "concerted" actions that, among other things, have the "purpose" of "collective bargaining" or "other mutual aid or protection." See, e.g., *Fresh and Easy Neighborhood Market, Inc*., 361 NLRB No. 12, slip op. at 13 (2014) (Member Miscimarra, dissenting in part); *Meyers Industries*, 268 NLRB 493 (1984) ("*Meyers I*"), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) ("*Meyers II*"), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[10] *Republic Aviation,* 324 U.S. at 797-798.

[11] Id. (emphasis added).

[12] *Essex International, Inc.*, 211 NLRB 749, 750 (1974).

[13] *Peyton Packing,* 49 NLRB at 843.

[14] 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

[15] *Register Guard*, 351 NLRB at 1114 (quoting *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000), enfd. per curiam 269 F.3d 1075 (D.C. Cir. 2001)).

[16] Id. at 1114 (quoting *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-664 (6th Cir. 1983)).

[17] Id.

[18] Id.

[19] Id. at 1115 (emphasis added) (quoting *Republic Aviation*, 324 U.S. at 801 fn. 6).

In *Republic Aviation*, the employer maintained a rule that prohibited *all* solicitation on the employer's property at *any* time, including nonworking time.[20] Because the employer's rule "entirely deprived" employees of their freedom to engage in solicitation in the workplace,[21] the Supreme Court agreed that the rule should be deemed presumptively unlawful as "an unreasonable impediment to self-organization."[22] The Court concluded there was a rational connection between what the Board "proved" (that the employer banned all workplace solicitation at any time) and "what [the Board] inferred" (unreasonable interference, restraint, or coercion in the exercise of employee Sec. 7 rights).[23] The Court recognized, however, that the exercise of NLRA-protected rights must accommodate the employer's right to operate its facilities for business purposes. According to the Court, employees have an "undisputed" right to NLRA protection when engaging in certain activities, but "equally undisputed" is the right of employers to "maintain discipline in their establishments."[24]

In *Beth Israel Hospital v. NLRB*,[25] the Supreme Court upheld a Board decision invalidating an employer rule that restricted solicitation to employee locker rooms. The Court based this decision on evidence establishing that "only a fraction" of the employees "ha[d] access to many of the areas in which solicitation [was] permitted,"[26] and those areas were not "conducive" to the exercise of protected rights.[27] Although employees in *Beth Israel Hospital* were not *entirely* deprived of their right to engage in protected solicitation during nonworking time, the Court concluded, once again, that a rational connection existed between "what [was] proved" (an unreasonable restriction limiting solicitation to areas that were "not conducive" to NLRA-protected activity) and "what [the Board] inferred" (interference, restraint, or coercion in the exercise of employee Sec. 7 rights).[28] Thus, the Court upheld the Board's conclusion that the cafeteria provided a reasonable alternative area for employee solicitation that struck the proper balance between the hospital's rights and employees' Section 7 rights.[29]

Here, by contrast, there is no rational connection between the fact relied upon by my colleagues (Respondent's maintenance of an email system for business purposes) and the majority's inferred conclusion (that the Respondent, absent special circumstances, has unlawfully impeded the NLRA-protected activities of its employees). Section 8(a)(1) of the Act makes it unlawful for an employer to "*interfere with*, *restrain*, or *coerce* employees in the exercise of the rights guaranteed in [S]ection 7."[30] Nothing in *Republic Aviation* or any other case supports the majority's presumption that, in the circumstances presented here, any employee has experienced unlawful interference, restraint, or coercion.

For starters, there is no evidence that the Respondent restricted or limited *any* type of solicitation during nonworking time. Nor is there evidence that the Respondent limited employees in the use of their own electronic de-

[20] As noted previously, it has long been the law that employers can lawfully prohibit employee solicitation during "working time," and employees who violate such a prohibition can lawfully be disciplined or discharged. The Board stated in *Peyton Packing*: "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. *Working time is for work*." 49 NLRB at 843 (emphasis added).

[21] *Republic Aviation*, 324 U.S. at 801 fn. 6.

[22] Id. at 803 fn. 10.

[23] Id.

[24] Id. at 797–798.

[25] 437 U.S. 483 (1978).

[26] Id. at 489.

[27] Id. at 505.

[28] *Republic Aviation*, 324 U.S. at 803 fn. 10.

[29] It is unconvincing for the majority to insist that a "reasonable alternative means" standard (a term of art in nonemployee access cases) plays no role in *Republic Aviation* balancing. As Member Johnson more fully explains in his dissent, a balancing test, such as the majority advocates here under *Republic Aviation,* necessarily requires consideration of alternatives to evaluate whether the proper balance has been struck between competing rights. For example, in *Beth Israel*, the hospital's locker rooms, where solicitation was allowed, failed to provide an adequate opportunity for most employees to exercise their Sec. 7 rights. The Board thus considered whether other areas in the hospital might afford employees more opportunity for Sec. 7 activity without undue infringement on the hospital's rights. The Board determined that the cafeteria provided such an area, and the Court approved the Board's analysis. So also here, the many avenues of communication already available to employees provide ample opportunities for employees to engage in Sec. 7 communications. Therefore, a proper balance already has been struck between employee and employer rights. Moreover, as the majority's own discussion illustrates, when performing *Republic Aviation* balancing, one only foregoes considering "alternative means" involving *away-from-the-workplace* employee communications. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978) (citing *Republic Aviation*, 324 U.S. at 798-799) (observing that its holding in *Republic Aviation* "obtained even though the employees had not shown that distribution *off the employer's property* would be ineffective") (emphasis added). The communication alternatives discounted by the majority—text messaging, social media, personal email, and face-to-face conversation—are available to employees *in the workplace* and *on the employer's property*. Such "alternative means" must clearly be taken into account under *Republic Aviation*, and they just as clearly negate any need for the statutory right created by the majority today.

[30] Sec. 7 protects the right of employees to engage in and refrain from union organizing, collective bargaining, and related activities. Sec. 7 states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [S]ection 8(a)(3)."

vices during nonworking time. And the instant case involves no contention that the Respondent discriminated against NLRA-protected activities while being more lenient towards other types of solicitation.[31] The *only* restriction at issue in this case relates to the Respondent's policy providing that the company email system and related electronic equipment "should be used for business purposes only."[32] However, nothing in logic or existing law suggests the Respondent's "business-only" policy was "an unreasonable impediment to self-organization."[33] Put differently, the majority effectively holds today that, when employees already have virtually *unlimited* opportunities to engage in protected workplace solicitation both face-to-face and through electronic means, it somehow constitutes unlawful "interference," "restraint," or "coercion" when an *additional* email system is dedicated to business purposes. Here, I believe the majority stretches *Republic Aviation* to a point that makes it unrecognizable: the present case has no remotely comparable restriction on NLRA-protected solicitation.

The Act has *never* previously been interpreted to require employers, in the absence of discrimination, to give employees access to business systems and equipment for NLRA-protected activities that employees could freely conduct by other means. As the Supreme Court held in *NLRB v. United Steelworkers of America (NuTone, Inc.)*, 357 U.S. 357, 363-364 (1958), even if an employer's rule "ha[s] the effect of closing off one channel of communication," the Act "does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it."[34] I believe this makes it unreasonable to conclude that the Act requires employers to turn over *all* electronic communication systems for a wide range of employee-to-employee complaints about working conditions and coemployees, the coordination of boycotts or walkouts against the company, and union organizing, among other things.[35]

B. The Majority's Standard Fails to Appropriately Balance NLRA-Protected Rights and Employer Property Rights

When the Board makes new law at the intersection of protected employee activity and employer property rights, it must strive to accommodate the competing interests "'with as little destruction of one as is consistent with the maintenance of the other.'"[36] For several reasons, I believe the majority engages in an improper balancing of these competing rights.

First, as noted above, nobody can reasonably suggest that employees lack access to electronic communications to engage in concerted protected activity. Recent decisions by the Board and its administrative law judges demonstrate a variety of circumstances where employees —without any statutory right to use employer-provided email systems—have engaged in NLRA-protected activities using Facebook and text messaging.[37] Twitter,

[31] The majority here does not address the Board's separate finding in *Register Guard* regarding types of discrimination (between restrictions on NLRA-protected activities and other restrictions on nonbusiness uses) that could violate the Act. As noted in the majority opinion, this case does not involve any allegations of unlawful discrimination, and no party has asked that we reconsider the treatment in *Register Guard* of unlawful discrimination. The General Counsel has alleged that Respondent violated the Act by maintaining a no-disruptions rule and based on certain statements made by the Respondent's president and CEO, but those allegations were severed and addressed in *Purple Communications*, 361 NLRB No. 43 (2014). I do not pass here on the Board's resolution of these other allegations.

[32] The Employer's Internet, Intranet, Voicemail and Electronic Communication Policy stated: "Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by the [sic] Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only." The Policy also prohibited employees (among other things) from using the employer-provided email system and related equipment 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."

[33] *Republic Aviation*, 324 U.S. at 803 fn. 10.

[34] Although the Court referred to the use of communication media by "labor organizations," the rules at issue in *NuTone* concerned solicitation by *employees*, not unions. The Court therefore made no distinction between labor organizations and employees when it articulated the principle that an employer need not provide access to every medium of communication available to itself.

[35] The separate dissent authored by my colleague, Member Johnson, enumerates many types of concerted activities that the Board has found to be protected, which employers would seemingly be required to permit on employer-provided email systems under the rules adopted today by the majority. I agree with Member Johnson's view that it is unreasonable to find employers in violation of the Act unless they make their business email systems available for all these types of activities. Indeed, the existence of such an extensive range of protected activities—all arising *without* employees having access to employer-provided email systems—demonstrates that employer-provided email access is not necessary for such protected activities to occur.

[36] *Hudgens*, 424 U.S. at 521 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

[37] See, e.g., *Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014) (employees engaged in protected concerted activity using Facebook to complain about employer's treatment of State income tax withholding, among other things); *Laurus Technical Institute*, 360 NLRB No. 133 (2014) (employee sent coworker protected text messages regarding employer favoritism in assigning leads); *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69 (2010) (employees exchanged protected text messages concerning plan to complain to management about conduct of

Instagram, and personal email systems like Gmail or Yahoo!Mail furnish additional avenues for employees to engage in NLRA-protected communications.[38]

Second, the constant expansion and refinement of social media services like Facebook, Twitter, YouTube, and Instagram, for example, have produced many features that account for their popularity, and that make social media much more powerful and effective for coordinated group activities than single-purpose business email systems. In this regard, the use of mobile phones and similar personal devices—*combined with* social media—render coordinated activities virtually immune from suppression. As reported in one study of the role of social media in the Arab Spring uprisings:

> *The government tried to ban Facebook, Twitter and video sites such as DailyMotion and YouTube. But within a few days, social media networks were the organizing tool of choice.* Less than 20 percent of the overall population actively used social-media Websites, *but almost everyone had access to a mobile phone*.
>
> . . . .
>
> And what we can see on Twitter is that *a large volume of people—both inside each country as well as across the globe—were following events as they unfolded*. Twitter seems to have been a key tool in the region for raising expectations of success and coordinating strategy. Twitter also seems to have been the key media for spreading immediate news about big political changes from country to country in the region.
>
> . . . .
>
> Around the region, people increasingly Tweeted about events that were occurring in their neighborhood. Stories of success and difficulty spread widely and created a kind of "freedom meme." *The same meme traveled across the region through Facebook and YouTube, as inspiring images were captured by mobile phone and transmitted*.[39]

The above considerations, in my view, render all the more implausible any suggestion that U.S. employees experience an "unreasonable impediment"[40] to protected concerted activities when an employer operates an email system that is devoted to business purposes.

Third, the majority's balancing fails to recognize that their new standards—effectively requiring employers to turn over email systems for Section 7 employee-to-employee communications—undermine or greatly complicate many other legal rights and obligations, including many arising under the NLRA. See Part C below.

Fourth, the majority's approach unreasonably fails to acknowledge that the right to control use of one's own property is one of the most basic of all rights.[41] In this regard, I believe the majority's criticisms of *Register Guard* demonstrate an unreasonable indifference to employer property rights. Although longstanding Board law permits employers to restrict "equipment" to business purposes, the majority argues employers lack *any* comparable property right in computer-based email systems because they can support a larger number of simultaneous users. Therefore, my colleagues state that "[e]mployee email use will rarely interfere with others' use of the email system or add significant incremental usage costs." In my opinion, this rationale only makes sense from the perspective of someone who misunder-

supervisors); *Bettie Page Clothing*, 2012 WL 1496201 (NLRB ALJ 2012) (employees exchanged protected messages on Facebook expressing concern about working late in unsafe neighborhood); *Hispanics United of Buffalo, Inc.*, 2011 WL 3894520 (NLRB ALJ 2011) (employees exchanged protected messages on Facebook responding to criticism of their job performance).

[38] There is no merit in the majority's argument that other electronic media are inadequate substitutes for employer-provided email systems "in light of the high value our precedents place on communication *in the workplace*" (majority's emphasis). The majority's position is based on a false premise that employer email systems uniquely provide the opportunity for communication *in* the workplace, and—according to the majority—Facebook, Twitter, personal email, and text messaging ostensibly occur *outside* the workplace. Here, the majority is simply wrong, and their reasoning is contradicted by the everyday experience of nearly everyone who uses email, social media, and other forms of electronic communication: employees often use employer email systems in *and* away from the workplace, and they likewise communicate via social media, texting, and personal email in *and* away from the workplace.

Also unpersuasive is the majority's contention that social media and other electronic communications (other than employer-provided email) are inadequate for protected communications because employees may be "virtual strangers to each other" with "no regular face-to-face contact" and "no practical way to obtain . . . [the] information necessary to reach each other" by social media. This deficiency is similarly contradicted by what we have seen in the real world. For example, thousands of strangers somehow managed to use social media communications to coordinate concerted action that brought down governments during the Arab Spring. See supra fn. 5.

[39] Philip N. Howard et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?*, supra fn. 5, at 8-13 (emphasis added), http://pitpi.org/wp-content/uploads/2013/02/2011_Howard-Duffy-Freelon-Hussain-Mari-Mazaid_pITPI.pdf (last visited September 26, 2014).

[40] *Republic Aviation*, 324 U.S. at 803 fn. 10.

[41] "The right to a full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, as long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law. . . . Every person owning property has the right to make any lawful use of it as he or she sees fit, and restrictions sought to be imposed on that right must be carefully examined to prevent arbitrary, capricious, or oppressive action under the guise of law." Am. Jur. 2d Property § 31 (West 2009).

stands the nature of property rights or is determined to disregard them. An owner of property is normally entitled to permit its use while imposing conditions or restrictions, based on the mere fact that he or she is *the owner*. Even if government-compelled access does not destroy the availability of private property for concurrent use by the owner (or others at his or her direction), this is still an extraordinary intrusion on the owner's private property rights.[42]

My colleagues' rationale is made worse, in my view, by their concession that employers may lawfully prohibit employees from using email for Section 7 activities, but only if those employees are denied the use of email for *all* purposes. Thus, according to the majority, Section 7 rights must be balanced against "the employer's legitimate *interest* in *managing its business*" whenever employees "have rightful access to their employer's email system" (emphasis added). By this logic, if a driver uses a company car to take employees to and from work, the employees must be given an unrestricted right to take the wheel and drive wherever they want, or the owner cannot use the car at all for its intended business purpose. The majority's analysis ignores the fact that property rights are implicated just as much by denying an owner the right to impose conditions on the use of company equipment as would be implicated by seizing the property without the owner's consent.[43] To state the obvious, it does little to preserve an employer's property rights in an email system, acquired and maintained at enormous expense, when such a system is considered lawful only if nobody uses it.

As a final matter, the need to appropriately balance property rights and protected activities is not an inconsequential aspect of the Act. In *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), the Supreme Court—when upholding the NLRA's constitutionality—emphasized the limited scope of Section 8(a)(1). The Court stated: "[I]n its present application, the statute *goes no further than to safeguard the right of employees to self-organization* and to select representatives of their own choosing for collective bargaining or other mutual protection *without restraint or coercion by their employer*." Id. at 33 (emphasis added). The Court continued:

> Employees have as clear a right *to organize and select their representatives* for lawful purposes *as the respondent has to organize its business* and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. . . . Hence the prohibition by Congress of *interference* with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, *was based on the recognition of the rights of both*."[44]

Again, in *Republic Aviation* the predicate for permitting "some dislocation" of property rights was the Court's reasonable conclusion that the employer-imposed requirements constituted an "unreasonable impediment to self-organization."[45] No comparable impediment to protected activities can reasonably be attributed to Respondent's email system devoted to business purposes.

C. The Majority's New Standard Will Create Significant, Unintended Problems for Employees, Employers, Unions and the Board

The majority's creation of a statutory employee right to use employer email systems for Section 7 activity will predictably create intractable problems in many areas, evident in just a few of the examples described below.

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[42] Of course, the owner may not impose restrictions that are contrary to law. Thus, an employer that permits some uses of its property and prohibits others may not, in doing so, discriminate against employees based on prohibited considerations like race or sex, for example (which would violate Title VII) or age (which would violate the Age Discrimination in Employment Act) or along Section 7 lines. *Register Guard*, 351 NLRB at 1116 ("*[A]bsent discrimination*, employees have no statutory right to use an employer's equipment or media for Section 7 communications.") (emphasis added). See also *Du Pont*, supra fn. 6.

[43] Cf. Restatement (Second) of Torts § 168 (1965): "A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with." The majority draws attention to § 218 of the Second Restatement, which provides that *liability* for trespass to a chattel requires harm, e.g., impairment of the chattel's condition or value, deprivation of the possessor's use for a substantial time, and so forth. But as § 217 of the Second Restatement explains, trespass and liability for trespass are two different things. Even absent harm giving rise to liability, a trespass to a chattel affects the property owner's legal rights: "A trespass, though not actionable under the rule stated in §§ 218–220, may nevertheless be important in the determination of the legal relations of the parties. Thus, the fact that one person is committing a trespass to another's chattel, while it may not be actionable because it does no harm to the chattel or to any other legally protected interest of the possessor, affords the possessor a privilege to use force to defend his interest in its exclusive possession." Contrary to the majority, the fact that *liability* for a trespass to personal property requires evidence of harm does not derogate from the owner's *right* to control the use of that property. Moreover, the issue here is not liability for a trespass to chattels. The issue is whether the property owner's *right* to control the use of its property must give way to competing Sec. 7 rights where employees have ample means of exercising those rights outside of the employer's email system.

[44] Id. at 33–34 (emphasis added) (quoting *Texas & New Orleans Railroad Co. v. Railway & Steamship Clerks*, 281 U.S. 548, 570 (1930)).

[45] 324 U.S. at 803 fn. 10.

Lawful "Working Time" No-Solicitation Requirements. More than 70 years ago, the Board articulated in *Peyton Packing*[46] the bedrock principle that it is "within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working [time]."[47] Based on the majority's newly created right to use employer email systems for Section 7 activity, employees whose regular duties involve using email will invariably read incoming nonbusiness emails during their working time, and employees will be more likely to send nonbusiness responses to such emails during working time, thereby subjecting many senders and/or recipients to lawful discipline or discharge based on violations of the employer's lawful no-solicitation requirements.[48] The majority recognizes that employers may *lawfully* impose an outright ban on nonbusiness emails during working time, but the majority nowhere addresses the reality that such a "working time" restriction will be impossible to enforce under a rule that gives employees a right to use the employer's email for Section 7 activities. This enforcement problem arises because (i) most if not all employee access to the email system will occur during their working time; and (ii) emails sent by some employees during *their* nonworking time will undoubtedly be received and read during the working time of employee-recipients when the latter use email as part of their work responsibilities.

Lawful "No Access" Restrictions Applicable to Off-Duty Employees. Many NLRB cases involve difficult questions regarding lawful employer restrictions against access to work areas by off-duty employees.[49] There will be substantial confusion—and a significant risk of discipline and Board litigation—where the employer lawfully prohibits employees from reading or transmitting nonbusiness emails during working time, and prohibits or limits employee access to the employer-provided email system outside of working time. If employers only have access to work areas (and to the employer's email system) during working time, the majority's statutory right will either be illusory, or employees necessarily will engage in working-time solicitation using the email system, contrary to the employer's lawful policy prohibiting solicitation during working time.

Constant Employer Access and No Reasonable Employee Expectation of Privacy. When employees use Internet-based social media sites like Facebook and Twitter, for example, the communications do not reside on the employer's computer system, and the employer usually lacks access to them. By comparison, virtually all employer technology usage policies state (as did Respondent's policy here) that employees can have no expectation of privacy when using the employer-provided system; and employers have the need—regarding all communications on their systems—to search and access particular emails in connection with litigation-related discovery (which may have nothing to do with employment issues), workplace investigations (regarding production problems or accidents, for example), or employee complaints about emails received from coemployees.[50]

NLRA-Prohibited Surveillance. Based on the many legitimate employer needs to search and access materials on its own email system, employee use of employer-provided email systems for NLRA-protected communications gives rise to potentially difficult surveillance issues and employee confusion about the privacy (or lack of privacy) of their nonbusiness emails sent on the employer's email system. Most employers have policies stating that employees have "no expectation of privacy" when using company computers and that all electronic "information created, sent, received, accessed, or stored

[46] 49 NLRB 828 (1943).

[47] Id. at 843. The *Peyton Packing* Board used the phrase "working hours." In *Essex International*, 211 NLRB 749 (1974), the Board held that an employer's lawful "working hours" restriction must be stated as prohibiting solicitation during "working time," which makes clear that employees are permitted to engage in solicitation before they commence and after they finish working and while they are on breaks from work.

[48] Nonbusiness emails during an employee's working time could result in discipline or discharge under the employer's no-solicitation policy only if the emails involved or constituted "solicitation." However, if the emails did *not* involve or constitute "solicitation," the employees could *also* lawfully be disciplined or discharged unless the emails involved or constituted some *other* Sec. 7 activity (which typically only arises from "concerted" activities by two or more employees, engaged in for the "purpose" of collective bargaining or other mutual aid or protection). See fn. 9, supra. Moreover, under the majority's standards, even if the emails involved Sec. 7 activity, the employees could *still* lawfully be disciplined or discharged if the employer could prove "special circumstances" that (in the Board majority's view) justified permitting the employer to limit use of its email system to business purposes.

The complexity of this footnote, standing alone, illustrates the challenges associated with applying the majority's standards. As expressed in the text, I fear the majority's standards make it basically impossible for anyone to understand, in real time, what nonbusiness emails—if sent, reviewed, and/or responded to using the employer's email system—will and will not subject employees to lawful discipline or discharge.

[49] See, e.g., *Piedmont Gardens*, 360 NLRB No. 100 (2014); *Tri-County Medical Center*, 222 NLRB 1089 (1976).

[50] See, e.g., *Fresh and Easy Neighborhood Market, Inc*., 361 NLRB No. 12 (2014) (employer lawfully conducted investigation into multiple complaints, the first initiated by an employee regarding an obscene whiteboard message, the second by an employee who complained she had been "bullied" by the first employee, and the third by an employee who complained the first employee said "fuck you" to him); *Register Guard*, 351 NLRB at 1114 (noting that the General Counsel conceded employers had a "legitimate business interest in maintaining the efficient operation of its e-mail system" and "avoiding company liability for employees' inappropriate e-mails," among other things).

. . . is subject to inspection and monitoring at any time."[51] Yet, as noted above, the General Counsel conceded in *Register Guard* that employers have a "legitimate business interest in . . . avoiding company liability for employees' inappropriate e-mails."[52] However, the Board's own cases indicate that a wide range of "inappropriate" electronic communications are deemed protected under the Act.[53] And the Act prohibits employers from engaging in surveillance (or creating the impression of surveillance) of NLRA-protected activities.[54] In many cases, therefore, it will be unclear what employee emails are protected or unprotected and what emails can be freely reviewed by the employer without implicating the NLRA. Indeed, it is unclear how an employer can avoid engaging in unlawful surveillance even when conducting the type of review necessary to determine *whether* particular emails involve protected activity, whether they are objectionable, and whether or when the employer is permitted to review them.

NLRA-Prohibited "Financial or Other Assistance." As noted previously, the Board has held—with court approval—that an employer can *violate* the Act by giving employees "pencils," "paper," "telephones," and a "calculator" to use during "paid time."[55] Such unlawful assistance is especially likely to be found in nonunion work settings where employees, as a group, engage in NLRA-protected activity. See *Electromation*, 309 NLRB at 998 fn. 31 (giving financial and other assistance such as writing materials and a calculator to unrepresented employees during paid time is unlawful when such materials are supplied in the absence of an "amicable, arm's-length relationship with a legitimate representative organization").

Federal Law Prohibition Against Giving Any "Thing of Value" to Union Representatives or Employees, and Mandatory Reporting. Section 302(a) of the Labor Management Relations Act (LMRA) makes it unlawful—with potential criminal liability—for any employer to "pay, lend, or deliver" any "thing of value" either (i) to any "labor organization" or "officer or employee thereof" that "represents" or "seeks to represent" any of the employer's employees, or (ii) to any "employee or group or committee of employees" where the "thing of value" is "in excess of their normal compensation" and is provided "for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees" in the exercise of their Section 7 rights.[56] The scope of these prohibitions has not been definitively established by the Supreme Court, but lower courts have disagreed about whether Section 302 makes it unlawful for an employer merely to pay employees who serve as union stewards for working time they devote to union business.[57] LMRA Section 302 is enforced by the courts, not the NLRB, and the use of computer systems that cost the employer thousands or millions of dollars could conceivably be considered a "thing of value" for purposes of the LMRA Section 302 prohibition applicable to union representatives and employees.

In summary, I believe my colleagues' newly created statutory right will create significant problems and intractable challenges for employees, unions, employers, and the NLRB. This will mean more work for the National Labor Relations Board and the courts. However, the losers will be parties who must endure years of litigation after the above issues arise (literally) with lightning speed, and then trudge towards resolution at a pace that, by comparison, appears to be standing still.

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[51] See, e.g., *U.S. v. Hamilton*, 701 F.3d 404, 408 (4th Cir. 2012), cert. denied 133 S.Ct. 1838 (2013).

[52] 351 NLRB at 1114.

[53] A Board majority has held (over my dissent) that it violates the Act for an employer even to use the word "inappropriate" in a policy that indicates some electronic communications may violate the law and subject the employee to potential discipline or discharge. See *Triple Play Sports Bar and Grille*, 361 NLRB No. 31, slip op. at 9 (2014) (Member Miscimarra, dissenting). See also *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) (invalidating employer rule barring "false, vicious, profane, or malicious statements toward or concerning . . . employees"), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999); *Adtranz, ABB Daimler-Benz*, 331 NLRB 291, 293 (2000) (invalidating employer rule barring "abusive or threatening language"), vacated 253 F.3d 19 (D.C. Cir. 2001); *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973) (referring to potential protection afforded to a "moment of animal exuberance").

[54] *Automotive Plastic Technologies, Inc*., 313 NLRB 462, 466–467 (1993); *Avondale Industries,* 329 NLRB 1064, 1068 fn. 16 (1999).

[55] See *Electromation, Inc*., 309 NLRB 990, 991, 998 & fn. 31, 1017 (1992), enfd. 35 F.3d 1148, 1153 (7th Cir. 1994), described in fn. 6, supra.

[56] Not only can LMRA Sec. 302 violations result in criminal liability for the employer and the recipient(s), Secs. 202(a)(6) and 203(a) of the Labor-Management Reporting and Disclosure Act (LMRDA) require mandatory reporting regarding any "thing of value" provided in violation of LMRA Sec. 302(a), and non-compliance with such reporting obligations can also result in criminal liability. See LMRA Sec. 302(d)(2); LMRDA Sec. 209(a), 209(d).

[57] See, e.g., *Caterpillar, Inc. v. Auto Workers*, 909 F. Supp. 254 (M.D. Pa. 1995), reversed 107 F.3d 1052 (3d Cir. 1997), cert. granted, 521 U.S. 1152 (1997), cert. dismissed 523 U.S. 1015 (1998) (district court finds employer's no-docking policy unlawful under LMRA Sec. 302, which is reversed by a divided court of appeals, with Circuit Judge Alito dissenting). The Supreme Court granted certiorari in *Caterpillar*, but dismissed the case before rendering an opinion based on Supreme Court Rule 46.1, providing for dismissal of any action where all parties agree to the dismissal, with arrangements for addressing relevant costs and fees. *Caterpillar, Inc. v. International Union, UAW*, 523 U.S. 1015 (1998). Circuit Judge Alito, who dissented from the court of appeals decision finding the no-docking policy lawful, is now a justice on the United States Supreme Court.

D. The Majority's New Standard Makes It Impossible For Parties to Have "Certainty Beforehand" Regarding Their Rights and Obligations

My final objection to the majority's new right—effectively giving employees access to employer email systems for Section 7 activities—relates to the fact that it takes the form of a presumption combined with qualifications that will rarely permit employees, unions, and employers to determine whether or when it will be permissible for employees to send, review, or respond to particular nonbusiness emails using the employer's email system. Thus, the majority gives employees the right to use employer-provided email systems for NLRA-protected communications, provided that the employer makes its email system available to those employees for use when conducting business. Yet, the majority's presumptive right will *not* exist if the employer can prove that (i) "special circumstances make [a] ban *necessary to maintain production or discipline*" or (ii) "[a]bsent justification for a *total* ban[,] . . . *uniform and consistently enforced controls* . . . are *necessary* to maintain production and discipline" (emphasis added). The majority indicates employers can attempt to prove that "*special circumstances* necessary to maintain production or discipline *justify* restricting its employees' rights" (emphasis added).

Every legal presumption confers some type of protection with one hand, while potentially eliminating the protection with the other. However, the only party that really knows which presumption-based "hand" will prevail—especially in Board cases—is whatever Board majority may ultimately decide the case, usually years after the fact, subject to further years of potential appeal in the courts. Legal presumptions are helpful to the Board and the courts when attempting to lend discipline and consistency to the manner in which cases are decided. However, presumptions and qualifications like those articulated in the test adopted today by the majority are notoriously ill-suited for practical application.

The above criticism of presumption-based standards is not new. More than 30 years ago, the Supreme Court specifically rejected a court of appeals' "presumption" standard in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981). In contrast with the instant case—which will clearly involve tens or hundreds of thousands of email communications even in small workplaces—*First National Maintenance* dealt with whether the statute mandated bargaining over an extraordinary event: an employer's decision to shut down part of its business for economic reasons. Id. at 680.

Preliminarily, the Supreme Court in *First National Maintenance* emphasized that the Act contemplated an even-handed balancing of competing rights and obligations rather than focusing on a particular party's rights in a given case. The Court observed that "the Act is not intended to serve either party's individual interest, *but to foster in a neutral manner a system in which the conflict between these interests may be resolved*." Id. at 680–681 (emphasis added). Also, the Supreme Court recognized that one of the Act's many virtues is that—even without a mandated statutory right—the Act supports collective bargaining that frequently produces benefits beyond those guaranteed in the statute. Thus, although the Court concluded that the Act does *not* mandate bargaining over an employer's decision to shut down part of a business, the Court noted that (i) the Act requires bargaining over the effects of such a shutdown, (ii) effects bargaining often entails substantial discussions regarding the decision, and (iii) even "without the intervention of the Board enforcing a statutory requirement to bargain," parties often have an incentive to engage in voluntary negotiation, which, in fact, had resulted in successful alternatives to shutdowns. Id. at 681–682 & fn. 19, 684.

Before the Supreme Court granted certiorari in *First National Maintenance*, the Court of Appeals for the Second Circuit adopted a "presumption" analysis that created a statutory right that was subject to rebuttal based on evidence concerning the relative interests of the parties.[58] Thus, while finding that bargaining would normally be required, the court stated that such an obligation would not exist if the employer proved, for example, that (i) the "purposes of the statute would not be furthered by imposition of a duty to bargain," (ii) "bargaining . . . would be futile . . . when it [was] clear that the employer's decision cannot be changed," or (iii) there were "emergency financial circumstances" or a "custom of the industry . . . not to bargain."[59]

Significantly, the Supreme Court rejected any "presumption" analysis that required case-by-case application because, according to the Court, it appeared "ill suited to advance harmonious relations between employer and employee."[60] In words that have equal application in the instant case, the Court held:

> An employer *would have difficulty determining beforehand* whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain. If it should decide to risk not bargaining, it might be faced ultimately with harsh remedies. . . . If the em-

[58] *NLRB v. First National Maintenance Corp.*, 627 F.2d 596 (2d Cir. 1980), reversed and remanded 452 U.S. 666 (1981).

[59] Id. at 601–602.

[60] 452 U.S. at 684.

> ployer intended to try to fulfill a court's direction to bargain, it would have difficulty determining exactly at what stage of its deliberations the duty to bargain would arise and what amount of bargaining would suffice before it could implement its decision. . . . If an employer engaged in some discussion, but did not yield to the union's demands, the Board might conclude that the employer had engaged in "surface bargaining," a violation of its good faith. . . . *A union, too, would have difficulty determining the limits of its prerogatives, whether and when it could use its economic powers to try to alter an employer's decision, or whether, in doing so, it would trigger sanctions from the Board.*[61]

As noted above, *First National Maintenance* dealt with an issue (whether bargaining was required over a partial closing decision) that differs from the presumptive right (to use employer-provided email systems for protected activities) created by the majority in this case. However, as described in Parts B and C above, I believe the instant case involves *greater* obstacles than those presented in *First National Maintenance* to the ability of employees, employers, and unions to have "certainty beforehand" regarding their respective rights and obligations.[62] Moreover, we are dealing here with hundreds of thousands of electronic communications that, as discussed previously, will quickly proliferate even in relatively small workplaces. To understate the obvious, case-by-case Board and court litigation—which often takes years to complete—is poorly suited to help the parties understand their rights and obligations under the standards created by the majority today.[63]

Employees, unions, and employers need the Board to accomplish one thing above all else: give them understandable answers in advance regarding what they can and cannot do. Consequently, while intending no disrespect either to myself, my colleagues, or other members of the bar, I believe we should strongly favor understandable rules that, whenever possible, have reasonably bright lines rather than standards that are written in the language of lawyers. *Register Guard* conformed to this principle. It announced a standard that was sound as a matter of law, but also clear and easy to apply. And the Board in *Register Guard*—while not creating a statutory right to use employer email systems for Section 7 activities—recognized that the Act still provides substantial protection for concerted activities undertaken by employees for mutual aid or protection. Thus, *Register Guard* provided that employers violate the Act if they deny access to email in a manner that discriminates against Section 7 activities, while permitting the use of email for other comparable nonbusiness purposes. Employees retained the protection afforded by decades of Board and court precedents to engage in solicitation during nonworking time and to engage in distribution during nonworking time in nonworking areas. In unionized work settings, Section 8(a)(5) requires bargaining over issues such as access to employer property and equipment and the use of working time for union activity, and there is abundant evidence that bargaining has conferred important benefits in these areas, in addition to rights conferred by the Act.

E. Conclusion

Like my colleagues, I am fully committed to Section 7's protection afforded to employee self-organization, collective bargaining, and other concerted activities for mutual aid or protection. However, the Act's protection is undermined by creating rights, presumptions, and exceptions—like those adopted in today's decision—that will be extremely difficult to apply. Nobody will benefit when employees, employers, and unions realize they cannot determine which employer-based electronic communications are protected, which are not, when employer intervention is essential, and when it is prohibited as a matter of law. Not only is such confusion almost certain to result from the majority's decision, it is unnecessary and unwarranted. As explained above, I believe the Board cannot reasonably conclude—based on the record in this case or 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."[64] The use and availability of such an email system, devoted exclusively to business purposes, even more clearly does not constitute interference, restraint, or coercion within the meaning of Section 8(a)(1).

For the above reasons, I respectfully dissent.

Dated, Washington, D.C. December 11, 2014

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[61] Id. at 684–686 (citation omitted; emphasis added).

[62] 452 U.S. at 679.

[63] See, e.g., *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982) (summarizing the multiple categories of "special circumstances" regarding the treatment of employer restrictions on the display of union insignia in different workplaces).

[64] *Republic Aviation*, 324 U.S. at 801 fn. 6, 803 fn. 10.

MEMBER JOHNSON, dissenting.

I. INTRODUCTION

The question presented here is whether the National Labor Relations Act requires an employer to surrender possession and control of *its own email network* so that employee communications about union activities and other concerted 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 (a) there are *multiple other* electronic communications networks that employees could use for such kinds of statements and discussions on their own time, including employees' own personal email, (b) employees *already possess* the right to solicit and engage in communications for both their own mutual aid and union-related activity in the workplace on a face-to-face basis, and (c) the employer's email policy *does not discriminate* against such communications in particular but evenhandedly prohibits all nonbusiness uses of its email system? Because I don't think this question is a close one, I respectfully dissent.

First, however, I address the basic contours of the issue at hand before examining the various flaws in the majority opinion. Today, just as in 1935 when the Act was passed, businesses exist and go about their purposes while occupying ordinary physical space. In turn, if the business has employees, those employees interact with each other within the physical space the business occupies, otherwise known by lawyers as "real property." This real property is typically owned or leased by the business.

But in 2014, most businesses in the United States, like other organizations, also possess, pay for and operate their own email communications networks, which are unaffected by many of the constraints that physical space would otherwise place on communication. That particular quality of email explains why it is so widely used by businesses. Email is a necessary and practically invaluable means of communication from a business's internal perspective. It provides the business organization with a user-driven communications network that can connect any or all of the people within the business—and also people outside that network—by allowing the user to select and create an audience for any particular communication. And, email allows the user and his or her audience to communicate on a nearly instantaneous basis if desired, creating a time-stamped record of back-and-forth communication that persists in the long term (sometimes permanently) on the business's email network for the user and audience to peruse at length. These email communications can span anything from a simple message a few lines long, to videos, to animations (e.g., .gifs), or to large compilations of visual and textual information, including links to the wider internet containing the same. Unlike ordinary conversation, these communications do not depend upon the "speaker" and "listener(s)" being in the same physical area, at the same time, in order to take place. Instead, they can be separated geographically to the ends of the Earth and temporally over minutes, hours, days, or weeks. Because of the versatility of the underlying technology, these communications can be rapid exchanges, or they can involve significant time spent on their composition by the writer, and their comprehension and then response, by the reader.

If the organization owning the email network is a business, the business typically and unremarkably requires its employees, as a first priority, to use its email network to fulfill its business objectives, whatever they may be at a given moment. Because of the convenience and versatility of email, businesses frequently use it to communicate with their customers, suppliers, vendors, various stakeholders, third parties; and internally among managers, supervisors, and employees. The communications span the gamut from day-to-day operational matters involving only a few people all the way to the level of binding contracts, business commitments, or company-wide communications that are part of the strategic direction of the business.

Of course, to paraphrase the movie, "if you build the email network, they will come."[1] The convenience and versatility of email understandably makes a business's email network attractive to its users far beyond what is directly or indirectly related to business objectives. From the worker's perspective, it is very convenient to use the same terminal, device, or email account directly available on the business email network to engage in wholly personal matters, instead of switching terminals, devices or accounts. Thus, I agree with the majority's contention that most employees nationwide who use email as part of their duties, have used, and will continue to use business email networks for non-business purposes, including occasional discussions about terms and conditions of employment. In the abstract, there is nothing surprising or problematic about that.

But does the Act transform this use phenomenon into some kind of rule of adverse possession by employees regardless of their particular employer's wishes, and regardless of that employer's rules and regulations? In other words, does the Act require this private virtual space paid for by the employer to become public for employee Section 7 purposes?

[1] "Field of Dreams" (1989) http://www.imdb.com/title/tt0097351/quotes, last visited September 2, 2014.

My colleagues in the majority posit that it does. They err, although I commend their reliance on data concerning email use, and their construction of an empirical argument based on the same, in order to draw their conclusions in this technology-heavy case. Their conclusions are incorrect, however, because they fail to consider all the relevant information, fail to draw the correct analogies from the *Republic Aviation* case discussing face-to-face communications in the 1940s,[2] ignore the reality of the world of electronic communications in 2014, impose an unfunded mandate on employers far beyond what the Act requires, and finally, put into place a legal regime that violates the First Amendment. Sections II-VII of the analysis below examine each of my areas of concern in detail.

In short, I would not overturn the Board's decision in *Register Guard,*[3] holding that the Act does not create a statutory right for employees to use their employer's email system to engage in Section 7 activity, in order to replace it with the majority's overbroad rule. *Register Guard*'s conclusion flows from decades of well-settled precedent on the use of employer equipment to engage in Section 7 activity. It also flows from examining the application of the principles set forth in the Supreme Court case, *Republic Aviation*, on which the majority relies, to technology-driven communications of today's era. The majority's contrary view that employee use of email for statutorily-protected communications is presumptively permitted by employers who have chosen to give employees access to their business email networks**,** is a radical departure from long-settled Board and court precedent.

That the new rule is a radical one is unsurprising given that my colleagues have both disregarded the substantial differences between email and face-to-face communication and have 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. Further, this new standard will undermine the long settled Board and court principle that "working time is for work"—a principle inextricably woven into the Act's integral balance that allows Section 7 activity to go on at the workplace, and in the first place. Here, the majority's standard also effectively requires employers to pay employees for the time reading and writing emails directly or even tangentially relating to terms and conditions of employment. Finally, the new rule imposed by my colleagues violates the First Amendment, and, by extension, departs from Section 8(c) of the Act, because it requires an employer to pay for and "host" speech that is not its own and that the employer does not support.

There is one more thing of introductory note. The majority's rationale today is absolutely not "carefully limited," as the majority claims. By implication, albeit an obvious one, this rationale extends beyond email to any kind of employer communications network (be it instant messaging, internal bulletin boards, broadcast devices, video communication or otherwise) that employees have access to as part of their jobs. And, inasmuch as the Board has created a presumptive right to "use your employer's device" with today's result, an employer almost certainly cannot restrict employees under a "bring your own device" (BYOD) policy. The majority dodges these aspects of its holding with disclaimers that this holding is restricted to the email-network issue only, but recent Board history has revealed that similar prior claims of limitation were not borne out by events. Compare *Specialty Healthcare & Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011) (claiming not to overrule other industry unit rules), slip op. at 14, enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB, 727 F.3d 552* (6th Cir. 2013)*,* with *Macy's, Inc.*, 361 NLRB No. 4 (2014)(eliminating retail store unit presumption based on *Specialty Healthcare*). Thus, a reviewing court would be well within its power to review not only the immediate consequence of the opinion but also its obvious implications, to determine whether the Agency deserves deference here. My view is that it does not.

II. FACTS

The Respondent provides video interpreting services to deaf and hearing-impaired individuals from 16 call centers located across the country, including call centers in Corona and Long Beach, California, which are involved in this proceeding. The Respondent's employees, known as video relay interpreters, provide sign language interpretation between hearing-impaired and hearing persons through video calls. The video relay interpreters process calls using company-provided computers located at their workstations. The Respondent assigns an email account to each video interpreter. The interpreters can access these accounts from the computers at their workstation, as well as from their personal computers and smart phones. Employees regularly use their work email to communicate with each other, and managers use it to communicate with employees and other managers.

The Respondent has a written policy in its Employee Handbook providing that email on its business system should be used for business purposes only, and listing

[2] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[3] *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

specific activities that are strictly prohibited. That policy states:

> INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY
>
> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by the [sic] Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.
>
> . . . .
>
> **Prohibited activities**
>
> Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:
>
> . . . .
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
>
> . . . .
>
> 5. Sending uninvited email of a personal nature

The intention and effect of that provision is to prohibit all personal use of the employer's business email network. The record contains little evidence of employees' personal use of email.

The video interpreters are expected to be "logged in" i.e., in their workstation connected and ready to take calls, 80 percent of the time in a day and 85 percent of the time from 9 p.m. to 9 a.m. They consider themselves to be on break when they are not logged in. They also are provided a 30-minute meal period if they work five hours or more. The Respondent has a kitchen/break room in both its Long Beach and Corona call centers.

Applying the Board's decision in *Register Guard*, the judge dismissed the General Counsel's allegation that the Respondent violated Section 8(a)(1) by maintaining an overly-broad electronic communication policy that prohibited employees from using its computers, Internet, and email for nonbusiness purposes. The General Counsel and Charging Party both filed limited exceptions to that conclusion, arguing that the judge erred by finding that the Respondent's communication policy was not facially unlawful. On April 30, 2014, the Board invited the parties and amici to submit briefs addressing five questions concerning whether *Register Guard* should be overturned and, if so, what standard the Board should apply to employees' use of their employer's electronic communications systems.

III. EMAIL IS NOT A WATER COOLER: MY COLLEAGUES MISAPPREHEND THE CRUCIAL DIFFERENCES BETWEEN EMAIL AND PHYSICAL SPACE, AND THUS IMPERMISSIBLY UNDERMINE THE RIGHTS TO OWN AND OPERATE AN EMAIL NETWORK FOR BUSINESS PURPOSES

My colleagues' sweeping new analytical framework centers on their belief that email is a "new natural gathering place" for employees to communicate with one another in the workplace. The dissenting Board members in *Register Guard* held the same position. *Register-Guard*, 351 NLRB at 1125 ("discussion by the water cooler is in the process of being replaced by the discussion via e-mail"). The majority draws this conclusion based on data that it claims shows that email has become a type of "forum" for, and the primary means of, workplace communication.

The majority's initial jumping off point is categorically inapt. An email network is by no means a gathering place or "forum," even an electronic one, like an electronic bulletin board. First, email is not a set-off area with some recognizable boundary that is thus potentially separable from the middle of an ongoing work process. This is important, as, unlike with physical spaces, there is no easy-to-determine-and-administer dividing line between the "working area" and the "nonworking area." Instead, all emails appear on the same user interface on the business's email system that is utilized for work-related emails, and cannot be set off in some fashion according to their content as being a "Section 7 email" or not. Here, imagine an employee standing at the archetypal production line of widgets and working on each widget coming down the line. At random but frequent intervals, instead of a widget, the next item to suddenly appear on the line would be a conversation with one or more other employees —and the employee could choose to stop the line until his or her part in that conversation was finished.

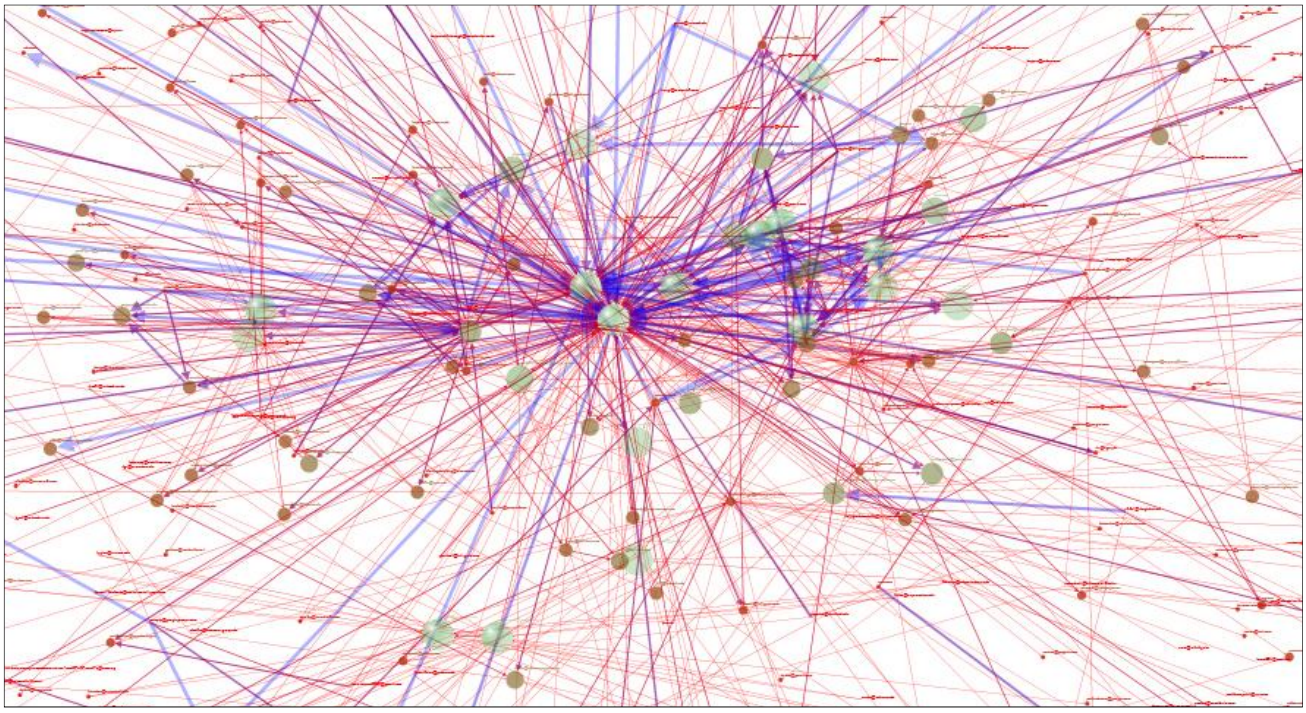
Second, the existence of the supposed "gathering place" is not fixed in space at all, unlike an actual gathering place. Because, as described in the introduction, an email is a user-created and user-directed communication that summons up its own audience, in effect, the author of the email may create a "water cooler discussion" of whatever size he or she wants, by summoning whatever employees (or other persons) he or she wants there. As a corollary, there is no limit on the amount of "water cool-

ers" that can be created and exist at one time. And, importantly, as long as the user has access to the email system for his or her job, the user may initiate this discussion on an unpreventable and contemporaneously unmonitorable basis.

Third, the existence of this "place" is not bound by time, either, in two separate and different ways. The "water cooler" can be created at any time, with the press of a key or a button, regardless of whether the author or any of the people in the intended audience is working or not. And, no one really can leave the "water cooler" unless and until the last person in that audience has had their say, which may be days or weeks later. For example, even if an email recipient deletes a particular email, one is still subject to being "dragged back into" the conversation by the ubiquitous "reply to all" function.[4]

So, the "natural gathering place" posited by the majority: (a) has no boundaries from which we could derive some feasible kind of separation, in terms of dividing a "nonworking break area" from a "working area"; (b) has no fixed spatial existence at all but can appear anywhere in the employer's operations; (c) has no real audience size limitation; (d) has no upper limit on the amount of "places" that can coexist at once; (e) can be summoned up at any time; (f) can be repeatedly summoned regardless of the wishes of some or all in the audience; and (g) is impossible to leave (as long as one is working on the email system).

Indeed, a visual representation of an email network[5] does not resemble a water cooler or physical gathering place in any way:



[4] This happens frequently. A particularly noteworthy example from recent Board cases was the misfiring of an employer-initiated United Way campaign described in *California Jet Propulsion Laboratories,* 360 NLRB No. 63, slip op. at 10-11 (2014).

[5] This is a two dimensional rendering of a portion of a visual representation model of reply emails existing on an email network; the original representation, created using NodeXL, was created by Dr. Marc Smith. See http://www.smrfoundation.org/wp-content/uploads/2009/03/2009-nodexl-email-marc-smith-scaled-down.jpg (last visited September 20, 2014). What the reader sees above is cropped; the full rendering should be available at the link above.

Unsurprisingly, Board principles that govern worker communication in physical space do not translate well to regulate this "natural gathering place."

The majority's analysis essentially equates email with face-to-face communications that take place at a fixed point in physical space and time. But, as explained above, the majority's new rule disregards the fact that email and face-to-face communications are inherently different. For example, when employees communicate with each other in person at their work facility during break time, their conversations come at little or no cost to the productivity of the employer. Such face-to-face "water cooler" or "break room" communications are limited by space and time. In this regard, the "water cooler" or "break room" can be set up by the employer at some fixed point on the premises so that it does not inherently interfere with the employer's production operations. Also, because the "water cooler" is located at this fixed point, communication will involve only those employees who voluntarily decide to show up at the "water cooler." They will show up most likely during a break from work, and most break areas and shift schedules are set up exactly so that employees have the opportunity for free discussion *when they are not working, and at locations that would not inherently interfere with operations.*

In contrast, email communications can extend to the entire work force and can occur during any point when the email system is operational, be that working time or nonworking time. They also occur on the exact same system used for both crucial and ordinary business communications. Moreover, unlike a conversation, email allows a single individual to force a communication with everyone in the office, surrounding offices, across a company's national or global network, or with anyone anywhere on another email network on the internet, in a matter of seconds with a click of a button.[6] Any email, also in a matter of seconds, then can be forwarded on the employer's email system or others to dozens or hundreds of other recipients, including third parties.[7] The conversations at the "water cooler" do not persist beyond the utterance of the words themselves, far different than email which maintains itself in the employer's system for a long time or sometimes indefinitely, waiting for a potential response. Unlike an in-person conversation that can be ignored, email exists until it is deleted by the recipient, and the recipients can repeatedly be drawn back into the conversation.

Most significantly, email communication cannot be treated like face-to-face communication because email requires the employer inherently to pay for each and every communication and the enduring maintenance of that communication on its network. Here, one can analogize the progressive creation and storage of emails to a series of bulletin boards, with different audiences, increasing over time with no finite limit. The employer pays for and maintains all of this, unlike face-to-face communications.

In short, email conversations have no definite bound in space, time, or audience and necessarily cost employers money, while the conversation of the "natural gathering place" occurs in a location that can be (and often is) set apart from the production process, usually occurs during break time, usually occurs between limited groups of coworkers at a time, and comes at no inherent cost to the employer. In this case, for example, an employee using the Respondent's email can communicate with everyone in its 16 call centers across the country in a matter of seconds, and that email becomes a permanent record, which can be obtained and responded to indefinitely in limitless conversations, all of which conversations the employer pays for directly. To be sure, none of the "natural gathering place" precedent that the majority relies upon deals with a communications network, or a communications network like email, with the above-mentioned features that transcend how communications systems worked in 1935, when the Act was passed.

All these differences illustrate that email is a double-edged sword in relation to productivity. The very convenience and versatility of business email, once such communications are redirected to nonwork purposes, guarantee a boundless, permanent distraction from, if not a disruption of, the core purposes for which the business exists and which were the point of paying for and operating the email network in the first place. This observation reflects no hostility to Section 7 rights, and indeed is separate and apart from the content of whatever the nonbusiness subject matter happens to be. For example, if there was created a Federal law to compose and share, to whatever audience one wished on business email, the full extent of one's own views (and one's collected stories, articles, photos, .gifs, links, and videos) concerning politics, popular movies or TV series, playoff races in professional sports, bestselling books, fantasy football, or one's favorite recording artist, and to respond to such emails from others about the same, there would be a massive national productivity loss.

[6] For example, in *Caltech Jet Propulsion Laboratory*, 360 NLRB No. 63, slip op. at 15 (2014), five employees sent out 7,217 emails using the employer's email addresses and listservs (the employer's prepopulated email addressee lists) to express their views to coworkers about a Supreme Court decision.

[7] As such, a conversation that an employee intended to be private (for example, regarding union support), can be transformed into a public announcement to hundreds on email, regardless of the speaker's intent.

Email thus poses far more of an acute and substantial danger of infringement on the overall productivity of an employer's enterprise than face-to-face conversation ever could. The core communications network used for business operations may be transformed into a "permanent chat room" for nonbusiness topics. This danger, in turn, should affect the balance that the Board strikes between the employer's right to own and effectively operate a business—which we label in Boardspeak "the right of employers to maintain production and discipline in their establishments"[8]—and employees' Section 7 rights to communicate for the purposes of union organizing, mutual aid or assistance, or urging otherwise.

However, the majority simply deploys the same precedent that covers face-to-face conversations in physical space to justify its new test, rather than perform this balance anew with respect to the medium that it now regulates. This causes consternation, as, even with physical space, the Supreme Court recognized long ago that ongoing solicitation in certain kinds of physical spaces that are used for business operations can necessarily pose "direct and substantial interference" with the employer's business. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 506 (1978) ("In the retail marketing and restaurant industries, the primary purpose of the operation is to serve customers, and this is done on the selling floor of a store or in the dining area of a restaurant. Employee solicitation in these areas, if disruptive, necessarily would directly and substantially interfere with the employer's business.")

If I had to strike this balance between employer electronic property rights and Section 7 rights, I would balance them differently, as I explain below in section V. However, as I discuss below in section IV., the *Republic Aviation* balance need not even be struck where decades of Board precedent concerning equipment has shown us that there is no presumptive Section 7 right to balance.

IV. THE REPUBLIC AVIATION FRAMEWORK IS NOT APPLICABLE TO COMPANY OPERATED EMAIL NETWORKS AB INITIO BECAUSE OUR PRECEDENT SHOWS THERE IS NO SECTION 7 RIGHT TO THE USE OF EQUIPMENT, NOR CAN THE FACT OF EMPLOYEE CONVENIENCE ESTABLISH ONE

My colleagues go to great lengths to explain why the majority in *Register Guard* erred in relying on the Board's equipment precedents to find that employees had no statutory right to use their employer's email system for Section 7 purposes. As noted above, I recognize the unique aspects of email, which also demonstrate that email is different from earlier forms of communication equipment considered by the Board. In that sense, I agree with the majority. However, an employer's email system is, at its core, merely another means of communication that the employer owns and provides to its employees to advance productive business interests. As the Board recognized in *Register Guard*, an employer's "communication system, including its email system, is the [employer's] property and was purchased by the [employer] for use in operating its business." 351 NLRB at 1114. Unlike face-to-face water cooler communications, the employer's email system is a place where work is supposed to occur. To the extent that it is a tool of communication, it is the employer's tool purchased, designed, and operated by the employer to further the employer's business purposes.[9]

Even more than the prior communications devices that the Board addressed in earlier decisions, email constitutes an enormous business investment. Procuring and maintaining the infrastructure necessary to operate their email systems (which are, in turn, just one part of the electronic business ecosystem for any employer) costs American employers many billions of dollars per year. It is my view that employers are entitled to protect these significant investments in equipment by limiting their use to the purposes for which they are intended and maintained.

My colleagues argue that the Board's equipment precedent does not actually hold that employees have no statutory right to use an employer equipment or media for Section 7 purposes. They argue that most of the cases relied on by the majority in *Register Guard* were decided on discriminatory enforcement grounds, and therefore the language in these cases regarding an employer's right to ban nonbusiness use of its equipment was merely dicta. They contend that the Board never actually addressed the issue of whether a complete ban on nonwork use of the equipment would have been lawful if consistently applied. I disagree.

The Board clearly held in *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001), citing *Union Carbide Corp*., 259 NLRB 974, 980 (1981), enfd. in relevant part 714 F.2d 657 (6th Cir. 1983), "that there is no statutory right of an employee to use an employer's equipment or media." There, the Board further stated that there is no statutory right to use

[8] *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 113 (1956); *Beth Israel v. NLRB*, 437 U. S. 483, 492–493 (1978). This employer right is also referred to as the right to "maintain production or discipline." See also *Republic Aviation* at 803–804, fn. 10 (quoting *Peyton Packing Co.*, 49 NLRB at 843–844).

[9] Employers design their email system in the sense that they create the email directories, address lists, and certain system parameters for their email system.

an employer's bulletin board. 332 NLRB at 230. See also *Container Corp. of America*, 244 NLRB 318 at fn. 2 (1979) (Board stated that "[i]t is well established that there is no statutory right of employees or a union to use an employer's bulletin board"). My colleagues correctly point out that in *Union Carbide Corp*., the Board agreed with the judge's finding that the employer had applied its equipment-use rule discriminatorily. However, in that case, the judge stated that the employer "could unquestionably bar its telephones to any personal use by employees." 259 NLRB at 980. The Board did not disagree with this statement. Moreover, on review, the Sixth Circuit reiterated this principle. *Union Carbide Corp*., 714 F.2d 657, 663 (6th Cir. 1983). Furthermore, in *Allied Stores of New York*, 262 NLRB 985 fn. 3 (1982), the Board explained:

> There is no statutory right for an employee or a union to use an employer's bulletin boards or blackboards. The Act's prohibitions come into play only where the employer otherwise assents to employee access to the bulletin board/blackboard but discriminatorily refuses to allow the posting of union notices or messages. . . . Therefore, *Respondent could conceivably promulgate a nondiscriminatory rule denying employees any access to the bulletin boards or blackboard for any purpose*.

[Citations omitted and emphasis added.][10]

Thus, contrary to my colleagues, the majority in *Register Guard* correctly held based on prior precedent that "[a]n employer has a 'basic property right' to 'regulate and restrict employee use of company property.'" 351 NLRB at 1114, citing *Union Carbide Corp. v. NLRB*, 714 F.2d at 663–664. My colleagues' assertion that the Board never endorsed this basic principle that an employer may prohibit all nonwork use of its equipment is simply wrong, as a matter of doctrinal history.[11]

A final weakness in the majority position here is the lack of supporting evidence. The linchpin of the majority's assertion that a Section 7 right arises to business email is because such email has become a critical form of communication for nonwork-related issues. I question my colleagues' conclusion that email has become the predominant means of communication for nonwork purposes in many workplaces. While my colleagues have cited data for this claim, it pains me to fault them for the conclusions they draw from the data.

The majority points to a 2008 survey 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. However, my colleagues disregard the fact that this survey has aggregated all three media of internet, phones, and email. Thus, this statistic as stated is no more illuminating than the assertion "96 percent of people use work implements while they are working." Furthermore, the data cited by my colleagues shows that the trend of using email communication overall is actually declining. They also point to a Madden & Jones 2008 survey that found that 62 percent of employees used email at work, acknowledging that this number is lower than "the 2004 finding that 81 percent of employees spent an hour or more on email daily." In addition, the majority emphasizes the increase in the percentage of employees who telework, noting that email is the primary means of communication in these workplaces. That convinces, but not to the necessary extent. With the explanation of how the increase in telework might justify the new rule, it would seem that the majority should cabin its rule to employees who telework from home or remote locations, and not extend this analysis to every employee who has access to email.

The majority also goes on to conclude that "in many workplaces, email is a large and ever increasing means of employee communication for a wide range of purposes … and often nonwork purposes." Yet, other than a single, aging survey from 2004, my colleagues cite zero data to support this sweeping assertion. My colleagues make an additional leap, stating that *Register Guard* failed to consider "the importance of email as a means by which employees engage in protected communications, an importance that has increased dramatically during the 7 years since *Register Guard* issued." However, again my colleagues cite absolutely no data to show that employees now use work email for Section 7 activity "dramatically more" than 7 years ago. That the only source cited shows that email is a common form of workplace communication clearly does not establish that employees are using business email at a "dramatically increased

[10] See also *Challenge Cook Brothers of Ohio, Inc*., 153 NLRB 92, 99 (1965) (judge stated that if the employer "had consistently not allowed its employees to use the bulletin boards to publicize their personal affairs, the [employer] could properly have prohibited the posting of notices of union meetings).

[11] Recognizing the problem presented by the Board's clear endorsement of this principle that there is no statutory right to use an employer's equipment in *Mid-Mountain Foods*, the majority says that this opinion is somehow still "dicta" because the Board does not explain or justify it. Yet, the cases clearly explain that there is nothing in the statute protecting an employee's right to use equipment, but the Act does address discrimination, and therefore covers an employer's rule that discriminates against equipment-use. It is unclear what more the Board could say to explain this self-evident principle. Moreover, the amount of ink spilt is not a basis for determining whether something is a holding or merely dicta; for example, the explanations of the Supreme Court's holdings in *Republic Aviation*, the cornerstone of the majority's rationale, are each just a few lines long.

level" for personal purposes, let alone to engage in Section 7 activity.

I believe that, fairly considered, my colleagues' theory that business email has become a "critical means" of communication for "work-related" issues or a "natural gathering place" for workplace communication is really just another way to talk about convenience. I agree with my colleagues that the technological advantages of business email and its ease of access make it a vastly more convenient communications system for certain kinds of messages and certain audiences than face-to-face meetings, paper literature distribution, the phone system, or even personal email. While it may be more convenient for employees to communicate with each other using the same employer-owned email system upon which they carry out their daily work, convenience has never been a justification for an employer losing control over its property. As the *Register Guard* majority emphasized, "Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate." *Register Guard*, 35 NLRB at 1115, citing *Guardian Industries Corp. v.* NLRB, 49 F.3d 317, 318 (7th Cir. 1995).

The majority's principle seems akin to adverse possession through convenience and work usage, and, as such, it is far too expansive. For example, it would be much more convenient for employees to be able to use the same copiers, markers, paper, bulletin boards, conference rooms, pagers, tablet-computers, phone networks, and audio-visual equipment used on the job for spreading employees' messages at work whenever employees desired. But the Act has never been held before to require an employer to turn over the means of production to employees for Section 7 purposes. Finally, to the extent that the majority posits that employees must be able to access employer email to discuss "work-related" topics, simply because the employer does, the Supreme Court precedent mitigates to the contrary. The Act "does not command that labor organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications simply because the Employer is using it." *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 363–364 (1958). The same should hold true for employees themselves.

And, even assuming that all of the data cited by the majority is correct, my colleagues have not shown the necessary predicate to an extension of Section 7 rights to email. They have not shown that email has eliminated face-to-face interactions, or replaced the effectiveness of those interactions, in the workplace.[12] Regardless of how pervasive email use becomes, most employees still must eat meals, travel about the workplace, use the restroom, or take breaks, all of which are activities that are likely to occur outside an office and away from a desk or computer in areas where other employees congregate and are likely to engage in face-to-face communication. Employees still use such facilities, as they do here, and still communicate with each other there as they have in the past. Indeed, many employers require that employees take breaks away from their work area and provide break rooms where employees can talk to their coworkers. Some employers have on-site cafeterias, gyms, or outdoor areas for employees to use during their breaks.[13] These natural gathering places exist and will continue to exist, regardless of the growth of email. As the majority stated in *Register Guard*, there is no evidence here that the Respondent's "employees rarely or never see each other in person or that they communicate with each other solely by electronic means." 351 NLRB at 1116. The majority here claims that email is a critical means of communication, but that simply begs the question of why face-to-face communication has suddenly lost its effectiveness in serving Section 7 rights.

V. EVEN IF IT WERE APPLICABLE, *REPUBLIC AVIATION* DICTATES A DIFFERENT OUTCOME HERE, AS IT

[12] According to a 2009 Forbes Insights survey of more than 750 business professionals, most executives still feel face-to-face communication is essential for business. "In fact, eight out of 10 respondents said they preferred face-to-face meetings over technology-enabled meetings such as videoconferencing. Face-to-face meetings 'build stronger, more meaningful business relationships,' they said, while allowing better social opportunities to bond with clients and coworkers. It is also easier to read body language and facial expressions and interpret nonverbal communication signals. Respondents overwhelmingly agreed face-to-face communication is best for persuasion, leadership, engagement, inspiration, decision-making, accountability, candor, focus and reaching a consensus." Face-to-Face Communication in Business, available at http://smallbusiness.chron.com/face-to-face-communication-business-2832.html (last visited September 22,2014).

[13] For example, "technology companies have long embraced the concept of voluntary group breaks as a path to creativity and collaboration. . . . In addition to cafes and coffee bars, Google provides Ping-Pong tables, pool tables and video games. It even has a bowling alley that can be booked like a conference room. Employees can also hike, bike and train for races together, and form groups for activities like wine tasting." Communal Breaks: A Chance to Bond, New York Times (July 14, 2012), available at http://www.nytimes.com/2012/07/15/jobs/group-breaks-can-raise-workplace-productivity.html.

According to a study by an MIT professor regarding how ideas flow through groups and the effect that flow has on productivity, "only rich channels of communication like face-to-face and to a lesser extent video conferencing and telephone lead to changes in behavior and therefore in culture. Email and text are particularly ineffective when it comes to the adoption of ideas." Inside The Weird, Profitable Study Of "Social Physics" (Feb. 27, 2014), available at http://www.fastcolabs.com/3027066/inside-the-weird-profitable-study-of-social-physics.

MEASURED ALTERNATIVES FOR EMPLOYEE COMMUNICATION BEFORE EXTENDING THE SECTION 7 RIGHT TO EMPLOYER PROPERTY, ESTABLISHED A RIGHT OF PROPERTY ACCESS ONLY INSOFAR AS IT WAS "ADEQUATE" FOR THE "EFFECTIVE" EXERCISE OF SECTION 7 RIGHTS, AND PROTECTED THE EMPLOYER'S INTEREST IN PRODUCTIVITY BY ESTABLISHING THAT "WORKING TIME IS FOR WORK," NONE OF WHICH THE MAJORITY DOES HERE

The majority finds that employees' use of their employer's email system should be analyzed under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), adopting a presumption that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications. I agree with the prior majority in *Register Guard* that this analysis is flawed, because there is no Section 7 right arising to employer equipment in the first place. But even if *Republic Aviation* does apply, the majority's application is dead wrong because it leaves out key parts of the balance. Here, the majority does not (1) examine alternative methods of electronic communication for employees, (2) determine that the current *Republic Aviation*-endorsed allowance of face-to-face communication, *plus* alternative methods of electronic communications that are generally available and actually preferred today over email, are now inadequate to effectively allow the expression of Section 7 rights, or (3) adhere to the principle that "working time is for work"—*all of which were key parts of the reasoned balance that the Supreme Court set up and endorsed* in the *Republic Aviation* line of cases deciding the boundary between Section 7 rights and the employer's real property rights.

In *Republic Aviation*, the employer had a policy banning all oral solicitation at any time on the premises. The employer terminated an employee for soliciting union support on his own time. The Supreme Court affirmed the Board's finding that the rule and its enforcement violated Section 8(a)(1). The Court recognized that "[i]nconvenience or even some dislocation of property rights, may be necessary in order to safeguard" Section 7 rights. See 324 U.S. at 802 fn. 8. According to the Court, "the employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable to employees effectively to exercise their right to self-organization and collective bargaining." Id. The Court found that the employer's policy "entirely deprived" employees of their right to communication in the workplace on their own time. Id. at 801 fn. 6. The Court upheld the Board's presumption that a ban on oral solicitation on employees' nonworking time was "an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." Id. at 803 fn. 10. Otherwise, employees would have no time at the workplace in which to engage in Section 7 communications.

The basic holding from *Republic Aviation* and its progeny is that employers must provide employees with "adequate avenues of communication" to "effectively" communicate about protected concerted activity. Specifically, the Board in the underlying case *LeTourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944), affd. sub nom. *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), laid down the general rule that "employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are *adequate avenues of communication* open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization."[14] (Emphasis added). And, the Supreme Court, applying *Republic Aviation*, stated in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 fn. 9 (1978), that the right of employees to engage in Section 7 activities "necessarily encompasses the right *effectively to communicate* with one another regarding self-organization at the jobsite." (Emphasis added.) These general principles must be construed in light of the Court's admonition that "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox*, 351 U.S. at 112.

The *Republic Aviation* framework does not support the new standards imposed by the majority because access to

[14] My colleagues argue that black-letter property law does not support *Register Guard* because real property rights receive more protection than personal property. Citing *Republic Aviation*, they contend that an employer's "rights regarding its personal property would yield to an even greater degree to competing Section 7 rights" than its rights regarding its real property. This is a poor analogy because regardless of whether the test for allowing Sec. 7 activity to encroach on property is an "effective communication" standard or a "necessary in order to enjoy Section 7 rights" standard, the use of equipment cannot meet either test. Second, the analogy doesn't work with a communications network. The right to communicate on one's own network is not solely a property right; as set forth in sec. VII. below, it also includes a free speech/Sec. 8(c) right to use the network as intended.

Finally, that a plaintiff bringing a tort claim has a higher burden to show damages regarding trespass to personal property than real property has no bearing on whether an employee has a Sec. 7 right to use an employer's personal property. These are apples and oranges, conceptually.

an employer's email system is simply unnecessary for employees to effectively engage in Section 7 activity.[15] This is for several reasons. First, as set forth above, regardless of the increased importance of email for work-related communication, employees are in no way deprived of engaging in traditional, face-to-face solicitation on nonworking time. Indeed, in this case, the evidence shows that employees do not need access to the employer's email system to communicate with each other. The interpreters have rest and meal periods during the workday, and there are break facilities at each of the locations.[16] Further, there is no evidence that any of the interpreters telecommute. Although the call centers operate during more than typical business hours and some of the video relay interpreters are part-time employees, there is no evidence that the schedules of interpreters are such that employees do not see one another. There is no evidence in the record with these specific employees that face-to-face solicitation cannot function to allow effective communication.

Neither does the majority make an empirical case that the considerable freedom to engage in Section 7 activity guaranteed by *Republic Aviation*, *Beth Israel*, and other cases is now "inadequate" generally for all employees nationwide. Logically, it would seem that some proof is needed that this baseline set of freedoms—the product of years of Board precedent, affirmed by the Supreme Court, establishing and fine-tuning the current solicitation rules since the 1940's—is now not functioning as intended, or the *Republic Aviation/Beth Israel* balance struck was the wrong one. The majority cites considerable empirical evidence, for which I again applaud them, contending that work email use has grown. But, in contrast, there is no data that people at work have lost their ability to communicate effectively over the last few decades by the simple means of talking to each other. The majority demonstrates that a possible exception exists for those teleworkers who work so often from home or a remote location that they constitute a permanently dispersed work force, but the majority's new rule is not confined to that kind of teleworker.

However, let us assume for the sake of argument that there is at least a legitimate question of whether employees can only effectively communicate for Section 7 purposes if they have the additional right to use the employer's business email network to do so. Since the Supreme Court has not issued any directly applicable precedent on how to strike the Section 7 versus property rights balance in electronic space, let's assume that the majority is correct to turn to cases on physical space as the best, albeit imperfect, guide.

Like the majority, I would turn to *Republic Aviation* and Justice Brennan's opinion in *Beth Israel*, as the lodestars here. But, unlike the majority, I would take those cases to establish that the ultimate inquiry is *whether adequate avenues of communication exist to effectively communicate about protected concerted activity without the use of business email*? And also, unlike the majority, I would tailor my inquiry after Justice Brennan's specific considerations in *Beth Israel,* which he used in analyzing the rationality of the Board's Section 7 balancing. As noted above, in regard to the hospital cafeteria at issue, Justice Brennan upheld the Board's striking of the balance of Section 7 rights versus property rights in favor of Section 7 rights, thereby invalidating the employer's ban of solicitation in the cafeteria. In doing so, Justice Brennan specifically noted three factors in determining whether or not the Board's balance was rational in the case of the cafeteria, as compared to its balancing in the restaurant industry, where the Board did and does not allow solicitation in the operational, customer-facing areas:

> [It] cannot be said that, when the *primary function and use* of the [hospital] cafeteria, the *availability of alternative areas* of the facility in which § 7 rights effectively could be exercised, and the *remoteness of interference with patient care* [i.e., operations] are considered, it was irrational [for the Board] to strike the balance in favor of § 7 rights in the hospital cafeteria and against them in public restaurants.

437 U.S. at 506–507 [emphasis added].

Derived from these sources, my balancing test would be as follows: To answer the ultimate inquiry of whether a workplace's existing technological means of communi-

[15] My colleagues emphasize that the Board has applied *Republic Aviation* to determine employees' Sec. 7 rights to several factual variations over the years. However, all of these cases cited by my colleagues concern employees' rights to engage in Sec. 7 activity on real property. Significantly, my colleagues fail to grasp that, in all of these cases, the Board applied *Republic Aviation* where access was *necessary* for employees to effectively exercise their Sec. 7 rights. For example, in *Beth Israel*, 437 U.S. at 490, the Court agreed with the Board that the hospital's cafeteria was a natural gathering place for employees to communicate because, among other things, there were few places where employees could discuss nonwork issues. In *New York New York*, 356 NLRB No. 119 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013), the Board reasoned that denying access rights of the contractor's employees "would place a serious burden on the exercise of their Section 7 rights to communicate with the relevant members of the public." Slip op. at 10. The Board stated that the employees "sought access to locations that were uniquely suited to the effective exercise of their statutory rights." Id. Again, it may be convenient for employees to access their work email for Sec. 7 purposes but it is not necessary.

[16] California law requires mandatory meal and rest breaks. See, e.g., secs. 226.7 and 512 of the California Labor Code.

cation are adequate for employees to effectively communicate about Section 7 activity, we should consider (i) what is the primary function and use of the communications network at issue, (ii) are there alternative means (including alternative communication networks) that employees can use, and (iii) how remote is the risk of interference with the employer's operations if the network at issue is open freely to Section 7 communications? Unlike the majority, I would not simply wholesale adopt *Republic Aviation*'s presumption of wide-open solicitation—which was only created for and applies to face-to-face communications in physical space—without engaging in this balance. And, without answering in advance how this balance might apply in the future to such communication media as electronic bulletin boards and intranets, I find that it squarely comes out against establishing a presumptive right on typical business email networks to generally communicate and solicit for Section 7 purposes, where the employer has already asserted its property right to nondiscriminatorily prohibit solicitation in general. Let us examine the factors derived from *Beth Israel*, here each in turn:

The primary function and use of business email networks are for business communications.

As discussed extensively above, and as conceded by the majority, business email networks exist and are used primarily for business purposes and communications. So, determining the outcome of this prong of the analysis is fairly easy. Reinforcing the conclusion that business email networks are, in fact, primarily for business communications are the facts of *Beth Israel*. There, the patrons frequenting the hospital cafeteria, the physical space at issue in that case, comprised 77 percent employees, all of whom were on break, as opposed to 1.56 percent patients, who were there as part of their stay. 437 U.S. at 490. This amounts to a rough ratio of 50:1 in favor of nonworking-use versus working-use for that location. Moreover, because this cafeteria was "equipped with vending machines used by employees for snacks during coffee breaks and other nonworking time," the cafeteria was demonstrably marked out in the Court's view as "a natural gathering place for employees on nonworking time." Id.

I am neither a technology expert nor a futurist, but I have enough experience observing email systems and employees in action to know that no business email system has a 50:1 ratio of nonbusiness to business use. One survey of 2,600 workers in the United States, United Kingdom, and South Africa showed that emails received at work were 80 percent work to 10 percent personal, for instance.[17] This would be an 8:1 ratio pointing the other way, and this ratio does not actually adjust for the time spent on emails received, which in my view would slant the ratio further toward "working time." Nor do email user interfaces typically have incorporated into them the electronic equivalent of a "vending machine," i.e. some kind of persistent feature that signifies that the employer expects or desires employees to spend their break time on the email system. For example, there are no built-in games such as Minecraft or World of Tanks on modern email interfaces typically used by companies for business purposes.[18]

Indeed, in *Beth Israel*, the Supreme Court noted that the "natural gathering place" resembles an "employee service area" rather than a production/operational area of the employer. On those facts, it remarked that the cafeteria "is a natural gathering place for employees, which functions more as an employee service area than a patient care [i.e., operational] area." 437 U.S. at 506. It stands to reason that, because a business email network is primarily used for work, then it is an operational area of the business and not an employee service area, or what the majority characterizes as a "natural gathering place."

There are many alternative communication networks besides business email systems that employees can use to communicate about their Section 7 concerns.

Another reason that employees do not need to use their employer's email system to engage effectively in Section 7 communication is the existence of numerous, available alternative electronic channels of communication beyond business email networks. These include personal email, social media, and ordinary text messaging on personal communication devices.

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[17] This was a 2012 survey of 2,600 workers in the U.S., UK, and South Africa who used email every day: they reported that 82 percent of their work network email received was work, 10 percent was personal, and 8 percent was "junk" not deflected by a spam filter. Barry Gill, "E-Mail: Not Dead, Evolving," *Harvard Business Review*, June 01, 2013, accessible at http://hbr.org/2013/06/e-mail-not-dead-evolving/ar/1. The article revealed no details about the survey methodology. However, the percentage estimates were related to volume of email received, not time spent on different types of email. It is likely that the work-to-non-work ratio of *time spent on the business email system* is significantly higher than 8:1, since work emails typically require more time to compose, understand, and answer than email invitations to, e.g., go out to lunch.

[18] The desire to spend time at work on a computer doing things other than working is nothing new. Early computer games had a specific "boss key" subroutine to conceal playing games at work, assuming the employee could install the game on the employer's system. See http://en.wikipedia.org/wiki/Boss_key (last visited September 10, 2014). The "boss key" concept is still alive today. See http://wwlp.com/2014/03/21/boss-button-making-it-easier-to-watch-ncaa-at-work/ (last visited September 10, 2014).

Employees can and do use personal email instead of business email.

The most obvious example here is personal email. Personal email, as we all know, is just as ubiquitous as business email. Personal email is widely accessible to any employee. As of this writing, for example, Microsoft offers effectively unlimited email for free, with an additional 15 gigabytes of document storage for free; Google offers email access with15 gigabytes of email storage for free; and Yahoo offers email access with 1000 gigabytes of email storage (i.e. one terabyte) for free.[19] And those are just three providers. This is an enormous amount of messaging and informational power available to the average employee. Fifteen gigabytes is nearly a million pages of text in a Word document and far more in an email file format, for example.[20] All of these email services allow mass emails, and the creation of address lists, just like business email networks do.

Today, unsurprisingly then, most employees have personal email accounts. As of 2012, approximately three-quarters of all email accounts were personal accounts, not work accounts.[21] In addition, a Pew research study shows that the vast majority of employees now carry their own communication devices with them. For example, as of January 2014, approximately 90 percent of American adults have a mobile phone; 58 percent of American adults have a smartphone (a mobile phone with a broader capability for internet and social-media access, among other features); and 42 percent of American adults own a tablet computer.[22] A 2013 study by the International Data Corporation (IDC), sponsored by Facebook, concluded that by 2017, smart phone ownership will increase to 68 percent of the American public.[23]

The majority overlooks this point in concentrating on the prevalence of business email. According to the majority, most of the world's email traffic is business email.[24] The majority contends that its data show that employees use business email for communication on a widespread basis and will do so at an increasing rate. I agree, in that employees will continue to use their employer's email systems *undoubtedly because these systems are a very important tool of business communication*. The majority's data equally supports that conclusion. But, more importantly, the majority's argument seems to miss the point. The widespread and increasing use of business email *fails to show that personal email is not a viable alternative* for communication about Section 7 rights. Indeed, the same report used by the majority also shows us that, out of the 196.3 billion total emails sent per day worldwide in 2014, a *full 87.6 billion of them (44.6%)* are sent to, or from, "consumer" (i.e., personal) email accounts. There is no basis in the report suggesting that this ratio would be different within the United States.

One immediately notices (1) the enormous absolute size of the "consumer email universe" (of 87-billion-personal-emails-per-day worldwide) and (2) its rough equivalence to the "business email universe" (of 109-billion-business-emails-per-day). This data stands as a mute, gigantic testament to one basic fact. People find personal email just as incredibly versatile and convenient as a communications network, as businesses find with business email. An analysis of email client programs located primarily in the United States also supports the inference that there is a significant amount of personal email use in the United States.[25] Finally, I also believe

[19] See http://windows.microsoft.com/en-US/windows/outlook/email-storage-limits; https://onedrive.live.com/about/en-us/plans/; https://www.google.com/settings/storage; https://overview.mail.yahoo.com/ (all last visited September 11 or 12, 2014).

[20] Lexis/Nexis, "How Many Pages in a Gigabyte?" Discovery Services Fact Sheet, (one gigabyte is 64,782 pages of text in word format, and 100,099 pages of email file format), available at http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf (last visited September 11, 2014).

[21] Email Statistics Report, 2012-2016, Executive Summary, at 2-3, The Radicati Group, Inc., (April 2012), available at http://www.radicati.com/wp/wp-content/uploads/2012/04/Email-Statistics-Report-2012-2016-Executive-Summary.pdf. This is the earlier version of the Executive Summary cited by the majority, see note 25, which does not have a comparable statistic measured.

[22] Pew Research Internet Project, Mobile Technology Fact Sheet, (June 9, 2014), http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/.

[23] IDC Study, Always Connected for Facebook (2013), at 4, available at https://fbpublic.app.box.com/s/3iq5x6uwnqtq7ki4q8wk.

[24] The majority cites an Executive Summary from a report from The Radicati Group for this proposition. Because the livelihood of this entity appears to be email analytics, I am assuming for the sake of argument that the methodology in the report (the specifics of which are proprietary) correctly estimated the total amount of emails and correctly separated business-type email from personal-type email. Because the majority extensively relies on the Executive Summary, I shall in this opinion as well.

[25] According to an analysis of 835 million "opened" emails in August 2014, the email client programs used to open them rank as follows: (1) Apple iPhone, 26 percent; (2) Gmail, 15 percent; (3) Apple iPad, 13 percent; (4) Outlook, 11 percent; (5) Apple Mail, 7 percent; (6) Google Android, 6 percent; (7) Outlook.com, 5 percent; (8) Yahoo! Mail, 5 percent; (9) Windows Live Mail, 2 percent; and (10) AOL Mail, 1 percent. See http://emailclientmarketshare.com/ (last visited September 11, 2014; this is the page link for the overall summary of "Email Client Market Share" analysis calculated and tracked by Litmus Email Analytics, a division of Litmus Software, Inc., a Cambridge, Massachusetts company that tracks what happens to emails after they are sent). As with the Radicati Group Executive Summary in notes 23 and 25, there is no specific methodology detailed for this summary report, but, because Litmus' business depends on the accuracy of this data, I accept it equally for the sake of argument here. A study of this

that the only rational inference from daily observation is that people have at least an equal opportunity to use email in their personal lives as they do in their professional ones.

Employees can and do use social media instead of business email networks.

Since *Register Guard* issued in 2007, there has been yet another dramatic change in how individuals communicate with each other. This is social media, which has flourished at the nexus between the revolution in increasingly miniaturized and powerful computers, and the evolution of increasingly sophisticated and data-rich user-driven "social networks" existing within the larger internet. The rise of these two forces was not taken account of by the legal framework established by *Republic Aviation* in 1945 simply because neither computers nor social media existed then.[26] However, they have resulted in far more effective and efficient avenues for employees to engage in personal communications than work email, and, in some respects, than even personal email.

Employees now have access to and use a plethora of social media. This is a logical outgrowth of the fact that the vast majority of American adults actively participate in some form of online social media. As of September 2013, 72 percent of online adults use social networking sites.[27] This usage level represents a significant growth in the past decade, as less than 10 percent of online adults utilized social media in 2005, which was roughly the time of *Register Guard*.[28] Most social networkers apparently currently use Facebook, but a growing number use LinkedIn, Twitter, and others, and a larger number of people—up to 42 percent—use multiple platforms.[29] The better-known social media networks are each gigantic: for example, each of Facebook, LinkedIn, and Twitter has an enormous number of members.[30] And, even according to the majority's cited report, social networking is expected to grow from about 3.6 billion accounts in 2014 to over 5.2 billion accounts by the end of 2018.[31] These statistics, along with the reader's everyday life experience, demonstrate 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.

Moreover, some of the more widely known social media platforms actively search for "connections" between the user and those other members of the network. This feature is enhanced on some social media platforms. Facebook and LinkedIn both have algorithms that both search for and even suggest potential connections.[32] One of the parameters that can be used for searching is the name of a current or prior employer. So, these networks enable employees to search not only by name, but also by employer, to build up their own directories of coemployees. The ability to create directories or mailing lists of employees thus mimics that of email, albeit this requires more work on social media to compile such a directory.

The Board itself has recognized that the explosive growth of social media has changed the way in which

email client activity reveals that the top three most frequent recipients (who actually open email) use Apple iPhones, Gmail, and Apple iPads. Although there are some business exceptions, it is a fair inference that most if not nearly all of this usage is personal. The number four email client, Microsoft Outlook, is heavily used by businesses, however. See also note 37 (Pew study shows 52% of mobile phone users also use email on the device).

[26] In this regard, ENIAC was one of the nation's first computers. Debuting in 1946, the year after *Republic Aviation*, it began the revolution in computer technology that is now a part of everyday life. Programmed by plugging in cords and setting thousands of switches, the decimal-based machine used 18,000 vacuum tubes, weighed 30 tons and took up 1,800 square feet. Today, the space needed to perform the computing functions of all 1,800 square feet of that machinery fits on the head of a pin, and, resultantly, today's handheld tablets and smart phones that employees possess perform many more functions than ENIAC at speeds many times faster. See http://encyclopedia2.thefreedictionary.com/ENIAC (last visited September 3, 2014). An even more radical change than the progression from ENIAC to today's device technology has occurred within the field of information networks like social media networks. In the time of *Republic Aviation* and ENIAC, no such electronic networks even existed. Obviously, *Beth Israel* and *Babcock & Wilcox* also did not involve consideration of these developments or these facts whatsoever.

[27] Pew Research Internet Project, Social Networking Fact Sheet, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/.

[28] Id.

[29] Social Media Update 2013, at 1-2, Pew Research Center (December 30, 2013), available at http://www.pewinternet.org/files/2013/12/PIP_Social-Networking-2013.pdf.

[30] The size of the Facebook network is demonstrated amply by its central role in the spread of the viral ALS "ice bucket challenge," as the company has recorded that "**. . .** [b]etween June 1 – September 1 [2014], more than 17 million videos related to the ice bucket challenge were shared to Facebook. These videos were viewed more than 10 billion times by more than 440 million people." See http://newsroom.fb.com/news/2014/08/the-ice-bucket-challenge-on-facebook/ (last visited September 15, 2014). According to the company, LinkedIn is "the world's largest professional network with 300 million members in over 200 countries and territories around the globe." See http://www.linkedin.com/about-us (last visited September 15, 2014). And, according to the company, Twitter usage clocks in with 271 million monthly active users who send 500 million Tweets per day. See https://about.twitter.com/company (last visited September 15, 2014).

[31] See Sara Radicati and Quoc Hoang, Email Statistics Report, 2014-2018, The Radicati Group (April 2014).

[32] See, e.g., "Creating A Killer LinkedIn Profile: Tips From Link Humans," *LinkedIn Official Blog*, see http://blog.linkedin.com/2014/07/01/creating-a-killer-linkedin-profile-tips-from-link-humans/ (last visited September 15, 2014).

employees communicate. Many of the Board's recent decisions show that employees use social media sites to communicate about work. See, e.g., *Triple Play Sports*, 361 NLRB No. 31 (2014) (Facebook "likes" may be protected activity); *Bettie Page Clothing*, 361 NLRB No. 79 (2013) (three employees' discussion on Facebook was protected); *Hispanics United of Buffalo, Inc*., 359 NLRB No. 37 (2012) (five employees' discussion on Facebook was protected); *Knauz BMW*, 358 NLRB No. 164 (2012) (employee posted photos and comments to Facebook).[33] Moreover, the Board has created strong protections to ensure that employers may not attempt to limit employee use of social media for Section 7 purposes. See, e.g., *Triple Play Sports*, above, slip op. at 2. The General Counsel's office has issued several memoranda on the issue of social media, and provided policy guidance for employers.[34]

Understanding the power and reach of social media, of course, unions have taken advantage of this forum to promote all forms of union activity, from initial organizing through ongoing collective bargaining efforts**.** Several labor organizations have campaigned through Facebook, YouTube, and Twitter.[35] With the growth of social media, most unions now have one or more Facebook pages, Twitter accounts, and websites.[36] Many of these unions also invite employees or others interested in organizing to sign up for an e-newsletter or other communications using their email address.[37] Unions' own investment, efforts, and experience with social media are the best indicator of the power of social media to effect protected concerted activity among employees.

Thus, social media is here to stay as a means of communication among and between employees. The Board should take account of this fact in its Section 7 balancing here. Although I have no prediction on what the dominant social media platform for employees is currently or will be in the future, it is an easy prediction based on the course of history that social media will become increasingly more useful and convenient for employees as a communications medium.

[33] The latter two cases are constitutionally invalid as Board precedent, so I include them as examples only to show the pervasiveness of social media in employee-to-employee contact.

[34] See, e.g., NLRB General Counsel Operations Memorandum 12-59 (May 30, 2012).

[35] See Robert Quackenboss, Technology: Friending the unions, Inside Counsel (April 20, 2012), available at http://www.insidecounsel.com/2012/04/20/technology-friending-the-unions.

[36] See, e.g., www.facebook.com/CWAUnion; www.twitter.com/cwaunion; www.cwa-union.org/ (linking to Facebook, Twitter, Flickr, YouTube, and Google+ under the "Stay Connected" heading) (last visited July 3, 2014).

[37] See, e.g., www.cwa-union.org/pages/sign_up_for_email.(last visited September 13, 2014).

Employees can and do use text messaging instead of business email networks.

Daily observation also reveals that text messaging via personal mobile phone is another common way for employees to communicate. Indeed, text messaging may be the simplest way of all to convey short, direct messages. Text messages also offer near-instantaneous transmission and typically alert the receiving party to the incoming message, making them closer to a telephone call in user convenience than a typical email. They can also be sent to multiple text recipients at once, much like email. I would find that text messaging is at least as widely-used as email, if not more. It is instructive here that, as of May 2013, mobile phone usage research shows that 81 percent of mobile phone users overall send or receive text messages, more than those who use their phones to access the internet or send or receive email.[38]

Once an employer's business email network is open freely to Section 7 communications, interference with the employer's operations is not remote, but rather is a matter of immediate concern.

The discussion of the basic differences between email and physical space amply demonstrates the dangers that email usage as of right can pose to an employer's productivity and efficiency. See section III above. I will not belabor this further but will address the majority's implicit contention that efficiency is not a real concern, in that some employers allow personal use of email and a few court decisions have opined in dicta that personal use of email may improve efficiency. I agree with the majority that some employers allow nonwork-related email on business email systems, although most that do also place substantial restrictions on such use, such as requiring personal usage to be "limited and incidental." However, several reasons exist why that fact or dicta about potential efficiency, made in other contexts, should have little weight in our analysis. First and foremost, we are dealing here with a rule that does not allow nonwork related use of a business email system. Those employers that allow such use made their own business judgment that such use is acceptable given the nature of their business, the character of their work force, and how personal usage of the business email network may impact morale and productivity. Other employers, like the Respondent, have made the judgment to prohibit personal usage based on those circumstances, which are obviously unique to the employer. The judgment of one set of employers, based on their own situations, obviously cannot detract

[38] Pew Research Internet Project, Mobile Technology Fact Sheet, above at fn. 23.

from the property rights of another, and the Act does not allow the Board to decree one business judgment in effect superior to another. Second, the majority does not announce a rule of "limited and incidental" Section 7 usage, but one of *unlimited usage* unless and until an employer can show the special circumstances justifying prohibition of email on the basis of production or discipline. And, according to the majority, that special circumstance itself has many qualifications and limitations.[39] One can only conclude that the majority's new rule sweeps way beyond "limited and incidental," to reach the level of "unlimited unless there is substantial interference with production." Third, emailing about personal matters at work can be more efficient, but that totally depends on the nature of the email. It is more efficient in the sense of "not detracting from production" for an employee to email a friend who works three stories downstairs a short email about lunchtime plans and get a short response rather than travel down to the office to ask him or her, and then perhaps have a social conversation about other topics during the visit. It is demonstrably *not* more efficient for that employee to send the short email, "What are the top ten things you dislike about working here and why?" and then engage in the inevitable back-and-forth discussion that will result. Considering that Section 7 activity is by its nature concerted with the aim of unionization or mutual aid or protection, that typically means that such discussions on email—especially under the majority's new "all you can eat" Section 7 standards—will be longer, more involved, and thus much more likely to interfere with production.[40]

The majority discounts the productivity impact for three reasons: (1) employees "promptly hit the 'delete' button when they receive [potentially unproductive] messages"; (2) employers can monitor productivity; and (3) "many employers already permit personal use of work email, and the sky has not fallen." None of these reasons hold water. Hitting the delete button will not solve an employee, e.g., having to review long emails to determine whether or not they are of interest, repeatedly receiving mass chain emails, or who is personally called out, challenged, or attacked (and thus may feel required to respond even if the employee would not want to engage in the conversation otherwise). There are many variants of email interaction where "delete" is not a catchall palliative for productivity loss. Next, the majority asserts that "employers can monitor productivity" without explaining what tools may actually exist to enable an employer to do so, without explaining what will constitute unlawful surveillance and what will not, and without explaining how its highly restrictive "special circumstances" standard permits the employer to monitor and to pose a concrete limit on productivity loss. The last reason is fundamentally unsound because the majority's new rule effectively enacts a subsidy for Section 7 email. The previous, pre-subsidy *Register Guard* system tells us absolutely nothing about what will happen once Section 7 emails are allowed as a matter of right. In fact, the only reasonable inference is that the productivity loss will be substantial. See notes 19, 48-52 and accompanying text.[41]

Even a brief consideration of the primary business purpose of business email, the availability of these alternatives, and the productivity danger to employers posed by a "permanent chat room," compel the conclusion that business email networks need not be added to the vast array of media that employees may use and do use, as of

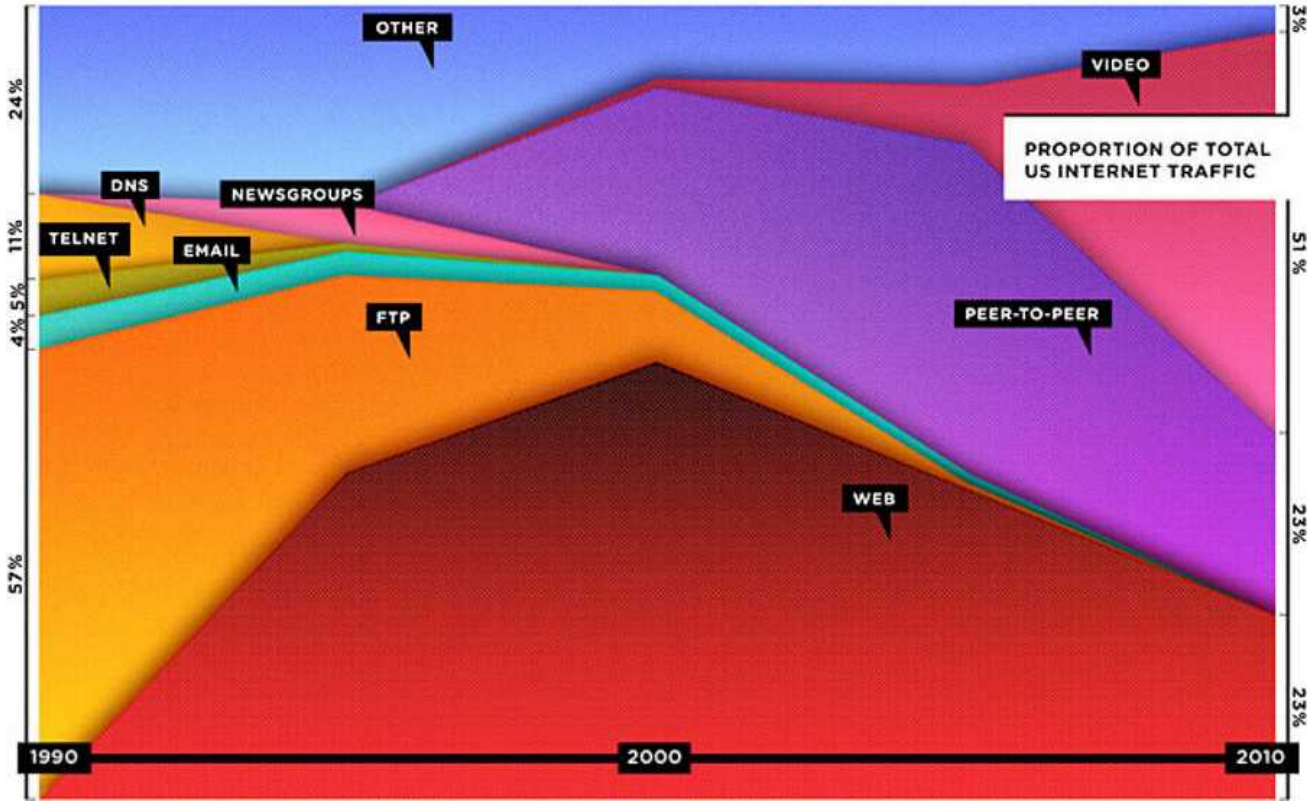
[39] While I commend the majority for attempting to describe to employers and other interested parties some parameters that denote a valid versus invalid email rule, the obvious import of their discussion is to restrict the use of the "special circumstances" exception, not enlarge it.

[40] Moreover, employees using their personal accounts and devices to discuss organizing and other concerted activities have several efficiency advantages and other advantages over using their employer's email system. First, an employee can turn his or her phone off while working so as not to be disturbed by email messages and texts. Further, employees are able to send private communications by personal email if they choose to do so. And, they can also communicate more publicly through social media or other sites. Employees have no right to privacy on their work email accounts. Third, employees who do not want to receive emails or texts concerning, for example, union activity, can withhold their personal email addresses and phone numbers, whereas they do not have that control on the employer's email system. In this respect, if workers use their work email to continuously send emails to a company created listserv, or a manually created list of employees' work email addresses, the receiving employee is not able to block that group communication. But, if the communications occur on websites like Facebook, LinkedIn, the employee can decide whether to join the online group. Personal email and social media accounts allow users to block access or messages from others that may be engaged in harassing or otherwise unwanted communications. If an employee is receiving unwanted messages on a personal email address or other electronic communication account, the employee can mark email from the individual as spam (causing it to be blocked), "unfriend" the individual on Facebook, or block the person on Twitter. Because an employee does not have the option to not participate when communications are sent over work email, the employee may be *essentially deprived of his or her Sec. 7 right not to engage in protected concerted activities*. Fourth, there is no cost for employees to use these media. Finally, these media permit employee communications without interfering with an employer's property rights.

[41] The majority opinion misunderstands the thrust of my dissent here. I do not contend that business email is "obsolete" or inconvenient for communication, as the majority characterizes my view, but rather it has been eclipsed in terms of both utility and necessity in regards to person-to-person communications by other alternative electronic communications networks. For business purposes, business email networks are absolutely crucial and they continue to be relied upon by those businesses. So, diverting those email networks will constitute a productivity loss to employers, and a completely unnecessary productivity loss at that.

right, to engage in Section 7 communications. The growth of social networking, smartphones, text messaging, and personal email have combined to provide employees with abundant opportunities to engage in easy and inexpensive group or personal communications with friends, family, and coworkers without use of their employer's email system.[42]

Adopting the majority's analogy to physical space reinforces this conclusion. Most of the communications "terrain" available on the internet is free for employees to use at will, at low cost to no cost. Business email is a tiny part of this landscape, and an unnecessary part for employees to utilize for personal or Section 7 purposes. Just how tiny it is may astound the reader. For example, the magazine Wired presented the findings of Dr. Andrew M. Odlyzko, School of Mathematics, University of Minnesota in this regard in a very informative graphic. Dr. Odlyzko measured the change in relative U.S. traffic on the internet from 1990 to 2010, based on estimates by Cisco. Wired then published the findings in an instructive chart of total internet traffic and email's role in it over time:



[42] Our president has recently noted the vast democratizing power of the internet, power that I contend principally arises from social media and not business email. Statement of President Barack Obama on Net Neutrality ("By lowering the cost of launching a new idea, igniting new political movements, and bringing communities closer together, [the internet] has been one of the most significant democratizing influences the world has ever known."), at http://www.whitehouse.gov/Net-Neutrality (last visited November 11, 2014).

See Chris Anderson and Michael Wolff, "The Web Is Dead. Long Live the Internet", Wired Magazine (August 17, 2010), accessible at http://www.wired.com/2010/08/ff_webrip/all/ (last visited at September 16, 2014).[43] Note how the relative proportion of email has declined in significance, from an already very low proportion of internet traffic of approximately 4 percent, then continually diminishing until email is no longer measurable by 2010.

According to this model, email *in toto* is not only unnecessary for electronic communication, it is an infinitesimal part of today's electronic terrain.

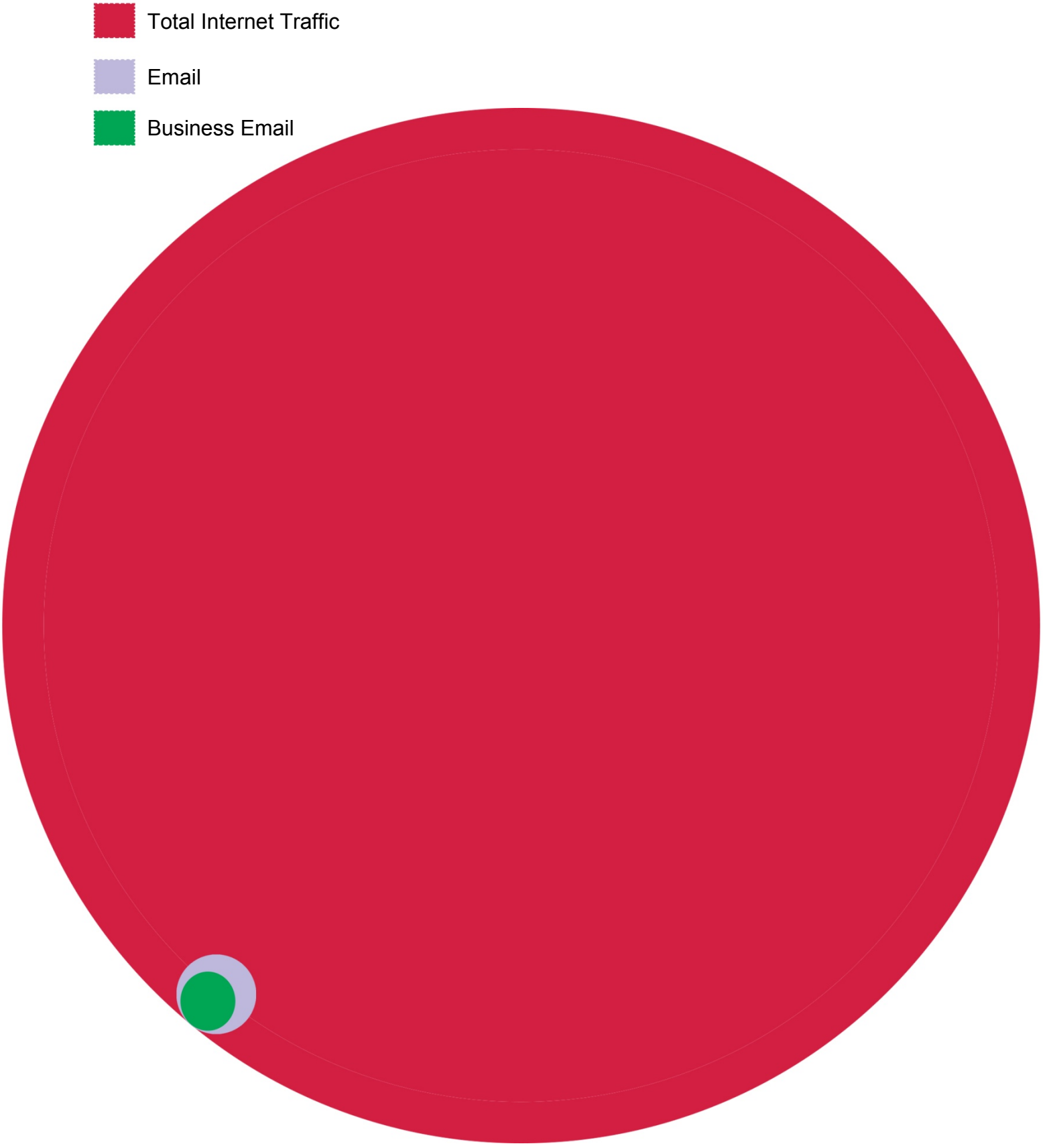
As the majority uses email data from the more recent Radicati Group study, one can also take the majority's data, combine it with other recent estimates of total internet traffic and come up with another representation of this relationship, on the following page.[44]

[43] My sincere thanks are extended to Wired and Dr. Odlyzko for their permission to use this information herein.

[44] Methodology:

1. Average size of an email: 75 Kilobytes – See (http://email.about.com/od/emailstatistics/f/What_is_the_Average_Size_of_an_Email_Message.htm).
2. Total number of emails sent daily in 2014: 196.3 Billion – (Radicati Group Email Statistics Report, 2014-2018 – Executive Summary. See http://www.radicati.com/?p=10644).
3. Total daily email traffic: 196.3 billion emails X 75 kilobytes = 14.7225 Petabytes.
4. Total annual email traffic: 5.3737125 Exabytes.
5. 2013 Internet traffic in one day: 28,875 Gigabytes per second – Cisco VNI 2014 http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/VNI_Hyperconnectivity_WP.html).
6. Annual internet traffic: 910.60200 Exabytes.
7. 5.37371 Exabyte / 910.602 Exabyte = 0.00590127191.
8. Thus, all email is about 0.59% of all internet traffic.

Circle calculation: A circle with a radius of 4 inches has an area of 50.266 in^2. 0.59 percent of 50.266 inches is 0.297 in^2. To get a circle with an area of 0.297 in^2, we need a radius of 0.307 inches. That is a circle 0.614 inches across. Per the Radicati Group's further analysis of work versus total email traffic, a smaller included circle approximately 56 percent of this first circle is work i.e. "corporate" email traffic. See note 23, cited by the majority.


Total Internet Traffic
Email
Business Email

Again, one sees that business email is a tiny part of the electronic space available for communication, even looking at the majority's Radicati Group worldwide statistics. We could translate that physical space into Earth landmass terms, to make this an even more understandable zoning-related analogy (assuming, however, for purposes of this model, that all places above water on Earth are equally habitable). In that event, we would be looking for a country that is about 0.3304 percent of the earth's landmass, or 189,347.76 square miles. This would be approximately the size of Cameroon in relation to global landmass, as seen below.[45]



[45] If one looked at this analogy from the perspective of the land area of contiguous i.e., "lower 48" United States, this amount of territory would correspond roughly to Maryland.

As one can see, the ultimate problem with the majority's analysis is that we are dealing with an immense "landmass" of electronic "space," where any individual can "inhabit" and thus communicate, that is demonstrably *not* the business email network of the employer. Applying our global zoning analogy, under *Register Guard*, employees may of right inhabit *anywhere* on the landmass of the Earth to carry out Section 7 expression except for Cameroon.

In other words, 99.6 percent of the electronic world is free speech zone for employees.[46] Is it thus essential for employees to occupy Cameroon, so that they may communicate effectively? The answer is obviously "no." Can they engage in Section 7 communications adequately otherwise? The answer is equally obviously "yes."

The problem posed by the majority's approach is compounded because the residents of Cameroon in my analogy—business owners in real life—actually *need* to use the territory of Cameroon for their business uses. As discussed earlier, that is why they purchase and run the email network in the first place, and, as discussed throughout this opinion, they will suffer certain productivity loss because email does not neatly sort itself out, like face-to-face communication, in a working-time-versus nonworking-time dichotomy. There is a zero sum trade off. Even if we cannot derive a mathematically precise ratio for the trade between nonworking Section 7 email and production, we know that some substantial amount of production with be sacrificed. *Simply stated, the utility of employers' property will be destroyed, and for something that is unnecessary to maintain adequate Section 7 rights.* There is no reason to take the property away from the citizens of Cameroon if people can live anywhere else on Earth as of right, right now. This violates the cardinal precept that the destruction of property rights must be as little as consistent with the maintenance of Section 7 rights. *Babcock & Wilcox,* 351 U.S. at 112.

Thus, in light of the vast growth of personal devices and social media accounts, not to mention face-to-face and other traditional methods of communications, employees have numerous options available to them in order to communicate with one another about their wages, hours, and working conditions. Given the availability of all of these fora, employees do not need to use their employer's email system to communicate with one another on these issues. It is easy for an employee during his or her nonwork time to send a text message, or make a phone call, or access the internet via smartphone in order to send a message through a social media site and communicate with colleagues, or even to send an email on a personal email service. The widespread availability and use of social media provides an additional means through which employees can easily engage in Section 7 activities making access to business email systems unnecessary. Employees can even locate each other to communicate more quickly and conveniently about Section 7 matters by finding coworkers on social-media sites such as Facebook and LinkedIn, where users typically list their work affiliations**.**

I acknowledge that it is typically quicker for an employee to communicate with his or her colleagues using the employer's email system than by using social media or personal email. However, as explained above, convenience is not a justification for using the employer's equipment. As the majority in *Register Guard* correctly stated, if other means of communication exist and have not been rendered useless, there is no reason that an employee's use of an employer's email system for Section 7 purposes must be mandated. 351 NLRB at 1116. This statement is truer today than ever before because the combination of alternative means for employees to communicate on Section 7 issues has never been larger in scope or more powerful in utility.

The majority and I disagree sharply in discussing the relative electronic space available to employees as contained in the above charts derived from The Radicati Group and the Dr. Odlyzko/Wired data, the role of business email in that electronic space, and the appropriate Section 7 inferences to draw. The majority argues that the data proves several related things: (1) business email is not obsolete but efficient; (2) that other "resource-hogging technologies" crowd the rest of the internet's electronic space, and are assumedly less efficient and useful to employees; (3) the low "overall use of email by percentage of internet data traffic speaks more to the minimal burden it places on a data network than to its utility as a communication medium"; and (4) the norm amount of email use in a workplace (or, impliedly, on the internet as a whole) has nothing to do with whether Section 7 email should be protected. I answer each contention in turn. First, to restate, I do not in any way contend that email is obsolete; indeed, I contend that business email is the necessary backbone of business communication, and the same features that make it so important for businesses make it convenient and attractive for employees for personal use on business networks as well. Nor do I contend Section 7 email communications will be inefficient in a technical sense, such that their "data burden" will cause employer email servers to crash, freeze, catch fire, or worse. I do contend that, regardless of the efficiency of sending one email, the eventual backlog of

[46] One could also view this as a time place and manner restriction where the only place off limits to Section 7 activity in the entire Earth landmass is Cameroon (or Maryland, in the lower 48).

Section 7 emails will cause employers to spend substantial incremental amounts for additional storage, and that will cause an inefficiency.

More importantly, for the reasons discussed elsewhere in this dissent, I contend that Section 7 emails will be written and read on worktime, and will then more easily spawn further Section 7 emails to be written and read on worktime, and so forth, so that a substantial efficiency drain will occur. There will be a negative impact on productivity, in other words. In response to the arguments about the supposed superiority of business email over social media, I suppose that—if we were dealing with the sparse employee device options and the dial-up-modem internet of the early 1990's—relegating Section 7 communications to that internet would be a mistake. But current reality is different. The 99.6 percent of internet content that is "other than business email" is *so deeply utilized* by the marketplace of millions of internet consumers and *has grown so much* from 1990 to 2010 *precisely because it is generally more attractive and better than* business email at conveying nonbusiness communications.[47] And, the capacity of the internet "pipe" has grown, and continues to grow, because of these nonemail communications are so much in demand. The majority implies that email has shrunk as a relative proportion of internet use because it is somehow superior to these other means; but that defies common sense. People will flock to the superior means of delivering anything, including internet communications. The majority cannot show that the vast majority of this electronic terrain is closed to employee Section 7 communications or that it is somehow an inhospitable environment for Section 7 communications. The last assertion by the majority, that the relative paucity of email use is irrelevant to the analysis, is simply a restatement of the majority's attack on the examination of alternative means of communications. I rebut such an attack below in Section VI.

An Essential Part of The Republic Aviation Balance Was That "Working Time Is For Work."

Although the majority states it is applying *Republic Aviation*, it leaves out of its balance of competing interests here a crucial principle recognized under the balance struck there. The *Republic Aviation* court, and every subsequent Board and court decision to apply it, recognized that the corollary to the presumptive Section 7 right in physical space was the principle of "working time is for work." The Board has long held that employers have a right to ensure that employees are productive during working time. In *Republic Aviation*, 324 U.S. at 803 fn. 10, the Supreme Court affirmed the Board principle from *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), that *"[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work . . . ."* (Emphasis added.) The wisdom of that decision is apparent.

Employers exist to produce products and provide services, and no employer would last long in business if its only output was the exercise of Section 7 rights. In other words, no employer could survive if its only endeavor was a never-ending conversation with or among its employees about their terms and conditions of employment. Because the employer's right to exist and produce is the primary right without which Section 7 rights would not long remain in that workplace, the Board and courts have sensibly drawn the bright line rule of "working time is for work." Here, the courts and Board have held that the employer's interests in production and discipline required some bright line to show where Section 7 rights to the employer's property normally stopped, and that principle was it. I compliment my colleagues in adhering, at least in the textual body of their opinion, to the long-established rule that working time is for work, and consequently finding that employers have a legitimate interest in preventing Section 7 email from spiraling out of control. The majority makes clear at various points in their opinion that the new Section 7 balance only allows employee use of the employer's business email systems on nonworking time, as a technical matter. Yet despite the textual adherence to the "working time" bright line, the majority still undermines this crucial part of *Republic Aviation*, by turning it into an exceedingly gray area. As a result, the new standard imposed by the majority will substantially undermine an employer's right to make certain that employees are working during scheduled worktime.

Why? The technology of email does not respect the "working time"/"break time" boundary. In this respect, email does not care when it is sent, received, reviewed, or composed. The sender of an email may not know whether the recipient is working, and the recipient of an email may not know that the email is not work-related. And, in either case, employees who wish to, can simply send, review, and respond to emails on their working time.

[47] For example, a Starbucks employee's YouTube production complaining of work conditions, entitled "The Starbucks Rant Song," currently has over 1,200,910 views, as of November 9, 2014. See http://www.youtube.com/watch?v=MUTrJW-0xtc (last visited November 9, 2014). This showcases the enormous power of today's social media technology to efficiently and effectively spread a single employee's message, undermining the majority's contention that "resource hogging" social media technologies are comparatively inferior to business email for Section 7 purposes.

Under the majority's approach, this inherent problem with the technology is enhanced once concerted activity emails become a matter of right on the business email system. Concerted activity such as discussion of job conditions or union organizing often produces debate that can be vigorous, emotional, profane, extended, or all four. Moreover, the current Board has extended Section 7 protections to a larger scope of face-to-face communications, and it remains to be seen to what extent these case holdings will be imported to business email conversations. As such, it is likely that a single email discussing a Section 7 issue will generate numerous response emails on the business email system.[48] And those emails will generate still more. During a union organizing campaign, or collective-bargaining negotiations, for example, employees will likely send hundreds—if not thousands—of emails to each other during work**.** *It is extremely naive to believe that substantial amounts of work time, in the aggregate, will not now be spent on these communications—on a basis that is essentially unmonitorable by the employer*.[49] Working time will no longer be for work; it will be for extended bouts of Section 7 communications. Thus, under the majority's new standard, the boundary of "working time," which was so crucial to the balance under *Republic Aviation*, will break down.

The majority concedes that its new rule reflects a "blurring of the line between working time and nonworking time" but states that the blur comes from "far broader developments in technology and the structure of current workplaces" that are "beyond [their] control" but must be taken account of here rather than "turn the calendar back to a simpler era." However, unless I missed something recently, employers hire people with the expectation that a certain readily definable quantity of time will be spent working, or (for salaried employees) a certain readily identifiable body of work projects will be performed. The net effect of the majority's rule inevitably siphons off time spent from these endeavors to Section 7 emails. Why? Because it is generally much more engaging and entertaining to talk about work than to actually do work, a reflection of basic human nature. It is true that the convenience of technology can allow employees to allot nonworking time to work hours and working time to non-work hours more easily than in the past. But that is a far cry from the majority's transformation of the basic bargain of the workplace, a transformation which makes Section 7 emails on working time protected by law. The majority's supposed shield in support of productivity is porous. It places the *burden on the employer* to show "special circumstances" that themselves have been defined so narrowly as to constitute no effective counterweight to the one-way subsidy the majority has created. Although the cost of this to employers cannot be quantified precisely, there will be a cost. This raises another problem. Between the costs to employers of (1) lost productivity, (2) running the email system each day, and (3) maintaining and storing the "Section 7 archive" of emails along with the rest of them, the Board is imposing a substantial cost on an employer that uses email (and has a significant number of employees). This unfunded mandate is something that may exceed the Agency's power. For example, the majority of today points to a 2004 survey cited by the *Register Guard* dissent that found that over 81 percent of employees spent an hour or more on email during a typical workday, with about 10 percent spending at least 4 hours. *See* majority op. at 16, and *Register Guard*, 351 NLRB at 1125 (citing American Management Association, *2004 Workplace Email and Instant Messaging Survey* (2004)). If anywhere near that amount of time is now spent being paid for Section 7 email communications, the result will be a substantial if not immense cost to employers. That is a result more appropriately levied by Congress, not us.[50] For example, if a taxing agency simply decided to issue a regulation to tax employers for the equivalent of 1-to-4 hours of wages a day per employee with no specific legislative authorization to do so, that would presumably exceed its mandate. Here, a similarly unelected agency is imposing the same kind of impact with no Congressional authoriza-

[48] *See, e.g., Triple Play Sports*, above, slip op. at 2 (an involved, multi-party conversation on Facebook).

[49] Although an employer might be able to monitor overall system metrics and can investigate a person's particular email content on a time-consuming, employee-by-employee basis, the majority does not explain how an employer is going to determine the existence of, and prevent, the drafting, reading, and consideration of Sec. 7 emails on working time.

[50] The total productivity loss, just considered in itself, could be tremendously expensive. Let's assume that employees spend one hour a day on paid Sec. 7 communications activity, extrapolating a rough equivalence of Sec. 7 communications to the 10 percent "personal" email usage figure (notably, in a world *without* subsidized Sec. 7 communications) that is documented by the survey cited by the majority in note 25 (or, alternatively, to the one hour per day usage estimated by the *Register Guard* dissent, above). Let's also assume the employee's effective hourly rate is $20 an hour, the employee works 5 days a workweek, and the employee gets roughly 2 weeks of vacation time. Based on those numbers, an employer potentially loses $5000 per employee ($20/hour x 5 days x 50 weeks) a year if it is required to grant use of its email system for Sec. 7 purposes. For ten employees, that is $50,000 a year; a hundred employees, $500,000 per year; a thousand employees, $5 million per year. Depending on the number of employees a company has, that could be millions of dollars lost every year.

As the majority points out, it is true that the 2004 study which establishes the 1-hour-per-day figure measured only work email use, but, in my view, it is rational to infer that, with our new subsidy of Sec. 7 email use, an equivalent amount of time could be spent on electronically discussing work instead of working.

tion, an act which is punitive at worst or may go well in excess of our authority, at the very least.[51]

The majority contends otherwise—that the new rule will cost employers little because it does not "prevent an employer from establishing uniform and consistently enforced restrictions . . ." nor "prevent employers from continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity." See majority opinion at 15. However, it will be impossible for employers to monitor employees' productivity. As noted above, email technology cannot distinguish between working time and nonworking time in terms of solicitation; it cannot prevent itself from being written, considered or read during working time. There is absolutely no technology of which I am aware on the market that would allow an employer universal omniscience across its work force as to whether the time used either sending or reading emails on the business system is confined to nonworking time. The majority provides no guidance as to how an employer is supposed to, for example, cross-correlate break schedules with email usage. Instead, the majority asserts that my concern is "hyperbole," because the "incremental increase in usage resulting from Sec. 7 activity would, in most cases, have a minimal effect on costs."

But we know that any subsidy creates more of the activity subsidized. This is just as true of the Board subsidizing Section 7 emails as if we had subsidized fantasy football emails. So, given the majority's repeated assertions throughout its opinion that employees already use business email for a large part of their workday, this should lead one to the opposite conclusion that the "incremental increase" will be large, and the costs will be large. And, regardless, it should not lead to the majority's conclusion that a supposedly central means of communication will now be subsidized, but somehow only to a "minimal" cost effect.

As discussed above, my colleagues also assert with essentially no support that "typically" employers permit some personal use of employer email systems. Citing *City of Ontario, California v. Quon*, 560 U.S. 746, 759 (2010), and *Schill v. Wisconsin Rapids School District*, 786 N.W.2d 177, 182–183 (Wisc. 2010), they then make the argumentative leap that many employers allow personal email use *because* it can increase employee productivity. However, dicta from two cases—neither of which concerned macro-effects from personal email use—hardly establish that this new standard will not constitute a net loss to productivity. Further, that nearly all those employers who do permit nonwork email on their business systems also attempt to keep such email "limited and incidental" flies in the face of my colleagues' assertion. Even in the *Register Guard* legal environment, where employees had no presumptive Section 7 right to use the business email system for nonwork purposes, employers have been hugely concerned with nonwork consuming an employee's "email time."

To its partial credit, the majority concedes in a fashion that email technology is fundamentally incompatible with the concept of "working time" and "break time," as email technology currently stands. But the majority should have taken this as a sign that business email networks are inherently unsuitable for a blanket application of the physical space presumption established by *Republic Aviation.* Instead, the majority essentially holds that the concept of "working time" will be sacrificed as part of the new rule, because the allowable "working time" prohibitions that it envisions for employers are technologically impossible to bring about, much less enforce.

VI. THE ROLE OF ALTERNATIVE MEANS OF COMMUNICATION: THE MAJORITY'S DISPUTE WITH ME, AND WHY THEY ARE WRONG

My central disagreement with the majority is whether or not alternative means of communication for employees matter at all in this case. This alternative means issue is posed by each of (1) the revolutionary expansion of social media networks, (2) personal email, (3) text messaging, and (4) the continued efficacy of face-to-face communication (which my colleagues do not attempt to entirely negate). Essentially, I contend yes; they contend no. The majority asserts that because the new legal standard it has imposed "applies only to employees who already have access to their employer's email system for

[51] Regulatory takings can also occur as the result of large government-imposed property injuries to private parties. It is beyond the scope of this opinion to determine whether there is a class of employers so impacted by the loss of control over their business email networks that they will have suffered such an injury. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 529 (1998) (cumulative loss "on the order of $50 to $100 million" is one factor allowing a regulatory takings challenge). If the taking is seen as a permanent physical occupation (i.e. the forced hosting of speech on the employer's servers), however, the impact need only be slight before the Constitution comes to bear. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In rebutting my use of *Loretto*, the majority believes I am being inconsistent in citing a case that involves physical space. But, the point of *Loretto* is that *constitutional takings jurisprudence* recognizes violations from even minimal intrusions upon physical property. The additional storage and user interface area required by the majority to be devoted to depicting, hosting and maintaining Sec. 7 emails would constitute such intrusions, in my view. *Loretto* has nothing to do with whether physical space concepts should translate automatically, under *Sec. 7 employee communication jurisprudence*, to electronic space. No one is arguing, for example, that employees miniaturize themselves and physically meet on disk sectors of an employer's email server.

work purposes, the right to use that system for Section 7 communications does not turn on the unavailability of traditional face-to-face discussion or other alternative means of communicating." The majority believes that an examination of alternatives occurs only in determinations of third party rights to enter upon the employer's physical property, as in *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 537–538 (1992). But my colleagues err, because a consideration of alternative means of communication is part of the *Republic Aviation* line of cases in two different ways.

The extant tests for Section 7 balancing inherently invoke a consideration of alternatives.

First, the extant tests inherently invoke a consideration of alternatives. As set forth above, *Republic Aviation* and its progeny ultimately hold that employees must have "adequate" avenues to "effectively" engage in Section 7 activity. *Beth Israel*, 437 U.S. at 491 fn. 9; *LeTourneau Co.*, 54 NLRB at 1260, affd. sub nom. *Republic Aviation*, 324 U.S. at 802. This begs the conceptual question: "adequate" and "effective" as compared to what?

At its root, the disagreement between my colleagues and me centers on how to interpret *Republic Aviation* and *Beth Israel*. I see those cases as setting forth a *methodology* that must be used to rationally apply Section 7 when the Board addresses a new medium of communications in the first instance; they see the cases as mandating the *exact same result* in electronic space as they require for physical space. In my view, *Republic Aviation* found the Board's reasoning in creating its presumption permissible, only because the Board had considered all the alternatives in deciding what constituted "adequate avenues of communication." In other words, *Republic Aviation* requires an examination of alternatives before the Board can create a presumption applying to a medium of communication (there, the employer's real property), even though the presumption could then be applied to subsequent cases without a measurement of alternative means in each and every case. *Beth Israel* clarifies that a rational methodology would expressly consider alternative means of communication, i.e. "the availability of alternative areas . . . in which § 7 rights effectively could be exercised." 437 U.S. at 506.

Further, the longstanding Supreme Court balancing standard that we apply here is that the destruction of property rights be "as little as is consistent with" the maintenance of Section 7 rights, and vice versa. *Babcock & Wilcox,* 351 U.S. at 112. How can we possibly determine this "least destructive means" for property rights and Section 7 rights without considering alternatives? That would be like a court applying a "least restrictive means" test in a First Amendment case without considering anything beyond the originally asserted means. See, e.g., *United States v. Alvarez*, 132 S.Ct. 2537 (2014) (examining alternative approach to criminalizing false claims).[52]

Finally, the proof is in the decisional pudding. Even after *Republic Aviation* established a general presumption of access in cases concerning physical property, consideration of alternatives still appears in Board decisions. The actual working rules that the Board created to determine the Section 7 versus property rights balance in traditional settings within the employer's physical premises frequently show a consideration of alternatives. For example, how could the Board create and then apply a dividing line between "working areas" and "nonworking areas" for distribution without having considered different, alternative dividing lines for property access? (One could easily argue that emails resemble distribution more than solicitation.) Why did the Board examine the public areas versus the backroom offices of public restaurants, as Justice Brennan discussed in *Beth Israel*? The "working area" standard did not drop out of the sky as some kind of received wisdom, nor is its application self-apparent or mechanical in any given case.

Moreover, examining alternatives is simply supposed to be part of doing our job as an administrative agency—part of good government. Where the question involves a novel extension of the Act to a particular technology, plain common sense should drive us to examine alternative, related technologies. The people of the United States do not expect us to woodenly apply traditional rules to new technologies without seeing whether these rules still serve their intended goals, given the whole technological context and all the alternatives that the regulated technologies present. Indeed, the easiest way that the Board can forfeit deference is to stop asking "does this still make sense?" in such a case and simply decree that a monolithic approach will control any situation regardless of factual context. Here, I fully agree with the majority that technological changes in the pattern of societal communications present novel issues that we must confront. However, analytical fixation on a single feature of a changing pattern, artificially divorced from the pattern as a whole, is fundamentally incompatible with our statutory purpose.

[52] Given the ramifications of the majority's new rule for an employer's free speech rights, indeed, a "least restrictive means" test may be required. See Section VI, infra.

> *The particular language used by the Supreme Court and Board also invokes consideration of alternative means of communication.*

Further illustrating the centrality of alternatives to the Section 7 balance here, the particular language endorsed and used by the Supreme Court in striking the balance expressly incorporates a consideration of alternatives. Here, as generally referenced above, *Republic Aviation* endorsed the rule of *LeTourneau Co. of Georgia* (54 NLRB at 1260), that employees should have "*adequate avenues of communication* open to them" to be informed of their Section 7 rights and express their Section 7 opinions. This test obviously looks to all the avenues. *Beth Israel* was even more explicit, measuring the Board's rationality of its distinctions by looking to "the *availability of alternative areas* of the facility in which § 7 rights effectively could be exercised." 437 U.S. at 506. Justice Brennan's opinion discussed the different types of spaces that could be used for Section 7 activity in the scope of its determination, and posed a consideration of alternatives in its analysis of allowing use of an employer's physical space, in *both* health care and in retail facilities. Id. at 505–507.

The majority disagrees, arguing that the Supreme Court in *Republic Aviation* made a blanket declaration that there was no need for a consideration of any alternative means of communication. But that is not what the Court wrote or held concerning the Board's operative *LeTourneau* theory of "adequate avenues of communication," in disposing of the argument that *LeTourneau* was an irrational decision arbitrarily divorced from any evidentiary considerations:

> In the *Le Tourneau Company* case, the discussion of the reasons underlying the findings was much more extended. 54 N.L.R.B. 1253, 1258 et seq. . . . The Board has fairly, we think, explicated in these cases the theory which moved it to its conclusions in these cases [i.e., *LeTourneau* and *Republic*]. The excerpts from its opinions just quoted show this. The reasons why it has decided as it has are sufficiently set forth."

Republic Aviation, 324 U.S. at 802. The *LeTourneau* Board's discussion applying the standard of "adequate avenues of communication" to the specific facts of the property at issue occurs on page 1260 of *LeTourneau*, and thus was exactly what the Supreme Court was referring to when it found the theory "fairly explicated." In other words, the Court held that the Board was not engaged in some arbitrary decisionmaking process, *precisely because* the Board had "fairly explicated" its theory concerning whether there were adequate avenues of communication overall, within which it considered potential alternative avenues of communication. To claim otherwise, based merely on the Court's noting the lack of a finding or evidence that the alternatives were totally "ineffective," misses the holding of *Republic Aviation*, and the adequate-avenues-of-communication theory that it validated. *Republic Aviation* requires the consideration of alternatives, in other words, when the Board is first formulating a presumption.

The majority goes on to argue that a number of cases since *Republic Aviation* have applied its presumption concerning solicitation on real property without any regard for whether an employer offers alternative areas on its property for solicitation purposes. Majority opinion at 13 fn. 62. I agree with the majority that the Board, once it had established a presumption of access in regard to physical space, as was affirmed in *Republic Aviation*, need not engage in a lengthy consideration of context and subsequent detailed balancing in every physical space case thereafter: such examination is what presumptions are designed to replace. But it is a different thing to state that in performing an *initial* Section 7 balancing for a totally new medium (employer email systems) we should not even consider context, and we should not give alternative means any weight.

In order to bolster its contention that an examination of alternatives is completely uncalled for here, the majority points to Justice Brennan's bare statement in the *Beth Israel* majority opinion 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 . . . ." *Beth Israel*, 437 U.S. at 505 (citing *Babcock & Wilcox*, 351 U.S. at 112–113), and subsequent interpretations of *Babcock* by *Lechmere v. NLRB*, 502 U.S. 527 (1992), and the *Register Guard* dissent. But there are several problems with relying on these sources for support. First, *Beth Israel* and *Babcock* concern *physical space* and employees' face-to-face communications in that space, and, as such, do not directly answer the question of considering alternative methods of communication when it comes to electronic space. Thus, they have no bearing on the argument here. For example, I am not contending that employees' use of personal email, social media, etc. should detract from their Section 7 right to communicate face-to-face at work about Section 7 matters, as historically established by *Republic Aviation*. Second, despite Justice Brennan's statement, neither *Beth Israel* nor *Babcock* actually rule out the necessity of general consideration of alternative means of communication, even in physical space. As noted above, the *Beth Israel* opinion found rational the Board's distinction—in terms of how Section 7 rights should be balanced—between the physical spaces of cus-

tomer areas and non-customer areas in the public restaurant sector. And, *Babcock & Wilcox*, relied upon by *all* the precedent cited by the majority, specifically endorsed the *LeTourneau* Board's factual consideration of alternative means of access. In fact, the *Babcock* Court began its discussion of *LeTourneau* by approvingly noting that the Board had considered the particular circumstances of the employees at issue:

> In the *LeTourneau* case, the Board balanced the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time, with the employer's right to control the use of his property, and found the former more essential *in the circumstances of that case*.[3] Recognizing that the employer could restrict employees' union activities when necessary to maintain plant discipline or production, the Board said:
>
> > "*Upon all the above considerations*, we are convinced, and find, that the respondent, in applying its 'no-distributing' rule to the distribution of union literature by its employees on its parking lots, has placed an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization."

351 U. S. at 110–111 (emphasis added; footnote quoted in text below). Then, the *Babcock* Court fully laid out the Board's "considerations" of this factual context in *LeTourneau*. The Supreme Court's detailed presentation here of the Board's rationale amply demonstrates beyond cavil that the Court approved of the Board's consideration of the total factual context and its weighing of potential alternatives to employees' physical access to the employer's parking lot:

> As previously indicated, the respondent's plant is located in the country in the heart of 6,000 acres of land owned by it or its subsidiary. Apart from U.S. Highway No. 13 (and perhaps the intersecting road), the respondent and its subsidiary own all the land adjacent to the plant. *This, in itself, seriously limits the possibilities of effectively communicating with the bulk of the respondent's employees.* This limitation would not, however, be too restrictive *if the respondent's gate opened directly onto the highway,* for then persons could stand outside the respondent's premises and distribute literature as each employee entered or left the plant. But, at the respondent's plant, the gate is 100 feet back from the highway, on company property. Over 60 percent of the respondent's employees, after passing the gate, enter automobiles or busses parked in the space between the gate and the highway, and presumably speed homeward without ever setting foot on the highway. *Distribution of literature to employees is rendered virtually impossible under these circumstances*, and it is an inescapable conclusion that self-organization is consequently seriously impeded. It is no answer to suggest that other means of disseminating union literature are not foreclosed. *Moreover, the employees' homes are scattered over a wide area.* In the absence of a list of names and addresses, *it appears that direct contact with the majority of the respondent's employees away from the plant would be extremely difficult.*

351 U. S. at 110 fn. 3, quoting *LeTourneau Co. of Georgia*, 54 NLRB at 1260–1261 (italics for emphasis). Thus, although the *Babcock & Wilcox* rule certainly allotted lesser access rights to nonemployee union organizers, the case certainly did not relieve the Board of having to consider alternative means of communication for employees, regardless of factual context. The majority puzzlingly classifies the detailed discussion of *Republic Aviation* and *LeTourneau* in *Babcock & Wilcox* as "dicta," even though it was absolutely necessary for the Supreme Court's ultimate review of whether the Board's standard-making was rational.

The majority cites other cases in support of their position, but they do not support the majority's view here. *NLRB v. Baptist Hospital, Inc*., 442 U.S. 773 (1979), fundamentally involved the consideration of alternative means of employee expression, since the whole point of the case was where to set the exact line between areas where employees could not solicit in a hospital ("immediate patient care areas") versus areas where they could. In reversing the Board's determination on areas properly included within "immediate patient care areas," indeed, the Court underscored that the Board should always pay attention to context: "[I]n discharging its responsibility for administration of the Act, the Board must frame its rules and administer them *with careful attention to the wide variety of activities* within the modern hospital." Id. at 791 fn.16. The majority cites *Eastex*, but *Eastex*, like *Baptist Hospital*, also approves of a contextual distinction between work areas and nonwork areas, which inherently incorporates a consideration of alternative means of communication (e.g. distribution in nonwork areas only versus distribution throughout premises). Moreover, *Eastex* simply affirms the original *Republic Aviation* analysis, which itself had looked directly to the Board's "adequate avenues of communication" theory in *LeTourneau*.

The remaining Board cases cited by the majority are cases where the Board simply applied *Republic Avia-*

tion's presumption to further physical space scenarios on the employer's real property, so they tell us nothing about the proper method of reasoned decisionmaking for an issue of first impression involving a different medium of communication. And finally, the overbroad statement from *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 13, that no court or Board has "ever" looked to an alternative means of communications analysis for employee solicitation issues, is, as I have amply demonstrated above, just plain wrong. All roads ultimately lead to an "adequate avenues of communication" analysis, when it comes to considering the initial application of Section 7 to a new milieu, and this means considering alternatives.

I agree with the majority that there is no requirement under the existing physical space presumption, as it has evolved from the time of *Republic Aviation*, for employees to actually show that distribution or solicitation off the employer's real property would be "ineffective," before they are allowed to solicit or distribute on that real property. But that does not answer the question presented, for various reasons, including that this case does not involve solicitations or distributions in physical space.

Thus, contrary to the majority, alternatives are important, must be considered before we apply Section 7 to an entirely new medium of communications, and have often been considered even under the "presumption-based" Section 7 jurisprudence regarding real property. The facts that employees can effectively communicate by (1) face-to-face and other traditional methods of communications and (2) social networking, smartphones, text messaging, and personal email in electronic space are *directly relevant* to whether employees should have access to their employer's business email network for Section 7 purposes.

> *The majority cannot show that such alternatives are ultimately inferior to business email for purposes of the adequate-avenues-of-communication analysis.*

The majority's decision that alternative methods of communication are categorically irrelevant further underscores the radical nature of their departure from extant law. The majority also dismisses such communications alternatives by attempting to argue some kind of inherent quality of business email that these alternatives supposedly lack. Specifically, the majority makes two specific contentions claiming that workplace communication is inextricably linked to the use of business email networks. First, the majority states that "employees themselves generally see such concerns as inextricable from their work lives and most appropriately dealt with at the workplace," rather than be "relegated to personal communications options" like personal email, texting, and social media. Second, the majority contends that these options "simply do not serve to *facilitate* communication among members of a particular workforce." Majority opinion at 6, fn.18 (emphasis added).

These contentions seem attractive at first blush, but fail to convince upon closer scrutiny. The majority gets it wrong that the "personal communications options" available to the average employee amount only to some kind of second class system in terms of technical capability, as I have explained extensively above, and then the majority compounds that error with the implicit assumption that employees cannot use social media, personal email, or text messaging at the "workplace." Of course they can, on their breaks, just as how most ordinary physical solicitation takes place. Indeed, the majority's atavistic attachment to physical space concepts when describing and regulating electronic communications networks is what probably drives their erroneous approach.

However, several technically equivalent, parallel communications networks can exist all at once in electronic space—e.g., a person can access and be accessible on LinkedIn, Facebook, Twitter, and personal email all at the same time. This is totally different than physical space: no one can physically be in more than one place at once. Precisely because a person can exist on several electronic communications networks at once, the idea that existence within a particular network has some kind of non-fungible value such that it should amount to a "right" is simply incorrect. The existence of multiple planes of electronic communication, in today's world, reduces the essentiality of any single plane.

The majority's true animating principle is actually found in its follow-on assertion that employees should have access to business email networks because it will "serve to *facilitate* communication among members of a discrete workforce" (emphasis added). As I note earlier, this is just another way of stating that access would be more *convenient* to employees who want to engage in Section 7-related discussions, and convenience has never been part of the Section 7 balance. What's more, the majority's assertion, though stated as a self-evident fact, is empirically wrong here as well. The phenomenal popularity of modern electronic communications networks—whether personal email, social media, or text-message groups—came about *exactly because they facilitate communication among discrete groups of people*, be they work forces or not.

The majority further argues that employees do not share all the same social media options and that they also may be "virtual strangers" who have no "practical way to obtain . . . [the] information necessary to reach each oth-

er" absent the use of business email. The former point underscores that the majority's rationale is based on convenience and not need. Rather than requiring employees who may not be on others' network to actually take a few minutes to sign up for the same electronic communications service (in most cases, for free), the majority would prefer to simply give unlimited break time access to the employer's network.

The latter "virtual stranger" point is a far better one, but, here, the majority's universal presumption of business email access for all employees far exceeds any rational connection to a "virtual stranger" scenario. It may be that, under the "adequate avenues of communication" standard adopted by the *Republic Aviation* Board and Court, there are kinds of employees who should have a right under Section 7 to the employer's business email system that they also commonly use for work.[53] Employees who truly have no or minimal connection to *any* physical place of work—for example, who telework exclusively—and lack *any practical ability* to reach each other without business email—for example, where the vast majority of a work force lacks smartphones or internet access for personal use—conceivably should have a right to limited use of their employer's email system during nonworking time. Simply stated, limited access to the email system used for work can conceivably redress the *Republic Aviation* balance for those employees who both (1) lack any connection to physical workspace to enjoy the "classic" *Republic Aviation* rights pertaining to employer real property and (2) effectively have no access to any alternative electronic communications space beyond their employer's. But the majority does not limit its rule to such employees, and the record in this case shows that the employees at issue fail condition (1) and present no evidence of condition (2).[54] Instead, with the majority's new rule, every employee across the land, even those who are "power users" of multiple social media platforms, personal email accounts, and texting, now additionally gets a right to communicate on business email networks they use for work. The majority's new rule goes far afield from the rationale stated.

VII. THE MAJORITY'S NEW RULE—WHICH FORCES AN EMPLOYER TO SUBSIDIZE HOSTILE SPEECH, BOTH BY COMPENSATING FOR IT AND PAYING FOR THE EMAIL SYSTEM TO SEND, RECEIVE, AND STORE IT—VIOLATES THE FIRST AMENDMENT

The First Amendment requires a coda to this dissent. Employers have their own points of view on many topics, including one of which is how they are operating their businesses and treating their employees. It should go without saying that those employees, engaging in protected Section 7 communications, do not always agree with their employers' point of view in such matters. Employees can and do disagree with their employers. Indeed, much speech the current Board has found protected by Section 7 is adversarial or hostile to the employer. And, within that body of hostile speech, some is even undeniably vituperative to the point of being damaging to working relationships or customer relationships. For example, in *Jimmy John's,*[55] employees participated in the union's poster campaign that disparaged the employer's sandwiches; in *Plaza Auto*,[56] the employee in his tirade called the business's very owner several variants of "motherfucker" while otherwise insulting him in various ways; in *Triple Play Sports*, above, at slip op. 2, there was an accusation of the owner illegally pocketing the employees' tax payments; in *Starbucks*,[57] there was a profanity-laced challenge of a supervisor to individual combat. Those are all things that now currently fall under the protection of Section 7, in the circumstances where they are tied in with communications about terms and conditions of employment. And, whether or not I agreed with any of these particular case results, all would agree that Section 7 allows, and should allow, a broad zone of expression for employees to express their views on improving the terms and conditions of their employment. Those views necessarily will include messages and viewpoints the employer does not support or in some instances even viscerally opposes. In other words, they will include "hostile speech."

In the new world created by the majority today, employers are now required to pay for such hostile speech. This will happen in three ways. First, as demonstrated above, employers will inevitably pay employees during working time to compose hostile speech, and to review hostile speech. Second, the employer must pay the licensing, electricity, and maintenance bills to allow the composition and transmission of this hostile speech (to whatever employees are the targeted recipients). Third, they will pay these fees and costs, plus the costs of incrementally adding more storage space, also to archive such hostile speech both on their business networks and on employee-operated terminals on those networks.[58]

[53] Of course, such a right would need to be delineated carefully so as to accord with both the "working time is for work" principle and the employer's First Amendment rights, as I discuss elsewhere.

[54] Here, I believe the burden of proof should be on the General Counsel.

[55] *Jimmy John's*, 361 NLRB No. 27 (2014).

[56] *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014).

[57] *Starbucks Coffee Co.*, 360 NLRB No. 134 (2014).

[58] I take it from the silence in the majority's opinion on this point that employers are not allowed to erase Section 7 emails. After some

Making someone pay to generate speech that that person opposes is an affront to the First Amendment to the Constitution. Here, the new standard violates the First Amendment—and, by extension, Section 8(c) of the Act—specifically because it requires an employer to pay for speech that is not its own, and that can be incredibly hostile to the employer's actual point of view. This is not a new concept. In *NLRB v. Steelworkers (NuTone)*, 357 U.S. 357 (1958), which issued 13 years after *Republic Aviation*, the Supreme Court held that "an employer is not obliged . . . to offer the use of his facilities and the time of his employees for pro-union solicitation." Id. at 363.

More recently, the Supreme Court has repeatedly held that the forced subsidization of speech is a First Amendment violation. In *Harris v. Quinn*, 134 S.Ct. 2618, 2639 (2014), the Supreme Court, relying on *Knox v. SEIU*, 132 S.Ct. 2277, 2289 (2012), reasoned that "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." The Supreme Court reasoned in that case that "Agency-fee provisions [that require employees to pay for the union's speech] unquestionably impose a heavy burden on the First Amendment interests of objecting employees." 134 S.Ct. at 2643. The Court further stated that it is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be *compelled to subsidize speech by a third party that he or she does not wish to support* [emphasis added]." Id. at 2644. That bedrock principle is the same one that the majority violates here, by imposing a system that will guarantee daily constitutional violations, with the transmission, reception, and storage of each and every hostile email on working time and using the employer's resources.

The First Amendment violation is especially pernicious because the Board now *requires an employer to pay for its employees to freely insult* its business practices, services, products, management, and other coemployees on its own email. All this is now a matter of presumptive right, as long as there is some marginal tie-in of the communications to group terms and conditions of employment. That is an incredibly easy standard to meet with today's Board.[59]

Compounding this problem is that today's Board also makes it difficult for employers to determine whether employee communications are protected at all in many cases. First, even communications that appear to the layperson's eye to be related solely to individual grievances have been held by the Board to be Section 7 communications. See *Fresh & Easy Neighborhood Market, Inc.,* 361 NLRB No. 12, slip op. at 4-5 (2014). Second, and especially relevant to email, the current Board paradoxically looks to non-email, face-to-face conversations to determine whether or not an *email* is a protected communication. See *Hitachi Capital America Corp.,* 361 NLRB No. 19, slip op. at 5 (2014) (Board majority looks to face-to-face communications in order to determine whether an "ill mannered, and perhaps more" complaint via email ostensibly about the employee's own point of view is actually a group complaint).[60]

Thus, if an employer cannot be sure whether or not a hostile email is protected solely through examination of the email, but must conduct a series of "parol evidence"-type interviews to determine whether certain emails are either "concerted" and "for mutual aid and assistance," then certainly more hostile emails will be permitted, either because of non-email "parol evidence" or employer caution in being unable to determine whether an email is protected. The final upshot is that the Board will effectively sweep in even more hostile speech for compulsory subsidization by the employer than would a rule defining Section 7 protection for email according to the text of the email alone.

In the end, the majority's rule compels employer funding of a huge volume of speech that the employer does not support. Other Board initiatives have been struck down for precisely this transgression—and for even a far lesser degree of this transgression—in the past. See *National Association of Mfrs. v. NLRB*, 717 F. 3d 947, 956 (D.C. Cir. 2013) (by requiring employers to post the Board's message on company bulletin boards [and computer systems], the Board unlawfully "told people what they must say"). The majority asserts that it is merely "telling employers that they must let their employees speak," but we are really telling employers they must subsidize the speech of their employees, and, thus "have employers say whatever the employees want them to." The Board chose not to appeal *National Association of Manufacturers*, but I regret that we have learned nothing.

amount of time, I believe that they should be, based on the similar interest that lay behind limiting distribution where it could amount to litter in the workplace. Moreover, most employers have document retention protocols that automatically delete emails after a certain amount of time, and I do not think Sec. 7 is implicated where such a protocol is applied generally.

[59] See notes 55–57.

[60] In *Hitachi*, the emails were not immediately apparent as concerted activity in that (a) the employee was the "only person" who complained; (b) the employee "never informed" the employer that she was relaying the shared concerns of a group of employees; (c) her emails did not reference any other employees, and she did not "cc" any coworker on the emails; and (d) her emails were replete with references to her own dissatisfaction with how the employer had treated her, e.g., the pronoun "I" appeared no less than 26 times in the course of four short emails. Id., slip op. at 5 (Member Miscimarra, dissenting).

Today's transgression against the First Amendment is worse. Instead of one notice poster, the Board now requires the employer to sponsor and underwrite a never-ending electronic procession of hostile speech. As the Supreme Court repeatedly held even before *Harris*, the government cannot require people to say what they do not wish to. See *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l Inc*., 133 S.Ct. 2321, 2327 (2013) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights*, Inc., 547 U.S. 47, 61 (2006)) (It is a fundamental principle of the First Amendment that "freedom of speech prohibits the government from telling people what they must say"); *Consolidated Edison Co. of New York, v. Public Service Commission of New York*, 447 U.S. 530, 544 (1980) (a utility company may not be compelled to place inserts in its monthly customer bills written by those with contrary interests, even if it would be efficient to do so); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (a newspaper may not be compelled to allow a reply on its letterhead to opinions or political positions that the paper has taken); *Wooley v. Maynard*, 430 U.S. 705 (1977) (compulsory statement on license plates unconstitutional). Here, as in the above cases, the government is compelling a third party to pay for speech that it does not endorse. There is no question government compulsion is involved, because the Board is making the employer pay for all this. The majority's rule here is wrong and it should be struck down on this ground alone.

My colleagues argue that the new rule does not violate an employer's rights under the First Amendment or Section 8(c). First, they assert that the hostile speech subsidization argument must fail because "the same argument could be made about employers' obligations under the Act regarding employee solicitation and distribution in break rooms and parking lots; nonetheless, employees' Sec. 7 rights require that accommodation." But employers do not have to pay for the exercise of those rights: they occur on break time and/or in non-work areas that do not detract from production at all. For example, an employer is not required to pay for the materiel or production time used for union flyers or other communications, nor does an employer have to pay for an employee engaging in union solicitation (because it can be limited to occurrence on nonworking time). This had always been a crucial distinction under our jurisprudence as discussed above: "working time is for work." Second, the majority asserts that the incremental costs are "de minimis," so apparently the First Amendment is not a concern. Of course, as I amply demonstrate above, such costs will not be "de minimis." Moreover, the Constitution frowns even on "de minimis" violations of traditional rights, especially those involving non-content-neutral First Amendment restrictions (as this one is) and property rights. See *Consolidated Edison Co.*, 447 U.S. at 537-38 (prohibition merely applying to company's utility bills); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (minimal permanent physical taking of property is still a taking). Even if an employer must only spend an extra ten dollars a day to host and promote hostile speech across its entire email network, that is still forcing the employer to turn a huge megaphone against itself—especially given how much electronic speech ten dollars buys one these days. The nature of the violation is being forced to pay *any amount* to support speech with which one disagrees, not how much one is forced to pay.

The majority also argues that it is unlikely that an email message sent by an employee using the employer's email system could reasonably be perceived as speech by, or speech endorsed by the employer. They reason that, just as an email user understands that a message received from a friend on their personal Gmail account does not speak for Google, the user similarly understands that an email message sent from a coworker's work email does not speak for the employer. However, as explained above, the problem with the rule is not confusion that an employee's speech would be attributed to the employer but rather, the employer is being forced to subsidize speech that is not its own, and will be, in many cases, 180 degrees opposite from its point of view.[61]

Further, my colleagues' Gmail analogy does not work. Gmail is simply an account provider, and using a Gmail address entails no indicia of apparent authority on behalf of Google.[62] In contrast, when one makes a statement about job conditions on a work account ending with "employer.com," especially if that is directed to a "virtual stranger" employee (per the majority) or a third party, there is indicia of authority and thus the real potential of confusion. There is no reason not to require a disclaimer at least for those who want to engage in Section 7 activity. Indeed, the CWA, the "Union of the Information Age," even recommends a disclaimer in terms of social media activity where the sites are social media sites not run by the employer:[63]

[61] *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 88 (1980), cited by my colleagues, is inapposite because the shopping center owner did not actually pay for the demonstrations that took place.

[62] Apparently, "google.com" is the official email address for this purpose.

[63] See CWA Social Media Policy Guidelines, available at http://cwa-union.org/pages/cwa_social_media_policy_guidelines (last visited September 22, 2014).

Many individual Facebook pages or personal social media sites contain information identifying you as employed by a particular organization or as a member of a CWA Local. When you are expressing your personal opinions, you should make it clear that these opinions are yours alone and are not intended to be understood as anything else. You should consider including a "disclaimer" on your personal page or site along the following lines:

> PLEASE NOTE: The opinions expressed on this site\page are entirely my own. They should not be seen as reflecting the views of my employer or the opinions of my Local or as having been authorized or approved by anyone other than me.

VIII. THE PARAMETERS OF THE MAJORITY'S RULE FURTHER ILLUSTRATE ITS UNWORKABILITY

I appreciate that the majority has attempted to describe some of the parameters by which parties can understand lawful versus unlawful email restrictions. Indeed, I think deference ostensibly owed because of "agency expertise" can be earned by the Board when it announces sweeping new rules only if it simultaneously supplies understandable and detailed guidance to parties on how those rules are going to apply in the future. But the problem here is twofold: there is still insufficient guidance and the guidance that the majority provides merely highlights all the problems with the rule itself. Indeed, I fear that the majority's insufficient guidance as to how the presumption of access to business email could work in practice demonstrates that it has not considered the entire matter in depth.

The majority asserts that, under its new framework, "an employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction." The majority fails to explain whether there is some special burden of evidentiary proof to establish special circumstances. Nor does the majority address what suffices as evidence of special circumstances. My colleagues say that an employer can prohibit emails with large attachments or audio/video segments, if the employer can demonstrate that they would interfere with the email system's efficient functioning. My colleagues have no consideration that large audio/video attachments, which now appear to be presumptively allowable, automatically cause a system drain and fill up mailboxes more quickly than text emails. That is simply a fact.[64] Under this new framework, it seems that the employer would have the burden to present evidence that its system was actually in some sense "broken" by such attachments or by "overuse" of email in general. That unfortunately would be a standard requiring actual property destruction—and business catastrophe—in order for an employer to even set forth an argument that the balance should tip in favor of its property rights.[65] I do not find the Act requires employer property to actually be destroyed before Section 7 rights can be limited.

The majority further states that "ordinarily, an employer's interests will establish special circumstances only to the extent that those interests are not similarly affected by employee email use that the employer has authorized." It would seem that any type of application or use of email (e.g., multiple address lists) that is authorized for work is then authorized for Section 7 activity. As such, it appears that the employer can never assert an interest against nonbusiness communications simply because they are nonbusiness communications. For example, there will be no volume-related limitation, because employers do not limit the volume of their own business-related email. That, in turn means there will be no ceiling to potential productivity loss. Moreover, just as with face-to-face communications, employees seemingly will be free to ignore an employer's request to "take it offline" to stop group emails or require a face-to-face conversation instead. See *The Modern Honolulu*, 361 NLRB No. 24, slip op. at 8 (2014).

[64] The United States government is not immune from these difficulties. One of the issues confronting our sister agency, the Internal Revenue Service, is the problem posed by mailbox overflow. See Gregory Korte, "How the IRS 'lost' Lois Lerner's e-mails," USA Today, June 17, 2014 (noting that, at the time of the then-Commissioner's hard drive crash, "the IRS also had an e-mail quota of 150 megabytes per mailbox — about 1,800 e-mails" and that "[IRS e]mployees reaching that limit would be responsible for deciding which e-mails to delete," accessible at http://www.usatoday.com/story/news/politics/2014/06/17/how-the-irs-lost-lois-lerners-e-mails/10695507/ (last visited September 17, 2014).

[65] To wit, "we had to destroy the network in order to save it." Such a standard would be grist for a future Joseph Heller writing about property and Section 7 rights.

My colleagues maintain that employers will still be able to monitor their email systems for "legitimate management reasons." While I commend my colleagues for, in a general sense, acknowledging an employer's interest in ensuring productivity and preventing email use that could give rise to employer liability, they fail to grapple with the fact that some employers have a huge number of employees on email. For such employers, what we are mandating, for those who need to monitor email use but want to try to comply with this rule, is an expensive "ediscovery model." In other words, the Board is mandating that an employer must now institute an ongoing, operative system in place that continually investigates emails coming from within its organization, in order to have any basis for clamping down on excessive email. I acknowledge that the majority is correct in that employers do possess some means of monitoring productivity. See note 67. But, the majority's confidence that all will simply work out well because of that fact is misplaced. I ask for the Board to provide clear guidelines or safe harbors, tied to such existing means, so that employers can comply with the law. To announce a broad rule, but leave such guidance to the future after hundreds or thousands of employers have been wrung through the Board's litigation processes, is not the way the Board should work, in my view.[66]

The majority says that it is "confident . . . that [the Board] can assess any surveillance allegations by the same standards [applied] to alleged surveillance in the bricks-and-mortar world." But one cannot apply the same standards because, as described above, email does not organically signal Section 7 use. Thus, it will be impossible for an employer to effectively monitor employee use of email, without examining the content to some degree, and creating the impression that it is surveilling union activity. Moreover, the search tools and problems applicable to email are entirely different; one does not have Boolean searches, data overflows, or relevance algorithms in the "bricks-and-mortar world." Further, the majority makes no effort to meaningfully explain permissible monitoring (and the triggers an employer may use to institute monitoring in the new world of post-*Purple Communications*) and an employer impermissibly "focusing its monitoring efforts on protected conduct." This is a derogation of duty of the Board, especially after laying out such an expansive rule. The majority fails to indicate whether an employer, e.g., can monitor overall system volume, and then put in place a monitoring system even if a volume spike is caused by organizational activity. Because of all its vagueness about what an employer *can* do, the new rule likely compromises even employers' current ability to effectively monitor employee use of email.[67]

Finally, the majority claims that this new rule is a limited one because it is confined to employer email systems. I disagree. My colleagues' decision is actually fairly sweeping. They have established a rule that essentially says that you can use your employer's communications technology or device for any Section 7 purpose as long as you also use it for work. Taken to its extreme, the majority's "general forum use" rationale would just as easily apply to taking over an employer auditorium or conference room in the middle of the workday during an employer presentation/conference. My colleagues also say that this new framework accommodates the competing rights of employers and employees. Putting aside my previous arguments that a *Republic Aviation* balancing test is inapplicable here, the rule completely disregards the legitimate interests of employers because, as set forth above, it will substantially interfere with an employer's ability to ensure that employees are working.

In sum, the special circumstances test is amorphous at best and impossible to meet at worst because it will require some actual evidence of injury before it is invoked, and it appears to disqualify any interest in prohibiting email simply because it is a nonbusiness communication that will only serve to increase distraction and diversion instead of work. The better approach here to protect Section 7 rights might have been to address the email access issue through reconsideration and possible modification of *Register Guard*'s test of prohibited discrimination for this issue. However, that issue has not been fairly presented and argued here for the parties and interested amici. Accordingly, any expression of my views in that regard would be premature.

[66] For example, after decades of litigation, employers still cannot predictably come up with work rules that pass muster under our *Lutheran Heritage Livonia* test – a test with far more specific parameters than the one the majority creates today. See, e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8 (2014) (Member Johnson, dissenting).

[67] Forty-three percent of employers attempt to monitor employee email usage according to the 2007 Electronic Monitoring & Surveillance Survey cosponsored by the American Management Association and the ePolicy Institute, (February 28, 2008), available at http://press.amanet.org/press-releases/177/2007-electronic-monitoring-surveillance-survey/.

Employers use email monitoring and Website blocking to manage productivity and minimize litigation, security, and other risks. "More than one fourth of employers have fired workers for misusing e-mail and nearly one third have fired employees for misusing the Internet . . . . The Latest on Workplace Monitoring and Surveillance, (June 2, 2014), available at http://www.amanet.org/training/articles/The-Latest-on-Workplace-Monitoring-and-Surveillance.aspx.

IX. CONCLUSION

For the reasons given above, I would not overturn the Board's decision in *Register Guard* that employees do not have a statutory right to use their employer's email system for Section 7 purposes. My colleagues have created a sweeping new rule that interferes with an employer's well-established right to restrict employee use of its property based on convenience. This new framework threatens to undermine an employer's right, as recognized by Board and Court precedent, to have a productive workforce. The new framework probably exceeds the jurisdiction of the Board to impose unfunded mandates on employers and certainly violates the First Amendment. 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. In short, this is a reenactment of a turf war over business email systems that was conducted nearly 10 years ago, with an original outcome that caused no cataclysm to employee Section 7 rights. The turf has grown even more nonessential to Section 7 rights; they have flourished within other avenues of communication.[68] And, this turf has grown even more crucial to modern employers' business necessity.

The majority cites Moore's Law but fails to understand how it applies to this case; Moore's Law has created an entire, and constantly expanding, ecosystem of employee expression that allows employees to fully engage in Section 7 communications *without* displacing critical employer business systems. The Board should get with the present, and concern itself with protecting Section 7 rights on that new 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 7, if it ever did in the past. Thus, for all the reasons above, I respectfully dissent.

Dated, Washington, D.C. December 11, 2014

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

Cecelia Valentine, Esq., for the General Counsel.
Robert J. Kane, Esq. (Stradling, Yocca, Carlson & Raut, of Newport Beach, California, for the Employer.
Lisl R. Duncan, Esq. (Weinberg, Roger & Rosenfeld) Los Angeles, California for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard these consolidated unfair labor practices and representation cases in Long Beach, California, on June 10 and 11, 2013. Communications Workers of America, AFL–CIO (the Union, the Charging Party, or the Petitioner) filed the charge on December 18, 2012, alleging that Purple Communications, Inc. (the Employer, the Respondent, Purple, or the Company) had committed unfair labor practices by maintaining rules that unlawfully interfered with employees' rights to engage in protected concerted activity. Representation elections were held at a number of the Employer's locations on November 28, 2012, including at the locations in Corona, California, and Long Beach, California. At the Corona facility, 10 ballots were cast for the Union and 16 ballots against the Union, with one challenged ballot. At the Long Beach facility, 15 ballots were cast for the Union and 16 ballots against the Union, with two challenged ballots.[1] The Union filed timely objections to preelection conduct at those locations.

On April 22, 2013, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint alleging that the Employer had committed unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining two rules that interfered with employees' rights under Section 7 of the Act. The Employer filed a timely answer in which it denied that the rules violated the Act. On April 30, 2013, the Regional Director for Region 21 issued a report on challenged ballots and objections and an order consolidating the cases regarding those matters with the unfair labor practices case for purposes of hearing.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Employer, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation, provides interpreting services to deaf and hard of hearing individuals, from its facilities in Corona, California, and Long Beach, California, where it annually performs services valued in excess of $50,000 for customers in states other than the State of California. The Employer admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND FACTS

The Employer is a provider of communication services for deaf and hard of hearing individuals. The primary service it

[68] Indeed, from the total-avenues-of-communication perspective of today's employees, this debate is about as relevant as one over control of an employer's telex lines.

[1] At the start of trial, the Respondent and the Union stipulated that the challenged ballots at the Long Beach facility were cast by ineligible voters and should not be counted.

provides is sign language interpretation during video calls. An employee known as a "video relay interpreter" or "VI" facilitates communication between a hearing party and deaf party by interpreting spoken language into sign language and sign language into spoken language. The Employer offers its video call interpretation services 24 hours a day, 7 days a week, from 15 call center facilities across the United States. In 2012, interpreters at seven of those facilities engaged in campaigns for union representation. The allegations in this case concern two facilities at which union representation elections were held on November 28, 2013. At one of those facilities, located in Corona, California, the Employer employs approximately 30 interpreters. At the other, located in Long Beach, California, the Employer employs approximately 47 interpreters.

III. UNFAIR LABOR PRACTICES

A. Facts

The Employer's video relay interpreters "process" calls using company-provided computers located at their workstations. The interpreters can use these workstation computers to access the Employer's intranet system and various work programs, but the computers have limited, if any, access to the internet and non-work programs. The Employer assigns an email account to each video interpreter, and the interpreters can access these accounts from the workstation computers as well as from their home computers and smart phones. Employees routinely use the work email system to communicate with each other, and managers use it to communicate with employees and other managers. At the Corona and Long Beach facilities, the Employer also maintains a small number of shared computers that are located in common areas and from which employees are able to access to the internet and non-work programs.

The Employer has an employee handbook that sets forth its policies and procedures. The unfair labor practices alleged in this case concern two handbook policies that the Employer has maintained since about June 19, 2012, and which the parties stipulate were in effect at all times relevant to this litigation. The first policy provides as follows:

> The following acts are specifically prohibited and will not be tolerated by Purple. Violations will result in disciplinary action, up to and including terminations of employment.
>
> . . . .
>
> Causing, creating, or participating in a disruption of any kind during working hours on Company property;

The second handbook policy at issue concerns internet, intranet, voicemail and electronic communications. The portions that are alleged to violate the Act provide as follows:

> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.
>
> . . . .
>
> Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:
>
> . . . .
>
> 2. Engaging in activities on behalf of organization or persons with no professional or business affiliation with the Company.
>
> . . . .
>
> 5. Sending uninvited email of a personal nature.

The Employer is authorized to punish an employee's violation of this policy with discipline up to and including termination. Ferron testified that the reason interpreters are prohibited from using their workstation computers for personal use is to prevent computer viruses from contaminating the call center.

B. Analysis

1. The General Counsel argues that the Employer's maintenance of the handbook policy prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" violates Section 8(a)(1) of the Act because it sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity. In determining whether the maintenance of a rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would "reasonably tend[ ] to chill employees in the exercise of their Section 7 rights." *Knauz BMW*, 358 NLRB No. 164, slip op. at 1 (2012), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Under this standard, a rule that explicitly restricts Section 7 rights is unlawful. Id., citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). If a rule does not explicitly restrict Section 7 rights, the General Counsel may establish a violation by showing any one of the following: (1) that employees would reasonably construe the language to prohibit Section 7 activity; (2) that the rule was promulgated in response to union activity: or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id., citing *Lutheran Heritage*, 343 NLRB at 647.

The Employer's prohibition on "causing, creating, or participating in a disruption of any kind during working hours on Company property" does not explicitly restrict Section 7 activity, however, the General Counsel argues that the policy violates the Act because it would reasonably be interpreted to do so. This argument is supported by Board precedent. In *Heartland Catfish Co.*, the Board found that an employer rule that prohibited employees from "engaging or participating in any interruption of work" violated Section 8(a)(1) of the Act because it would reasonably be interpreted by employees "to prohibit participation in a protected strike." 358 NLRB No. 125, slip op. at 1–2 (2012). Similarly, in *Labor Ready, Inc.,* the Board held that an employer's rule that "Employees who walk off the job will be discharged" was overbroad and unlawful. 331 NLRB 1656 (2000). In *North Distribution, Inc.*, the administrative law judge ruled on exactly the same disruption language that is at-issue here. 2002 WL 991684 (2002). In that case the

judge held that the rule violated Section 8(a)(1) because its language was "overbroad and could be interpreted as barring Section 7 activity, including the right to engage in a work stoppage." Id. Although I am not bound by the judge's decision,[2] I find his reasoning persuasive. Because the Employer's prohibition does not define or limit the meaning of "disruption" or state that it is not intended to refer to Section 7 activity, I find that employees would reasonably interpret it to outlaw some such activity.

To support its contention that the rule prohibiting employee disruptions is permissible, the Employer relies on the fact that the rule only prohibits disruptions during working hours. The Employer cites *Daimler-Chrysler Corp.*, 344 NLRB 1324 (2005), and argues that the "disruption" language would not interfere with lawful strike activity because strikes are not protected unless they occur on nonworktime. This contention is not persuasive for several reasons. First, I note that the prohibition on "disruptions" is so broad that it can reasonably be understood to apply not only to strike activity, but also to other forms of protected Section 7 activity, including, for example, solicitation. In addition, while the Employer argues in its brief that the Company is entitled to prohibit union activities during working "time," the rule at-issue is not, in fact, limited to working time. Rather the prohibition explicitly extends to the entire "working *hours"* period. The Board has long held that the phrase "working hours," unlike the phrase "working time," encompasses periods that are the employees' own time such as meal times and break periods, as well as times when employees have completed their shifts but are still on the company premises pursuant to the work relationship. *Grimmway Farms*, 314 NLRB 73, 90 (1994), enfd. mem. in part 85 F.3d 637 (9th Cir. 1996); *Wellstream Corp.* 313 NLRB 698, 703 (1994); *Keco Industries*, 306 NLRB 15, 19 (1992). For this reason, the Board has held that a rule prohibiting union solicitation during "working hours" is presumptively invalid, even though a presumption on solicitation during "working time" is generally lawful. Id.; see also *Our Way*, *Inc.*, 268 NLRB 394–395 (1983), citing *Essex International,* 211 NLRB 749 (1974). This distinction is particularly significant here since the Employer operates 24 hours a day, 7 days a week—meaning that the prohibition on disruptions during "working hours" arguably applies to *all* hours of the day and night. Moreover, the rule does not only prohibit employees from directly participating in a disruption, but also from "causing" or "creating" a disruption that takes place during working hours on company property. Employees could reasonably fear that this would allow the Employer to discipline them for participating in meetings or other Section 7 activities that take place during nonworktime and away from the workplace if those activities are causally linked to a disruption at the facility. Lastly, I note that the Employer incorrectly assumes that any strike that ran afoul of its rule prohibiting disruptions during working hours on company property would be a sit-down strike or slow down and, therefore, unprotected by the Act. See Respondent's Brief at page 14, citing *Daimler-Chrysler Corp.*, supra. This overlooks the scenario in which a strike begins when employees walk off the job and exit the facility. Such strikes are generally protected by the Act, see, e.g., *Labor Ready, Inc.*, supra, but would nevertheless be prohibited by the Employer's rules since the disruption would begin during working hours on company property.

For the reasons discussed above, I conclude that the Employer's maintenance of the rule prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" violates Section 8(a)(1) of the Act because it sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.

2. The General Counsel also alleges that the Employer interfered with employees' exercise of Section 7 rights in violation of Section 8(a)(1) by maintaining overly broad rules that prohibit the use of its equipment, including computers, internet, and email systems for anything other than business purposes, and which specifically prohibit the use of that equipment for "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company." While the General Counsel makes this allegation, it concedes that finding a violation would require overruling the Board's decision in *Register-Guard*, 351 NLRB 1110 (2007), enfd. in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). In that decision the Board held that "employees have no statutory right to use the Employer's e-mail system for Section 7 purposes" and therefore that an employer does not violate Section 8(a)(1) by maintaining a prohibition on employee use of its email system for "non-job-related solicitations." The General Counsel argues that *Register-Guard* should be overruled, inter alia, because of the increased importance of email as a means of employee communication. If the General Counsel's arguments in favor of overruling *Register-Guard* have merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent that has not been reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

Therefore the allegation that the Employer violated Section 8(a)(1) by maintaining rules that prohibit the use of company equipment for anything but business purposes should be dismissed.

IV. CHALLENGED BALLOTS

The Employer challenged the ballots of two individuals—Martin Garcia and LeeElle Tullis—who cast ballots in the representation election at the Long Beach facility. Those ballots are sufficient in number to affect the outcome of the Long Beach election. The Employer challenged these ballots on the grounds that the individuals had not worked the requisite number of hours to qualify to vote. At trial, the Union and the Employer stipulated that the two challenges should be sustained, and that the ballots of Garcia and Tullis should not be counted. No testimony or documentary evidence was presented on the subject. Given that the parties have stipulated to the validity of

[2] There is no Board decision reviewing the administrative law jJudge's decision in *North Distribution, Inc.*, supra.

the ballot challenges, I conclude that the ballots of Garcia and Tullis should not be opened or counted.

V. OBJECTIONS TO THE ELECTION

In October 2012, the Union filed petitions for representation elections at the Corona and Long Beach facilities. On October 25, the Union and the Employer entered into stipulated election agreements for elections at both of those facilities to be held on November 28 for bargaining units comprised of all full-time and part-time video interpreters. The elections were held as scheduled and the Union filed postelection objections. The Regional Director for Region 21 directed that a hearing be held on the six objections filed by the Union regarding the election at the Corona facility (21–-RC–91531) and the election at the Long Beach facility (21–RC–091584). The Union's objections, which are identical for both facilities, are as follows:

> 1. The employer encouraged a decertification petition to be prepared and circulated in the bargaining unit. It furthermore allowed employees to circulate this petition during work time and in work areas.
>
> 2. The employer maintained and enforced unlawful rules in the workplace which interfered with the exercise of rights guaranteed by section 7 and interfered with the election.
>
> 3. The employer made threats of bankruptcy and threatened employees with closure of the facility or loss of work if the workers voted or supported the Union.
>
> 4. The employer made offers of benefits and bribes to employees if they would not support the Union.
>
> 5. The employer otherwise threatened employees with loss of benefits if the employees supported the Union.
>
> 6. The Excelsior List was inadequate. It did not contain email address[es], work shifts, rates of pay and phone numbers.

These objections are discussed below.

> OBJECTION NO. 1: The employer encouraged a decertification petition to be prepared and circulated in the bargaining unit. It furthermore allowed employees to circulate this petition during work time and in work areas.

The Board has stated that an employer has no legitimate role in instigating or facilitating a decertification petition and may not solicit employees to circulate or sign it. *Armored Transportation, Inc.*, 339 NLRB 374, 377 (2003); cf. *Bridgestone/Firestone, Inc.*, 335 NLRB 941, 941–942 (2001) (Employer did not violate the act when employee decided of his own volition to file a decertification petition, and employer did not provide more than ministerial assistance.); *Ernst Home Centers*, 308 NLRB 358 (1992) (same). Objection No. 1 refers to the petitions that employees submitted in an effort to cancel the November 28, 2012 representation elections as "decertification petitions." This is a misnomer inasmuch as the Union was not the certified collective-bargaining representative of interpreters at either facility and therefore could not be "decertified." Nevertheless, I believe it is appropriate to apply the standard quoted above to the question of whether the Employer unlawfully involved itself in the petition to cancel the election. I find that under that standard, the Union has failed to show that the Employer instigated, facilitated, circulated, improperly permitted or otherwise unlawfully involved itself in the petitions at the Corona and Long Beach facilities.

The record evidence shows that shortly before the representation elections were held at the Corona and Long Beach facilities, interpreters at those facilities circulated identically worded petitions, which stated that the signing employees "wish to withdraw our request to unionize at this time, thereby canceling the vote that is scheduled to occur on November 28, 2012." The petitions also stated that "[b]y agreeing to withdraw, the undersigned are neither stating support for or against unionization, rather, we see wisdom in allowing Purple, our employer, to realize that they have been lax in addressing their employees' concerns and taking supportive action." After obtaining a number of signatures in support of the petitions, the proponents of the petitions transmitted copies to the Board, the Union, and the Employer. The letter transmitting the Corona petition is dated November 19, 2012, and the letter transmitting the Long Beach petition is dated November 26, 2012.

Prior to when the proponents of the petition transmitted it, video interpreters Judith Kroeger and Ruth Usher observed coworkers circulating the petition from workstation to workstation at the Corona location during working hours. Kroeger also saw the petition displayed in the Corona break room. On November 14, Kroeger sent an email message to facility manager, Sam Farley, stating:

> I just wanted to touch bas[e] with you as several VIs are approaching me stating that they are being accosted in their stations while working by other VIs not in support of the union. They are telling me they are being bribed with promises and coerced into agreements by these individuals while on company time.

Kroeger testified that the persons circulating the petition were rank-in-file interpreters who lacked authority to promise changes in working conditions. Later that day, Farley responded to Kroeger by email as follows:

> Thank you for bringing this to my attention. You are correct that I will not stand for any harassment in the workplace especially to the level that people are being accosted in their stations. If you would like to give me more specific information I can look into this further. I understand that you do not want to disclose any specific details in which case I will do my best to keep my eyes and ears open. Also . . . if people are coming to you, please encourage them to come and speak with me as well so I can make sure this is . . . dealt with appropriately.

The next day, November 15, Kroeger responded:

> Thank you Sam, and I have been directing individuals, but not everyone feels comfortable nor wants to contribute to what is going on. I know that the only way for you to effectively handle it would be for them to come to you. Thank you for making the extra effort to be more aware. I and many others are truly appreciative.

Kroeger testified that she did not see the petition being circulated again after the above email exchange with Farley.

Farley testified that he was not aware that any employees were circulating a petition to cancel the election until he received the November 14 email from Kroeger and that afterwards he was on the lookout for such conduct. He testified that no one besides Kroeger mentioned the petition to him prior to its submission, and that not a single employee complained to him that they had personally been accosted or offered bribes to sign the petition. Farley further testified that he did not help employees transmit the petition to the Union or other call centers. Although Farley may have been able to see employees walking in the hallways between the interpreters' workstations, Usher, a witness for the Union, conceded that someone seeing this activity would not necessarily know that the employees were moving between workstations because they "could be coming from anywhere."

I found Farley a generally credible witness based on his demeanor, testimony and the record as a whole. Moreover, his testimony was essentially unrebutted. For these reasons, I fully credit Farley's testimony that he was not involved in any way with the petition. There was no evidence that any other supervisor, manager, or agent of the Company was involved in the creation, circulation, or submission of the petition at the Corona facility. Nor was there evidence that any other such individual was aware that the petition was being circulated at the Corona facility during working time. Under the circumstances, I find that the evidence does not show that the Employer encouraged, prepared, instigated, facilitated, or improperly permitted the Corona petition in any way.

Evidence to support the Union's objection is similarly lacking with respect to the petition at the Long Beach facility. The Union presented the testimony of Robert LoParo, an interpreter at the Long Beach facility and one of the three prounion individuals who presented the petition for representation to management. On November 18, LoParo received the petition to cancel the vote in an email from a coworker. The following day, a different coworker showed LoParo the petition in the break room. That day, LoParo also saw interpreters passing around a piece of a paper, and heard them saying "sign this, please," but he could not tell whether the paper was the petition, and, at trial, he did not remember who he saw passing it. LoParo stated that the individuals were not on formal, clocked-out, breaks when they were passing the paper. However, the record indicates that this would not necessarily mean that the employees were passing the paper during times when they should have been working since interpreters are allowed 10-minutes of breaktime per hour and do not clock out for those breaks. Angela Emerson, another Long Beach interpreter, stated that she saw the petition passed at that facility on three occasions during a single morning in October or November. Eventually the petition was passed to her at a time when she was not handling a call, but was not taking an official break.

On Friday, November 23, 2012 (the day after the Thanksgiving holiday), LoParo sent an email about the petition to Ty Blake-Holden, the manager of the Long Beach facility. LoParo stated that an interpreter had told him that she was feeling accosted at her workstation by people attempting to pass the petition. Blake-Holden responded by email the following Monday, November 26. He stated: "You're correct. Nobody should feel accosted in their station. This is not appropriate. Please make sure that this person contacts me directly." There was no competent evidence that any employees contacted Blake-Holden to advise him that they personally had been accosted by a proponent of the antivote petition. Blake-Holden's office afforded a view into one or two interpreter workstations, but not into the hallway between the interpreters' workstations.

Even assuming that LoParo's above-discussed testimony is fully credited, I find that the evidence does not show that the Employer encouraged, prepared, instigated, facilitated, or improperly permitted the Long Beach petition in any way.

The evidence does not substantiate Objection No.1 with respect to either the Corona or Long Beach facility and that objection is overruled.

> OBJECTION NO. 2: The employer maintained and enforced unlawful rules in the workplace that interfered with the exercise of rights guaranteed by Section 7 and interfered with the election.

In its brief, the Union bases this objection on the same two employer rules that the General Counsel alleged were violations of Section 8(a)(1) in the unfair labor practices case discussed above. As found above, the Employer's maintenance of the rule prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity. The second rule—the Employer's prohibition on the use of company equipment for anything other than business purposes—is not, under current Board law, considered an improper infringement on Section 7 rights. I see no basis upon which to conclude that that rule is objectionable.

Objection No. 2 is sustained with respect to both the Corona facility and the Long Beach facility to the extent that the Employer's workplace rule regarding disruptions is overly broad and interferes with the Section 7 rights of employees. The Objection is overruled to the extent that it alleges other objectionable conduct.

> OBJECTION NO. 3: The employer made threats of bankruptcy and threatened employees with closure of the facility or loss of work if the workers voted or supported the Union.
>
> OBJECTION NO. 4: The employer made offers of benefits and bribes to employees if they would not support the union.
>
> OBJECTION NO. 5. The employer otherwise threatened employees with loss of benefits if the employees supported the Union.

1. Facts

The Union's argument in favor of sustaining Objections 3, 4, and 5, are based on statements allegedly made by Ferron (the Employer's president and CEO) during his November 16, 2012, presentations to day shift interpreters at the Corona and Long

Beach facilities.[3] These meeting were held 12 days before the union election and for the purpose of trying to persuade employees to vote against representation. A bit of background is necessary to provide context for Ferron's statements during those presentations. For some time prior to the presentations, the Employer had not been profitable. In 2010, the rate at which the FCC reimbursed the Employer for its video interpreting services was reduced by approximately 7 percent and the Employer reacted to the loss of revenue by, inter alia, reducing pay for interpreters and managers, and instituting layoffs. That year, the Employer closed approximately four of its facilities, including the Long Beach facility. Ferron's understanding in 2012 was that the FCC would soon reset the compensation rates for video interpretation services and that the rates would be lowered again at that time. Nevertheless, management was not contemplating closing any facilities. Rather Ferron was planning to expand the Company's operations, in part to take advantage of the lower cost of doing business in other geographic areas and also to add interpreters who were not on the certified interpreters' registry and therefore could be employed more cheaply. At some point in late 2011 or early 2012, the Employer reopened the Long Beach facility and rehired some of the interpreters who it had laid off there in 2010.

The Employer also sought to address its financial situation by increasing interpreter productivity. In early October 2012, shortly before the Union petitioned to represent interpreters at the Corona and Long Beach facilities, the Employer raised the productivity benchmarks that it relied on to, inter alia, determine bonuses. The Employer increased the amount of time interpreters were expected to be logged onto the Employer's system and the amount of billable time interpreters were expected to generate.[4] The record indicates that these changes resulted in interpreters being denied bonuses that they would have obtained under the prior productivity standards. Not surprisingly, interpreters disapproved of the new benchmarks and made their disapproval known to the Employer. In a letter to Ferron dated November 20, 2012, the Union noted that the new log-in standards were causing many interpreters "physical pain," and stated that the Union would not take any legal action if the Employer lowered those rates, regardless of whether the facilities were scheduled for a union election. At some point in November 2012—prior to the representation election—the Employer lowered some of the productivity benchmarks, although the benchmarks remained higher than they had been before the increases a month earlier. These changes were made at all facilities, regardless of union activity. It is not clear from the record exactly when in November the productivity standards were eased, but one interpreter at the Long Beach facility first found out about the changes in a November 21 email from the Employer.

[3] At trial there was also testimony about other meetings conducted by Fran Cummings, vice president of operations, and Tanya Monette, vice-president of human resources. The Union's brief does not identify any conduct by the Respondent at those meetings that it contends was objectionable.

[4] The Employer refers to its production standards as "key performance indicators" or "KPI."

Ferron made his antiunion presentations at the Corona and Long Beach facilities on November 16, and also made such presentations at five or six other facilities. Ferron prepared a set of notes for these presentations and used the same notes in each instance. Before preparing those notes, Ferron consulted with legal counsel and an outside labor relations consultant. He did not read from the notes, but did refer to them during the presentations in order to remind himself to cover certain topics. At each presentation, Ferron talked for 45 minutes to an hour, and then responded to questions for 30 to 45 minutes.

Corona Presentation

In support of the objections based on Ferron's presentation at the Corona facility, the Union relies on the account given by Ruth Usher, a former video interpreter at that location. The Employer counters Usher's testimony with that of Ferron, who disputes Usher's account in a number of key respects. I do not consider the account of either of these two witnesses to be unbiased or generally more reliable than that of the other regarding disputed matters. Usher served as a union observer during the election and at the time of trial her separation from the Employer was the subject of a pending unfair labor practices charge. On the witness stand, she sometimes gave the impression of straining to support the Union's position. Based on my consideration of Usher's demeanor, testimony, and the record as a whole, I think that her account was tainted by bias. I note, moreover, that no other interpreter who attended Ferron's presentation at the Corona facility testified to corroborate Usher's account.

Ferron's testimony was less than fully reliable since he conceded that he was generally unable to distinguish what he said during his Corona and Long Beach presentations from what he said at any other of the facilities where he spoke against unionization. In general, his testimony regarding what he said at the Corona and Long Beach facilities was rather vague except when he was asked about certain alleged coercive statements, at which points he became quite certain in his denials and seemed more intent on showing that he had not engaged in objectionable conduct than in searching his recollection for an accurate account of his statements. No other attendee was questioned by the Employer to corroborate Ferron's account of the disputed aspects of either the Corona meeting or the Long Beach meeting, although Ferron said that several management and supervisory employees attended the Long Beach meeting.

Some things about Ferron's presentation at Corona are clear. Ferron discussed: the recent decision of Hostess Brands, a company with union-represented employees, to file for bankruptcy; the Employer's own financial challenges and uncertain financial future; a plea that employees delay bringing in a union and allow management time to address employee concerns; the Company's priorities in the event that the Union won the right to represent interpreters; and the costs the Employer had incurred to resist the union campaign;

Regarding Hostess Brands, the record indicates that Hostess' situation relative to bankruptcy had been prominent in the news shortly before Ferron gave his presentations at the Corona and Long Beach facilities. Usher testified that, during his Corona presentation, Ferron referenced the Hostess situation and stated

that "because of the union, Hostess was filing for bankruptcy," but that Ferron did not elaborate further. At another point in her testimony, Rusher stated that Ferron had said something a bit different—"lot of good the union did in order to keep their jobs . . . at Hostess." Ferron testified that his discussion of Hostess during the presentations was confined to one or two sentences. According to him, he stated that he knew that employees were scared, but that "unionization isn't a panacea," as evidenced by the recent events at Hostess. He also testified that he told employees that having a union "was an added cost and it . . . may or may not produce a favorable or desired result from the standpoint of the interpreter." He testified that he said "Hostess, you know—you know, their situation ended in bankruptcy which was disastrous for the company and its employees and nobody was served." Ferron stated that he was fully aware that "bankruptcy" was a "fearful term" to employees and claimed that he "would never use it" in reference Purple itself. However, he stated that he considered it acceptable to mention the Hostess bankruptcy because "it was a popular topic in the news." He denied that he said that "what happened to Hostess would happen at Purple if employees voted in the Union." Based on the demeanor of the witnesses, the testimony, and the record as a whole, I find that Ferron made the statements regarding Hostess that he admitted to, but do not find a basis for crediting Usher over Ferron regarding additional statements about Hostess.

Regarding the Employer's overall financial situation and future, Usher testified that Ferron told employees that the Employer had "not made a big profit from last year to this year" and that the "overall tone" of Ferron's discussion was that "if we go union, I don't know what's going to happen." She testified that Ferron said, in relation to all employees, that he "couldn't promise that there would be benefits or anything like that in the future," and that he "could not make any promises about the future." For his part, Ferron testified that he told employees that the only promise he could make was that he "was doing his best to grow our company; to . . . increase profitability through productivity standards, through diversification of the company . . . but that it was an uncertain outcome because [he] had an uncertain reimbursement rate" for video interpretation services. He stated that the Employer was evaluating alternatives for expanding capacity at existing call centers and by opening new call centers. He discussed the possibility that benefits would be eliminated as a way of coping with further video interpretation rate reductions. According to Ferron, he also told employees that where the Employer "may have failed" was "in communicating" to employees that the state of their industry had rendered interpreters' expectations about wages and benefits unreasonable. He testified that he told employees: "We are in an uncertain time . . . with declining rates and what I'm trying to do is preserve what all of you have. . . . I can't sit here and give you an expectation of pay increases, increased benefits, things like that. We're all lucky to have a job and I'm trying to preserve what we have." In Ferron's account, he also stated that he wanted the Company to remain the "employer of choice" for video interpreters, but that the interpreters would have to measure what the Company was offering against the FCC reimbursement rate and what competitors were offering. "Employer of choice" was a term that the Employer had used in the past to mean that the Company respected and valued the interpreters' work and provided competitive wages and benefits. The testimonies of Usher and Ferron about Ferron's statements regarding the Employer's overall financial situation are not contradictory, and I accept that Ferron made the statements recounted by both witnesses on that subject and which are recounted above in this paragraph.

Usher also testified that Ferron told employees that he "would give more or less preferential treatment to the nonunion employees because they were willing to work with him." I do not credit Usher's testimony in this regard. On the face of it, her use of the phrase "more or less" renders this testimony uncertain and/or unclear. Moreover, as stated above, I believe that Usher's testimony was tainted by bias. Usher also testified that Ferron said that if some of the facilities became unionized he would "play hardball with the Union" but that he would "treat" the nonunion facilities "differently." Ferron denied that he said anything about giving less preferential treatment to facilities that voted to unionize. He did, however, testify that one of his basic talking points was that if employees "did not trust" him "it would become a different ballgame." In that case, he told the interpreters, he would have to negotiate in good faith and also "have to get the best deal for the company with the respect to the Union." He testified that he told employees that his focus during such negotiations would be "on the shareholders, the deaf and hard of hearing community, and looking after all of our employees—union, non-union and corporate." Based on the demeanor of the witnesses, the testimony and the record as a whole I do not find a basis for crediting Usher over Ferron regarding the question of whether Ferron made statements threatening to treat employees who unionized worse than employees at non-union facilities. I do, however, credit Ferron's uncontradicted testimony that he made the statements discussed above with respect to "a different ballgame" and how he would negotiate if the employee's elected union representation.

Ferron also testified that he asked employees to "give" him "another 12 months" to address their concerns without a union. He discussed improving communications by having additional meetings and forums and placing a priority on the issuance of monthly newsletters. He testified that he said:

> [T]here were things that we could hopefully collectively solve . . . . if given an opportunity over the next 12 months [to] evaluate whether, you know, conditions in their mind relative to what is controllable versus that which is not controllable has improved or has not improved and you could always address a Union situation 12 months later. But give us an opportunity to bridge that divide.

Ferron discussed employees' concern about the heightened productivity benchmarks. According to him, he stated that the productivity standards were "always fluid" and that the increases were in the interpreters' "best interest despite how they felt about them" because improved productivity allowed management to avoid layoffs and pay cuts. He testified he told employees that, nevertheless, "interpreter health and safety . . . had to come first and foremost" and that the Company might have

gone too far and "needed to recalibrate" production standards and "were looking at that matter." The portion of Ferron's testimony that is set forth in this paragraph is not directly contradicted as regards the Corona facility and I credit that testimony.

Regarding costs associated with the union campaign, Ferron testified that he said the following:

> And to the degree that we would have communicated better and wouldn't have incurred the cost to fly around the country and encourage a no-vote to these union call centers, think of how much more money the company would have had from a discretionary standpoint. And then we could have done a lot of things with it. We could have invested in further product development. We could have given spot bonuses to the interpreters. A lot of things we could have done that – you know – that money has kind [of] leaked out of the company.

I credit this testimony by Ferron, which was not contradicted by any other witness to his presentation at the Corona facility.

Long Beach Presentation

In support of its objections based on Ferron's presentation to the Long Beach facility interpreters, the Employer relies on the testimonies of LoParo and another Long Beach interpreter, Angela Emerson. The Employer again relies on the testimony of Ferron—which generally did not distinguish what he said at the Long Beach presentation from what he said any of the other "vote no" presentations he made around the same time. A number of management and supervisory officials of the Employer were present at the Long Beach talk (including Blake-Holden according to Emerson's account, and Tanya Monette according to Ferron's account)—but Ferron was the only representative of the Company who testified about the meeting.

It is undisputed that Ferron mentioned the Hostess' bankruptcy at his presentation. He testified that he said that he knew that employees were scared, but that unionization was not a panacea, as evidenced by the bankruptcy at Hostess. He stated further that having a union adds costs and that it might lead to results that employees would not consider favorable. He cited the experience of Hostess, which "ended in bankruptcy which was disastrous for the company and its employees and nobody was served." I credit Ferron's testimony that he made these statements. His testimony was consistent with that of Emerson, who testified that Ferron "brought up . . . the correlation between what our fears were, and Hostess, and what they went through." LoParo testified that Ferron went further and directly stated that the union at Hostess had caused that company to go bankrupt. I do not credit LoParo's testimony that Ferron made that explicit connection over Ferron's contrary testimony. I do not consider LoParo an unbiased witness. He was one of the proponents of unionization who delivered the representation petition to the Employer. Moreover, LoParo's accounts of what Ferron said regarding Hostess varied over the course of his testimony—becoming increasingly damning as the questioning went on.[5] I was left with the impression that LoParo was not so much trying to recount what Ferron had actually said about Hostess, as trying to convey what he believed was Ferron's implicit message on the subject. In addition, his memory appeared faulty. For example, he testified that Ferron made certain statements about councils and committees, but when confronted with his own notes, he conceded that those statements were made by someone other than Ferron at a different meeting, or possibly only in a company newsletter, and possibly not until after the November 28 elections. Emerson testified at one point that the "feel" of what Ferron was saying was "almost like" "if you vote union, this is going to happen to you," "Union equals, you know, what happened to Hostess." However, after reviewing Emerson's testimony as a whole, I find that at these points in her testimony she was conveying her subjective impressions of Ferron's presentation, not attempting to report his actual statements.[6]

At his Long Beach presentation, as at Corona, Ferron discussed the Company's difficult financial situation, and the challenges posed by rate reductions. LoParo testified that Ferron told the employees that "with some of the requests the Union might [make], it could possibly lead to closing of certain centers or the non-viability of certain centers that decided to go union." After his recollection was refreshed with notes that he prepared several days after the presentation—LoParo quoted Ferron as stating that "depending on the vote, he could either expand [the Long Beach operation], or not." LoParo also testified that Ferron discussed the possibility of eliminating benefits for interpreters in order to address the Company's financial situation. For his part, Ferron testified that he had not talked about closing any facilities or linked the viability of facilities or a reprioritization of facilities to whether those facilities unionized. According to Ferron, he told employees that there was the possibility of expanding the Long Beach operation, "but that a lot of variables went into that," including the "cost of labor" and "the outcome of collective bargaining relative to the pay rate of those interpreters." Ferron stated that he told employees that as a result of declines in the industry, it might be necessary to reduce pay or eliminate certain benefits at all call centers. I find that Ferron made the statements discussed above regarding the Employer's difficult financial situation, the variables that would affect a possible Long Beach expansion, and the possibility of reduced pay and benefits, but do not find a basis for crediting LoParo's testimony over Ferron's denials regarding statements Ferron allegedly made warning that decisions about whether to close, expand, or give preferential treatment to particular facilities would be based on whether employees voted to unionize.

At Long Beach, Ferron also made a plea that employees refrain from bringing in a union and give the Employer a chance to improve matters. As with the Corona talk, I credit Ferron's testimony that at Long Beach he told the interpreters: "There

[5] For example, at one point LoParo recounted that Ferron said: "Did you see the news recently about Hostess? They went union. See what happens there." Later LoParo recounted that what Ferron said about Hostess was: "It was the union that caused Hostess to have to close down and declare bankruptcy."

[6] The test of whether an employer's conduct is objectionable "is not a subjective one, but an objective" one, and "the subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct." *Lake Mary Health &* Rehabilitation, 345 NLRB 544, 545 (2005).

were things we could hopefully collectively solve . . . . If given the opportunity over the next 12 months evaluate whether, you know, conditions in their mind relative to what is controllable versus that which is not controllable has improved or has not improved and you could always address a union situation 12 months later. But give us an opportunity to bridge that divide." I also find that he told employees "From the standpoint that you've turned towards a union vote, obviously there's things that we as a company could have done better; first and foremost being communication" and that he discussed various steps to improve communication. I also credit his admission that he referenced the heightened productivity standards, stating the changes might have gone "too far," that he would not have made the same changes knowing what he knows now, and that to the extent that the changes were not consistent with the health and well being of interpreters, the Company would have to "adjust" as part of "a constant process of recalibration." That testimony was essentially uncontradicted and, to a significant extent, corroborated by LoParo and Emerson.

LoParo also testified that Ferron said: "I've heard you about your needs, but I'm in purgatory. I can't give you anything . . . . Those centers that haven't filed—I can change things for them, [productivity standards] and expectations. For those that filed for unionization, I can't do anything. My hands are tied." LoParo's testimony regarding the language used by Ferron on this subject was confident and detailed. Emerson testified less confidently and in less detail on this subject, but indicated that Ferron had said that he would not be able to take action to adjust productivity standards if the Union was voted in; however, Emerson did not appear to be claiming that Ferron said he could not take such action because the vote was pending. Ferron testified that he did not "talk about changes to the [productivity standards] based on the Union vote." I consider Ferron's testimony on this subject unclear. Although I think Ferron's testimony is fairly understood as denying that he told employees he would decide whether or not to make favorable changes based on the outcome of the Union vote, it is not clear at all that he was also denying that he told employees that the scheduled Union election prevented him from making changes. Additional questions were not posed to elicit a clear response from Ferron on the question of whether he told employees that he could not make changes at facilities where a union election was scheduled, but could do so at other facilities. I considered LoParo's testimony on this subject quite credible. He testified confidently and recounted colorful language—e.g., "I'm in purgatory"—that stood out from LoParo's own manner of speech during his testimony and had the ring of truth. Based on the above, I find that Ferron made the statements recounted by LoParo regarding the Company's ability to make changes at facilities where no election was scheduled, but not where an election was scheduled.

On the subject of addressing employee complaints discussed immediately above, LoParo claims that Ferron went further and stated that the employees who did not want the union "would become his priority" and "pretty much that those who were for the union would be have-nots and those who were against the union would be haves." However, in other testimony he stepped back from this claim, stating that Ferron did not explicitly say who were the "haves" and the "have-nots." Elsewhere in his testimony, LoParo claimed that Ferron clearly warned that he would prefer the non-union employees, stating that "he considered [the Employer] a family and a business and that, if certain centers decided to go union, he would have to reprioritize and focus on his family." Ferron unequivocally denied telling employees that the nonunion employees would be treated as "haves" or otherwise become his priority, or that he would reprioritize based on whether a facility was unionized. In addition, Emerson, the Union's other witness regarding the Long Beach presentation, did not recount the additional statements alleged by LoParo regarding giving priority to some facilities, or treating them as "haves" because they did not support the Union. I do not find a basis for crediting LoParo's testimony over Ferron's on this subject.

Ferron testified about a number of statements he says he made regarding his plans in the event that the facility rejected his plea for more time and voted for the Union. He testified that he told employees that his "first and foremost attention" would be to "our shareholder base . . . the people who own the company" and that he had to be concerned about the "deaf and hard of hearing consumers [that] rely upon [the Employer] for communication." He testified that he said that if employees voted in favor of union representation he would have to bargain in good faith and "would negotiate to get the best possible outcome that [he] could on behalf of all those constituents" and would want "to have the non-Union and Union centers be aligned with regards to, you know, economic incentives, the productivity standards, and the general, you know, care and maintenance of being an employer to all of them." I credit this testimony by Ferron, which was not directly contradicted by other witnesses to the Long Beach presentation.

The witnesses for both sides are in agreement that Ferron made some remarks about the money that the Company had expended campaigning for a "no vote" on unionization. In Ferron's account, he told employees that if he had communicated with employees more effectively in the past, and thereby avoided the costs of campaigning for a no-vote, the Company would have had more discretionary money to use for things such as product development and employee bonuses. In LoParo's account, Ferron said "We've spent so much money on the unionization issue, traveling around, et cetera, that we should have just paid out the bonus" or that if they had not expended that money they could have "possibly paid out bonuses to [the interpreters]."[7] Emerson gave a slightly different account. She stated that when people asked about their bonuses, Ferron stated that they had not reached the new benchmarks for receiving them. Then, Emerson recounts, Ferron went on to state that "he didn't want to have to spend all this money on a

[7] LoParo further testified: "In effect [Ferron] was saying, 'Fighting the union now is taking out the resources that I would have normally given to you, but now that you're going pro-union that makes you have nots again. It means that you can't earn that money, that bonus. It's not available for you anymore.'" I do not understand LoParo to be testifying that Ferron actually made these statements. Rather given LoParo's statement that this was "in effect" what Ferron was saying, I understand LoParo to be paraphrasing what he took to be Ferron's message, not reporting his exact words.

union buster, that . . . he should have just used all that money to just pay us our bonuses." The various accounts about what Ferron said regarding the costs of the Employer's antiunion campaign are not clearly contradictory and I find that he made all the statements discussed in this paragraph.

2. Analysis

The Union argues that Objection No. 3 is substantiated by the statements that Ferron made regarding the Hostess bankruptcy, the Employer's financial issues and lack of profitability, and the possibility that the Union's demands might lead to the closing or nonviability of facilities that elected union representation. I find that this objection is not substantiated for either the Corona facility or the Long Beach facility.

As discussed above, I find that Ferron discussed the recent bankruptcy of Hostess, and the presence of a union at that company, as evidence that "unionization is not a panacea," and that it would not necessarily be a solution to the interpreter's problems, but could, instead, have an outcome unfavorable to the interpreters and the Employer. Contrary to the Union's contention, this statement is not an unlawful threat of bankruptcy. In *Parts Depot, Inc.*, the Board found that a similar statement by a manager was not impermissibly coercive. 332 NLRB 670 fn. 1 (2000), enfd. 24 Fed. Appx. 1 (D.C. Cir. 2001). The manager in that case stated: "Remember what happened to Eastern Airlines. Because they let the union in they went bankrupt." The Board held that the statement was at most "a misrepresentation as to what caused Eastern to go bankrupt, not an implicit statement that the [employer] would take action on its own to declare bankruptcy if the Union won the election." Id.; cf. *Eldorado Tool*, 325 NLRB 222, 223 (1997) (employer unlawfully threatened plant closure when it displayed a series of tombstones with the names of closed union factories, culminating, on the day prior to the representation election, with a tombstone bearing name of the employer itself and a question mark). If anything, Ferron's statement was marginally less threatening than the one in *Parts Depot* since in that case the manager explicitly stated that unionization had caused the bankruptcy of Eastern Airlines, whereas I find that Ferron noted a correlation, but did not explicitly claim causation. Moreover, Ferron did not suggest that Hostess purposely chose to declare bankruptcy rather than deal with a union, but rather suggested that Hostess was forced into bankruptcy for economic reasons that unionization was either unable to ameliorate or negatively influenced. Thus Ferron's reference to Hostess cannot in my view be reasonably viewed as a threat that the Employer would choose to declare bankruptcy, or close union facilities, in order to avoid dealing with a union. I do not doubt that Ferron was hoping that the interpreters would see Hostess' experience not only as evidence that unionization was not a "panacea," but also as cause to fear that bringing in the Union at Purple would negatively affect the economic future of the facility. Indeed, Ferron conceded he was aware that the use of the word "bankruptcy" was frightening to employees. However, based on *Parts Depot*, I find that his statement did not impermissibly cross the line between a statement about the experience at one unionized employer and a threat that the Employer would choose to file for bankruptcy or close down facilities rather than deal with a union.[8]

I conclude that the evidence does not substantiate Objection No. 3 at either the Corona or the Long Beach facility, and that Objection is overruled.

The Union argues that Objection No. 4 is substantiated by Ferron's statements that, if the employees gave him year he would try to fix things without a Union, and that he would be able to change productivity standards for facilities that had not unionized or filed for unionization, but could not make such changes for those facilities that had done so. The Union argues further that this Objection is substantiated by Ferron's statements that he wished to return to being the "employer of choice" for video interpreters.

An employer unlawfully coerces employees when it promises improvements in wages, benefits, and other terms and conditions of employment if employees vote against a union. *DTR Industries*, 311 NLRB 833, 834 (1993), enf. denied on other grounds 39 F.3d 106 (6th Cir. 1994); see also *Curwood Inc.*, 339 NLRB 1137, 1147–1148 (2003) enfd. in pertinent part 397 F.3d 548 (7th Cir. 2005) (promise to improve pension benefits violated Sec. 8(a)(1) where the respondent was reacting to knowledge of union activity among its employees). I find that in this case the Employer did not make an improperly coercive promise. Ferron asked the employees to give the company another year to see whether by improving communication, and working together, they could address employee's concerns. The evidence showed not only that Ferron did not promise increases in wages or benefits, but that he specifically stated that he could not promise improved wages and benefits or even guarantee that there would not be decreases.

Although it is a closer question, I also conclude that the Ferron did not make an unlawful promise regarding productivity standards. During both his Corona and Long Beach presentations to employees, Ferron asked the employees to give the Company 12 months to improve communications and work with employees to address their concerns. He allowed that the Employer might have gone too far in raising productivity standards, that setting productivity standards involved an ongoing process of recalibration, and that he was looking into the matter. I conclude that these statements at Corona and Long Beach did not constitute a coercive promise. At the outset I note that the evidence does not show that he made any promise at all. He did not describe specific new productivity standards or promise that any changes he made in the future would necessarily be ones that the employees would approve of. He simply asked for another chance, conceded that the Company might

[8] In its brief, the Union notes that Emerson believed that the message that Ferron was conveying about Hostess was "If you vote for the Union, this is going to happen to you . . . the company would cease to exist or we wouldn't have jobs anymore." However, the subjective impression of Emerson is not determinative since "[t]he test is not a subjective one but an objective" one, and the "subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct." *Lake Mary Health & Rehabilitation*, 345 NLRB at 545. In this case, Ferron's statements regarding Hostess cannot objectively be seen as a threat that he would choose to close the facility or declare bankruptcy rather than deal with the Union.

have gone too far with productivity standards and stated that the Company was looking into the matter as part of an ongoing process of recalibration. In *Noah's New York Bagels*, 324 NLRB 266 (1997), the Board considered circumstances very similar to these and found that the employer's president did not violate the Act during a captive audience speech the day before a union election by: asking employees to give "us a second chance to show what we can do," admitting that the company had made mistakes, stating that the best way to overcome the mistakes was to work together without the involvement of a third party, and stating that the presence of a third party creates costs for both the company and employees and does not guarantee "job security, fair treatment good wages and benefits, and a warm friendly work environment." The Board noted that an employer's"[g]eneralized expressions . . . asking for 'another chance' or 'more time,' have been held to be within the limits of permissible campaign propaganda" when the employer does not "make any specific promise that any particular matter would be improved." *Noah's Bagels*, 324 NLRB at 266-267,citing *National Micronetics*, 277 NLRB 993 (1985). Nor did Ferron violate the Act by stating that Purple wanted to be the "employer of choice" for interpreters. This, too, was not a promise of any specific changes, but no more than propaganda about what the Company claimed would be its generally respectful and favorable treatment of interpreters.

I find, however, that Ferron did engage in objectionable conduct by stating to the Long Beach interpreters that he could not make changes to address employees' discontents given that a union election was scheduled, although he could make such changes at those facilities where a union vote was not scheduled. That characterization of the situation is clearly at odds with Federal law. In *Lampi, LLC,* 322 NLRB 502 (1996), the Board stated: "As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene." As was observed in *First Student, Inc.*, 359 NLRB No. 120, slip op. at 5 (2013), employers misstate the law when they tell employees that because they are awaiting a scheduled union election "they are caught between a proverbial 'rock and a hard place.'" Neither granting nor withholding improvements is illegal unless "the employer is found to be manipulating benefits in order to influence his employees' decision during the union organizing campaign." Id. In this case, I find that Ferron unlawfully coerced employees by blaming the upcoming union election for his purported inability to make changes to address employees' discontent.

Objection No. 4 is sustained with respect to Ferron's speech at the Long Beach facility and overruled with respect to Ferron's speech at the Corona facility.

The Union argues that Objection 5, which states that the Employer threatened interpreters with loss of benefits if the employees supported the Union, is substantiated at the Corona facility by Ferron's statement that he could not make any promises that the Company would continue to provide benefits for full-time and part-time interpreters. The statement that the Union relies on does not attach the possible discontinuation of benefits to the Union vote or its outcome. In fact, Ferron mentioned discontinuing benefits in the context of a discussion of the financial challenges facing the Employer and the various actions being contemplated to address those challenges. The actions he mentioned included expanding some facilities, creating new facilities, diversifying the company and increasing productivity—not just eliminating employee benefits. I find that the record does not show that these statements by Ferron at the Corona facility were improperly coercive as alleged in Objection No. 5.

The Union argues that Objection No. 5 is supported with respect to the Long Beach facility by evidence that Ferron said he was considering eliminating benefits as a means of saving money and that he would be unable to help those interpreters at unionized facilities. As discussed above, I found that the evidence did not show that Ferron told employees that he would be unable to make positive changes for employees if they elected to be represented by the Union. He did make reference to the possibility of cutting benefits, but as at Corona, this was in the context of a discussion of a variety of ideas that the company was contemplating to address its financial challenges and was not linked to the results of the union vote.

Objection No. 5 is overruled with respect to both the Corona facility and the Long Beach facility.

> OBJECTION NO. 6: The Excelsior List was inadequate. It did not contain email address[es], work shifts, rates of pay and phone numbers.

By letters dated October 25, 2012, the Acting Regional Director for Region 21 of the Board notified the managers of the Corona and Long Beach facilities of the Employer's obligation, pursuant to the terms of the election agreement, to provide "an election eligibility list containing the full names and complete addresses (including postal zip codes) of all the eligible voters who were on the Employer's payroll for the period ending Sunday, October 14, 2012." Similarly, the election agreement that the parties executed for each facility stated that the Employer had agreed to provide "an election eligibility list containing the full names and addresses of all eligible voters" and cited *Excelsior Underwear*, 156 NLRB 1236 (1966) and *North Macon Health Care Facility*, 315 NLRB 359 (1994). Neither document imposes on the Employer an obligation to include email addresses, work shifts, rates of pay, or phone numbers, as part of the election eligibility lists. There is no dispute that the Employer provided election eligibility lists containing all of the information required by the October 25 letters from the Board and by the election agreements between the parties. The Union did not even present evidence establishing that, prior to the election, it notified the Employer that the Union considered the election eligibility list to be deficient.

In its brief the Union presses its claim that the Employer engaged in objectionable conduct by failing to include employees' email addresses on the election eligibility list, but makes no argument that it was objectionable not to include information about work shifts, rates of pay, or phone numbers. Even regarding the subject of email addresses, the Union concedes that "the Board has not yet required an employer to provide employees' email addresses in order to fulfill its *Excelsior* duty." The fact is that the Board has specifically held that an

employer's obligation under *Excelsior*, supra, *does not* extend to providing email addresses for the eligible employees, even when the employer made a specific pre-election request for such information. *Trustees of Columbia University*, 350 NLRB 574 (2007). The Union makes a conclusory assertion that "in the particular circumstances of this case" additional information should have been provided, but it does not identify any special circumstances that would justify departing from the established standards. I conclude that the evidence does not show that the election eligibility lists provided by the Employer were inadequate under either Board law or the election agreement between the parties.

Objection No. 6 is not substantiated and is overruled.

VI. ANALYSIS OF THE SUSTAINED OBJECTIONS

At both the Corona and Long Beach facilities, the Employer maintained an overly broad rule that violated Section 8(a)(1) and constituted objectionable conduct. In addition, the Employer engaged in objectionable conduct when, at the Long Beach facility, Ferron told employees that because a union election was scheduled there he could not make changes to address employees' discontents, but that he could make changes at others facilities where a union election was not scheduled. The question is whether these objections are sufficient to warrant setting aside the election at either facility. The Board has stated that "[r]epresentation elections are not lightly set aside." *Safeway, Inc.*, 338 NLRB 525 (2002). "[T]he Board sets aside an election and directs a new one when unfair labor practice violations have occurred during the critical period,[9] unless the violations are de minimis." *PPG Aerospace Industries*, 355 NLRB 103, 106 (2010). "In determining whether misconduct is de minimis, the Board considers such factors as the number of violations, their severity, the extent of their dissemination, the number of employees affected, the size of the bargaining unit, the closeness of the election, and the violations' proximity to the election." Id., citing *Bon Appetit Mgt. Co.*, 334 NLRB 1042 (2001); see also *First Student, Inc*., 359 NLRB No. 120 , slip op. at 4 (2013) (when election results are close, objections must be carefully scrutinized); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (same).

Turning first to the Corona facility, I find that the circumstances there do not warrant setting aside the election. Only a single objection was sustained with respect to that facility – the maintenance of an overly broad rule regarding employee involvement in "disruptions." The Board has found that the mere maintenance of an invalid rule may be an insufficient basis on which to overturn election results. See, e.g., *Delta Brands, Inc.*, 344 NLRB 252, 253 (2006); *Safeway, Inc.*, 338 NLRB 525, 525–526 (2002). I note, moreover, that the evidence in the instant case did not show that the Employer enforced this rule at all during the critical period, much less that it enforced the rule against employees for engaging in union or protected concerted activity. Nor did the evidence suggest that any employee refrained from protected activity because of the rule. In any event, the Corona vote was not particularly close—in favor it, with one challenged ballot. I conclude that the employer engaged in only de minimis misconduct which, under the circumstances here, did not affect the outcome of the election at the Corona facility.

With respect to the Long Beach facility, the situation is different. At that facility the Employer acted unlawfully both by maintaining the overly broad rule and also when Ferron told the interpreters that he could not make changes to address their discontents given that a union election was scheduled, but that he could make such changes at those facilities where a union vote was not scheduled. This statement was made less than 2 weeks before the election and was broadly disseminated at a meeting held for all the interpreters present at the facility. In *First Student, Inc.*, the Board required that an election be set aside where, during the critical period, the employer told employees that it was not granting wage increases because Federal Law prohibited them from making unilateral changes to the current pay scale when there is a union election pending. 359 NLRB No. 120, slip op. at 5. Like the speaker in that case, Ferron was essentially blaming the union campaign for the Employer's refusal to make changes favorable to employees. In the instant case the misconduct is similar, but in certain respects both more severe and less severe than in *First Student*. It is more severe in that Ferron not only stated that he could not address the Long Beach employees' concerns because the union election was upcoming, but also contrasted that with the situation that would pertain if a vote was not scheduled and he could make changes. Those statements would certainly provide fuel for the efforts at Long Beach to persuade interpreters to petition for cancellation of the upcoming election. Although the election was not, in fact, cancelled, it is reasonable to infer that at least some of the antiunion sentiment generated or harnessed during the effort to cancel the election would carry over when the Union vote was held. On the other hand, the misconduct here was less severe than in *First Student*, because it was not shown that the Employer, in fact, withheld any benefit because a union vote was upcoming or in order to influence that vote.

On balance, I conclude that Ferron's statement that he could make changes to address employee discontent at facilities where a union vote was not scheduled, but could not do so at those where a union vote was scheduled, interfered with employees' free choice in the election and warrants setting aside the November 28, 2012 election at the Long Beach facility. In reaching this conclusion, I rely not only on the nature of the misconduct, the fact that Ferron's statement was disseminated to a large group of employees, and the temporal proximity of that statement to the election, but also on the extremely close margin by which the election at Long Beach was decided. Fifteen valid ballots were cast in favor of union representation, and 16 against it. Thus, if Ferron's misconduct caused even a single eligible voter to cast a ballot against, rather than for, union representation, then the outcome of the election was altered by that misconduct. For the reasons discussed above, I recommend that the November 28, 2012 election at the Long Beach facility be set aside, and that a new election be held.

[9] The "critical period" is the interval from the date of the filing of the petition to the time of the election. *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962).

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer has violated Section 8(a)(1) of the Act since June 19, 2012, by maintaining a rule prohibiting employees from "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property" because that rule creates an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.

4. Objection 2 is sustained with respect to the Corona facility and the Long Beach facility.

5. Objection 4 is sustained with respect to the Long Beach facility.

6. Objections 1, 3, 4, 5, and 6 are overruled with respect to the Corona facility.

7. Objections 1, 3, 5, and 6 are overruled with respect to the Long Beach facility.

8. The objectionable conduct engaged in by the Employer at the Corona facility during the critical election period did not have a more than de minimis impact on the election.

9. The objectionable conduct engaged in by the Employer at the Long Beach facility during the critical election period had an impact on the election, and that impact was more than de minimis.

REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order and Direction.[10]

ORDER

The Employer, Purple Communications, Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining any rule that prohibits employees from "causing, creating, or participating in a disruption of any kind" or that otherwise creates an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Delete the unlawful workplace rule that prohibits employees from "causing, creating, or participating in a disruption of any kind" from the current version of its employee handbook and notify employees that this has been done.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Employer has taken to comply.

IT IS FURTHER ORDERED that the election held on November 28, 2012, in Case 21–RC–091584 is set aside and that this case is severed and remanded to the Regional Director for Region 21 for the purpose of conducting a new election.

DIRECTION OF A SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Communications Workers of America, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 21 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994).

The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. October 24, 2013

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain any rule that prohibits you from "causing, creating, or participating in a disruption of any kind" or that otherwise creates an overly broad restriction that interferes with your Section 7 rights to engage in union and/or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL delete the unlawful workplace rule that prohibits you from "causing, creating, or participating in a disruption of any kind" from the current version of our employee handbook and notify you that this has been done.

PURPLE COMMUNICATIONS, INC.