UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES AND CASINO Employer, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO Petitioner.	Case 28-CA-060841

BRIEF OF *AMICI CURIAE* HR POLICY ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF EMPLOYER CAESARS ENTERTAINMENT CORPORATION

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QUESTIONS PRESENTED

1. Should the Board adhere to, modify, or overrule *Purple Communications*?
2. If the Board should overrule *Purple Communications*, should the Board return to the holding of *Register Guard*?
3. If the Board returns to the holding of *Register Guard*, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system?
4. Should the Board apply a different standard to the use of computer resources other than email?

STATEMENT OF INTEREST

The HR Policy Association ("HRPA") is a public policy advocacy organization representing the chief human resource officers of major employers. HRPA consists of more than 375 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of HRPA's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading

advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Society for Human Resource Management ("SHRM") is the world's largest HR professional society, representing 300,000 members in more than 165 countries. Our members, in turn, influence the lives of over 100 million people in the workforce—about one in three Americans. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management.

SUMMARY OF ARGUMENT

Amici urge the National Labor Relations Board ("NLRB" or "Board") to repudiate its prior decision in *Purple Communications, Inc.*, 361 N.L.R.B. No. 126 (2014), which purported to confer rights upon employees to use company email systems for non-work-related purposes. *Amici* are particularly concerned with the practical implications of the rule pronounced in *Purple Communications*. As such, *Amici* urge the Board to return to the historic standard, as set forth in

Register Guard, 351 NLRB 1110 (2007). This standard will safeguard legitimate business interests, including the employer's prerogative to minimize distractions in the workplace, to prevent misuse of communications systems, to guard against data security vulnerabilities, and to address other liabilities.

Furthermore, the Takings Clause of the Fifth Amendment precludes any interpretation of the National Labor Relations Act ("NLRA") abrogating the employer's *absolute right* to dictate the terms of use for private company-owned property. As a categorical matter, the physical takings doctrine requires payment of just compensation for ***any*** government-imposed encumbrance taking away the right to exclude unauthorized entry or use of private property. As the Supreme Court recently made clear in *Horne v. U.S.D.A.*, 135 S.Ct. 2419 (2015), this *per se* rule applies equally to protect personal property as it does real property. This means that the rule pronounced in *Purple Communications* would require payment of just compensation as applied under any circumstance, and with regards to any company-owned property.

Finally, the Board should reconsider the First Amendment implications of the rule pronounced in *Purple Communications*. The *Purple Communications* standard violates the First Amendment by compelling employers to publish "speech" on their email systems that they not only object to, but which may also harm their reputation and standing with customers, clients, and the general public. As the Supreme Court has made clear in numerous cases, most recently in *Janus v. AFSCME*, 138 S.Ct. 2448 (2018), the compelled speech doctrine generally precludes government mandates for commercial actors to speak against their interests.

ARGUMENT

I. The Board Should Overrule *Purple Communications*

Purple Communications, Inc., 361 N.L.R.B. No. 126 (2014) was an unjustified departure from historic precedent. Chief among its flaws was that the Board failed to appreciate the practical difficulties that the decision imposed on employers. Accordingly, the *Amici* urge the Board to repudiate the rule, pronounced in *Purple Communications*, that employers must permit non-business-related use of company email systems.

Today, companies invest tremendous resources in developing, maintaining, and monitoring their email systems. Business success and survival in the 21st century demands email connectivity. And while email systems facilitate communication, these systems exist in the business setting *solely to advance business interests*—as is true of any other form of company-owned property. For this reason, most companies establish policies dictating that computers and email systems are intended for business-related purposes and prohibiting or limiting personal use.[1] *See* NFIB Guide to the Employee Handbook: How to Create a Custom and Effective Handbook for Employees,

[1] To the extent that employers allow for de minimis use of company email systems for non-essential communication, the allowance is intended to further the company's interests by facilitating a sense of community within the workplace, and in recognition of the fact that it is unrealistic to police every single email that an employee might send. Even where some non-business-related messages are allowed, companies almost universally (and appropriately) prohibit use of company communication systems for purposes adverse to the company's business interests. These policies are consistent with the principle that employees have a fiduciary obligation to utilize company property only in the furtherance of business interests. *See Stengart v. Loving Care Agency* 973 A.2d 390 (N.J. Super. Ct. App. Div. 2009) (recognizing the legitimacy of a company policy restricting use of company computers); *Pierce v. Lyman*, 1 Cal.App.4th 1093, 1102 (1991) ("The basic fiduciary obligations are two-fold: undivided loyalty and confidentiality.").

Sec. 3.4 (2012) ("Company property, such as equipment, vehicles, telephones, computers, and software, is not for private use. These devices are to be used strictly for company business…").[2]

In taking away the employer's prerogative to dictate usage terms for its own property (*i.e.*, the fundamental right to exclude non-business-related uses), the Board's *Purple Communications* standard requires employers to host various non-business discussions over a wide range of subjects, including unionization activities, at the employer's expense, and at the cost of lost workplace productivity. In *Purple Communications* the Board suggested that "special circumstances" may (in theory) allow an employer to avoid these added costs and inconveniences in an extraordinary case. But the Board set an impermissibly high standard to establish "special circumstances," making it virtually impossible for employers to protect legitimate business interests while accommodating employees' debate and dialogue on non-business-related topics.

A. Extensive Email Traffic Regarding Non-Workplace Issues, Including Unionization Issues, is a Substantial Distraction in the Workplace

While emails are an integral part of our work lives, virtually any employee today knows that reviewing, deleting, and responding to emails is time-consuming. *See* Laura Vanderkam, *Stop Checking Your Email, Now*, Fortune (Oct. 8, 2012) (discussing a McKinsey Global Institute report finding that the average office worker "spen[t] 28% of her work time managing email [as of 2012].").[3]

Accordingly, if employer email systems are opened-up as a "forum" for virtually unlimited discussions regarding non-business-related issues that are arguably covered by Section 7, including but not limited to unionization and union-related discussion, employees will spend even

[2] *Available* online http://www.nfib.com/Portals/0/PDF/AllUsers/legal/guides/NFIB-employee-handbook-guide-WEB-2017.pdf (last visited Aug. 27, 2018).
[3] *Available* online at http://fortune.com/2012/10/08/stop-checking-your-email-now/ (last visited Sept. 29, 2017).

more time on email and be distracted from their jobs. Indeed, even if employees devote little time responding to non-business-related emails, their productivity, as noted above, will significantly diminish.

To be sure, email discussion on topics such as organizing, collective bargaining, concerted action (*e.g.*, a potential strike or a plan to engage in leafletting) and demonstrating will spark passionate debate among those potentially affected. It is reasonable to expect that a single email addressing the mere possibility of employees seeking to engage in collective action or union representation will trigger many emails in response. In the union area alone, organizing campaign issues, contract negotiation subjects, and discussion of contentious grievances or lawsuits, will result in hundreds —if not thousands—of emails. Further, the Board's *Purple Communications* standard invites business email systems to become an open forum for topics well beyond union organizing and bargaining, including immigration, workplace leave issues, scheduling, discipline, and many other subjects that touch upon terms and conditions of employment. As we have seen with social media, these open debates can spark passionate and sometimes intensive (or inappropriate) responses and can generate incessant email activity.

Given that the above topics and other issues potentially involving workplace issues can quickly enflame passions, these potentially extended exchanges will prove extraordinarily disruptive and more distracting than fleeting breakroom conversations. Moreover, emails populating silently at the employee's workstation can create greater risk of distraction, as an employer may have little or no knowledge of the nature of the email being read. Indeed, employees can draft or read emails covertly during working hours, making employer regulation of the workplace exceedingly difficult.

B. Employers Will Find it Difficult to Prevent Misuse of Communication Systems and to Ensure Employee Productivity

In forcing employers to host email "forums" on NLRA Section 7 protected issues, the *Purple Communications* decision requires employers to accept inefficiency in the workplace. Employees will increasingly have to sort through business and non-business-related emails to perform assigned work duties.[4] This fact alone demonstrates the impracticability of enforcing a policy limiting non-business use of company emails to off-hours. Further, an employer, pursuant to the requirements of the Fair Labor Standards Act, 29 U.S.C. § 201, will be required to pay employees for such additional tasks, as all of these activities constitute "work time."

The *Purple Communications* decision unquestionably hampers the employer's ability to monitor and ensure employee productivity in the use of company email systems—which is especially problematic since the Board itself recognized that "employers have a [protected] right to ensure that employees are productive during working time."[5] *Purple Communications*, 361 N.L.R.B. No. 126 at *11 (citing *Peyton Packing Co. Inc.*, 49 NLRB 828, 843 (1943)). While in one breath acknowledging that employers may impose restrictions where "necessary to maintain production or discipline," the *Purple Communications* decision stressed that employers will only be able to justify restrictions in "rare" cases where the employer can demonstrate "special circumstances." *Id*. at *14. This completely discounts the fact that *in all cases* employers will be

[4] Similar concerns over allowing personal employee messages to obscure company postings on employer bulletin boards led the Board to uphold nondiscriminatory employer policies prohibiting such employee postings on the employers' property. *See Sprint/United Management Co.*, 326 NLRB 397, 399 (1988); *Container Corp. of America*, 244 NLRB 318 (1979).

[5] In rejecting the suggestion that email systems may be analogized to other physical spaces within the workplace, the Board said that in most cases "email systems will amount to a mixed use area…" *Purple Communications*, 361 NLRB at 1062. But this amounts to a tacit acknowledgement that it is impractical to compartmentalize work email usage—which necessarily undermines the Board's suggestion that employers can effectively limit non-work-related email usage to non-working hours.

extremely vulnerable to non-productive time if employees are entitled to exercise a NLRB-conferred right to use company-owned email systems for their unionization forums.

The Board's *Purple Communications* standard also means that employers will assume liabilities stemming from use of emails for non-business-related reasons. For example, employees who send non-work-related emails to third parties or other employees may expose their employer to legal action based on the employer's acts or omissions under federal civil rights laws. *See Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J.) (finding employer responsibility to correct harassment occurring on electronic bulletin board deemed to be part of the workplace); *Amira-Jabbar v. Travel Services, Inc.*, 726 F. Supp. 2d 77 (D.P.R. 2010) (considering evidence of social media harassment as part of a hostile work environment); Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 Wash. L. Rev. 249, 269-74 (2012).

Such employment discrimination exposure has also recently been highlighted by the Board's decisions in *Pier Sixty* and *Cooper Tire*. For example, in *Pier Sixty*, the Board held that an employee's crude post on a social media website was protected activity under Section 7. The post read, "Bob is such a NASTY MOTHER [expletive] don't know how to talk to people!!!!!! [Expletive] his mother and his entire [expletive] family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" 362 N.L.R.B. No. 59 at *2 (2015). Despite the crude and rude nature of this statement, the employer was not permitted to terminate the employee because the Board deemed the posting to be protected concerted activity. Similarly, in *Cooper Tire*, the Board protected employees from termination based on their racially insensitive remarks to replacement workers, which included telling them to "Go back to Africa, you [expletive] losers," and "Hey, anybody smell that? I smell fried chicken and watermelon." 363 NLRB No. 194 at 4 (2016). Permitting

these statements on employer email servers based on the requirements of the Board's recent decisions would, without doubt, expose employers to hostile workplace liability charges from the Equal Employment Opportunity Commission.

In response to these legitimate business concerns, the Board suggests that employers can monitor "electronic communications on its email system…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." *Purple Communications*, 361 N.L.R.B. 126 at *16. But this supposed "guidance" on the employer's right to monitor its own email systems greatly impedes employers from monitoring workplace productivity and places an employer in a precarious legal position. Telling employers not to closely monitor individuals whom they reasonably suspect to be reading and drafting non-work-related emails during working hours interferes with employers' practical, operational, and legal responsibilities to maintain workplace productivity and discipline. Further, if an employer does engage in such monitoring, it may be found guilty of an unfair labor practice charge under the NLRA for illegal surveillance of employee concerted protected activity.

C. Requiring Consent to Non-Work-Related Email Traffic Burdens the Employer's Private Computers and Servers—While Creating New Data Security Vulnerabilities

The Board's decision further imposes burdens on employers by requiring them to incur additional costs in hosting non-business-related "forums" on company computers and servers. Of special concern is that the Board's *Purple Communications* standard requires businesses to allow email traffic that may create or exacerbate security vulnerabilities. This is of particular concern because employees may attach to their internal email messages on employer servers' communications from third parties that are repugnant to the employer and cast the employer in a

negative light. *Cf.* Brianna Gammons, *6 Must-Know Cybersecurity Statistics for 2017*, BARKLY BLOGS (Jan. 2017) (noting that the amount of phishing emails containing a form of ransomware grew significantly in 2016).[6] Exposing an employer's email system to such third party access may compromise sensitive company data and consumer privacy. Indeed, businesses face increased cyber-security threats daily, and, correspondingly, increased regulatory scrutiny, including being subject to oversight under the Federal Trade Commission's evolving data-security standards. Further, an increasing number of lawsuits have been initiated by the plaintiff bar against business entities for security breaches. *See Cf.*, *FTC v. Wyndam Worldwide Corp.*, 799 F.3d 236 (3rd Cir. 2015) (affirming a company's liability for a data security breach under FTC's evolving standards).[7]

The Board suggests that employers may apply "uniform and consistently enforced restrictions," to maintain the integrity of company systems, "such as prohibiting large attachments or audio/video segments…" *Purple Communications*, 361 N.L.R.B. No. 126 at *15. This "allowance"—which will no doubt have to be determined on a case-by-case basis—simply ignores the employer's practical concern that they will be burdened and exposed to further vulnerabilities if compelled to host public forums on non-business-related issues. And in any event the *Purple Communications* standard places unrealistic burdens on an employer to "demonstrate that [hosting a public forum on various Section 7 issues] [will] interfere with the [company's] email system's

[6] *Available* online at https://blog.barkly.com/cyber-security-statistics-2017 (last visited Sept. 29, 2017).

[7] "If you're sending email to someone on the very same service you use (say, Outlook.com), you have at least [some]... potential network vulnerabilities: your connection to Outlook.com and your recipient's connection to Outlook.com). If your recipient's email is elsewhere (say a company or school), then you have at least one more [vulnerability]: the connection between Outlook.com and your recipient's email provider... If one connection is secure, there's no guaranteeing any other connection in the sequence is secure." Geoff Duncan, Here's Why Your Email is Insecure and Likely to Stay That Way, Digital Trends (Aug. 24, 2013), *available* online at https://www.digitaltrends.com/computing/can-email-ever-be-secure/ (last visited Aug. 27, 2018).

efficient functioning[,]" which effectively means that all employers, and especially small and mid-sized firms (those less likely to have extensive technical resources) will be unable to impose even content-neutral restrictions, to preserve the integrity of the company systems, without risking litigation. *Id.*

II. The Board Should Return to *Register Guard* Without Exceptions

For decades prior to *Purple Communications*, under both Republican and Democrat Boards, the Board had recognized the right of employers to enforce nondiscriminatory rules limiting use of company property. *See e.g., Register Guard*, 351 NLRB 1110 at 1114-15 (2007) (bulletin boards); *Champion International Corp.*, 303 NLRB 102 (1991) (copy machine); *Churchill's Supermarkets*, 285 NLRB 139 (1987) (telephone); *Union Carbide Corp.*, 259 NLRB 974 (1981) (telephone); *Heath Co.*, 196 NLRB 134 (1972) (public address system). It should return to that standard today.

By returning to the *Register Guard* standard, the Board will avoid constitutional issues presented by the *Purple Communications* standard. Indeed, under the well-established canon of constitutional avoidance, courts and regulatory agencies have an obligation to interpret a statute in a manner that does not implicate constitutional questions. *See, Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (Brandeis, J., concurring) (1936). *Purple Communications* violates that canon in creating conflict with both the First and Fifth Amendments. For this reason, the Board must return to the historic standard as recognized in *Register Guard*.

A. The Board Must Return to *Register Guard* to Safeguard First Amendment Rights

An employer cannot be forced to provide its employees a means of communication for the sole purpose of advocating views with which the employer may not agree. As noted above,

the range of subjects and issues subject to discussion on an employer's email system will go far beyond union representation issues. *Purple Communications* requires an employer to host discussions on a broad array of issues protected under Section 7 of the NLRA, including many topics that are politicized or highly controversial. *Purple Communications* violates the First Amendment, in so far as it mandates that an employer must publish an employee's post that it may strongly disagree with, including crude and rude employee outbursts, as in *Pier Sixty* and the racially insensitive statements protected in *Cooper Tire*, among other speech with which it disagrees.

The United States Supreme Court has ruled on multiple occasions that the First Amendment prevents the government from requiring an employer to directly or indirectly promote views with which it disagrees. *See U.S v. United Foods*, 533 U.S. 405 (2001) (holding that a regulation mandating employers to pay assessments used primarily to fund advertisements with which they do not agree violated the First Amendment). The compelled speech doctrine prohibits the government from requiring companies to publish or to facilitate unwanted messages that may be attributed to the company. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1976) (explaining that the right of free speech implicitly protects the right to not speak if one so chooses). In addition, the Supreme Court has ruled that a utility company cannot be required to place leaflets with which it does not agree in its monthly bill mailings, *Consolidated Edison Co. of New York, Inc. v. Public Services Comm'n of New York*, 447 U.S. 530, 544 (1980), that a newspaper cannot be compelled to print a reply to a political stance or opinion that the paper has taken, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and that a private organization cannot be forced to associate with the speech of those whose outlook is wholly dissimilar from its own, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). In these cases, the Supreme Court has refused to enforce laws

requiring companies to facilitate the communication of opinions against their interests. The compelled free speech doctrine was even further strengthened in the Supreme Court's recent decision in *Janus v. AFSCME*. *Janus v. AFSCME,* 138 S.Ct. 2448 (2018). In that decision, the Court emphasized the broad scope and reach of this doctrine by prohibiting public sector unions from forcing employees to financially support various union initiatives, activities, and speech with which such employees disagreed. *Id*. at 2459-60.

In tension with this line of cases, *Purple Communications* requires employers to subsidize speech and views it does not endorse or even condone through publication on its own email systems. By requiring employers to allow use of their email systems for non-work use, *Purple Communications* compels speech in the same manner recognized by the Court in the above cases as violative of the First Amendment. Indeed, the Board's *Purple Communications* standard in essence grants a permanent "speech easement" on valuable employer property to post a wide range of communications that are protected by Section 7 of the NLRA. Statements in these email threads may cut against the employer's interests or may offend the employer's core values; there is, nonetheless, a substantial risk that such statements may be (inappropriately) attributed to the company. At the least, readers may infer that the company condones, and therein tacitly endorses, those statements—which may both undermine the company's interest in maintaining civility in the workplace and create liabilities for the employer. Further, such required posts on an employer's email system, as noted above, may significantly harm an employer's reputation and standing among its customers, clients, and the general public, who attribute such posts on the company's email system to the business entity in question.

B. The Board Should Return to *Register Guard* to Avoid a Violation of the Fifth Amendment's Takings Clause—Which Protects the Right to Exclude and Control Use of Private Property

The Fifth Amendment of the U.S. Constitution guarantees that private property cannot be taken by the government for third party use without just compensation. U.S. CONST. amend. V. Its purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 80 (1960). The Supreme Court has determined that the "Takings Clause" requires the government to pay a property owner just compensation whenever government regulations require an owner to suffer a physical invasion of her property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

In *Loretto*, the Supreme Court ruled that a permanent occupation of land constitutes a *per se* taking, regardless of how inconsequential it may seem. *Loretto*, 458 U.S. at 438. In that case, installation of a mere cable box required just compensation. This is because "the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435 (citing *Kaiser Aetna*, 444 U.S. 164, 179-80 (1979)).

In *Purple Communications* the Board concluded that while email systems are without question the property of the employer, the employer's property rights must give way to the Section 7 rights of the employee. *See Purple Communications*, 361 N.L.R.B. No. 126 at *11, n. 50. The Board improperly applied the Supreme Court's balancing test in *Republic Aviation*,[8] and concluded that the employees' Section 7 rights trump employer property rights. *Id.* But the Supreme Court has made clear time and time again that there is no balancing of competing rights under the Fifth Amendment when the invasion or encumbrance is permanent in nature. *See, e.g.*, *Loretto*, 458 U.S.

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

at 432 (1982). As stated in former NLRB Member Harry Johnson's dissent in *Purple Communications,* even a minimal intrusion upon physical property can constitute an unlawful taking. 361 N.L.R.B. No 126 at *51, n. 51. In addition to the "speech easement" discussed above, the *Purple Communications* standard also impermissibly grants a permanent property easement on employers' email systems without just compensation.

The *Purple Communications* standard represents a government-mandated employee right to physically invade the employer's email systems and to use portions of the employer's server for their personal communications in the name of Section 7 rights. This imposition is permanent in nature because, although an employer may periodically clear specific information from its servers, the Board's conferred right to physically occupy company servers is ongoing—as would be an imposed easement for the public to traverse across real property.[9] *See Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825 (1987). Accordingly, *Purple Communications* imposes an effective easement for third party use of the employer's email systems and must be recognized as a per se taking. *See Causby v. United States*, 328 U.S. 256 (1946).

III. The Board Should Not Carve Out Exceptions to *Register Guard*

For the reasons stated above, the Board should not carve out any exceptions to *Register Guard*.

IV. The Same Standard Should Apply for All Computer Resources

For the reasons stated above, the Board's previous standard in *Register Guard* should apply to all of an employer's computer and electronic communications resources.

[9] From a technical perspective, emails cannot be deleted per se, as they remain in some form of storage within the employer's server. In other words, emails are written in pen, not in pencil, and cannot be erased in practice.

CONCLUSION

For the foregoing reasons, the Board should overrule *Purple Communications* and return to the standard articulated in *Register Guard*.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Board's August 1, 2018 "Notice and Invitation to File Briefs," I certify that on October 1, 2018, I delivered a true copy of the foregoing brief to the following case participants:

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