UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION
d/b/a RIO ALL-SUITES HOTEL AND CASINO

and Case 28-CA-060841

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL 15,
LOCAL 159, AFL-CIO

NOTICE AND INVITATION TO FILE BRIEFS

On May 3, 2016, Administrative Law Judge Mara-Louise Anzalone issued a decision in the above-captioned case, applying *Purple Communications, Inc.*, 361 NLRB 1050 (2014), to find that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining a policy prohibiting the use of its computer resources to send non-business information. Under *Purple Communications*, employees who have been given access to their employer's email system for work-related purposes have a presumptive right to use that system for Section 7–protected communications on nonworking time, unless the employer can demonstrate that special circumstances necessary to maintain production or discipline justify restricting that presumptive right. Id. at 1063. Excepting, the Respondent asks the Board to overrule *Purple Communications* and, implicitly, to return to the holding of *Register Guard*, 351 NLRB 1110 (2007), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), that employees do not have a statutory right to use their employers' email system for Section 7 activity. Under the *Register Guard* standard, employers may lawfully impose Section 7–neutral restrictions on employees' nonwork-related uses of their email systems, even if those restrictions have the effect of limiting the use of those systems for communications regarding union or other protected concerted activity.

To aid in consideration of this issue, the Board now invites the filing of briefs in order to afford the parties and interested *amici* the opportunity to address the following questions.

1. Should the Board adhere to, modify, or overrule *Purple Communications*?

2. If you believe the Board should overrule *Purple Communications*, what standard should the Board adopt in its stead? Should the Board return to the holding of *Register Guard* or adopt some other standard?

3. If the Board were to return 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 (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so,

should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?

4. The policy at issue in this case applies to employees' use of the Respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?

In responding to these questions, the parties and *amici* are invited to submit empirical evidence, including anecdotes or descriptions of experiences that the Board may find useful in deciding whether to adhere to *Purple Communications* or adopt another standard.[1]

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[1] We note the similarity between our dissenting colleagues' arguments and those made by the dissenters to the grant of review and invitation to file briefs in *Lamons Gasket Co.*, 355 NLRB 763 (2010). The majority there sua sponte sought reconsideration of Board precedent set just 3 years earlier in *Dana Corp.*, 351 NLRB 434 (2007). In a concurring opinion, former Chairman Liebman rebuked the dissent's arguments that reconsideration was unnecessary and unprecedented, observing:

> The dissent's view of the proper role and function of a Federal administrative agency like the National Labor Relations Board is unusual, particularly coming from within such an agency. Compare, for example, the Supreme Court's quite recent observation:
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> > "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis," . . . for example, in response to changed factual circumstances, *or a change in administrations*.
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> *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863–864 (1984).

355 NLRB at 763 (emphasis added).

As for our decision to invite public briefing here on whether to overrule precedent, we adhere to the view that doing so is a matter of discretionary choice on a case-by-case basis and is not mandated by the Act, any Board rule or past practice, or by the Administrative Procedure Act. As our colleague acknowledges, her contrary view reiterates the dissenting position rejected by the majority in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).

Finally, we join dissenting Member McFerran's pledge to keep an open mind with respect to final disposition of the issues presented here. However, we do not accept her premise that the Board must adhere to a policy choice made in a prior decision unless presented with actual evidence of "significant problems and intractable challenges" created by that decision. See generally *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (holding that an agency "need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C., on or before September 5, 2018. The parties may file responsive briefs on or before September 20, 2018, which shall not exceed 15 pages in length. No other responsive briefs will be accepted. The parties and *amici* shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." Parties and *amici* are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/28-CA-060841 under the heading "Service Documents." If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Deputy Executive Secretary Roxanne Rothschild at 202-273-2917.

Dated, Washington, D.C., August 1, 2018

JOHN F. RING,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER

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reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates").

MEMBER PEARCE, dissenting.

I dissent from the majority's decision to re-visit *Purple Communications, Inc*.[1] While I support public input when the Board considers significant changes in precedent, I do not support giving a golfer a mulligan simply because he or she wants to swing another club. Four years ago, I carefully considered and decided *Purple Communications*, after an extensive exchange of views with my colleagues and a thorough review of briefing by the public and the parties. In *Purple*, the majority responded to the massive change in workplace technology and communication where email has become "the most pervasive form of communication in the business world" and a "natural gathering place" extensively used by employees to communicate among themselves. 361 NLRB at 1055, 1057.

Nothing has changed since the issuance of *Purple* to warrant a re-examination of this precedent. As Member McFerran points out in her dissent, there have been no intervening adverse judicial decisions, *Purple* itself is currently pending before the Ninth Circuit Court of Appeals, and the Respondent has not identified any change in workplace trends or presented any empirical evidence suggesting that *Purple Communications* "will create significant and intractable challenges for employees, unions, employers and the NLRB", as posited in Member Miscimarra's dissent in *Purple*. The Respondent does not even bring new arguments for consideration. The only thing new is the Board's composition.[2]

On another point, the charging party in this case has suffered the consequences of several dramatic shifts in Board law merely because the majority is intent on creating vehicles for prematurely reversing precedent. Lest we forget, in *The Boeing Company*, 365 NLRB No. 154 (2017), the majority went out of its way to reverse sua sponte the Board's decision in this case -- despite the fact that the charging party was not a party in *Boeing* and this case was pending before the Ninth Circuit Court of Appeals. After *Boeing* issued, the court remanded this case to the Board. And then when the charging party sought to protect its rights by moving to intervene in *Boeing* in order to seek reconsideration of that decision -- the decision that stripped its victory away -- the majority denied charging party's request to intervene. Now, this majority, in its zeal to revisit *Purple Communications,* has once again used this charging party as a punching bag.

Dated, Washington, D.C., August 1, 2018

MARK GASTON PEARCE, MEMBER

[1] 361 NLRB 1050 (2014)

[2] The majority's claim that it is doing nothing more than what the Board majority did in *Lamons Gasket Co.* is disingenuous. In *Lamons Gasket*, 357 NLRB 739 (2011), the Board reversed *Dana Corp.* – a case that reversed 41 years of precedent, based on a dubious view about voluntary recognition that was contradicted by empirical evidence. 351 NLRB 434 (2007).

Member McFerran, dissenting.

Less than 4 years ago, in *Purple Communications*, *Inc.*, the Board held 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," unless the employer can demonstrate that special circumstances necessary to maintain production or discipline justify restricting that presumptive right." 361 NLRB 1050, 1063 (2014). The Board reached that conclusion after inviting and receiving briefs from amici,[1] and after thoroughly considering the views presented both in those briefs and by the dissenting Board members.

Now, the Respondent in this case has asked the Board to overrule *Purple Communications*. However, the Respondent has not presented any new arguments, not already considered by the previous Board, to suggest that *Purple Communications* was incorrectly decided – indeed, the Respondent largely recycles the arguments made by then-Members Miscimarra and Johnson in their dissents. The Respondent has not identified any adverse judicial decisions that might warrant revisiting the decision.[2] Similarly, Respondent has not presented any empirical evidence, or even good reason to suspect, that *Purple Communications* has proved problematic in practice, as predicted by critics of its holding.[3] Nor has the Respondent identified any recent workplace changes or new trends that would justify reconsideration of *Purple Communications*.

In those circumstances, the majority's decision to revisit *Purple Communications* is premature, at best. Although the Board appropriately may revisit precedent when a compelling reason exists, the majority's decision to issue the present notice – which essentially gives an open invitation to interested parties to attempt to *generate* such a compelling reason -- gets

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[1] *Purple Communications, Inc.*, Case No. 21-CA-095151 et al., Notice and Invitation to File Briefs (filed April 30, 2014), available at http://apps.nlrb.gov/link/document.aspx/09031d45816e13ce.
Amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations, Service Employees International Union, labor law professor Jeffrey M. Hirsch, the United States Chamber of Commerce, the Council on Labor Law Equality, a group of entities consisting of the Coalition for a Democratic Workplace and nine other amici, the Employers Association of New Jersey, the Equal Employment Advisory Council, the American Hospital Association, the Retail Litigation Center, the National Grocers Association, the Food Marketing Institute, the United States Postal Service, the Arkansas State Chamber of Commerce, and the National Right to Work Legal Defense Foundation. *Purple Communications,* 361 NLRB at 1051 fn. 9.

[2] In fact, *Purple Communications* itself has not even received full judicial consideration; the employer's petition for review of the Board's decision (following a remand to the administrative law judge) remains pending in the United States Court of Appeals for the Ninth Circuit. *Communication Workers of America v. NLRB*, No. 17-70948 (9th Cir.), petition for review of order reported at 365 NLRB No. 50 (2017).

[3] In dissent, then-Member Miscimarra, for example, warned that the "new right [articulated by *Purple Communications*], will create significant problems and intractable challenges for employees, unions, employers, and the NLRB." *Purple Communications*, 361 NLRB at 1086.

things backward.[4] The better course would be to decline the Respondent's request, and all similar requests, until such time as the Board is presented with a genuine compelling reason to reopen the debate resolved in *Purple Communications*.[5]

In short, I do not support the majority's decision to revisit *Purple Communications* while the decision remains pending in the Courts of Appeals and in the absence of adverse judicial decisions and any evidence of changes in the workplace or problems caused by the Board's approach. But given that a majority of the Board is clearly determined to proceed, I support the majority's decision to return to the Board's practice of seeking public participation before reconsidering significant precedent. That practice had been in place and largely adhered to since the 1950's until it was abruptly abandoned late last year.[6] *If* the Board is going to reconsider an important precedent, then it is obviously better to seek public participation when doing so, and I will consider with an open mind whatever evidence and public input might emerge from this

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[4] Notably, the majority's notice exceeds the scope of the Respondent's request to overturn *Purple Communications*. In addition to asking whether the standard should revert to *Register Guard*, 351 NLRB 1110 (2007), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), or some alternative standard, the majority asks whether any exceptions should be made for scattered workforces, facilities located in areas that lack broadband access, or other special circumstances. Moreover, the notice suggests that the majority seeks to go beyond deciding the present case, which concerns only email, to make policy that reaches other forms of electronic communication. This approach resembles not adjudication, but rulemaking – albeit rulemaking without following the process required by the Administrative Procedure Act. As public statements from the Chairman have disclosed, the Board is now contemplating rulemaking with respect to the joint-employer standard under the National Labor Relations Act. In exercising its discretion to choose between adjudication and rulemaking, the Board surely must explain its choice – here, too.

[5] Certainly, the mere change in the composition of the Board since *Purple Communications* was decided is not a reason to revisit the decision. See *Brown & Root Power & Mfg., Inc.*, 2014 WL 4302554 (Aug. 29, 2014); *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003) (full Board), citing *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1237, 1239 (1954). Relatedly, the majority remarks that there is a perceived inconsistency between my views on the appropriate circumstances in which to solicit public input about the reconsideration of precedent and the views of a previous Board Member (Chairman Liebman) in a personal concurring statement in case I did not participate in, and which issued more than four years prior to the start of my service on this Board. I express no views on the Board's prior determination to seek briefing in *Lamons Gasket*, other than to note that there appears to have been empirical evidence under discussion in that case that directly spoke to the practical impact of the decision that was subject to reconsideration. Regardless, I am entirely comfortable with any perceived tension between my views expressed here and those expressed by Chairman Liebman in that case, because the question of what factors the Board should take under consideration in determining whether to revisit precedent is a difficult institutional issue that each Board Member must approach with his or her own independent judgment.

[6] See *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 22 fn. 2 (2017) (and the cases cited therein).

process suggesting that *Purple Communications* should be revisited. I trust that my colleagues will similarly give full consideration to whatever reliable, empirical information the Board may receive – and that they will be fully open to adhering to current law should actual evidence of "significant problems and intractable challenges" (in then-Member Miscimarra's phrase) fail to materialize.

Dated, Washington, D.C., August 1, 2018

LAUREN McFERRAN, MEMBER