United States Senate
WASHINGTON, DC 20510

September 17, 2018

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dear Chairman Ring:

The National Labor Relations Board (NLRB) in December 2014 ruled in *Purple Communications, Inc.* that when an employer grants workers access to company email, it cannot stop them from using that email on nonworking time to organize and advocate for better working conditions.[1] This represents an important protection for workers given the centrality of email in modern workplace communication. The employer appealed the decision to the United States Court of Appeals for the Ninth Circuit, which has yet to rule on the case.[2] Nonetheless, under your leadership, the NLRB is now reconsidering its decision.[3] We write to urge you to ensure that all Board members fully comply with federal ethics regulations during reconsideration of this matter. Specifically, the former law firm of Member William Emanuel represents the employer in the *Purple Communications* case, necessitating Member Emanuel's complete recusal from participation in any decision or other part of the Board's deliberative process relating to whether or how to overturn or alter the *Purple Communications* decision.[4]

Purple Communications clarified that workers' rights to protected concerted activities under Section 7 of the National Labor Relations Act (NLRA) extend to their use of workplace email systems. As workplace communication has increasingly moved online, particularly through employer-run email systems, the Board ruled that, generally, employers may not interfere with employees' rights to join together to push for higher wages or better conditions just because such efforts involve the use of workplace email. According to the Board's decision, "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" to "presume that employees who have rightful access to their

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[1] *Purple Communications, Inc.*, 361 NLRB 1050, 1050 (2014). The Board also created an exception permitting email restrictions where special circumstances make them necessary to maintain production and discipline. *Id.*
[2] *See* Calendar for William K Nakamura Courthouse October 9-12, 2018, United States Court of Appeals for the Ninth Circuit *available at* https://www.ca9.uscourts.gov/calendar/view.php?hearing=October%20-%20William%20K.%20Nakamura%20Courthouse,%20Seattle%20Washington&dates=9-12&year=2018.
[3] Notice and Invitation to File Briefs, Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino, Case No. 28-CA-060841 (NLRB Aug. 1, 2018), http://apps.nlrb.gov/link/document.aspx/09031d45828a4e02.
[4] *See, e.g.*, 28(j) Letter by Cross-Petitioner Purple Communications, Inc. and Supporting Amici, Communications Workers of America, AFL-CIO v. NLRB v. Purple Communications, Inc., Case Nos. 17-70948, 17-71062, and 17-71276 (9th Cir. Jul. 6, 2018), http://apps.nlrb.gov/link/document.aspx/09031d458286a739.

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."[5]

Less than four years later, on August 1, 2018, the NLRB announced that it would invite public comment on whether the Board should "adhere to, modify, or overrule *Purple Communications.*"[6] According to the announcement, the Board intends to use another case - *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino* – as a vehicle for reconsidering the *Purple Communications* decision.[7] And it will do so while *Purple Communications* remains an active, pending case before the Ninth Circuit.[8]

Member Emanuel must recuse himself from participating in this matter. Executive Order 13770 prohibits the involvement of a federal official in a "particular matter involving specific parties" if the official's former employer is, or represents, such a party.[9] Littler Mendelson P.C., the law firm where Member Emanuel worked until September 2017, represents Purple Communications.[10] While Littler Mendelson does not represent any party to *Caesars Entertainment Corporation*, the Board's August 1, 2018 announcement explicitly stated that it is considering using that case as an opportunity to "adhere to, modify, or overrule *Purple Communications.*"[11] Thus, Member Emanuel's participation, in any form, in *Caesars Entertainment Corporation* would present a clear conflict of interest and put him in the position of using the power of his office to influence the interests of his former employer—exactly the scenario that federal ethics regulations are designed to avoid.

There is a clear precedent requiring Member Emanuel's recusal: the matter involving his own improper involvement late last year in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, which sought to overturn the NLRB's 2015 *Browning-Ferris* decision. After the Board issued its decision in that case, the NLRB Inspector General determined that Member Emanuel's participation violated Executive Order 13,770.[12] The Inspector General found that "Hy-Brand was merely the vehicle to continue the deliberations of *Browning-Ferris*," and the two cases were effectively the same "particular matter involving specific parties."[13] Because Member Emanuel's former employer represented a party in *Browning-Ferris*, his involvement in

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[5] *Purple*, 361 NLRB at 1063.
[6] Notice and Invitation to File Briefs, *supra* note 3.
[7] *Id.*
[8] *See* Calendar, *supra* note 2.
[9] The White House, Executive Order No. 13770, 82 Fed. Reg. 9,333, January 28, 2017, https://www.whitehouse.gov/presidential-actions/executive-order-ethics-commitments-executive-branch-appointees/.
[10] *See* 28(j) Letter, *supra* note 4.
[11] Notice and Invitation to File Briefs, *supra* note 3.
[12] National Labor Relations Board Inspector General, "Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter," February 9, 2018, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf.
[13] *Id.* at 3-4.

the vehicle used to overturn it violated Executive Order 13,770.[14] The Board's Designated Agency Ethics Official agreed with the Inspector General's determination,[15] and the Board voted, three to zero, to vacate the *Hy-Brand* decision "in light of the determination…that Member Emanuel is, and should have been, disqualified from participating in this proceeding."[16]

The circumstances of the Board's reconsideration of *Purple Communications* are virtually identical to those of the *Hy-Brand* decision. Just as *Hy-Brand* was used as a "vehicle to continue to deliberations of *Browning-Ferris*," the Board made clear in its August 1 announcement that it intends for *Caesars Entertainment Corporation* to play the same role, using it to "adhere to, modify, or overrule *Purple Communications*." And just as Member Emanuel's former law firm represented a party in *Browning-Ferris*, the same law firm represents the employer in *Purple Communications*, which precludes his impartial participation in the linked *Caesars Entertainment Corporation* case. Based on the *Hy-Brand* precedent, Member Emanuel's participation in *Caesars Entertainment Corporation* would likewise be, as the Inspector General described his involvement in *Hy-Brand*, "a serious and flagrant problem and/or deficiency in the Board's administration of its deliberative process and the National Labor Relations Act."[17]

The fact that Member Emanuel participated in the Notice and Invitation to File Briefs on a matter from which he should be recused is an ominous sign, indicating that the Board has not—and moving forward, may not—follow appropriate ethics rules and precedents in this case. The issuance of the Notice itself benefits Member Emanuel's former firm and its client by casting a cloud of uncertainty over the holding in *Purple Communications*, which Littler is now contesting in the Ninth Circuit. Any further participation on the part of Member Emanuel related to overturning or altering *Purple Communications* (either directly or via *Caesars Entertainment Corporation*) —in which his former employer is indisputably, actively involved—would be a clear violation of Executive Order 13770, and of the federal ethics requirements that he "act impartially and not give preferential treatment to any private organization or individual" and to "endeavor to avoid any actions creating the appearance" of a failure to do so.[18]

As Chairman, you are obliged to ensure the ethical integrity of the NLRB. You have said as much yourself, recently tweeting that "it is essential that NLRB recusal issues be handled under the prescribed government ethics rules and procedures—not driven by political considerations."[19] Under your leadership, the Board has the opportunity to regain the public's

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[14] *Id.* at 4; *See also* Report of Investigation – OIG-I-541, National Labor Relations Board Inspector General, March 20, 2018, https://www.law.com/nationallawjournal/2018/03/23/trump-nlrb-member-denies-violating-ethics-pledge-in-vote-against-obama-labor-ruling/.

[15] National Labor Relations Board Designated Agency Ethics Official, "Recommended Action Plan Respecting the Board's Adjudication of Hy-Brand Industrial Contractors, Ltd.," 365 NLRB No. 156 (2017), February 21, 2018, http://src.bna.com/ykl.

[16] National Labor Relations Board, "Board Vacates Hy-Brand Decision," press release, February 26, 2018, https://www.nlrb.gov/news-outreach/news-story/board-vacates-hy-brand-decision. *See also* National Labor Relations Board, Order Vacating Decision and Order and Granting Motion for Reconsideration in Part, Hy-Brand Industrial Contractors, Ltd., 366 NLRB No. 26, February, 26, 2018, https://apps.nlrb.gov/link/document.aspx/09031d45826ffc1d.

[17] Notification, *supra* note 12.

[18] 5 C.F.R. § 2635.101.

[19] Tweet by John F. Ring, August 21, 2018, https://twitter.com/NLRBChairman/status/1031935158457442304.

trust that it is impartially enforcing federal law, but it can do so only if its members avoid any conflict of interest and scrupulously follow federal ethics requirements. Member Emanuel's involvement in *Caesars Entertainment Corporation*, now serving as a continuation of the Board's deliberations in *Purple Communication*, would amount to a clear violation of those requirements. We strongly urge you to protect the integrity of your agency and take all necessary actions to fully enforce all applicable ethics standards.

Thank you for your attention to this important matter.

Sincerely,

Elizabeth Warren
United States Senator

Kirsten Gillibrand
United States Senator

Mazie K. Hirono
United States Senator

Tammy Baldwin
United States Senator

Cory A. Booker
United States Senator

CC:

Hon. William Emanuel, Member, National Labor Relations Board
David Berry, Inspector General, National Labor Relations Board
Lori Ketcham, Designated Agency Ethics Official, National Labor Relations Board
Hon. Lamar Alexander, Chairman, Senate Committee on Health, Education, Labor and Pensions
Hon. Patty Murray, Ranking Member, Senate Committee on Health, Education, Labor and Pensions