

NOTES

THE CYBERPICKET: A NEW FRONTIER FOR LABOR LAW

Down, but not out; bruised, but not beaten: U.S. labor law, though tired, can still put up the gloves. New strategies, born of the digital age and modern-day labor struggles, are reinvigorating the century-old legislative bases.¹ One innovation, the cyberpicket, promises to revive an aging doctrine and equip employees of online businesses with a powerful new tool to galvanize public support for their strikes and protests. For now, it's just a concept. But that could soon change, for the right to cyberpicket fits comfortably within labor law's current regime.

Admittedly, labor law doesn't ooze novelty. Most worker protections today still percolate from the National Labor Relations Act² (NLRA), a New Deal statute last updated by Congress during the Nixon Administration.³ Some labor activists hope for bold amendments;⁴ others seek reinvention of the current order.⁵ Yet given the current political gridlock,⁶ it's worth trying to breathe new life into old law.

Make no mistake, however: the NLRA isn't mummified. It's still a seminal statute with far-reaching effects, guaranteeing workers' right to organize and act collectively in their own interests.⁷ Situating the Act in historical context explains its staying power. Many of the same labor injustices that beset Depression-era workers afflict their great-grandchildren today. And just as the NLRA provided cover for the Greatest Generation, so too does it keep watch over the twenty-first-century labor force. Issues in the modern workplace that resemble the abuses that motivated the NLRA's authors have equal claim to the Act's remedial scheme. Nowhere is this clearer than in the realm of picketing.

As part of its package of protections, the NLRA permits employees to engage in peaceful picketing against their employers.⁸ It's a familiar form of protest, calling to mind workers, signs and pamphlets in hand, lining the entrance of a brick-and-mortar. Picketing pairs strong messaging with striking visuals: from suffragettes marching outside the

¹ See, e.g., *Motor City Pawn Brokers Inc.*, 369 N.L.R.B. No. 132, at 7 (July 24, 2020) (recognizing social media as a protected medium through which employees can discuss unionization).

² 29 U.S.C. §§ 151–169.

³ See *infra* notes 23–26 and accompanying text.

⁴ See, e.g., Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 107 (2021).

⁵ See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 8–11 (2016).

⁶ Cf. Carl Hulse, *Republicans Prepare New Rules, But Fixing Congress Isn't So Easy*, N.Y. TIMES (Jan. 8, 2023), <https://www.nytimes.com/2023/01/08/us/politics/house-republicans-rules.html> [<https://perma.cc/QK2B-3LR2>] (describing the current congressional stalemate).

⁷ See *The Right to Unionize*, LAB. LAB., https://www.laborlab.us/the_right_to_unionize [<https://perma.cc/CY63-UYWC>].

⁸ See *infra* notes 62–69 and accompanying text.

White House⁹ to steelworkers patrolling their plants,¹⁰ these gripping scenes have long captured the public's attention and sympathies.

Consumer picketing¹¹ — this Note's focus — serves three main purposes: it informs the public about a labor dispute, dissuades customers from patronizing the business, and puts would-be shoppers to a symbolic choice — stand with workers, or cross against them. When successful in disrupting an employer's operations, picketing puts pressure on management to accede to the employees' demands, whether that means a return to the negotiating table, an agreement to comply with an existing contract, or a plan to improve workplace conditions.¹²

But having entered the digital age, many businesses now operate online. In the absence of a brick-and-mortar storefront, employees have nowhere to picket. This development jeopardizes labor law's delicate balance between employer interests and worker rights.

Luckily, there's a potential solution — first proposed by Professors Sharon Block and Benjamin Sachs — that doesn't require new legislation: the cyberpicket.¹³ Much like its in-person counterpart, a cyberpicket would alert potential customers to a labor dispute and put them to the choice of whether to continue transacting with the business. Instead of encountering rows of workers outfitted with signs and

⁹ See Matthew Costello, *Picketing the White House: The Suffragist Movement During the Great War*, WHITE HOUSE HIST. ASS'N (Apr. 14, 2017), <https://www.whitehousehistory.org/picketing-the-white-house> [<https://perma.cc/C5XF-UQ6T>].

¹⁰ See generally, e.g., Tom Juravich & Kate Bronfenbrenner, *Steelworkers' Victory at Ravenswood: Picket Line Around the World*, 3 WORKING USA 53 (1999).

¹¹ Some pickets target not consumers but coworkers, to dissuade them from strike-breaking. To avoid complication, any future mention of "picketing" refers to consumer picketing.

¹² A picket's objective can determine whether it's protected under law. The NLRA forbids, with few exceptions, nonunionized workers from picketing to "forc[e] or requir[e] an employer to recognize or bargain with a labor organization as the[ir] representative." 29 U.S.C. § 158(b)(7). This is called "recognitional" picketing. *What's the Law?*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/whats-law/unions> [<https://perma.cc/ZS78-9LP4>]. But these same workers can picket to "truthfully advis[e] the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization." 29 U.S.C. § 158(b)(7)(C). This is known as "informational" picketing. *What's the Law?*, *supra*. It applies equally to workers who are already unionized and want to, for example, draw attention to an impasse in contract negotiations. See *Cap. Med. Ctr.*, 364 N.L.R.B. 887, 887, 899, 905 (2016), *enforced*, 909 F.3d 427 (D.C. Cir. 2018). When this Note mentions picketing, it means to invoke the informational, rather than the recognitional, variety — and specifically informational picketing against employers with whom workers have a *primary* (that is, direct) dispute. Cf. 29 U.S.C. § 158(b)(4)(i)(B) (prohibiting secondary pickets against neutral employers).

¹³ See SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 64 (2020); see also Sharon Block, Benjamin Sachs & Tascha Shahriari-Parsa, *A Path Forward for Amazon Workers: Digital Picketing*, ONLABOR (Nov. 16, 2022), <https://onlabor.org/a-path-forward-for-amazon-workers-digital-picketing> [<https://perma.cc/Q3Y9-9HPA>]. Block and Sachs use the term "digital picket" to describe their innovation. Because that's also what the New York Times Guild called their recent social media campaign, see *infra* note 56 and accompanying text, this Note prefers the term "cyberpicket" as a way of differentiating the two concepts.

pamphlets, however, e-shoppers would come across a notification that materializes at a site's landing page — the business's "entrance."

The technology needed to implement a cyberpicket breaks no new ground. In fact, it's already widely utilized by online businesses for compliance with the European Union's (EU) "Cookie Law," which requires that websites give visitors the right to refuse data tracking.¹⁴ So-called "consent banners" — now familiar fixtures for netizens across the pond¹⁵ — present a tried-and-true template for the cyberpicket.

Not only is the cyberpicket a viable alternative to its in-person counterpart, it's a right owed to employees of online businesses. This Note sharpens the concept of a cyberpicket by expanding on its legal justification, expected benefits, and possible challenges. Part I outlines the NLRA's framework and argues that, though constructed long ago, it inherently extends to modern-day labor struggles. Part II supplies a doctrinal foundation, combing through case law to locate the right to cyberpicket. The focus here is on statutory precedents, temporarily setting aside constitutional considerations. Part III builds out the cyberpicket's mechanics, with inspiration from the EU's Cookie Law. It then offers next steps for interested workers. Part IV confronts the obstacles posed by the First and Fifth Amendments. Although the bleeding edge of constitutional law looks ominous, there's reason to test its boundaries.

This Note's goal isn't to engage in abstract statutory analysis but rather to inspire workers to test the limits of what's possible under the NLRA and thereby hold employers to their legal obligations. Labor law yearns for a spark; the cyberpicket promises to ignite one.

I. LABOR LAW'S INFRASTRUCTURE: SCAFFOLDING FOR THE CYBERPICKET

The NLRA, the nation's foundational labor statute, was forged from the industrial unrest and political agitation of a past era. Today, it's up to the modern National Labor Relations Board (NLRB) — more specifically, the agency's five-member committee that oversees implementation of the Act (the Board) — to recognize that the NLRA's heirloom protections still have purchase in the digital economy.

A. *A Framework Revisited*

Close to a century ago, the NLRA rewrote the rules of engagement in the battle for workers' rights. The result of labor unrest during the Great Depression, it dramatically altered the common law employment

¹⁴ See Council Directive 2002/58/EC, 2002 O.J. (L 201) 25 [hereinafter *ePrivacy Directive*], last amended by Council Directive 2009/136/EC, 2009 O.J. (L 337).

¹⁵ Many Americans will recognize consent banners, too: "As of October 2022, 45% of Fortune 500 websites were utilizing [them]." David A. Zetony, *How Many Websites Now Have Cookie Banners?*, NAT'L L. REV. (Dec. 7, 2022), <https://www.natlawreview.com/article/how-many-websites-now-have-cookie-banners> [<https://perma.cc/BRP5-RZMS>].

relationship and set a national policy in favor of collective bargaining and industrial democracy.¹⁶ Congress tasked the NLRB — an independent regulatory agency — with enforcing the new regime.¹⁷ These reforms catalyzed rapid labor mobilization and sharp union growth.¹⁸

The great NLRA experiment quickly felt the hand of correction. Responding to corporate interests and union abuses, Congress enacted the Taft-Hartley Act¹⁹ in the wake of World War II.²⁰ It reconfigured the labor-capital balance of power.²¹ Union arsenals shrunk; managements' strength grew.²² And labor law's landscape once again looked different.

Taft-Hartley not only dealt a blow to the labor movement but also marked one of Congress's last updates to the NLRA. Legislators addressed union corruption in 1959²³ and expanded the Act's coverage to nonprofit hospital workers in 1974,²⁴ but neither amendment worked a major shift in the labor-capital relationship.²⁵ Nor has any new legislation otherwise "modernized" labor law.²⁶ As a result, workers today must rely on a statute from a bygone era for their organizational rights. The workplace has changed, and labor law hasn't kept pace.

B. The NLRA Today

Still, the NLRA is far from a dead letter. Many workers (and employers) continue to seek refuge in its protections.²⁷ While the rate of unionization declined last year, the total number of union members grew,²⁸ as did workers' willingness to engage in collective action against

¹⁶ Andrias, *supra* note 5, at 13–14, 16.

¹⁷ 29 U.S.C. § 153.

¹⁸ See Andrias, *supra* note 5, at 16. The gains realized by workers were not evenly distributed. See, e.g., IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 53–79 (2005) (exposing the racist exclusion of agricultural and domestic workers from the statute's coverage).

¹⁹ Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187) (amending the NLRA).

²⁰ See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 272–81 (1950) (detailing the history of the Taft-Hartley Act).

²¹ See Andrias, *supra* note 5, at 18.

²² *Id.* at 18–19.

²³ Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

²⁴ Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified as amended in scattered sections of 29 U.S.C.).

²⁵ See Andrias, *supra* note 5, at 27 & n.127 (noting that the Landrum-Griffin Act "tinker[ed] with" the NLRA); Ira M. Shepard, *Health Care Institution Amendments to the National Labor Relations Act: An Analysis*, 1 AM. J.L. & MED. 41, 53 (1975) (lamenting that the health care amendments, while "ambitious," ultimately "fall[] short" of providing "essential" safeguards).

²⁶ See Andrias, *supra* note 5, at 27–28.

²⁷ See *Unfair Labor Practice Charges Filed Each Year*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/reports/nlr-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges> [<https://perma.cc/QFK3-V64Q>] (recording that individuals, unions, and employers collectively filed 17,998 unfair labor practice charges with the NLRB in 2022).

²⁸ News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Union Members — 2022 (Jan. 19, 2023), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/6C2Q-7QAS>].

uncooperative employers.²⁹ Tens of thousands — from graduate students to baristas — exercised their statutory right to strike in 2022.³⁰ Unions are also winning more elections, despite forceful company-led countercampaigns.³¹ Clearly, then, the rank-and-file still rely on the NLRA to justify and effect their self-empowerment.

And they currently have a powerful ally in NLRB General Counsel Jennifer Abruzzo, who bears responsibility for prosecuting unfair labor practices.³² Early in her tenure, Abruzzo vowed to challenge questionable Board precedents that hamstringing workers' statutory entitlements, including their picketing rights.³³ So far, she has kept her promise.³⁴

Yet Abruzzo's efforts have yielded little from the Board, despite its enjoying a Democratic majority that many hoped would revitalize labor law's doctrinal landscape.³⁵ Decisions under "Biden's NLRB" have been slow to emerge, with crucial cases seemingly left on the back burner.³⁶ A flurry of labor-friendly activity at the close of last year offers hope for a more active 2023.³⁷ But the outlook for workers remains hazy: even with its recent bump in funding, the Board still faces budgetary constraints and an ever-expanding backlog of cases.³⁸

Separate from these practical limitations lies an issue that can't be fixed with an appropriations bill or efficiency gains: the Board's politicization. Members are appointed by the President, with Senate consent,

²⁹ See Rani Molla, *How Unions Are Winning Again, In 4 Charts*, VOX (Aug. 30, 2022, 6:00 AM), <https://www.vox.com/recode/2022/8/30/23326654/2022-union-charts-elections-wins-strikes> [https://perma.cc/P5K4-UJNH].

³⁰ Marick Masters, *Worker Strikes and Union Elections Surged in 2022 — Could It Mark a Turning Point for Organized Labor?*, THE CONVERSATION (Jan. 5, 2023, 8:25 AM), <https://theconversation.com/worker-strikes-and-union-elections-surged-in-2022-could-it-mark-a-turning-point-for-organized-labor-195995> [https://perma.cc/5NKW-MSGK].

³¹ See Molla, *supra* note 29; Andrea Hsu & Alina Selyukh, *Union Wins Made Big News This Year. Here Are 5 Reasons Why It's Not the Full Story*, NPR (Dec. 27, 2022, 10:01 AM), <https://www.npr.org/2022/12/27/1145090566/labor-unions-organizing-elections-worker-rights-wages> [https://perma.cc/P7G8-EM8K]. Unions aren't just popular among their members; they enjoy high approval ratings from Americans generally. See Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [https://perma.cc/G2TV-CC55] (reporting that "[s]eventy-one percent of Americans now approve of labor unions").

³² 29 U.S.C. § 153(d).

³³ See Memorandum from Jennifer A. Abruzzo, Gen. Couns., Office of the Gen. Couns., Nat'l Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge & Resident Officers 1, 7–8 (Aug. 12, 2021).

³⁴ See, e.g., Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision at 20–62, CEMEX Constr. Materials Pac., LLC, No. 28-CA-230115 (N.L.R.B. Div. of Judges Dec. 16, 2021) (seeking to overrule decades of probusiness precedents).

³⁵ See David Dayen, *Coalition Asks: Where Is Biden's NLRB?*, AM. PROSPECT (Dec. 8, 2022), <https://prospect.org/labor/coalition-asks-where-is-bidens-nlr> [https://perma.cc/4QZB-P9YM].

³⁶ *Id.*

³⁷ See Paul King Jr., *Landmark NLRB Decision Expands Labor Violations*, NAT'L L. REV. (Jan. 17, 2023), <https://www.natlawreview.com/article/landmark-nlr-b-decision-expands-labor-violations> [https://perma.cc/5M5J-QJ7A].

³⁸ See Press Release, Nat'l Lab. Rels. Bd., Off. of Pub. Affs., Statement on NLRB Funding in the 2023 Omnibus Bill (Dec. 29, 2022), <https://www.nlr.gov/news-outreach/news-story/statement-on-nlr-b-funding-in-the-2023-omnibus-bill> [https://perma.cc/MYR8-L2J5].

to five-year staggered terms, meaning each administration can effectively reconstitute the Board.³⁹ The legislators who dreamt up the quasi-judicial body imagined that its constituents would be “nonpartisan and neutral.”⁴⁰ After only two decades, however, politically motivated appointments began to splinter the Board.⁴¹ Today, shifting majorities create doctrinal whiplash, as probusiness Republicans blow one way, while prolabor Democrats sweep the other.⁴² Even if labor secures a victory in the picketing context, the rights might not stick.

Setting a precedent still carries weight, however. The Board must later justify a departure in a reasoned decision.⁴³ In the meantime, labor enjoys stronger protections and generates a proven template for future cases. It’s therefore crucial that workers continue to assert their statutory rights, striking while the iron is perhaps lukewarm, but hopefully heating up, under the Biden Board.⁴⁴ Depending on the results of the next presidential election, it may soon turn stone-cold.

C. Digital Dilemma, Cyber Solution

One of labor law’s new frontiers, the internet, challenges the NLRA to prove its continued vitality. For most of the Act’s lifespan, Americans shopped in brick-and-mortar stores.⁴⁵ Take the once-prominent department chain Sears.⁴⁶ If, during the retailer’s mid-twentieth-century heyday,⁴⁷ its employees were to picket, Sears’s customers would ipso facto learn about the underlying labor dispute. Shoppers would then have to make an informed decision about whether to keep spending there, a symbolic act that expresses a lack of solidarity with the workers.⁴⁸

³⁹ See 29 U.S.C. § 153(a).

⁴⁰ James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMPAR. LAB. L. & POL’Y J. 221, 243 (2005).

⁴¹ See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1365 (2000).

⁴² See Dayen, *supra* note 35. Political approximations for Members’ tendencies to support decisions seen as prolabor or probusiness aren’t perfect, but they roughly align with what Presidents look for in appointees and thus capture general trends. See Brudney, *supra* note 40, at 248–50.

⁴³ See *Shaw’s Supermarket v. NLRB*, 844 F.2d 34, 35 (1st Cir. 1989).

⁴⁴ See *supra* notes 35–36 and accompanying text.

⁴⁵ The first known sale of an item over the internet took place in 1994. See Shahed Nasser, *The History of Ecommerce: 1979 to 2023*, MEDUSA (Mar. 9, 2023), <https://medusajs.com/blog/ecommerce-history> [<https://perma.cc/HVF4-9CH6>].

⁴⁶ See Vicki Howard, Essay, *How Sears Industrialized, Suburbanized, and Fractured the American Economy*, ZÓCALO PUB. SQUARE (July 20, 2017), <https://www.zocalopublicsquare.org/2017/07/20/sears-industrialized-suburbanized-fractured-american-economy/chronicles/who-we-were> [<https://perma.cc/K7E9-L4SK>].

⁴⁷ See *id.*

⁴⁸ See Kim Kelly, Opinion, *Crossing the Picket Line: What You Need to Know About Strikes*, TEEN VOGUE (Sept. 1, 2020), <https://www.teenvogue.com/story/strikes-and-picket-lines-explained> [<https://perma.cc/F3AB-8AEZ>].

But what if there's no physical storefront? E-commerce as an industry, which earned over a trillion dollars in the United States in 2022,⁴⁹ threatens workers' ability to picket. Consider Amazon's business model. Although the company now operates several brick-and-mortar outlets,⁵⁰ the plurality of its retail sales come from its online marketplace.⁵¹

Last year, Amazon's Staten Island warehouse successfully unionized following a historic election.⁵² Despite this, the e-commerce giant has refused to engage in contract negotiations, no doubt violating its statutory duty to bargain in good faith.⁵³ The legal remedies available to the union are "too weak to offer . . . much hope of forcing Amazon to come to the table . . . any time soon."⁵⁴ Suppose the Staten Island workers, instead of taking to the courts, wish to exercise their right to picket. Sure, they can line the entrances of a local Amazon grocery outlet, if there's one nearby. But customers can continue to shop on the company's website, blissfully unaware of any labor dispute. These patrons don't have to make the difficult choice of whether to cross the picket line because there's none in sight: no patrolling, chanting, or signs.

Workers can try to publicize labor disputes to online audiences through other means, such as social media, but that's no substitute for traditional picketing.⁵⁵ Members of the New York Times Guild recently initiated what they called a "digital picket," taking to sites like Twitter to urge consumers not to engage any of the newspaper's platforms until

⁴⁹ See CENSUS BUREAU, U.S. DEP'T OF COM., CB23-22, QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER 2022 (2023), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf [<https://perma.cc/P8GG-DCP6>].

⁵⁰ See, e.g., Veronika Bondarenko, *Amazon's New Brick-and-Mortar Store Concept Is Now Open for Business*, THE STREET (May 25, 2022, 1:15 PM), <https://www.thestreet.com/investing/amazon-first-retail-fashion-store> [<https://perma.cc/PXK8-YUAH>].

⁵¹ See Amazon.com, Inc., Annual Report (Form 10-K), at 67 (Feb. 3, 2023).

⁵² See Karen Weise & Noam Scheiber, *Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html> [<https://perma.cc/5VDX-GKLG>]. "Amazon's fulfillment centers are the engine of the company — massive warehouses where workers track, pack, sort, and shuffle each order before sending it on its way to the buyer's door." Colin Lecher, *How Amazon Automatically Tracks and Fires Warehouse Workers for "Productivity"*, THE VERGE (Apr. 25, 2019, 12:06 PM), <https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations> [<https://perma.cc/HDP7-YPEE>]. Each location boasts thousands of employees, who do their best to meet Amazon's tall demand. See *Our Facilities*, AMAZON, <https://www.aboutamazon.com/workplace/facilities> [<https://perma.cc/7YZJ-KZEP>].

⁵³ See 29 U.S.C. § 158(d); Ananya Bhattacharya, *Amazon Refuses to Make Peace with Unions Even After They've Won the Right to Organize*, QUARTZ (Dec. 1, 2022), <https://qz.com/amazon-refuses-to-make-peace-with-unions-even-after-the-1849839810> [<https://perma.cc/AB3J-92EQ>].

⁵⁴ Block, Sachs & Shahriari-Parsa, *supra* note 13.

⁵⁵ Because social media companies are privately held, they can arbitrarily limit the reach of union-led campaigns by suppressing or rejecting posts. Cf. Sofia Grafanaki, *Platforms, The First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 133–34 (2018). This threat alone counsels against relying on such platforms to supply workers' picketing rights.

it reached an agreement with the union.⁵⁶ The call-to-action went viral, garnering much interest (and some criticism) from the public.⁵⁷ Yet it could easily have gone unheeded by those without an active online presence. Social media word-of-mouth can serve as a powerful adjunct to traditional forms of economic pressure, but it looks more like a sign above a freeway than a banner beside a building's entrance — those who *walk* to the store miss the message.

More importantly, labor law doesn't end where the World Wide Web begins; employers can't escape the NLRA's reach by doing business online. The Act's broad language, as interpreted by the Board, naturally supports the right to cyberpicket.⁵⁸ The basic idea, first sketched elsewhere,⁵⁹ is simple enough. Each time someone navigates to a cyberpicketed business's landing page, a banner will appear on screen. It will describe the labor dispute and encourage the visitor not to transact with the company until the workers' demands have been met. To continue to the site, customers must click a box indicating that they agree to cross the picket line. Nothing on the landing page itself will change; once past the cyberpicket, the visitor will encounter a shopping experience that's identical to the one they're familiar with.

So conceived, cyberpickets aim to achieve the same goals as their in-person counterparts: educating visitors about ongoing labor disputes, discouraging customers from doing business with the employer, and forcing patrons into the same tough decision that confronted the mid-twentieth-century Sears shopper.⁶⁰ And ultimately, employees seek a similar outcome: applying enough economic pressure through reduced sales and bad press to push the employer into meeting their demands.

The right to cyberpicket, then, not only fits naturally into the NLRA's scheme but also signals that the Act will stand as a bulwark against novel encroachments on established labor protections and keep online businesses accountable. The Board should take note, for the rise of e-commerce is precisely the kind of "changing industrial practice[]" meant to factor into its "adapt[ive]" interpretations of the Act.⁶¹

⁵⁶ Nicholas Clairmont, Opinion, *Tweeters of the World, Unite Around the New York Times and Its "Digital Picket Line,"* NEWSWEEK (Dec. 9, 2022, 2:11 PM), <https://www.newsweek.com/tweeters-world-unite-around-new-york-times-its-digital-picket-line-opinion-1766052> [<https://perma.cc/PZS8-BCF4>].

⁵⁷ See *id.* (critiquing the class-based dimension to the digital picket).

⁵⁸ When this Note speaks of "online businesses," it refers not only to fully virtual e-commerce sites but also to brick-and-mortars that sell in-person services on the internet. For instance, most people book travel online. See *Online Travel Booking Statistics 2020–2021*, CONDOR FERRIES, <https://www.condorferries.co.uk/online-travel-booking-statistics> [<https://perma.cc/233T-SHAA>]. A hotel that offers getaways for purchase on its site can be cyberpicketed. (Indirect booking through travel agencies presents a different question, but one best suited for future research.)

⁵⁹ See sources cited *supra* note 13.

⁶⁰ See *supra* notes 11–12 and accompanying text.

⁶¹ See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

II. FROM PAVEMENT TO PIXELS: PICKETING RIGHTS IN THE DIGITAL AGE

The Board has constructed a comprehensive scheme of picketing rights from the NLRA's text. Putting constitutional objections aside for the moment, the right to cyberpicket fits neatly within the case law.

A. *Statutory Regime*

Peaceful picketing holds special significance in labor law jurisprudence, both constitutionally and statutorily. When it occurs on *public* property like parks and sidewalks, the First and Fourteenth Amendments grant participants broad protections.⁶² Even some *private* property — namely, company towns — must conform to the constitutional guarantee of free expression.⁶³ In most cases, however, picketing on an employer's premises is governed exclusively by the NLRA.⁶⁴

Section 7 of the Act supplies picketing its statutory anchor. It states that employees “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.*”⁶⁵ These protections embrace the right “to criticize or complain about [one's] employer or [one's] conditions of employment, and to enlist the assistance of others in addressing employment matters.”⁶⁶ Further still, workers may “solicit[] support not only from fellow employees but also from nonemployees such as customers and the general public,”⁶⁷ including through primary picketing.⁶⁸ Employers, in turn, “commit an ‘unfair labor practice’ in violation of the Act when they ‘interfere with, restrain, or coerce employees in the exercise of’ their Section 7 rights.”⁶⁹

Sometimes Section 7 rights run up against employer property interests. When that happens, the Board must “seek a proper accommodation between the two,”⁷⁰ meaning with “as little destruction of one as is consistent with the maintenance of the other.”⁷¹ Over time, the Board has developed certain presumptions to aid in its task. One, first

⁶² See *Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968), *overruled on other grounds by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

⁶³ See *Marsh v. Alabama*, 326 U.S. 501, 508–09 (1946).

⁶⁴ See *Hudgens*, 424 U.S. at 513, 521.

⁶⁵ 29 U.S.C. § 157 (emphasis added).

⁶⁶ *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 545 (D.C. Cir. 2016) (citing *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002)).

⁶⁷ *Cap. Med. Ctr. v. NLRB*, 909 F.3d 427, 430 (D.C. Cir. 2018) (citing *Stanford Hosp. & Clinics*, 325 F.3d at 343).

⁶⁸ *Cf.* 29 U.S.C. § 158(b)(4)(i)(B) (“[N]othing contained in this clause . . . shall be construed to make unlawful, where not otherwise unlawful, any . . . primary picketing.”).

⁶⁹ *Cap. Med. Ctr.*, 909 F.3d at 430–31 (quoting 29 U.S.C. § 158(a)(1)).

⁷⁰ *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972).

⁷¹ *Id.* at 544 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

developed in the context of workplace organizing but later applied to picketing cases, made its way to the Supreme Court. In *Republic Aviation Corp. v. NLRB*,⁷² the Justices confronted an employer's rule that prohibited solicitation of any kind — union-related or not — at its plant.⁷³ Agreeing with the Board's reasoning below, the Court approved a presumption that blanket no-solicitation rules unreasonably impede employees' Section 7 right to self-organize unless necessary for discipline or production.⁷⁴ Hence, employers can't prohibit off-the-clock workers from passing out pro-union pamphlets on company property, whether during rest periods, on lunch break, or after hours.⁷⁵ This holding rested on a simple truth: to effectively exercise their right to self-organization, employees must have an opportunity to communicate about unionization, and the job site is uniquely conducive to such interactions.⁷⁶

The Board has extended the *Republic Aviation* presumption to certain restrictions on worker picketing. It once found that a business committed an unfair labor practice by “calling the police” and “causing the arrest” of off-duty employees who were picketing in front of a store's entrance.⁷⁷ A similar result obtained when a hospital tried to ban like activity outside its front lobby doorway.⁷⁸ These cases establish that off-duty employees have a statutory right to picket on nonworking areas of company property, in turn saddling employers with the heavy responsibility of showing business necessity for any imposed constraints.⁷⁹

The NLRA's protections go further still, underscoring Section 7's breadth. Employees of, say, a Walmart in Atlanta are legally entitled to picket not only at their assigned store but also at the nearby Decatur branch.⁸⁰ In this scenario, Walmart's corporate structure serves as the unifying entity — the individual locations need not maintain a close relationship, support each other's inventories, or sell the same products:

⁷² 324 U.S. 793 (1945).

⁷³ See *id.* at 794–95.

⁷⁴ *Id.* at 803 & n.10.

⁷⁵ See *id.* at 803 n.10 (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944)); *cf.* *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572–74, 574 n.23 (1978) (applying *Republic Aviation* presumption to restrictions on at-work distribution of union newsletter that not only discussed purely organizational matters but also other protected Section 7 activity).

⁷⁶ See *Republic Aviation Corp.*, 324 U.S. at 801 n.6 (quoting *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 1195 (1943)).

⁷⁷ See *Cap. Med. Ctr.*, 364 N.L.R.B. 887, 889 (2016) (citing *Town & Country Supermarkets*, 340 N.L.R.B. 1410, 1413–14 (2004)), *enforced*, 909 F.3d 427 (D.C. Cir. 2018).

⁷⁸ See *id.* at 887–88, 891.

⁷⁹ See *id.* at 888–90. True, “Section 7 does not itself speak of access rights.” *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1000 (D.C. Cir. 2001). But “the Board's reasonable interpretation[s] of ambiguous NLRA provisions” call for deference from federal courts. *Cap. Med. Ctr.*, 909 F.3d at 433 (citing *ITT Indus., Inc.*, 251 F.3d at 999–1000; *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984)).

⁸⁰ See *ITT Indus., Inc.*, 341 N.L.R.B. 937, 941 (2004), *enforced*, 413 F.3d 64 (D.C. Cir. 2005); *Hillhaven Highland House*, 336 N.L.R.B. 646, 648–49 (2001), *enforced sub nom.* *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003).

“[I]f [an employer] is essentially a single enterprise, in its operations, its employees have the right to picket geographically separated parts of its operation in support of a primary dispute in one part, without proving that there is a direct relationship between the parts at the local level.”⁸¹

Off-site employees aren’t relegated to picketing on a distant public sidewalk; they too have a right to engage in Section 7 activity *on company property*.⁸² Part of this holding’s significance lies in the fact that it was never inevitable. Off-site employees could’ve been treated like nonemployee union organizers, who enjoy *very* limited access rights.⁸³ Indeed, if store employees are reasonably accessible off the property, a business may treat nonemployee organizers as trespassers and bar or evict them from the premises.⁸⁴ Critically, any access privileges nonemployee organizers enjoy “deriv[e]” from the workers’ right “to exercise their organization rights effectively.”⁸⁵ That’s not true of off-site employees, so concluded the Board.⁸⁶ Their access rights spring directly from Section 7 as part of protected “concerted action,” for the employees ultimately aim “to increase the power of the[ir] union” and “improve the working conditions for the onsite and offsite worker alike.”⁸⁷

Other strands of NLRB case law strike a different, less worker-friendly balance between employees’ Section 7 rights and employers’ private property interests, yet none map as cleanly onto the cyberpicketing context as, well, the Board’s picketing precedents. One decision in particular — *Caesars Entertainment*⁸⁸ — might have the look of a management trump card, but the analogy folds under scrutiny. There, the Board interpreted *Republic Aviation* narrowly to hold that employees, in most cases, aren’t entitled to use their company’s email system to communicate about Section 7 activity.⁸⁹ Today’s workers, the Board

⁸¹ Teamsters, Loc. Union No. 560, 248 N.L.R.B. 1212, 1214 (1980) (citing Int’l Bhd. of Teamsters, 128 N.L.R.B. 916, 919 (1960); Retail Clerks Int’l Ass’n, 122 N.L.R.B. 1264, 1270 (1960); Madden v. Steel, Metals, Alloys & Hardware Fabricators, 22 F. Supp. 635, 638 (N.D. Ill. 1963)).

⁸² See, e.g., *Hillhaven*, 336 N.L.R.B. at 648–49. The Board has modified slightly the *Republic Aviation* framework to account for the fact that employers “may well have heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to its property to exercise their Section 7 rights.” *Id.* at 648.

⁸³ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992).

⁸⁴ See *id.* at 539 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)) (citing *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948)) (permitting access in limited contexts, such as logging camps).

⁸⁵ *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978).

⁸⁶ See, e.g., *Hillhaven*, 336 N.L.R.B. at 648.

⁸⁷ *First Healthcare Corp. v. NLRB*, 344 F.3d 523, 533 (6th Cir. 2003) (citing *Hillhaven*, 336 N.L.R.B. at 648). Another “critical distinction” for the Board “is that employees are not strangers to the employer’s property, but are already rightfully on the employer’s property pursuant to their employment relationship, thus implicating the employer’s management interests rather than its property interest.” *Town & Country Supermarkets*, 340 N.L.R.B. 1410, 1414 (2004) (citing *Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571–73 (1978)).

⁸⁸ 368 N.L.R.B. No. 143 (2019).

⁸⁹ See *id.* at 7–8.

submitted, can usually discuss union-related matters either face-to-face or through digital mediums like social media; thus, a company could prohibit nonbusiness use of its IT resources without unreasonably impeding the exercise of its employees' self-organizational rights.⁹⁰

The Board's decision in *Caesars* doesn't spell doom for cyberpicketing. For one, a landing page isn't akin to an email system — it's the functional equivalent of a storefront. In this sense, temporarily occupying business property for a cyberpicket is more like standing outside a retail outlet to engage with would-be shoppers (protected) than typing to coworkers on internal company servers (not protected). And even if employees of online businesses can meet in a break room or connect on LinkedIn to discuss Section 7 activity, these same avenues aren't available (and certainly aren't adequate) for communicating with potential customers or the public at large about a labor dispute. Hence, *Caesars* neither applies of its own force nor succeeds by analogy. The Board's picketing cases supply a much sturdier foundation on which to rest a decision about the right to cyberpicket.

B. Closing the Click-and-Mortar Gap

The NLRA's broad regime of picketing rights has not yet made its way online, choking off an important stream of worker power at the source. Nothing in the Board's decisions recognizing the right of employees to access nonworking areas of company property — such as parking lots, gates, and storefronts⁹¹ — for Section 7 activity suggests a carveout for online businesses. Nor does the text of the NLRA, which broadly permits "concerted activities" for "mutual aid or protection."⁹² Traditional conceptions of picketing, however, deprive e-commerce workers of a valuable tool for applying economic pressure against their employers, who gain an unfair advantage just by operating on the web. Settling for a watered-down version of the NLRA would leave Amazon's Staten Island warehouse employees to either picket one of the company's relatively inconsequential brick-and-mortars or shout into the void of social media.⁹³ But there's a better path forward.

Employees of online businesses have a statutory right to cyberpicket, the functional analog of an in-person picket. The Board's precedents, fairly read, make that clear. To illustrate why, it will help to first revisit

⁹⁰ *Id.* at 8.

⁹¹ See *Tri-County Med. Ctr.*, 222 N.L.R.B. 1089, 1089 (1976).

⁹² 29 U.S.C. § 157.

⁹³ See *supra* notes 49–51 and accompanying text. Conceivably, the workers could picket their own warehouse, but because customers don't shop there, the message wouldn't reach its intended audience. The NLRA doesn't relegate workers to such an enfeebled form of picketing. *Cf. Teamsters, Local Union No. 560*, 248 N.L.R.B. 1212, 1214 (1980) (upholding workers' right to picket "geographically separated parts" of a "single enterprise"); *Scott Hudgens*, 230 N.L.R.B. 414, 415–18 (1977) (protecting right of striking warehouse employees to picket adjacent to employer's retail outlet in shopping mall).

the Walmart hypothetical — typecast here as a chain of brick-and-mortars — before comparing it with Amazon’s e-commerce business. Assume Walmart has refused to bargain in good faith with the Atlanta workers’ union. Under Board precedents, not only do those employees have the right to picket at the entrance of their “home” store, but they can also line the gates of the nearby Decatur location — or the Miami Walmart, for that matter.⁹⁴ Every potential customer to these outlets must witness the picket and decide whether to proceed inside anyway.

Now consider Amazon’s online marketplace. Despite its intangibility, it too is a bona fide store.⁹⁵ The shop’s entrance is not a revolving door but rather the landing page. From there, customers can peruse products, put items in their carts, and even ask for help from a “live agent.” Indeed, scrolling through goods on one’s phone closely resembles thumbing through a grocery outlet’s selection of produce. Amazon’s web banner might look different from Walmart’s bright-blue storefront lettering, but the activity inside is the same: retail shopping.

Although Amazon’s online marketplace operates much like Walmart’s physical stores,⁹⁶ employees of the e-commerce giant miss out on a crucial Section 7 right due to the lack of effective picketing options. The cyberpicket promises to fill the gap. Its contours may still seem blurry, but for now think of it as a banner-like notification that materializes when a webpage is loaded. Conceiving of the cyberpicket in broad strokes at this early stage can help illustrate how it fits into the NLRA’s scheme without getting bogged down in nitty-gritty mechanics.

Employers may argue that recognizing a right to cyberpicket will swing the pendulum too far in the direction of workers, upsetting the NLRA’s fragile balance. For Atlanta Walmart employees to picket the entrances of a Los Angeles store, they’d need to buy plane tickets for a multihour flight. All told, that could cost thousands of dollars, take up valuable time, and exhaust participants, weakening resolve. Granted, nationwide pickets aren’t uncommon — off-duty pilots recently instituted

⁹⁴ See *supra* notes 80–81 and accompanying text.

⁹⁵ This analogy is more than intuitive — it’s making its way into other areas of law, as well. Several courts of appeals have determined that websites can be places of public accommodation. See Randy Pavlicko, Note, *The Future of the Americans with Disabilities Act: Website Accessibility Litigation After COVID-19*, 69 CLEV. ST. L. REV. 953, 962–63 (2021).

⁹⁶ Although Amazon consolidates its marketplace into one online site available to shoppers nationwide instead of operating region-specific domains, the analysis remains the same. Walmart couldn’t escape pickets by maintaining a single “superstore” in California, to which customers from around the country flocked for ultradiscounted goods. East Coast employees who manage and ship the inventory would retain their Section 7 rights. The same goes for Amazon’s Staten Island warehouse workers: they can stage a cyberpicket visible to customers beyond New York, even without a direct connection to their purchases. Cf. *Teamsters*, 248 N.L.R.B. at 1214.

one,⁹⁷ as did Starbucks workers.⁹⁸ But these protests involve immense coordination with local employees, who typically do not travel to new locations but rather man the entrances of their own stores.⁹⁹ Cyberpicketers — armed with nothing but a keyboard — could theoretically engage in a potent form of collective action from thousands of miles away, at home, fast asleep. They need not carry signs, patrol, or chant. This ability arguably gives employees a powerful *new* weapon against employers, instead of restoring to them an old one.

But making the exercise of Section 7 rights too easy doesn't trigger the same concerns as a complete forfeiture. Nothing in the NLRA forbids employees from devising ways to make their picketing more efficient or less burdensome. And there's no requirement that says workers must endure arduous conditions — they may picket in sunny Los Angeles or snowy Boston.¹⁰⁰ Even if the Board disagrees, all hope isn't lost. It's possible to “geofence” the cyberpicket, such that only customers shopping within a defined area see it.¹⁰¹ Reasonable time limits might also be appropriate.¹⁰² It will be up to the Board to set parameters, if it so chooses.¹⁰³ Even if subject to limitations, the cyberpicket should remain a viable option for interested workers.

III. CONSTRUCTING THE CYBERPICKET: MECHANICS AND IMPLEMENTATION

While cyberpicketing promises to shake up labor law, its proposed mechanics are unremarkable. Many websites — particularly

⁹⁷ *Pilots Nationwide Picketing for Change After Summer of Airline Woes*, CBS (Sept. 1, 2022, 8:09 PM), <https://www.cbsnews.com/newyork/news/pilots-nationwide-picketing-for-change-after-summer-of-airline-woes> [<https://perma.cc/6F3D-ZGY7>].

⁹⁸ Matt Bloom, *Starbucks Workers in Colorado Join Nationwide Strike as Union's Contract Negotiations Stall*, CPR NEWS (Nov. 17, 2022, 11:35 AM), <https://www.cpr.org/2022/11/17/starbucks-workers-in-colorado-join-nationwide-strike-as-unions-contract-negotiations-stall> [<https://perma.cc/B4GJ-V6MY>].

⁹⁹ See, e.g., *id.* (reporting on local logistics of nationwide Starbucks picket).

¹⁰⁰ The picket is one of workers' most valuable economic weapons, but employers have equally powerful arms at their disposal. For example, they can stop furnishing work to employees, known as a lockout, which diminishes unions' perceived power. See 29 U.S.C. § 158(d)(4); Ellen Dannin & Ann C. Hodges, *The Supreme Court Empowers Employers to Lock Out Workers*, TRUTHOUT (May 23, 2013), <https://truthout.org/articles/the-supreme-court-empowers-employers-to-lock-out-workers> [<https://perma.cc/4RPQ-5D6M>].

¹⁰¹ Geofencing is a “location-based service” that uses GPS and other data “to trigger a pre-programmed action” when a device “enters or exits a virtual boundary set up around a geographical location.” Sarah K. White, *What Is Geofencing? Putting Location to Work*, CIO (Nov. 1, 2017), <https://www.cio.com/article/288810/geofencing-explained.html> [<https://perma.cc/7YAH-PJBL>]. It's a popular marketing tool: for instance, “[i]f you download a grocery [store] app, chances are it will register when you drive by to prompt an alert, trying to get you to stop in.” *Id.*

¹⁰² Cf. 29 U.S.C. § 158(b)(7)(C) (requiring workers who initiate recognitional picketing to file an election petition within thirty days).

¹⁰³ See *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (“[T]he task of the Board . . . is to resolve conflicts between § 7 rights and private property rights . . .”).

those available to users in Europe — already include a similar feature. This model provides the jumping-off point for the cyberpicket.

A. *The Blueprint*

The cyberpicket need not reinvent the wheel; there's a template from which it can draw inspiration. The EU's ePrivacy Directive sets ground rules for data protection in the digital age.¹⁰⁴ It's not self-executing, so each member state devises its own means for implementation, but the end goal is common to all.¹⁰⁵ One of its provisions, the so-called Cookie Law, requires that websites give visitors the opportunity to refuse certain data tracking and collection.¹⁰⁶ To remain in compliance, online businesses that wish to reach EU audiences have designed “consent banners” that ask for permission to use the visitor's cookies.¹⁰⁷ These banners, overlaid across the main webpage, vary in shape, size, and functionality. Sites can freely customize them so long as they are compliant with the law.¹⁰⁸ The banners most relevant to cyberpicketing are known as “modal dialogs,” which are effectively pop-ups that prevent users from accessing a webpage's content until they've either “accepted or declined the cookie collection.”¹⁰⁹ That is, users can't ignore the banner and go on using the site — they must first interact with it.

Cyberpickets should look similar to consent banners and function like modal dialogs. To access the landing pages' contents and shop as desired, visitors must decide whether to “cross” the cyberpicket line. That means featuring a binary choice.¹¹⁰ For example — as suggested by Block and Sachs — an introductory prompt might read, “There is a strike occurring at this [business]; do you still want to proceed?”¹¹¹ Clicking “yes” would close out the dialog box and give the customer

¹⁰⁴ See generally *ePrivacy Directive*, *supra* note 14. The closest U.S. analog is the California Consumer Privacy Act (CCPA), CAL. CIV. CODE §§ 1798.100–199 (West 2022), which applies to businesses that serve the state's residents. See *id.* § 1798.140(d)(1)–(4), (i). Unlike the ePrivacy Directive, the CCPA doesn't require that companies obtain affirmative consent from e-visitors before collecting their data, but sites must include opt-out mechanisms and privacy notices. See Phillip Walters, *A Cookie Banner Isn't Enough for CCPA Compliance*, TRUEVAULT: BLOG (Oct. 27, 2022), <https://www.truevault.com/blog/a-cookie-banner-isnt-enough> [<https://perma.cc/MRX8-FHVS>]. So, mandated digital disclosures aren't foreign to U.S. law, businesses, or consumers.

¹⁰⁵ See *Types of Legislation*, EUR. UNION, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en [<https://perma.cc/KP5J-TK3K>].

¹⁰⁶ See *ePrivacy Directive*, *supra* note 14, at 25. Cookies are “small text files that websites place on your device as you are browsing,” which “can store a wealth of [personally identifiable] data.” Richie Koch, *Cookies, The GDPR, and the ePrivacy Directive*, GDPR.EU, <https://gdpr.eu/cookies> [<https://perma.cc/S2FG-Q23B>].

¹⁰⁷ See Cristiana Santos et al., *Are Cookie Banners Indeed Compliant with the Law?*, 2 TECH. & REG. 91, 91 (2020).

¹⁰⁸ See *id.*

¹⁰⁹ See Sheri Byrne-Haber, *Cookie Banners and Accessibility*, MEDIUM: UX COLLECTIVE (Aug. 25, 2020), <https://uxdesign.cc/cookie-banners-and-accessibility-d476bf9ee4fc> [<https://perma.cc/Q3TZ-D3DS>].

¹¹⁰ See BLOCK & SACHS, *supra* note 13, at 64.

¹¹¹ *Id.*

immediate access to the site’s contents; clicking “no” would return the customer “to the last page they visited.”¹¹² This mechanism would put online customers on equal footing with the twentieth-century Sears patron, who had to make an informed decision about whether to advance past the protesting workers and into the store.

B. *The Specifications*

Online businesses ought to have flexibility to determine a banner’s configuration, meaning its dimensions, positioning, and appearance.¹¹³ This suggestion will likely trigger objections from both sides, but it’s a sensible approach.¹¹⁴ Employers may protest that they must not only host the cyberpickets but create them too. Generally, workers can’t expect their employer to finance Section 7 activity.¹¹⁵ If they want pro-union signs, they have to bring their own. The company must lend only its premises; it need not open its pocket book. This argument sounds not only in the NLRA but also in the Constitution — a topic addressed in Part IV. Suffice to say here, employees must pay for their cyberpickets, including hosting fees and labor costs, but preliminary estimates suggest that these expenses won’t be prohibitively high.¹¹⁶ This allocation of financial responsibility should allay employers’ concerns.

¹¹² Block, Sachs & Shahriari-Parsa, *supra* note 13. Admittedly, in-person patrons need not *announce* their intention to cross the picket line; they can quietly duck their heads and scurry past. But even that requires an affirmative choice to disregard the workers in front of them. It would needlessly corrode the cyberpicket’s function, then, to allow employers to insist on non-modals, by which “[u]sers can still interact with the background content” without engaging with the overlay. See Ryan Neufeld, *Modal vs Page: A Decision Making Framework*, MEDIUM: UX PLANET (Mar. 2, 2020), <https://uxplanet.org/modal-vs-page-a-decision-making-framework-34453e911129> [<https://perma.cc/3F7L-HWUL>]. Some workers may favor this less confrontational method to reduce the risk of alienating visitors from the union, but that’s a preference, not a requirement.

¹¹³ Sachs has proposed a different mechanism for effecting a cyberpicket that doesn’t engage employers at all, but his suggestion falls short of what’s required by the NLRA and ultimately proves ineffective. He submits that “the Department of Labor [could] collect[] data on labor disputes” and then “mak[e] a browser extension available to consumers” that would trigger a DOL-designed notification when visiting a picketed site. Interview by Gizmodo with Benjamin Sachs, Cofounder, Clean Slate for Worker Power Project, *transcribed in* Whitney Kimball, *The Case for Virtual Picket Lines*, GIZMODO (Apr. 12, 2021), <https://gizmodo.com/the-case-for-virtual-picket-lines-1846654139> [<https://perma.cc/3RQL-X6QU>]. While creative, the browser-extension approach requires an affirmative opt-in from users. It thus resembles the New York Times Guild social media campaign, reaching primarily those who wish to engage. See *supra* notes 55–57 and accompanying text. The NLRA empowers workers to engage in picketing that’s far more robust and impactful.

¹¹⁴ Consider the alternative. Workers *could* configure the banner, but they’d likely need access to sensitive source code, and the design may not mesh well with the webpage’s layout. A reasonable compromise might involve contracting with a third-party vendor. See *infra* note 116.

¹¹⁵ While the NLRA prohibits employers from “interfer[ing] with . . . employees in the exercise of” their Section 7 rights, 29 U.S.C. § 158(a)(1), nothing in the Act’s text speaks to mandatory funding or reimbursement. Cf. BLOCK & SACHS, *supra* note 13, at 83 (“Historically, labor unions in the U.S. have relied on dues and fees paid by employees to finance their operations.”).

¹¹⁶ Costs per cyberpicket will vary by website — depending on visitor traffic, design elements, and security features — but a survey of third-party vendors that create and implement consent

Workers might prefer more control over the banners' specifications, but they too must yield. Consider a dialog box that occupies the customer's entire screen, eclipsing any part of the main webpage. That's arguably the most worker-friendly formulation of the cyberpicket, but it would raise several issues. For one, it's not analogous to what the twentieth-century Sears shopper would've seen when arriving at a picketed store. The protest might have wrapped around the building, but the company's name, blazoned near the top of its concrete structure, would've remained visible, lifted high above the workers' heads.

Apart from a broken analogy, there would be practical issues too. Potential customers must be able to tell that they're in the right place and didn't accidentally navigate to the wrong URL. To be sure, "[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard [Section 7 rights]."¹¹⁷ But the Board must seek a proper balance between worker and employer interests,¹¹⁸ which seems best achieved by permitting businesses to retain agency in their web design while also enabling the use of cyberpickets. Of course, employers will have an incentive to minimize the banner's dimensions, so the Board must be proactive. On top of ordering corrective measures on a case-by-case basis, it should issue regulations that establish minimum specifications and other mandatory guidelines for banners.¹¹⁹

C. *The Contents*

Even if employers were to supply the vessels, workers would retain control over the contents.¹²⁰ In-person pickets often include a mix of patrolling, chanting, and handbilling. Cyberpicketers could leverage analogous features to craft their message. For example, a banner could inform potential customers of a labor dispute through text, graphics, or both, standing in for the signs held by in-person picketers. A banner could also contain a link to an external website, managed by the

banners for businesses reveals modest pricing schemes. For only \$40 per month, one company will generate custom geotargeted consent banners, assertedly compliant with EU law, that can meet the needs of "large business[es] with high traffic." *Pricing & Plans*, COOKIEYES, <https://www.cookieyes.com/pricing/#pricing-comparison> [<https://perma.cc/88LT-Q485>].

¹¹⁷ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8 (1945) (quoting *LeTourneau Co. of Ga.*, 54 N.L.R.B. 1253, 1259 (1944)).

¹¹⁸ *See Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972).

¹¹⁹ *See* 29 U.S.C. § 156 (giving the Board rulemaking authority). The Board doesn't often promulgate regulations, but it's not an unprecedented practice. *See* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. (SPECIAL ISSUE) 1469, 1471 (2015); *see also* Press Release, Nat'l Lab. Rels. Bd., Off. of Pub. Affs., NLRB Issues Notice of Proposed Rulemaking on Fair Choice and Employee Voice (Nov. 3, 2022), <https://www.nlr.gov/news-outreach/news-story/nlr-issues-notice-of-proposed-rulemaking-on-fair-choice-and-employee> [<https://perma.cc/5SUV-ACFC>].

¹²⁰ In the "extremely unlikely event" that two distinct groups of (unionized) workers employed by the same company wanted to implement a cyberpicket and couldn't agree on a unified message, the ensuing banner may need to be partitioned and its space shared. Zoom Interview with Benjamin Sach, Cofounder, Clean Slate for Worker Power Project (Mar. 6, 2023).

picketing employees, that would offer more information about the protest to those interested.¹²¹ This URL would be equivalent to talking to passersby and distributing pamphlets to those willing to take them.

There's great potential for creativity with the more granular elements. These include wording, font, and level of detail.¹²² Images too: just as brick-and-mortars can't limit protesters to text-only leaflets, online businesses couldn't insist on text-only banners. In-person pickets are as visually striking as they are informative. The sight of bundled-up Cleveland Heights teachers braving snow to contest their district's contract offer injected pathos into their appeals.¹²³ Cyberpicketers might not face the same physical obstacles, but that doesn't mean they couldn't build sympathy through their visual depictions. There's power in putting a face to a labor dispute, particularly one where in-person protest is futile or impossible. Online businesses must allow for reasonable customization of the banner's contents to avoid the cyberpicket becoming an empty formality. Giving employers control over the banners' specifications doesn't smuggle in the authority to mute the picket's distinctive features or otherwise control its message.¹²⁴

D. The Placement

Although this Note has presented a business's landing page as the most appropriate place for a cyberpicket, some employees may seek a more impactful location. Imagine adding an item to your virtual Amazon cart, only to be met by a notification that the company is embroiled in a labor dispute. You might rethink that purchase decision. Or as you're about to "checkout," suppose you encounter an image of striking workers. The urge to click "place order" may quickly dissipate.

While enticing, these options likely won't pass muster under the NLRA. In-person picketers can't follow customers around while shopping or stand with them at the cash register. Employers can generally bar off-duty employees from engaging in Section 7 activity in *working*

¹²¹ Relatedly, the banner could give visitors the option to make a donation to the picketing workers. This approach might appeal to a wider audience, including those who may choose to cross the picket line but still want to support the employees in some way.

¹²² Just as in-person picketers march with union-made signs, cyberpicketers can opt for a union-made banner, if they so wish.

¹²³ See Tony Bifulco, *Cleveland Heights Teachers Strike in the Snow, Beating Austerity with Solidarity*, LAB. NOTES (Dec. 11, 2020), <https://labornotes.org/2020/12/cleveland-heights-teachers-strike-snow-beating-austerity-solidarity> [<https://perma.cc/7QGC-TFQF>].

¹²⁴ Text and images are one thing; video is quite another. Consider a fifteen-second clip of employees staging an in-person picket at an online business's warehouse. Embedding it into the cyberpicket banner and programming it to auto-play wouldn't be an issue in itself. In-person pickets aren't just striking for their still frames; the chanting and patrolling influence patrons too. But to force customers to watch the entire video before accessing the site would be problematic. In-person picketers can't physically block customers from entering the store. See, e.g., Dist. 65, Retail, Wholesale & Dep't Store Union, 141 N.L.R.B. 991, 1001 (1963). Similarly, cyberpicketers would need to ensure that e-shoppers have the option to proceed quickly through the dialog box.

areas,¹²⁵ like grocery aisles and checkouts. The digital marketplace is no different. That’s why the landing page, as the store’s “entrance,” readily lends itself to hosting the cyberpicket banner.

E. The Execution

The right to cyberpicket isn’t self-executing; it requires recognition by the Board. Workers should start by creating a design and then contacting their employers to request implementation, providing clear steps for doing so. Predictably, the company will deny the request, as most are loathe to fulfill even clearly established legal obligations.¹²⁶ Once that happens, the workers should file a charge with the NLRB, alleging that the employer has violated their Section 7 rights by refusing to permit protected activity on company property and petitioning for injunctive relief under Section 10(j).¹²⁷ If the Board faithfully applies its precedents, it should order implementation of the cyberpicket.

IV. THE SUPREME COURT CONUNDRUM

Even if the NLRB swings in the workers’ favor on statutory grounds, the game isn’t over. The Supreme Court could step into the batter’s box next, ready to make contact with two constitutional curveballs: the First Amendment’s “compelled speech” doctrine and the Fifth Amendment’s Takings Clause. Workers face disquieting odds, but balking guarantees that picketing won’t ever make its way online.

A. Compelled Speech Doctrine

By far the most menacing obstacle, the compelled speech doctrine threatens the right to cyberpicket on multiple fronts. The First Amendment prohibits laws that abridge the “freedom of speech,” a term that “necessarily compris[es] the decision of both what to say and what *not* to say.”¹²⁸ Simple in theory, but complex in fact. It’s difficult to make sense of the doctrinal morass in the Court’s compelled speech case law, whose broad principles and internal tensions defy easy categorization.¹²⁹

Here’s the upshot: the right to cyberpicket lies at the intersection of several threads of compelled speech. Framed most favorably to employers, it seemingly requires online businesses to host and subsidize third-

¹²⁵ See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 493 (1978) (working area); cf. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943)) (working time).

¹²⁶ See, e.g., Alana Semuels, *Some Companies Will Do Just About Anything to Stop Workers from Unionizing*, TIME (Oct. 13, 2022, 10:12 AM), <https://time.com/6221176/worker-strikes-employers-unions> [<https://perma.cc/99ZM-E8SU>].

¹²⁷ See 29 U.S.C. § 160(j).

¹²⁸ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988).

¹²⁹ See Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 356–57 (2018).

party speech on private forums. So understood, this statutory right resembles content-based speech regulation and thus awaits an inevitable showdown with the oft-fatal test of strict scrutiny.¹³⁰ But that's not the end of the road. Workers must contest the employer-friendly characterization of the speech interests at stake and, as a backup, make a case for satisfying strict scrutiny.

Compelling an online business to compromise its own messaging in favor of someone else's is a surefire way to raise the Supreme Court's suspicions. The Justices are especially wary of government laws that "alte[r] the content of [one's] speech."¹³¹ Websites certainly *look* like speech products. Much like parade organizers¹³² and newspaper editors,¹³³ online businesses exercise control and judgment in curating their landing pages. Forcing them to include worker-made messages could be seen as intruding on their editorial prerogatives.

But in-person picketers don't trammel on a brick-and-mortar's free speech rights by visually disrupting company messaging on the building's exterior with their marching and signs. Neither do cyberpicketers inflict constitutional damage through their virtual protest at the threshold of an online marketplace. Unless the Court is willing to recognize a speech interest in a physical store's outer design, which could be partially obscured by shoulder-to-shoulder employees, it shouldn't extend comparable protections to the gateway for entering Amazon's marketplace. Cyberpicketers don't seek integration or commingling with a website's substantive content; they request a digital overlay, leaving what lies beneath untouched.¹³⁴

Without a speech interest in the threshold to their landing pages, online businesses will lay down a different First Amendment trump card: compelled subsidy. A brick-and-mortar doesn't pay for in-person pickets; nor does it incur ongoing costs (apart from lost business) by virtue of the workers' presence. Websites, though, have server fees. And creating a cyberpicket occupies IT resources. The Court hasn't taken kindly to coerced payments for labor-related causes.¹³⁵ As long

¹³⁰ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)).

¹³¹ *Nat'l Inst. Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (first alteration in original) (quoting *Riley*, 487 U.S. at 795).

¹³² *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 568–70 (1995).

¹³³ *See Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

¹³⁴ Online businesses may try to frame cyberpicket banners as occupying otherwise fillable space on customer screens — specifically on the “second layer,” where dialog boxes sit — arguably amounting to a speech restriction. But a brick-and-mortar can't expel protesting workers from the property simply because it wishes to keep open the possibility of erecting a statue where they stand. And, again, a banner wouldn't interfere with any underlying content, over which the business would retain full control.

¹³⁵ *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018) (prohibiting mandatory agency fees).

as workers pay the attendant costs, however, there's little to protest.¹³⁶ True, the business must dispatch staff to coordinate with the picketing employees and implement their request (unless the job is outsourced). But labor law is no stranger to these small asks. Consider employers' responsibilities with regard to representation elections. They must print out election notices, take time and resources to post them, and supply eligible-voters lists.¹³⁷ Neither the Board nor the union is expected to reimburse employers for these minimal costs.

Rounding out the employer's First Amendment laundry list is the charge of compelled hosting, as the cyberpicket requires some accommodation of worker speech. This doctrinal thread remains elusive,¹³⁸ though it's clear that the statutory right to cyberpicket doesn't stir up the same anxieties as other laws found impermissible by the Court. There's little risk, for example, that visitors to a website will mistake a cyberpicket — whose character is one of conflict, not synergy — for the owner's speech.¹³⁹ Businesses could make that even clearer with a co-terminous disclaimer. It's also difficult to imagine how the Court could cabin an employer-friendly decision to the cyberpicketing context. Unless willing to put all access rights on the chopping block, the Justices should approach the compelled-hosting argument with caution.

Even if strong-armed into strict scrutiny — which demands that content-based regulations be narrowly tailored to serve compelling government interests¹⁴⁰ — the statutory right to cyberpicket could survive. The federal government arguably has a compelling interest in ensuring that employees of online businesses can exercise effectively their Section 7 rights. And assuming employers have substantial control over the positioning and dimensions of banners, there's an argument for narrow tailoring too. Admittedly, this last-ditch effort faces tough odds, as few laws emerge victorious from the gauntlet of strict scrutiny.¹⁴¹ But the constellation of statutory and constitutional arguments available to workers provides enough of a foundation to press ahead.

¹³⁶ For a discussion of expected costs, see *supra* note 116.

¹³⁷ See 29 C.F.R. §§ 102.63(a)(2), 102.67(l).

¹³⁸ See Volokh, *supra* note 129, at 371–75.

¹³⁹ Cf. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 576–77 (1995) (citing *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 87 (1980)) (worrying about message confusion with uninvited participants in parade).

¹⁴⁰ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)).

¹⁴¹ See Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359, 2367 (2020). *But cf.* 303 *Creative LLC v. Elenis*, 6 F.4th 1160, 1178–82 (10th Cir. 2021) (finding that a law compelling speech survives strict scrutiny), *cert. granted in part*, 142 S. Ct. 1106 (2022).

B. *The Takings Clause*

Another potential issue — this one involving the Fifth Amendment’s Takings Clause¹⁴² — threatens not just cyberpicketing, but picketing rights generally. In *Cedar Point Nursery v. Hassid*,¹⁴³ the Court ruled that a California regulation granting nonemployee union organizers limited access rights to farm property interferes with the employers’ right to exclude and therefore constitutes a per se physical taking requiring just compensation.¹⁴⁴ Of course, the picketing rights discussed in this Note accrue to employees, not union organizers. Under a narrow reading of *Cedar Point*, employees merit an entirely different analysis, reflecting their (limited) license to be on the employer’s property.¹⁴⁵ Yet the Court’s opinion didn’t dwell on the defendants’ nonemployee status. Read expansively, it arguably requires just compensation to employers whose property is co-opted for picketing — or presumably any Section 7 purposes. That conclusion would mark a significant departure from the American labor law tradition, counseling restraint.¹⁴⁶

CONCLUSION

Workers’ broad picketing rights under the NLRA don’t disappear when a business moves online. Amazon can’t hide behind the World Wide Web for insulation from its legal obligations. E-commerce sites might have revolutionized retail, but they aren’t so different from brick-and-mortars as to evade the strictures of current law. These online marketplaces have entrances, aisles of products sorted by category, shopping carts, and even customer-service assistants. They operate like traditional retail outlets but don’t have to contend with worker pickets — a protected activity under the NLRA. Cyberpicketing promises to restore to employees of online businesses a long-held tool of economic persuasion, resetting the careful balance of power between labor and capital. It’s high time for these workers to reclaim what’s rightfully theirs.

¹⁴² U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

¹⁴³ 141 S. Ct. 2063 (2021).

¹⁴⁴ *Id.* at 2072, 2074.

¹⁴⁵ See Benjamin I. Sachs, *Safety, Health, and Union Access in Cedar Point Nursery*, 2021 SUP. CT. REV. 99, 101–02, 102 n.24 (2022).

¹⁴⁶ Look no further than the World War II-era case *Republic Aviation*, discussed *supra* notes 72–76 and accompanying text. Admittedly, however, the current Court sees no difficulty overturning longstanding precedent. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).