

THE DIGITAL MARKETPLACE: FOSTERING COURAGEOUS COMMUNICATION FOR ONLINE UNION ORGANIZING IN HYBRID WORK ENVIRONMENTS

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I. INTRODUCTION

For much of the past century, an important aspect of private-sector employment has been the right of workers to organize and bargain collectively.¹ The National Labor Relations Act (“the Act”) gives employees the right to organize and to communicate about whether they want to organize.² The Act has long protected this right of workers to advocate their positions on whether the workplace should unionize.³

To organize, workers need to communicate with one another.⁴ The modern workplace, however, is increasingly online. Communication is often as likely to happen virtually as it is to happen in person.⁵ Even workers whose jobs require physical labor rely on digital technology.⁶ When compounded by the rapid switch to remote work spurred by the COVID-19 pandemic,⁷ virtual work is commonplace today. This change in working conditions means employees are more likely to converse on virtual platforms than around the proverbial water cooler.⁸ In short, virtual communication in the

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¹ See generally National Labor Relations Act, 29 U.S.C. §§ 151–69 (1935).

² *Your Rights During Union Organizing*, N.L.R.B., <https://www.nlr.gov/about-nlr/b/rihts-we-protect/the-law/employees/your-rights-during-union-organizing#:~:text=Working%20time%20is%20for%20work,break%20times%3B%20or%20from%20istributing> [<https://perma.cc/E5DV-3NHH>] (last visited Sept. 13, 2022) (“[Y]our employer cannot prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.”).

³ See 29 U.S.C. § 157.

⁴ See Ken Green, *4 Communication Tactics to Counter Anti-Union Rhetoric When Organizing*, UNIONTRACK (Feb. 4, 2020), <https://uniontrack.com/blog/counter-anti-union-rhetoric> [<https://perma.cc/96QY-5QXJ>].

⁵ Chris Cancialosi, *Digital Communication in The Workplace Is No Longer Optional*, FORBES (Aug. 1, 2016), <https://www.forbes.com/sites/chriscancialosi/2016/08/01/digital-communication-in-the-workplace-is-no-longer-optional/?sh=3d7a7b2046de> [<https://perma.cc/H7LZ-WWBF>].

⁶ See Corey Giroux, *Effective Use of Email in Construction*, N.H. BUS. REV. (Aug. 10, 2016), <https://www.nhbr.com/effective-use-of-email-in-construction/> [<https://perma.cc/4F4Y-NLGA>].

⁷ Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, *How the Coronavirus Outbreak Has—and Hasn’t—Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/> [<https://perma.cc/7MZJ-TDY7>].

⁸ Morgan A. Godfrey & Michael T. Burke, *Pandora’s Inbox: NLRB Changes Email Rules*, 72 BENCH & BAR MINN. 16 (2015).

workplace is workplace communication. This all means a primary way employees communicate with one another is online.

But the current position of the National Labor Relations Board (“the Board”), the independent federal agency tasked with protecting the rights of private-sector workers,⁹ is that employers generally may ban employees from using employer-provided communication technologies for nonwork purposes.¹⁰ This position hinders employees in digital work environments from exercising their right to organize under Section 7 of the Act (“Section 7”).¹¹ This position also hinders employees in hybrid work environments who rely on employer communication platforms for much of their work communications, despite being able to see one another in person for part of their workday activities.¹² Section 7 stipulates that employees in private workplaces have the right “to form, join, or assist labor organizations,” and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹³ While employees may use employer technology for Section 7 purposes if such technology is the *only* reasonable means for employees to communicate with one another during the workday,¹⁴ this standard imposes too high a bar on employees because employers can easily claim employees have alternative communication channels.¹⁵

Employees have the right to discuss union-organizing activity at the workplace during nonwork time¹⁶ and must have “adequate avenues of communication” to exercise their Section 7 rights.¹⁷ Employees’ right to organize trumps an employer’s right to control its property if an employer’s control of its property creates an “unreasonable impediment” to employees’ self-organization.¹⁸ In other words, an employer cannot control its property in a way that unreasonably impedes employees’ right to organize. For this reason, when workplace communications are as likely to occur on an employer technology platform as they are in the employee break room, the Board must view employee communications across an employer’s technology platform in the same way it views employee communications in an employer’s break room.

The Board took a version of this position in the 2014 case *Purple Communications, Inc. and Communication Workers of America, AFL-CIO*. There, the Board held that employees could use an employer’s email platform for Section 7 activity.¹⁹ But the Board overturned *Purple Communications* five years later in *Caesars Entertainment* where it held that

⁹ *Who We Are*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are> [https://perma.cc/U7AC-7MLP].

¹⁰ See *Caesars Ent.*, 368 N.L.R.B. No. 143 *1, *6–*7 (2019); see also *Comm’ns Workers of Am., AFL-CIO v. NLRB*, 6 F.4th 15, 24–25 (D.C. Cir. 2021).

¹¹ See 29 U.S.C. § 157.

¹² See *Recreating Work as a Blend of Virtual and Physical Experiences*, HARV. BUS. REV. (Sept. 15, 2020), <https://hbr.org/resources/pdfs/comm/verizon/RecreatingWorkAsABlendOfVirtualandPhysicalExperiences.pdf>.

¹³ 29 U.S.C. § 157.

¹⁴ *Caesars Ent.*, 368 N.L.R.B. No. 143 at *10.

¹⁵ See, e.g., *id.* at *9 (explaining that employees’ personal communication technologies are often sufficient for Section 7 communications in modern workplaces).

¹⁶ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945).

¹⁷ *Caesars Ent.*, 368 N.L.R.B. No. 143 at *8.

¹⁸ *Id.* at *9.

¹⁹ *Purple Commc’ns, Inc.*, 361 N.L.R.B. No. 126, *1050, *1057 (2014).

employers may prohibit employees from using employer email for nonwork purposes, unless email provides employees the only reasonable means by which to communicate with one another for Section 7 purposes.²⁰ The Board should not only return to its position in *Purple Communications* but should go further and rule that employees have the same Section 7 rights to discuss union-organizing activity on an employer technology platform as they do in an employer’s facility.²¹ In other words, employees should enjoy the right to engage in Section 7 speech on employer platforms—whether those be, say, email, Zoom, or Slack—in hybrid work environments where employees may be able to speak with one another in person while also communicating with one another across employer technology platforms.²²

This Note will explain the importance of a Board position that permits employees to exercise their Section 7 rights on employer technology platforms in hybrid work environments. This Note will also argue for employers and employees to embrace open dialogue in their approach to online organizing activity. Employees advocating for a union should be willing to speak their views about a union on an employer’s technology platform. Doing so shows solidarity with fellow employees, a seriousness of purpose given their willingness to express their views on a platform viewable by management,²³ and the continued relevance of the Act, which provides workers with important protections.²⁴ For their part, employers should recognize that an open discourse in the workplace creates a more content workforce, which all employers presumably desire.²⁵

To achieve a workplace in which open discourse is possible, I advocate for a workplace culture where employees are willing to voice their opinions, even when they believe those opinions will not be received well by management. To be willing to voice unpopular opinions requires courage. An important precondition to achieve such courage comes from an environment in which sharing diverse ideas and viewpoints is the norm. Such a culture of open dialogue—or a marketplace-of-ideas approach to workplace discourse—cultivates an environment where employees can say what they believe needs to be said. In this way, a workplace elicits the best ideas not only from employers, but also from all employees, enabling the workplace to implement these ideas and be as effective as possible. In this

²⁰ See generally *Caesars Ent.*, 368 N.L.R.B. No. 143.

²¹ In today’s work environment, an employer’s technology platform includes such communication platforms as Zoom in addition to more traditional platforms like email. See, e.g., Eli Rosenberg, *The Latest Frontier in Worker Activism: Zoom Union Campaigns*, WASH. POST (Sept. 11, 2020), <https://www.washingtonpost.com/business/2020/09/10/unions-zoom-pandemic/> [<https://perma.cc/ZC2A-CYUC>].

²² See *Recreating Work as a Blend of Virtual and Physical Experiences*, supra note 12.

²³ J.C. Pan, *Unionizing the Office in an Age of Remote Work*, THE NEW REPUBLIC (May 28, 2020), https://www.ted.com/talks/ray_dalio_how_to_build_a_company_where_the_best_ideas_win?language=en [<https://perma.cc/2LC7-78EQ>] (“[E]ven as messaging services like Slack and email become a growing part of contemporary union campaigns, employer surveillance—on company laptops or phones—presents real risks to workers hoping to keep campaigns private in early stages.”).

²⁴ See generally Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLR?*, 76 GEO. WASH. L. REV. 262, 271 (2008).

²⁵ See generally Chris Miksen, *Dealing with Employee Dissatisfaction in Supervisory Roles*, CHRON, <https://smallbusiness.chron.com/dealing-employee-dissatisfaction-supervisory-roles-31371.html> [<https://perma.cc/UYQ7-EED5>] (last visited Sept. 13, 2022) (“Communication plays an enormous part in satisfying dissatisfied employees. To understand why employees are dissatisfied and how to remedy the problem, supervisors must communicate with their staff.”).

dynamic—an “idea meritocracy”²⁶—employees can feel their voices are heard and respected, while employers can learn if employees are unhappy and can address employee discontent.

Part I of this Note explains the law governing employees’ Section 7 rights, beginning with *Republic Aviation* and culminating with *Caesars Entertainment*. The Board’s current position in *Caesars Entertainment* is that while employees can engage in Section 7 communications during nonwork time in an employer’s facility, employers have a property right to prohibit nonwork uses of their equipment.²⁷ Because employer communication technology platforms are viewed as employer equipment, the *Caesars Entertainment* decision allows employers to prevent employees from using these platforms for nonwork purposes,²⁸ unless such platforms provide the “only reasonable means for employees to communicate with one another.”²⁹

The Board did not explain what is meant by the “only reasonable means for employees to communicate with one another.” Rather, the Board merely stated that it would not “attempt to define the scope of this exception but shall leave it to be fleshed out on a case-by-case basis.”³⁰ The Board, however, suggested that because a “typical workplace” gives employees “adequate avenues of communication that do not infringe on employer property rights in employer-provided equipment,” it expected that it would be “rare” for employees to need to use employer technology for Section 7 purposes.³¹

Not only is this position inconsistent with Board precedent, but it is woefully outdated given the realities of the modern digital workplace that have become further entrenched by the massive shift to remote work because of the COVID-19 pandemic.³² Moreover, this case-by-case approach favors employers by allowing them to claim in any given case that at least some types of alternative communication channels are available to employees, regardless of how unrealistic or difficult such channels may be for employees to use.

Part II of this Note examines the pragmatic dilemma facing employees who engage in online Section 7 activity across employer platforms. Specifically, when employees do organize across employer platforms, employers can often see what employees say.³³ Upon seeing such pro-union activity, an employer’s natural inclination is often to intervene to steer employees away from wanting a union.³⁴ Therefore, employees are naturally

²⁶ Ray Dalio, *How to Build a Company Where the Best Ideas Win*, TED (Apr. 2017), https://www.ted.com/talks/ray_dalio_how_to_build_a_company_where_the_best_ideas_win?language=en [<https://perma.cc/K8JY-WQ44>].

²⁷ *Caesars Ent.*, 368 N.L.R.B. No. 143 *1, *9 (2019).

²⁸ *Id.*

²⁹ *Id.* at *10.

³⁰ *Id.*

³¹ *Id.*

³² See Parker et al., *supra* note 7; see also Alex Christian, *Why a Wide-Scale Return to the Office Is a Myth*, BBC (Jan. 14, 2022), <https://www.bbc.com/worklife/article/20220113-why-a-wide-scale-return-to-the-office-is-a-myth> [<https://perma.cc/P2DP-GAF8>] (“Today, the idea that we’ll all return to the office together again seems highly unrealistic.”).

³³ See Pan, *supra* note 23.

³⁴ See *id.*; see also STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP 328–39 (2019):

By far the biggest obstacle to unions’ growth is fierce employer opposition . . . Few Americans realize how tilted the playing field is when unions seek to organize a workplace. Managers have

reluctant to use employer platforms for activity they reasonably believe could be viewed unfavorably by management.³⁵

For these reasons, I argue workplaces need to cultivate a culture of social courage, meaning the willingness to express views that could be disliked by management. I base this argument on a theory of free-speech values that contends that a culture of courage is an essential precondition by which individuals will feel comfortable speaking their minds in group settings. The group settings with which this note is concerned are hybrid work environments.

While employees may opt to communicate across personal communication channels that cannot be viewed by management,³⁶ at least some Section 7 digital communications should occur on employer platforms. Communicating openly on an employer platform is a means for employees to wrest some control of the digital workspace from an employer, just as Section 7 activity in the physical workplace gives employees a degree of agency and power in the workplace. Additionally, communicating across employer platforms, as opposed to nonwork personal platforms, gives employees a sense of unity otherwise lacking when employees do not regularly see one another in person.³⁷ Therefore, a marketplace-of-ideas approach to workplace culture is important to cultivate for employees. They should feel empowered to share their positions on whether they support a union in an election campaign, like wearing a pro-union button on a work hard hat,³⁸ as this act not only shows solidarity among employees, but also shows a seriousness of purpose given employees would be speaking their views on unionization even when management can see them. For their part, employers should recognize that allowing employees to air grievances is beneficial not only because it lets them feel respected and heard, but also because it provides employers with a good opportunity to respond to employee grievances and improve the overall quality of the workplace.³⁹

When both sides openly communicate their positions across digital platforms, the speech is more accessible to employees because digital solicitation lacks the time-and-place restrictions imposed by the NLRB on in-person Section 7 activity.⁴⁰ Employers, for example, may not

access to workers 24/7 and often show antiunion videos in lunchrooms and break rooms. Companies often require employees to attend meetings where high-priced consultants tell them that unions are corrupt and dishonest and only want their dues money, and that workplaces like theirs have closed down after unionizing.

³⁵ See Pan, *supra* note 23.

³⁶ See *Caesars Ent.*, 368 N.L.R.B. No. 143 at *9 (“[I]n modern workplaces employees also have access to smartphones, personal email accounts, and social media, which provide additional avenues of communication, including for Section 7-related purposes.”).

³⁷ See Tammy Katsabian, *The Rule of Technology: How Technology Is Used to Disturb Basic Labor Law Protections*, 25 LEWIS & CLARK L. REV. 895, 933 (2021) (explaining that digital work “has disrupted the basic bonds between employees in the workplace. This detachment is to the detriment of workers’ solidarity and may sabotage their ability to create a solid trade union.”).

³⁸ See generally *NLRB v. Malta Const. Co.*, 806 F.2d 1009 (11th Cir. 1986) (explaining that management cannot fire employees simply for pro-union behavior).

³⁹ See Carolyn Hirschman, *Giving Voice to Employee Concerns*, SHRM (Aug. 1, 2008), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0808hirschman.aspx> [<https://perma.cc/KXK5-ZMZE>].

⁴⁰ Martin H. Malin & Henry H. Perrit, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 UNIV. KAN. L. REV. 1, 57 (2000) (“Electronic communication systems have the potential to equalize access, thereby increasing the level of democracy in union

communicate their views on unionization to employees after hours at employees' homes; unions, however, are allowed to do so.⁴¹ An advantage of communicating across digital platforms is that such time-and-place restrictions cease to be a major factor. With these restrictions playing a smaller factor in union campaigns, employees can simply view competing messages from pro-union employees and management, respectively, and decide for themselves with which message they agree. With messages from both sides becoming more accessible to employees in, say, their work email inboxes, workplaces function in a more democratic fashion—competing ideas, as opposed to political tactics, play the main role in unionization campaigns.⁴²

Part III of this Note uses free-speech theory to develop a theory of social courage, which can be used as a framework for successful digital organizing in hybrid work environments. The opportunity to speak freely and openly encourages people to be willing to share unpopular ideas in social spaces, such as voicing support for a union on a digital platform viewable by one's boss. A culture in which sharing diverse ideas is normal allows people to feel safe expressing opinions in institutions that may be unfriendly to their views. Voicing competing opinions in institutions allows for the best ideas to emerge as the dominant ideas of a social space. I am therefore focused in this section on the central role courage plays in advancing the democratic marketplace of ideas. Through courageous speech, individuals can best learn what they do and do not believe. Once individuals make informed decisions about what they believe, they are best positioned to contribute to the discourse of a social space, so the best ideas emerge. When an institution—that is, a workplace—functions democratically in this way, it benefits from more good ideas being generated from employees, which in turn allows the institution to function better by incorporating such ideas into the way it operates. For this reason, I apply to workplace settings my theory of how institutions can foster courage. In doing so, employees will feel more willing to speak openly so they can engage in some of their Section 7 organizing activity on employer communication platforms.

Finally, employees need to show that the Act remains relevant for the modern workplace in which so much communication occurs across digital platforms.⁴³ If employees opt to use nonwork means of communicating with one another for Section 7 purposes, and choose to organize outside of Board-run election proceedings altogether, employees risk demonstrating the irrelevance of the Act and, potentially, hastening its demise along with the protections it provides workers.⁴⁴ To avoid this outcome, employees need to

representation disputes. No longer would employers be excluded artificially from contacting employees at home, and no longer would unions be given artificial playing field levelers, such as special treatment regarding home visits.”).

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Parker et al., *supra* note 7.

⁴⁴ Hirsch, *supra* note 24, at 263–64:

Perhaps no other workplace development has so exposed the weaknesses in the Board's current enforcement of labor rights as has the introduction of the Internet. These weaknesses threaten to write the final chapter of the NLRA, as it traverses from near irrelevance to obsolescence. . . . The Internet . . . has the greatest possibility of becoming the straw that breaks the NLRA's back. . . . For example, unions have already begun to show their willingness to bypass the NLRA representational process by pressuring employers for voluntary recognition

demonstrate that given the chance to organize digitally, they will take advantage of this opportunity—as opposed to organizing outside of Board-run proceedings—to show the Act remains compatible with the realities of the twenty-first century workplace.

II. SECTION 7 ORGANIZING IN THE VIRTUAL WORKPLACE

A. AN OVERVIEW OF THE DOCTRINE

Employees have long enjoyed the right to express views on unions at the workplace during nonworking time in nonworking areas.⁴⁵ In *Republic Aviation*, an employee of a military aircraft manufacturer violated a general company prohibition against solicitation—encouraging employees to support a union—by passing out union application cards to colleagues during lunch.⁴⁶ The Supreme Court used this case to explain the delicate balance between employees' right to self-organize and employers' right to maintain discipline in the workplace.⁴⁷ The Court held that blanket prohibitions against solicitations at the workplace violated employees' Section 7 right to self-organize.⁴⁸ Because the company employees lived far from one another, contact on the company premises was the only realistic means by which employees could communicate with one another for Section 7 purposes.⁴⁹ Absent evidence showing that prohibiting solicitation was necessary to maintain discipline, the Court held an employer may not prohibit employees from soliciting during nonworking time in nonworking areas.⁵⁰

But the Board and reviewing courts have gone back and forth in recent years as to how and when employees may use employer-owned communication technologies for Section 7 purposes. In 2009, the Court of Appeals for the D.C. Circuit held in *Guard Publishing Co. v. N.L.R.B.* that an employer may prohibit nonwork use of its email system, provided the employer does not block Section 7 activity while allowing email to be used for other types of nonwork purposes.⁵¹ The Court of Appeals explained that such disparate treatment of work email is discriminatory and thus constitutes an unfair labor practice.⁵² Five years later the Board held in *Purple Communications* that when employees are allowed to use an email system for work, they also have the right to use this system for Section 7 communications during nonworking time so long as the activity does not disrupt the production and discipline of the workplace.⁵³

rather than waiting for a Board-run election. The Board's failure to adequately protect unions' Internet-based organizing efforts will only intensify this trend and further undermine union support for the NLRA.

⁴⁵ See generally *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (explaining that firing employees for union solicitation during their lunch break violates the NLRA).

⁴⁶ *Id.* at 794–95.

⁴⁷ *Id.* at 707–98.

⁴⁸ *Id.* at 805.

⁴⁹ *Id.* at 797.

⁵⁰ *Id.* at 798, 805.

⁵¹ *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 57 (D.C. Cir. 2009).

⁵² *Id.*

⁵³ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, *1050 (2014).

Caesars Entertainment overturned *Purple Communications* and shows the Board's current position. There, the Board held "employees have no statutory right" to use employer communication technologies for Section 7 communications.⁵⁴ But the Board recognized that employees may use an employer's email system when it is "the only reasonable means for employees to communicate with one another."⁵⁵ The Board's position in *Caesars Entertainment* relied mainly on the observation that employers' email systems are their "property" and that employers enjoy a right to control the use of their property.⁵⁶ While the Board stated that under *Republic Aviation* employees must have "adequate avenues of communication" for self-organization, it also noted that rules restricting solicitation are only unlawful when they restrict solicitation during nonworking time and in nonworking areas.⁵⁷

The Board focused on the fact that in *Republic Aviation* there was a clear delineation in physical workspaces between working and nonworking areas and between working and nonworking time.⁵⁸ An employer's email system, however, "creates a virtual space" where such distinctions are "meaningless."⁵⁹ Therefore, as the Board reasoned, in digital environments "Section 7-related communications may be composed, sent, and read at different times," presumably reaching the inboxes of workers who are not on breaks.⁶⁰ The Board apparently believed that a collapse between working and nonworking time and between working and nonworking areas meant employees could receive digital solicitations when they are supposed to be working, a potential disruption to the workplace. Therefore, the Board found employers are justified in restricting workplace email for Section 7 purposes.

Despite acknowledging that employees must have "adequate avenues of communication" available to them to exercise their Section 7 rights,⁶¹ *Caesars Entertainment* explained that in the typical workplace "face-to-face" solicitation provides sufficient means of communication.⁶² The Board also expressed that modern workers have personal means of communication at their disposal such as "smartphones, personal email accounts, and social media, which provide additional avenues of communication, including for Section 7-related purposes."⁶³ In other words, face-to-face solicitation is, in the Board's view, sufficient for in-person workplaces while personal communication technologies typically suffice for digital environments.

The Board has subsequently criticized the *Purple Communications* Board's contention that employer email systems could be used for Section 7 activity because these systems provided "a useful, convenient, and effective additional means for employees to engage in Section 7 discussions with their coworkers."⁶⁴ *Caesars Entertainment* explained that the Act requires only

⁵⁴ *Caesars Ent.*, 368 N.L.R.B. No. 143, *1 (2019).

⁵⁵ *Id.* at *9.

⁵⁶ *Id.* at *6.

⁵⁷ *Id.* at *7-*8.

⁵⁸ *Id.* at *8.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at *9.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

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that employees have “adequate” means of communication, not “the most convenient or most effective means of conducting those communications.”⁶⁵

Caesars Entertainment acknowledged that “there may be some cases in which an employer’s email system furnishes the only reasonable means for employees to communicate with one another” in which case “an employer’s property rights may be required to yield in such circumstances to ensure that employees have adequate avenues of communication.”⁶⁶ But the Board declined to explain what exact type of circumstances would warrant use of employer email for Section 7 purposes. The Board stated that “in the typical workplace, employees do have adequate avenues of communication that do not infringe on employer property rights in employer-provided equipment.”⁶⁷ Presumably, by “adequate avenues of communication,” the Board meant employees could communicate in person or could use personal communication technologies. For these reasons, the Board explained that it expects “such cases [of an employee’s use of employer email for Section 7 purposes] to be rare. We shall not here attempt to define the scope of this exception but shall leave it to be fleshed out on a case-by-cases basis.”⁶⁸

Such a “case-by-case” approach can be seen in the recent case of *Communication Workers of America, AFL-CIO v. NLRB*.⁶⁹ There, the Court of Appeals for the D.C. Circuit held that employers may prevent employees from using employer-owned email for Section 7 purposes provided employers do not discriminate against Section 7 activity and instead have a facially neutral policy against nonwork use of employer technology.⁷⁰ In essence, *Communication Workers* stated that employers can prevent use of employer email for union purposes if the policy is consistent with a more general policy against all employee use of employer email for any nonwork purposes.⁷¹ Importantly, the employer must have such policies against nonwork use of employer email in place before taking action against employees.⁷² If the employer does not have such policies in place prior to taking action against the employees using employer email for union purposes, and the employer has in fact allowed use of the employer email for any type of nonwork-related correspondence, taking action against employees for use of employer email for Section 7 purposes is discriminatory and an unfair labor practice.⁷³ But while *Communication Workers* emphasizes that employers cannot discriminate in their email policies, it still allows them to prevent nonwork use of employer email, essentially a return to the standard set forth in *Guard Publishing*.⁷⁴

⁶⁵ *Id.* at *5, *9.

⁶⁶ *Id.* at *9.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Comm’ns Workers of Am., AFL-CIO v. NLRB*, 6 F.4th 15 (D.C. Cir. 2021).

⁷⁰ See *id.* at 23.

⁷¹ *Id.* at 24–25.

⁷² *Id.*

⁷³ *Id.* at 22, 24–25 (holding that because T-Mobile had allowed correspondence on its email network regarding nonwork-related content, such as emails about signing a birthday card for T-Mobile’s CEO, prior to the Union bringing unfair labor practice charges, it could not justifiably claim that use of its email for Section 7 purposes was a violation of the company’s “Acceptable Use Policy”).

⁷⁴ See generally *Guard Publ’g Co. v. N.L.R.B.*, 5712 F.3d 53 (D.C. Cir. 2009) (holding that employers may bar employees from nonwork-related use of email).

We are thus left today with a Board standard stating that employers may continue to prevent employees from using employer email for Section 7 purposes. It is important to consider, however, that the *Caesars Entertainment* Board noted that *Republic Aviation* “does not require the most convenient or most effective means of conducting [Section 7] communications.”⁷⁵ Rather, under *Caesars Entertainment*, the Act requires merely “adequate avenues of communication” for Section 7 purposes.⁷⁶ Under this nebulous standard, it would in theory be “adequate” to require employees to conduct all Section 7 activities outside of employer property—that is, say, on the public sidewalk outside of the company facility. But *Republic Aviation* does not permit employers to force employees to conduct such activities completely outside of employer property, even though such a location would most likely be an “adequate” place from which employees could conduct such activities. Rather, employers are required to yield at least some of their property—that is, say, a break room—to Section 7 activities during at least some of the time when employees are on the employer’s premises—that is, say, during a break. Employers should therefore be required to yield at least some of their virtual property in the form of their digital communication technologies when most, if not all, of their employees’ communicative activities occur across such technologies.

Although *Caesars Entertainment* states that employees may use such technologies for Section 7 activities when they are “the only reasonable means for employees to communicate with one another,” employers are already required to allow employees to use some employer space for Section 7 activities despite such space often not being the “only reasonable means for employees to communicate with one another.” For this reason, employees should not be required to meet such a high and nebulous burden as that set forth by *Caesars Entertainment*. Instead, they should be allowed to use at least part of an employer’s digital space in a similar fashion to how they are allowed to use at least part of an employer’s physical space for Section 7 activities.

B. USE OF EMPLOYER PROPERTY FOR SECTION 7 ACTIVITY

Employers must have legitimate reasons for prohibiting employee use of employer equipment for Section 7 activity.⁷⁷ In *N.L.R.B. v. Malta Construction*, a construction company fired an employee for refusing to remove a union sticker from his company-issued hard hat.⁷⁸ Both the Board and the Court of Appeals for the Eleventh Circuit held this firing violated the employee’s Section 7 rights because the company had no “legitimate reasons” for rules preventing union insignia on hard hats and had instead fired the employee because of his pro-union activity.⁷⁹

Malta Construction implies that employer property issued to, or allowed to be used by, employees may be used by employees for Section 7 activity absent a “legitimate reason” preventing employees from using the property

⁷⁵ *Caesars Ent.*, 368 N.L.R.B. No. 143 *1, *10 (2019).

⁷⁶ *Id.* at *7.

⁷⁷ *See generally* *N.L.R.B. v. Malta Const. Co.*, 806 F.2d 1009 (11th Cir. 1986).

⁷⁸ *Id.* at 1010–11.

⁷⁹ *Id.* at 1012.

for such activity.⁸⁰ The *Caesars Entertainment* Board itself noted that the Board’s prior decisions allowing union insignia on hard hats in the workplace was in line with *Republic Aviation*. At the same time, however, *Caesars Entertainment* also stated that “[c]ertainly, no such right to use employer-owned equipment for Section 7 purposes is recognized in *Republic Aviation*.”⁸¹ But if there is no “right to use employer-owned equipment for Section 7 purposes,” why would the Board and the Eleventh Circuit have required union insignia to be allowed to be affixed to employer-owned hard hats as opposed to merely requiring employees be allowed to wear union insignia on some other part of their person that was not a piece of employer-owned equipment or clothing? As the *Caesars Entertainment* dissent pointed out,

The Board has held that employers must permit employees to wear union insignia on employer-owned hardhats, squarely rejecting the argument that because the hard hat was the employer’s property, the employer was entitled to control what was affixed to the hardhat, even without showing special circumstances that made a restriction necessary to maintain production or discipline or to ensure safety.⁸²

Taken together, the case law on this issue points toward allowing employees to use employer-owned technology in the same way employees on a construction site can affix union insignia to an employer-owned hard hat. Further, because the Board has the “responsibility to adapt the Act to the changing patterns of industrial life,”⁸³ the Board must recognize the importance of not merely returning to the policy laid out in *Purple Communications* that employees may use employer email for Section 7 activity, but also the importance of going further to recognize the modern digital reality of the workplace.⁸⁴ In short, the Board must acknowledge that employees have a right to Section 7 activity across any technology platform that is reasonably relied on for the day-to-day functioning of the workplace.

C. VIRTUAL SPACE AND AN OBSOLETE DISRUPTION STANDARD

The *Republic Aviation* standard provides that so long as Section 7 activity does not have a substantial disruption on the productivity of the workplace, it must be protected, provided it occurs during nonworking time and in nonworking areas.⁸⁵ But the rules developed for traditional in-person workplaces do not apply in the same way to workplaces that are partially or

⁸⁰ *Id.*

⁸¹ *Caesars Ent.*, 368 N.L.R.B. No. 143 *1, *12 (2019).

⁸² *Id.* at *15.

⁸³ *Id.*

⁸⁴ See generally Malin & Perrit, Jr., *supra* note 40.

⁸⁵ See *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 798 (1945) (explaining that the workplace requires a balance between employees’ “undisputed right of self-organization” with employers’ “undisputed right . . . to maintain discipline in their establishments.”); see also Malin & Perrit, Jr., *supra* note 40, at 46:

[T]he employer may limit solicitation to nonworking time and may prohibit solicitation during nonworking time where special circumstances justify it. The employer may not prohibit literature distribution, but may limit it to nonworking areas and may prohibit it completely upon a showing that distribution even in nonworking areas creates excessive litter or otherwise unduly disrupts operations.

entirely online.⁸⁶ In traditional physical workplaces, it is possible to clearly delineate between working and nonworking time as well as between working and nonworking areas.⁸⁷ But “[e]-mail and related electronic technologies blur these boundaries. Employees who work all or part of their time from their homes tend to integrate home and work in a manner directly contrary to the strong home-work boundary found in traditional industrial settings. Remote access to the job also blurs the distinction.”⁸⁸ This reality of remote work is particularly important given that 37% of all jobs in the U.S. can be done remotely and as of April 2020, “34% of people who previously commuted to work said they had transitioned to teleworking due to the coronavirus.”⁸⁹ Additionally, “the COVID-19 pandemic . . . accelerated the phenomenon of telework, and forced numerous workers to participate in the largest global experiment in telecommuting in human history.”⁹⁰

This blurring between home and work demonstrates that solicitation during what has traditionally been termed “working time” is not disruptive in the same way it once was. Electronic solicitation during the workday is less disruptive than in-person solicitation because “with electronic solicitation . . . the recipient controls when he or she will actually read the message . . . remote site workers tend to exercise greater control over their time and can determine whether any given moment is ‘working time’ or not.”⁹¹ Some employers claim electronic solicitation can be more disruptive than in-person solicitation because in-person solicitation must occur when all employees are on break at the same time, whereas electronic solicitation can be communicated to an employee at any time, regardless of whether he or she is on a break.⁹² This claim is dubious. It presumes employees are incapable of preventing themselves from becoming distracted from work by an electronic message. But even if employees are tempted to check a message they receive at a moment when they happen to be working, such digital disruption is part of the modern working world. Learning to avoid one’s desktop or mobile digital notifications for a sustained period of time for focused work—whether those be news alerts or personal text messages—is simply part of being a modern worker.⁹³ Moreover, “[e]ven [if] the recipient receives the message during working time, the recipient need not read it immediately. The recipient can recall the message during break time or even remotely from home after departing the premises.”⁹⁴ In fact, electronic solicitation causes no more disruption to the workplace than does

⁸⁶ Malin & Perrit, Jr., *supra* note 40, at 3–4.

⁸⁷ *Id.* at 52.

⁸⁸ *Id.*

⁸⁹ Carolyn Copeland, *Suddenly Working Remotely? You and Your Coworkers Can Still Unionize*, PRISM (Apr. 23, 2020), <https://prismreports.org/2020/04/23/suddenly-working-remotely-you-and-your-coworkers-can-still-unionize/> [<https://perma.cc/7AJV-Y8QF>].

⁹⁰ Katsabian, *supra* note 37, at 918–19.

⁹¹ Malin & Perrit, Jr., *supra* note 40, at 52–53.

⁹² *See id.* at 57:

[I]n the typical e-mail system, the employer should be required to show some actual significant disruption to its operations resulting from the use of e-mail to solicit employees on behalf of a union. The mere fact that the solicitation can be read during working time should not, standing alone, be sufficient to enable an employer to prohibit it.

⁹³ *See* Ryan Jenkins, *How to Reduce Smartphone Distraction at Work (and Home)*, INC (Nov. 12, 2018), <https://www.inc.com/ryan-jenkins/how-to-reduce-smartphone-distraction-at-work-and-home.html> [<https://perma.cc/D496-WNJS>].

⁹⁴ Malin & Perrit, Jr., *supra* note 40, at 52–53.

traditional in-person solicitation.⁹⁵ And an employer’s ability to “ban abusive or disruptive oral solicitations” could easily apply to digital communications, meaning employers have little reason to argue digital solicitations could be more disruptive than the in-person solicitations protected by Section 7.⁹⁶

An employer should be able to prevent “unreasonably disruptive uses” of its communication platforms or uses that “unreasonably interfere[] with an employer’s business interests.”⁹⁷ But employers should be required to show that employees’ uses of its communication platform for Section 7 activity are in fact unreasonably disrupting the workplace or are unreasonably interfering with business. Employers should not be able to impose a ban on all nonwork use of employer communication platforms when such a ban encompasses Section 7 activity, just like employers cannot impose a ban on all nonwork discussions in the physical workplace during nonwork time in nonwork areas if such a ban were to encompass Section 7 activity. Moreover, given the reality that most employees in digital and hybrid work environments only communicate with one another through their digital work platforms—as opposed to sharing breaks in a communal area in which they can discuss nonwork topics—it makes little sense to impose a nonwork-time or nonwork-area limitation on digital Section 7 activity.⁹⁸ When working and nonworking time are blurred in digital or hybrid work environments,⁹⁹ the Board needs to recognize that the delineation between “work” and “nonwork” is no more—there is simply the working day during which employees must be able to discuss Section 7 activity in the same way they discuss all other important tasks of the day—on their work communication platforms.¹⁰⁰ All of which is to say that employers have little justifiable reason to argue digital solicitations could in some way be more disruptive to the workplace than the in-person solicitations that are protected by Section 7.¹⁰¹

For these reasons, “there is no reason to assume that the electronic solicitation of employees necessarily causes more than a de minimus disruption of the workplace. In many respects, the sending of electronic solicitations to employees in the workplace resembles the distribution of

⁹⁵ Hirsch, *supra* note 24 (“Some employers have argued that unwanted electronic messages—primarily emails—are harmful because they use company resources, take time to filter, and detract from work. These hypothetical problems, however, are generally less significant than the already trivial risk of disruption and physical litter that accompany written distributions.”).

⁹⁶ *Id.*; see also Malin & Perrit, Jr., *supra* note 40, at 49 (explaining that in a case in which an employee was fired for sending a “flippant and grating e-mail message to all persons on the [employer e-mail] system criticizing an employer memo which announced a new vacation policy,” the administrative law judge held that the firing violated the NLRA in part because “the e-mail message could not have taken more than a few minutes to digest” and therefore caused “no material disruption of the employer’s operation”).

⁹⁷ Hirsch, *supra* note 24, at 294.

⁹⁸ See *id.* at 286–87 (“Employees may have limited personal interactions and communicate with each other primarily through electronic means, even at the same worksite. For these workers, a broad prohibition against nonwork time or nonwork area Internet use would severely infringe their right to communicate freely with one another about unionization.”).

⁹⁹ Malin & Perrit, Jr., *supra* note 40, at 52.

¹⁰⁰ See *id.*; see also Hirsch, *supra* note 24.

¹⁰¹ See, e.g., Malin & Perrit, Jr., *supra* note 40, at 49 (noting that in a case in which an employee was fired for sending a “flippant and grating e-mail message to all persons on the [employer e-mail] system criticizing an employer memo which announced a new vacation policy,” the administrative law judge held that the firing violated the NLRA in part because “the e-mail message could not have taken more than a few minutes to digest” and therefore caused “no material disruption of the employer’s operation”).

leaflets to employees as they enter the workplace.”¹⁰² Moreover, given that employer technology platforms are the “digital water cooler of the modern-day office,”¹⁰³ it is appropriate to view such platforms not so much as employer-provided tools but rather as virtual workspaces. Because these platforms function more like virtual workspaces than as mere tools to supplement physical workspaces, bans on digital solicitation “threaten to frustrate even initial explorations of unionization and other types of collective action.”¹⁰⁴ Just as *Republic Aviation* established that once employers invite employees onto employer property for work purposes they cannot then prohibit employees from soliciting for a union during nonworking time in nonworking areas, a similar standard should apply when employers allow employees to use electronic communication technologies. No good reason exists “to treat employee use of the computer system differently from the use of the employee parking lot, cafeteria, locker room, or entry hall for the same purpose.”¹⁰⁵

The COVID-19 pandemic has made clear that in many cases, in-person workplaces—particularly offices—will likely be hybrid going forward.¹⁰⁶ Employees in these environments may therefore have access to one another in person, but they will increasingly rely on digital communication technologies for routine workplace dialogue and collaboration.¹⁰⁷ Even when employees do work in person, conversation still routinely occurs on workplace technology platforms.¹⁰⁸ For these reasons, employers should not be allowed to enable such technology for all essential work tasks except for when employees wish to discuss a union.

As this section has shown, the disruption to the workplace caused by digital solicitation is minimal.¹⁰⁹ Further, employees are allowed to use employer-provided equipment—that is, hard hats—for Section 7 activity.¹¹⁰ Employer email is in many ways a piece of equipment as important for office work as a hard hat is for construction work, meaning employees should be allowed to display their union support in the digital work context similar to how they are allowed to display union support in the physical work context. Lastly, employers must let employees use part of the employer’s physical space for Section 7 activity.¹¹¹ Therefore, as employers incorporate the digital sphere into their operations to the point where the digital sphere is as important to workplace operations as is the physical one, employees should enjoy the same Section 7 rights in the digital space as they do in the physical one.

¹⁰² *Id.* at 53.

¹⁰³ Godfrey & Burke, *supra* note 8.

¹⁰⁴ Hirsch, *supra* note 24, at 285.

¹⁰⁵ Malin & Perrit, Jr., *supra* note 40, at 54.

¹⁰⁶ See Andrea Alexander, Rich Cracknell, Aaron De Smet, Meredith Langstaff, Mihir Mysore, & Dan Ravid, *What Executives Are Saying About the Future of Hybrid Work*, (May 17, 2021), MCKINSEY & CO., <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/what-executives-are-saying-about-the-future-of-hybrid-work> [https://perma.cc/3X7F-HFLQ].

¹⁰⁷ See *id.*

¹⁰⁸ See Cancialosi, *supra* note 5.

¹⁰⁹ See Malin & Perrit, Jr., *supra* note 40.

¹¹⁰ *N.L.R.B. v. Malta Const. Co* 806 F.2d 1009 (11th Cir. 1986).

¹¹¹ See *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803 (1945).

III. THE SOCIAL PROBLEM OF SECTION 7 DIGITAL ORGANIZING

Beyond the legal considerations of online Section 7 organizing, there are social dilemmas facing workers who decide to use employer platforms for unionization efforts in hybrid work environments.¹¹²

As we settle into a world in which working remotely is no longer viewed primarily as a response to the COVID-19 pandemic, but rather as a fact of the working world in the twenty-first century,¹¹³ important questions must be addressed. Chief among these questions is how to ensure this new virtual world of work is decent and humane in the same way the labor movement forced industrial work to become more humane in the early twentieth century.¹¹⁴ With the advent of work conducted in the metaverse, for example,¹¹⁵ for how much longer will employers be able to argue in good faith that such virtual platforms are mere tools to be used by employees as opposed to the substantive arena in which modern work is conducted? And when a new arena is erected, the question becomes: Who sets the rules for this new arena?

If left unchecked, those who establish new work arenas are also the ones to control them.¹¹⁶ The inhumane conditions of the early factories are a case in point. Excessively long workdays, no days off, and unsafe conditions were common.¹¹⁷ In addition, discrimination by race, gender, age, and other classes that are today protected was not illegal.¹¹⁸ The Labor, Women's, and Civil

¹¹² It should be noted that given the current make-up of the Board, it may soon return to a position closer to that of *Purple Communications*. See Allen Smith, *NLRB May Overturn Employer-Friendly Decisions During Biden Administration*, SHRM (Dec. 3, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nlr-may-overturn-employer-friendly-decisions.aspx> [https://perma.cc/2YRL-SCED]; see also Joseph Guming, *Employment Lawscene Alert: Biden Administration Will Promote a Significant Shift in Recent Federal Labor Law*, O'NEIL CANON HOLLMAN DEJONG & LAING (Feb. 25, 2021), <https://www.wilaw.com/tag/nlr/?print=pdf-page> [https://perma.cc/N2JV-GL5P]; see also W. Eric Baisden, Corey Clay, Rick Hepp, & Adam Primm, *Biden's Nomination of Abruzzo as General Counsel Signals Pro-Union Moves Ahead*, JD SUPRA (Feb. 22, 2021), <https://www.jdsupra.com/legalnews/biden-s-nomination-of-abruzzo-as-7335728/> [https://perma.cc/B4SF-Q8TG];

[S]hould Abruzzo be confirmed, it is likely that she will pursue pro-union investigations and use novel legal theories to try to overturn several Board decisions, including Caesar's Entertainment, which held that an employer may prohibit employees from using its information technology systems, such as e-mail, to solicit support for a union.

See also *Potential Changes Under The Biden NLRB Impacting Retailers*, HUNTON ANDREWS KURTH, <https://www.huntonak.com/images/content/7/7/v2/77025/potential-changes-under-the-biden-nlr-impacting-retailers.pdf>.

¹¹³ See generally Christian, *supra* note 32.

¹¹⁴ See GREENHOUSE, *supra* note 34, at xii:

Unions also played a crucial role in achieving many things that most Americans now take for granted: the eight-hour workday, employer-backed health coverage, paid vacations, paid sick days, safe workplaces. Indeed, unions were the major force in ending sweatshops, making coal mines safer, and eliminating many of the worst, most dangerous working conditions in the United States.

¹¹⁵ Kate Beioley, *Metaverse vs employment law: the reality of the virtual workplace*, FIN. TIMES (Feb. 20, 2022), <https://www.ft.com/content/9463ed05-c847-425d-9051-482bd3a1e4b1>.

¹¹⁶ See generally Shoshana Zuboff, *The Age of Surveillance Capitalism* (2019) (arguing that if people do not attempt to write the rules for the "digital future," then this future will be written for them by the major technology corporations that build the crucial platforms for this future).

¹¹⁷ GREENHOUSE, *supra* note 34, at xii.

¹¹⁸ RAYMOND F. GREGORY, *THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION: A FIFTY YEAR HISTORY* 11–12 (2014):

Rights Movements all contributed to the establishment of safer, more equal, and more humane work environments.¹¹⁹ Such progress resulted from people banding together to wrest some control from those in power,¹²⁰ resulting in a better world for all workers.¹²¹

The Act was established, at least in part, because the federal government recognized a workplace is better when workers share some workplace power.¹²² But, if the workplace is better when workers can organize to collectively bargain with their employers, how do workers best communicate with one another? Workers may, of course, choose to communicate in secret. They can communicate outside of work, in person at one another's homes, via phone, or via text. In the digital arena, it is likely to be even more tempting for employees to communicate across personal devices or nonwork digital platforms to avoid scrutiny from management who likely has access to employees' communications across employer-owned platforms.¹²³ But the Act allows for workers to communicate *at work*.¹²⁴

When the Act was passed, the physical workplace was the only realistic place in which workers could effectively communicate with one another for Section 7 purposes.¹²⁵ And given the many personal communication channels

At the outset of the twentieth century . . . monthly employment statistics showed significantly higher unemployment among African Americans than whites, manifesting widespread discrimination in hiring and firing. . . . The Supreme Court's attitude toward women persisted well beyond the nineteenth century. As late as 1948, the court upheld a Michigan statute barring a woman from employment as a bartender, unless the male owner of the bar in which the woman intended to work was either her father or her husband. . . . Age bias was generally not addressed in the American workplace prior to 1967, as the population at large failed to recognize that ageism was outdated and irreconcilable with civilized society and American cultural values. Consequently, discrimination against older workers was unaddressed and remained rampant.

¹¹⁹ *Id.* at 14; GREENHOUSE, *supra* note 34, at xii.

¹²⁰ GREENHOUSE, *supra* note 34, at xii.

¹²¹ *Id.* ("Labor unions, and their ability to create a powerful collective voice for workers, played a huge role in building the world's largest, richest middle class.")

¹²² See *About NLRB*, N.L.R.B., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law#:~:text=Congress%20enacted%20the%20National%20Labor,businesses%20and%20the%20U.S.%20economy> [<https://perma.cc/9476-CYS7>] ("Congress created the [NLRA] in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."); see also MATTHEW W. FINKIN & TIMOTHY P. GLYNN, COX, BOK & GORMAN'S LABOR LAW CASES AND MATERIALS 44 (2021) ("The Wagner Act of 1935 established on a permanent foundation the legally protected right of employees to organize and bargain collectively through representatives of their own choosing."); see also GREENHOUSE, *supra* note 34, at 325 ("When the National Labor Relations Act was enacted in 1935, its chief sponsor, Senator Robert F. Wagner, a Democrat from New York, saw it as a vehicle to give millions of workers more bargaining power vis-à-vis their employers. That act gave workers a federally guaranteed right to unionize"); GREENHOUSE, *supra* note 34, at 75–76:

After the conservative Supreme Court overturned key parts of the National Industrial Recovery Act as unconstitutional, [Senator] Wagner inserted a pro-union provision nearly identical to Section 7A into the heart of the National Labor Relations Act (NLRA) of 1935. That provision became pivotal to organized labor's future growth and its hunger for a voice in the nation's workplaces. "We must have democracy in industry as well as in government," Wagner said. "Democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that the workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing."

¹²³ See, e.g., 18 U.S.C. § 2511 (noting that an employer may intercept an employee's digital communications across an employer's platform so long as the employer is doing so as part of the "normal course" of business).

¹²⁴ See 29 U.S.C. § 157; see also *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803 (1945).

¹²⁵ See *NLRB v. Magnavox Co.*, 415 U.S. 322, 323–24 (1974):

average workers have at their fingertips today,¹²⁶ it is understandable that workers would prefer to communicate across nonwork platforms, particularly when they do not want management to see their private communications.¹²⁷

But there is value in conducting at least some Section 7-protected communication across employer platforms. Despite the many conveniences of remote work, workers can lose solidarity with one another when they do not share physical space.¹²⁸ Communicating with fellow employees across the same digital platforms used in the workplace for day-to-day tasks can have a similar effect as the communications that occur in the physical workplace. Though not a replacement for the communal bonds forged through in-person connections, communications received through one's work email, for example, can remind employees that the sender of the message works for the same employer for whom they also work. Given that online communities of workers can be difficult to cultivate because "they lack genuine trust and commitment, which are difficult to generate online,"¹²⁹ using official workplace communication platforms can show employees that the message is about something they all have in common—workplace issues that need to be addressed.

The workplace email is also where employees receive official missives and directives from colleagues and superiors. It is inherently tinged with more authority than nonwork communication platforms. By being willing to, say, express support for a union across this platform, workers can claim some of this authority for themselves, thereby imbuing their message with a weight of courage and seriousness of purpose it might not otherwise have. Because courage is often contagious,¹³⁰ fellow employees can in turn be inspired to express their views themselves as a result of witnessing one or several pro-union employees demonstrate such courage on the employer platform.

Moreover, unionization efforts involve public campaigning in which the union, pro-union employees, and management communicate their positions

[Employees'] place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.

See also Hirsch, *supra* note 24, at 263:

The NLRA is more than seventy years old and its enforcement by the [NLRB] has for decades been mired in the past. . . . The ability to communicate electronically has transformed employees' relationships with one another and their employers. As others have noted, however, enforcement of the NLRA has yet to adapt to these advances.

¹²⁶ See *Caesars Ent.*, 368 N.L.R.B. No. 143, *9 (2019).

¹²⁷ See 18 U.S.C. § 2511.

¹²⁸ Katsabian, *supra* note 37, at 933:

Scholars describe the essential basics of the traditional trade union and its need to be built on familiarity, solidarity, and trust among the workers. These are usually developed in informal, face-to-face daily communications, such as the office's break room or any other shared space in which workers can meet regularly.

¹²⁹ *Id.* at 937.

¹³⁰ Brené Brown, *Developing Brave Leaders and Courageous Cultures*, BRENÉ BROWN: DARE TO LEAD HUB, <https://brenebrown.com/hubs/dare-to-lead/> [<https://perma.cc/L2Y4-CBYL>] (last visited Sept. 2, 2022).

to workers as to why they should or should not vote to unionize.¹³¹ Given this reality, employers must provide employees with the opportunity to broadcast at least some of their Section 7 messages on employer communication platforms. Doing so sends the message to fellow workers that pro-union employees are not afraid to advocate for their position. In an in-person equivalent, choosing to speak one's message in the workplace entrance sends a very different message than does expressing one's message from a discreet location. Similarly, communicating one's message across one's work platform conveys a seriousness of purpose and courage that is more difficult to convey when communicating in secret. Further, communicating in the open of a digital workspace, just like a construction worker wearing a pro-union sticker on an employer-owned hard hat, shows employers that employees have some agency in how they comport themselves in the workspace.¹³² When employees show they are willing to advocate for some control of the workplace environment, employers are more likely to take seriously employees' grievances and demands. Of course, employers' reactions to seeing such pro-union activity from employees often have to do with what they can do to sway employees away from a union.¹³³ But instead of reacting negatively to pro-union activity in the workplace, employers should recognize that promoting open discourse in ideas¹³⁴ is also in the best interest of employers. By learning of employees' grievances, employers can address them.¹³⁵ If employers address such grievances, employees are more likely to feel heard and respected by their employers.¹³⁶ By empowering employees to publicly express their grievances with the workplace, employees are in turn more likely to feel favorably toward the employer for allowing them a voice in the workplace; if employers can empower employee voices in this way, employees may be less likely to feel the need for a union to give them a voice in the workplace.¹³⁷ For these reasons, it is

¹³¹ William E. Fulmer, *Step by Step Through a Union Campaign*, HARV. BUS. REV. (July 1981), <https://hbr.org/1981/07/step-by-step-through-a-union-campaign> [<https://perma.cc/SH97-ZMYT>] (explaining that after the stage in which employees have been solicited to sign authorization cards, management typically "wakes up to what is going on [with regards to unionization activity in the workplace]. At this point, the union campaign usually goes public with an exchange of leaflets, handbills, and letters.").

¹³² See, e.g., *N.L.R.B. v. Malta Const. Co.*, 806 F.2d 1009 (11th Cir. 1986).

¹³³ Cf. GREENHOUSE, *supra* note 34, at 359 (explaining that employers face "extraordinarily weak penalties" for breaking the law when battling unions):

[The] main penalty that employers often face for such lawbreaking is having to post a notice on the bulletin board admitting they broke the law and promising not to do it again. Researchers have found that nearly 20 percent of rank-and-file union activists are fired during organizing drives. It's almost foolhardy for antiunion companies not to fire the two or three workers heading an organizing drive. Such firings often cripple the campaign, while the NLRB might order the lawbreaking company to pay \$5,000 or \$10,000 in back wages two or three years later, long after the union drive has fizzled. For a major company, that's not even a slap on the wrist.

¹³⁴ See Malin & Perrit, Jr., *supra* note 40, at 57–58.

¹³⁵ See Miksen, *supra* note 25.

¹³⁶ Jan Simon, *What Can Managers Do to Establish Relationships?*, CHRON, <https://smallbusiness.chron.com/tips-prevent-attrition-organization-23517.html> [<https://perma.cc/XS53-PEYR>] (discussing how treating employees with respect helps build trust in the workplace).

¹³⁷ *Reasons Employees Give for Joining a Union*, FISHER PHILLIPS (Nov. 1, 2009), <https://www.fisherphillips.com/news-insights/reasons-employees-give-for-joining-a-union.html> [<https://perma.cc/T4AB-A4WJ>]:

When [management] overlook[s] employee complaints, and especially claims of discrimination and payroll concerns, or fail to resolve them quickly and efficiently, resentment grows. . . . Unions know this. Indeed, one of the key promises made in every union campaign is to provide employees a "stronger voice on the job." To the underappreciated employee, this can be an attractive selling point. [Employers] need an effective complaint-handling system—one

in the interests of both employers and employees to embrace free and open Section 7 activity on employer communication platforms.

But how do employers promote a culture in which workers feel safe to share views they have good reason to believe will be disliked by management? A culture of social courage helps to achieve such a workplace dynamic. Workplaces should embrace a culture in which dissent within the workforce is permitted, and even encouraged, for the benefit of all interested parties.

IV. SOCIAL COURAGE IN THE WORKPLACE

A. COURAGEOUSLY DISSENTING THROUGH DISCOURSE

The courage to speak one's mind in a social setting begins with understanding the ideas to which one feels a strongest connection. To do so, one must be able to think for oneself to determine what is true. To enable people to think for themselves, and ultimately adopt the best ideas for a social space—that is, the workplace—people need access to all ideas, popular and unpopular—a free flow of ideas.¹³⁸

For unpopular opinions to emerge in a social space, people must be willing to offer such opinions. As Alexander Meiklejohn explains, competing views need to be heard so those in a social space can make the best decisions.¹³⁹ Although Meiklejohn specifically comments on democratic spaces, his theory of how to discover the best ideas applies to spaces that are not traditionally democratic—such as workplaces—because it allows workplaces to find the best ideas by which to govern themselves. Granted, mere exposure to diverse ideas alone does not give people the necessary courage to speak their minds in social spaces. But if a space—that is, a workplace—establishes a culture in which speaking candidly in group settings is the norm, done in a civil and respectful way, then an open discourse in ideas can be an important prerequisite for employees who may be undecided on a matter to best learn where they stand on an issue, such as whether to support a union.¹⁴⁰ In turn, by learning where they stand, undecided employees can express the views they develop through this process, thereby contributing to the growing group consensus and allowing for the best views to emerge in this meritocratic way.¹⁴¹

To better illustrate how undecided individuals can learn where they stand on an issue, and thereby gain the necessary courage to express views that may be unpopular, consider the following hypothetical. Imagine a workplace

that gives [employers] employee feedback on a regular basis. Periodic group meetings and mini surveys are good places to start. That way, if a union starts promising your employees a “voice” in the workplace, they’ll understand that they already have opportunities to be heard, and they’ll more likely conclude that they don’t need to pay a union representative for that privilege.

¹³⁸ See John Stuart Mill, *On Liberty*, 86–87 (Floating Press 2017) (1859).

¹³⁹ See Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 27 (1960).

¹⁴⁰ See *id.*, at 24–28 (explaining that for there to be a norm of rational discourse in the first place, there must be a structure in place to begin with so people the space is designed to facilitate rational discourse in which the best arguments will prevail; as Meiklejohn describes, a “chairman or moderator” needs to facilitate such a meeting to ensure that “certain rules of order be observed.”); see also Dalio, *supra* note 26.

¹⁴¹ See Meiklejohn, *supra* note 139, at 24–28.

where people use certain language an employee finds offensive. In such an environment, if the employee does not express an opinion on use of this language to others in the workplace the employee might think this feeling is trivial, or not shared by others, and might believe it useless to try to change this work environment. But if the workplace committed itself to a marketplace approach to exchanging ideas, say, in the form of a staff meeting in which staff air grievances, then the employee could learn that others feel similarly about the language. The employee could also hear from those who do not believe the language is offensive. Through hearing both sides of the issue, the employee could acquire a fully developed opinion as to why the language is offensive.

This process of developing one's opinion, particularly when it differs from that of the majority, can instill a willingness to express this opinion to others in one's social space. For example, if an employee decides to speak up to explain why the use of offensive language should stop, the employee will be better equipped to express this opinion because they will have been exposed to different strains of thought on the matter and the employee will have decided why the language is problematic after hearing different views. When different strains of thought exist on a matter, the "truth" is often found in the middle of these diverse strains, which is why different sets of ideas are needed to find what is true.¹⁴² Of course, many people will naturally be averse to having their views critiqued by others and may in fact become defensive if they believe their views are being attacked. But if individuals in a workplace setting can become acculturated to an environment in which the norm is to constantly critique one another's ideas so the group can reach the best versions of those ideas, they will come to see such critiques not as attacks but rather as stepping stones toward the best versions of ideas.¹⁴³ An employee who discovers truth through this process will be more committed to the opinion and will be better able to express the opinion as an extension of core values. In short, a free flow of ideas is an important precondition to enable one to courageously speak one's mind in social spaces such as workplaces.

This free flow of ideas allows people to "think rationally"¹⁴⁴ so they can find the idea they feel strongest about that they will then feel most comfortable expressing to others. While a free flow of ideas does not by itself give people the courage to speak up, it is an important precondition for doing so—it lets people learn ideas they might not otherwise have heard and allows them to sharpen their ideas by subjecting them to critique. In this way, people can become more ready to share their views in public. Like an artist going through multiple drafts of a manuscript before putting out a final version, or a seminar student hearing multiple views on a topic to clarify her own thoughts before speaking, partaking in a marketplace of ideas gives one a better version of what one wants to say. One can then share this thought with the group and, in turn, enable others to build on the thought to develop it into the best version it can be to aid the community.

¹⁴² MILL, *supra* note 138, at 112.

¹⁴³ Dalio, *supra* note 26.

¹⁴⁴ See FREDERICK F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 25–27 (1982).

To be sure, exposure to multiple competing views could have the effect of making people less likely to know where they stand on an issue and thus less likely to share their views in public. But if the culture of a workplace has been established as one that values the views of as many members of the workplace as possible,¹⁴⁵ workers can realize they should contribute to the group dialogue because they will be enhancing and sharpening the quality of the dialogue by contributing. As workers become accustomed to the notion of sharing views for the betterment of the workplace, they may feel more emboldened to share their thoughts even if they are still working out for themselves where exactly they stand on an issue.

Once one reasonably comes to know an idea, one must be able to broadcast the idea to give it a chance of gaining acceptance in the marketplace. Broadcasting ideas is often a difficult task, especially if the idea is disliked by the majority. But the social courage to share unpopular opinions grows with the commitment one develops for an idea upon exposure to competing ideas. Like Plato's freed prisoner, one becomes more willing to stand up for a belief grounded in personal observation and experience and tested in the marketplace of ideas.¹⁴⁶ And, if all individuals in a community put forward the best possible ideas—ideas to which all community members helped to contribute—and the community adopts them, community members will be more likely to believe the governing laws are just and should be followed by all who have a stake in the community. Although this theoretical ideal will naturally manifest differently in a real workplace, a culture that allows workers to comfortably discuss with one another and with management grievances they have and ideas for how to address such grievances will likely result in workers feeling the rules and policies of the workplace are more just because they will know they contributed to the formulation of such rules and policies.¹⁴⁷

The social courage to express dissenting ideas emerges from strong faith in an idea. To develop such faith, people must engage with a wide variety of ideas. In a social space based on rational discourse, they can gravitate toward the ideas with which they agree and sharpen their ideas against opposing ideas. Further, if one is convinced an idea with which one initially disagreed is in fact preferable, one can adopt that idea instead. If one can come to believe an idea in this way, one can achieve the necessary social courage to voice one's opinion even when it is unpopular.¹⁴⁸

¹⁴⁵ See Dalio, *supra* note 26.

¹⁴⁶ See generally PLATO, THE ALLEGORY OF THE CAVE (Thomas Sheehan trans.) (c. 375 B.C.).

¹⁴⁷ See FISHER PHILLIPS, *supra* note 137 (explaining that the “number one reason” employees give for joining a union is when “employer[s] take[] inconsistent disciplinary action The solution here is a simple one: establish clear policies and regulations and follow them.”). As this Note argues, employees should be at the table when determining what these “clear policies and regulations” will be as such employee involvement will make for a more content workforce that feels more favorably toward the workplace overall.

¹⁴⁸ Though some people with strong opinions may be unaware of the counterarguments to those opinions, it is unlikely one would be willing to continue to hold such an opinion after exposure to counterarguments. After all, if the space is set up for differing sides to put forward their best arguments and evidence, one will have difficulty being productive in this space by publicly proclaiming one's allegiance to an idea that does not hold up against stronger counterarguments.

B. APPLYING COURAGEOUS DISCOURSE TO SECTION 7 DIGITAL SPEECH

A workplace culture is enhanced through a free flow of ideas that allows the best ones to emerge to affect how the workplace is run. As Ray Dalio, founder of the world's largest hedge fund, Bridgewater Associates, has explained, a culture of "radical transparency" in the workplace has been key to his company's success.¹⁴⁹ According to Dalio, his success stems largely from implementing a workplace culture in which the leadership can "stress test" their perspectives by receiving constant feedback from all members of the workplace regardless of status or position.¹⁵⁰ Dalio refers to this workplace dynamic as an "idea meritocracy in which the best ideas . . . win out."¹⁵¹ Many companies today incorporate this kind of transparency into their operations.¹⁵² By considering its employees' opinions, an employer has a wider pool of ideas to pull from when making decisions, empowers employee voices so they view the employer more favorably,¹⁵³ and builds the company's brand as a more humane place where people want to work, a boon for its image.¹⁵⁴

In a similar fashion, a digital or hybrid workplace benefits when employees share views on unionization across employer platforms as such sharing "can result in full competition in the marketplace of ideas between unions and employers for the support of the workforce."¹⁵⁵ When employer and pro-union employee speech is in the same virtual space, such as an employee's inbox, an employee who may have no opinion on unions sees competing messages. The employee can read and assess the arguments from both sides and decide. Because the employee is making a decision based on the content of the messages, the employee's decision reflects a democratic exchange of ideas based on arguments presented from competing sides.¹⁵⁶ In-person solicitation, on the other hand, must obey time-and-place restrictions.¹⁵⁷ Both employers and pro-union employees are restricted in how and when they can reach out to employees.¹⁵⁸ Distributing views from both sides electronically avoids these obstacles to a full exchange of ideas about unionization.¹⁵⁹ Granted, in-person solicitation has natural advantages because solicitors can convey more emotion and build more of a personal,

¹⁴⁹ Dalio, *supra* note 26.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See *The 100 Most Transparent Companies of 2020*, THE ORG (Dec. 21, 2020), <https://theorg.com/insights/the-100-most-transparent-companies-of-2020> [https://perma.cc/VZH5-Y6EY].

¹⁵³ See FISHER PHILLIPS, *supra* note 137.

¹⁵⁴ See, e.g., Keith Burton, *Listen Up: Why Employees Are Your Key*, THE PUB. RELS. STRATEGIST (2012), http://www.halklailiskiler.com/pdf/Strategist-Winter-2011-p14_1337258941.pdf (explaining that today's employees want "[a]uthenticity—which calls for demonstrating integrity, telling employees the truth even if the news is bad, being consistent in what is said and done and acting in an honest, trustworthy way"); see also Michelle Carvill, Gemma Butler & Geraint Evans, *How Ben & Jerry's Instilled a People-First Culture*, MINUTEHACK (Jan. 28, 2021), <https://minutehack.com/opinions/how-ben-jerrys-instilled-a-people-first-culture> [https://perma.cc/9RKS-YK8T] (explaining that part of Ben & Jerry's strong corporate culture stems from allowing outsiders to audit its operations and from "various initiatives focused on treating their employees well—including events hosted by its 'Joy Gang' . . . , a team responsible for supporting its employee-first culture").

¹⁵⁵ Malin & Perrit, Jr., *supra* note 40, at 57–58.

¹⁵⁶ See MEIKLEJOHN, *supra* note 139.

¹⁵⁷ See Malin & Perrit, Jr., *supra* note 40.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

sympathetic connection with fellow employees. For this reason, digital solicitation should not fully replace in-person solicitation in hybrid work environments but should rather supplement it to recognize the reality that many workers may spend roughly equal amounts of time working remotely at home versus being at the physical workplace.¹⁶⁰

When employees see this marketplace-of-ideas approach to Section 7 activity playing out in their inboxes, they can adopt the view with which they most identify and thereby feel empowered to voice their own opinions on the union, which they may have otherwise been unwilling to do. To be willing to participate in such digital discourse one knows will likely be seen by, and disliked by, management requires social courage. But assuming commenters on, say, an email thread abide by norms of civility and respect, the result would be a forum in which both sides could make their arguments about the union, employees would hear both sides, and employees who previously might not have spoken up could feel emboldened to share their opinions. In such a town-hall style digital forum, more voices would likely speak and be heard, the workplace marketplace of ideas would be enriched, and employees would be in a better position to decide for themselves how they feel about a union as they would be seeing both sides disagreeing in a civil manner in the convenient location of the workplace electronic inbox.

Moreover, because at least a portion of a union-organizing campaign will likely occur in public,¹⁶¹ pro-union employees should conduct some of their solicitation on employer platforms to show solidarity with fellow employees. But because employees in digital or hybrid work settings may lack the solidarity gained in more traditional in-person settings,¹⁶² employees in such environments should be sure to also take advantage of opportunities to gather in person to form the type of community required for effective unionizing efforts.¹⁶³ While employees may understandably wish to maintain secrecy from management in the early days of their unionizing efforts, at a certain point pro-union employees need to reckon with the reality that management will learn that pro-union sentiment is brewing in the workplace, even if employees use non-work digital platforms for early organizing efforts.¹⁶⁴ Once pro-union employees decide to publicly broadcast their message on an employer platform, other employees who may have had no prior thoughts on a union can have the opportunity to be inspired by the courage of their pro-union counterparts. Additionally, a marketplace of ideas can begin to play

¹⁶⁰ See *Recreating Work as a Blend of Virtual and Physical Experiences*, *supra* note 12.

¹⁶¹ See Fulmer, *supra* note 131.

¹⁶² See Katsabian, *supra* note 37.

¹⁶³ *Id.* at 933–34 (explaining that although digital work “has challenged the traditional connection between workers, it has at the same time enabled new online forms of communication, such as the workplace’s official platforms or general social media sites. These alternatives could, it would seem, be the basis for an employees’ community and enable employees’ organization. However, there are many difficulties with this concept.” For example, “[e]mployees do not have a right to use their workplace’s official sites, which are the employers’ property, for purposes of unionization.”).

¹⁶⁴ *Id.*:

[W]hether employees wish to use [employer-owned] official sites is questionable, taking into consideration the fact that they are usually controlled by and accessible to the supervisory eye of the employer. As for general sites, such as Facebook or WhatsApp groups, they can be easily accessible to the employer, even if in a lesser degree, since they are usually open to numerous people who can forward information to employers.

out as both sides share their views on the pros and cons of unionization and these undecided employees can decide for themselves where they stand on a union. This being so, using an employer-owned digital platform can help to demonstrate solidarity among employees, particularly for the pro-union employees who wish to sway their colleagues to support the union. Additionally, by seeing pro-union employees demonstrate courage by expressing union support even when management can see, other employees might feel similarly emboldened to also express their opinions upon seeing such a show of courage.

Although total reliance on digital platforms for such community building is likely to be ineffective given the difficulties of building community in purely digital arenas,¹⁶⁵ partial reliance on employer digital platforms can remind one's fellow workers that the message one is sending has to do with work. A pro-union leaflet handed to an employee by a fellow employee in the breakroom of an in-person workplace shows that the leaflet has to do with work and the bonds the employees share as fellow workers. An email in one's inbox from a fellow worker can have a similar effect of establishing that initial bond of trust that is often necessary for one's fellow employee to read the message in the first place.

In the 1979 film *Norma Rae*, based on the true story of union organizer Crystal Lee Sutton,¹⁶⁶ the protagonist, Norma Rae, is attempting to unionize the cotton mill where she works.¹⁶⁷ Before the police can escort her from the workplace for causing a disturbance, she stands on a table in the middle of the factory.¹⁶⁸ She hoists above her head a sign with the word "union" printed in all capital letters for the whole workplace to see.¹⁶⁹ Her fellow workers quickly take notice of her action.¹⁷⁰ One by one, inspired by her act of courage, they stop their mill machines, bringing the entire factory floor to a standstill.¹⁷¹

This scene shows the galvanizing effect that voicing support for a union in one's actual workplace can have on one's fellow workers. Such an act of courage taken in the physical workplace itself demonstrates to all who are watching one's dedication and resolve toward achieving a union. As evinced by the film's display of workers joining Norma Rae in her cause in that moment, such a courageous act can give others the courage they need to take similar action. In the digital sphere, the equivalent is speaking support for a union on an employer platform where all can see, both employees and management. By taking such action on the employer platform itself, employees can be inspired by the courageous employee's resolve and can feel emboldened to take similar action themselves.

¹⁶⁵ *Id.* at 937–38 (noting that scholars have found that entirely "online communities are at risk of failure, particularly when the economic or political risks are high, since they lack genuine trust and commitment, which are difficult to generate online. This is perhaps why many offline activities of platform-based workers, such as strikes or demonstrations, which demand more involvement than simply signing an online petition, ultimately attract only small numbers of participants.").

¹⁶⁶ Dennis Hevesi, *Crystal Lee Sutton, the Real-Life 'Norma Rae,' Is Dead at 68*, N.Y. TIMES (Sept. 15, 2009), <https://www.nytimes.com/2009/09/15/us/15sutton.html> [https://perma.cc/REN7-GYGR].

¹⁶⁷ NORMA RAE (20th Century Studios 1979).

¹⁶⁸ *Norma Rae*, Martin Ritt, 1979—*Union Sign Scene*, YOUTUBE (Oct. 3, 2017), <https://www.youtube.com/watch?v=X8ulYIVcCeY&t=44s> [https://perma.cc/CZC3-5LL4].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

C. DEMONSTRATING THE NLRA'S CONTINUED RELEVANCE AND THE
BENEFIT OF OPEN DISCOURSE TO EMPLOYERS

Numerous examples exist already of employees using non-employer technology for unionizing, with the COVID-19 pandemic dramatically increasing the amount of virtual organizing.¹⁷² But despite these examples,¹⁷³ if nonwork digital organizing becomes the norm, and if that leads employees to organize outside of Board-run elections altogether, this trend could hasten the irrelevance of the Act, thereby eroding the protections it offers employees in the private sector.¹⁷⁴ For example, if employees in digital or hybrid work environments organize through nonwork communication channels, they are less likely to feel the necessary solidarity required to show up to a physical location to vote in a Board-run election.¹⁷⁵ Further, increased reliance on nonwork channels of communication could incentivize employees to opt for a non-NLRA unionization process altogether that does not require them to commute to a physical location to cast a ballot, given they may feel little connection to such a place.¹⁷⁶ If Board-run elections disappear, and employees are not organizing at the workplace, the Act could become viewed as unnecessary to be maintained for modern workers.¹⁷⁷ It is true that the Board must update its policies to come in line with the realities of modern

¹⁷² See Acacia Gabriel, *Virtual Labor Organizing: The Ultimate Guide for 2021*, MOBILIZE BLOG (Apr. 21, 2021), <https://join.mobilize.us/blog/virtual-labor-organizing-the-ultimate-guide>; see also Rosenberg, *supra* note 21.

¹⁷³ Hirsch, *supra* note 24, at 275–76:

One example of Internet-based organizing involves an attempt by the Service Employees International Union (“SEIU”) to convince Argenbright Security to voluntarily recognize the union as the representative of a unit of employees at the Los Angeles International Airport. . . . [T]he SEIU purchased banner advertisements on the website Yahoo! that targeted customers of Argenbright’s parent company and another of the parent’s subsidiaries; the Internet ads directed readers to a website that described the labor dispute. The SEIU’s efforts were ultimately successful. . . . Another example of the Internet’s importance to union organizing is the Association of Pizza Delivery Drivers (“APDD”), which formed out of an Internet chat room discussion and conducted all of its business meetings over the Internet. . . . [T]he ability to create and run a union through the Internet demonstrates its value as a low-cost, yet effective, organizing tool.

¹⁷⁴ *Id.* at 271 (“Elimination of the NLRA would clearly hurt employees. Without the NLRA, employers would be free to retaliate against virtually any type of employee collective action . . . the NLRA’s protections, although far from ideal, still provide unions some benefit.”); see also *About NLRB*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/resources/faq/nlr> (explaining that the Board “has regional offices across the country where employees, employers and unions can file charges alleging illegal behavior, or file petitions seeking an election regarding union representation”). Absent the procedures and the protections offered by both the Act and the Board, it is conceivable that it would become more difficult for employees to hold union-certification elections and for employees to hold employers accountable for committing unfair labor practices.

¹⁷⁵ See Katsabian, *supra* note 37, at 949:

Part of the formal unionization process . . . includes a ballot in which the union must achieve a certain percentage of supporting votes. The ballot requirement is one of the most challenging stages in the establishment of any union. This is particularly true of unionization by full telework or platform-based workers. Since these workers are inherently distanced from one another and particularly from a concrete workplace, it is less reasonable to think that they will travel to a remote physical place just to vote. Logically, it is more difficult for such a union to gain the necessary support in the ballot. In other words, the fact that the workers do not have a distinct physical workplace and tend to feel less obligated to one another may deter them from making the effort to vote at a remote voting spot at a specific time.

¹⁷⁶ *Id.*

¹⁷⁷ See Hirsch, *supra* note 24.

work. But employees must recognize that while unions may wish to “avoid the NLRA representation process, which they often perceive to be unhelpful, if not detrimental, to their organizing activity,”¹⁷⁸ staying within the parameters of NLRA-protected activity demonstrates the continued relevance of the Act, which offers protections employees do not want to lose.¹⁷⁹

For their part, employers should recognize that permitting such activity on their platforms is to their benefit. Not only does witnessing such activity give employers the chance to address employee grievances and create an environment where employees may no longer feel the need for a union to give them a voice in the workplace, it also allows employers to gain good ideas they can implement in the workplace. By allowing this process to exist, an employer will have in place a system by which employees know their opinions are heard and considered by management. In this way, employees will feel more content and less of a need to disrupt the workplace environment. The workplace environment itself will be good enough—it will be a place that takes seriously and permits the sharing of all ideas, allowing for the best ones to emerge and contribute to the functioning of the workplace.

V. CONCLUSION

As work continues to be digital, the Board must recognize that the spirit of the Act calls for allowing workers to discuss unionization on employer platforms because such platforms are far closer to the workplace itself than to mere work tools. Employers must recognize that the workplace benefits when employees are willing to share dissenting views in the open. As Dalio notes, “In order to be successful, we have to have independent thinkers—so independent that they’ll bet against the consensus. You have to put your honest thoughts on the table.”¹⁸⁰ In this way, employees not only become a fountain of ideas from which employers can pull to improve the workplace, but they can feel more content and devoted to the workplace, and may thus feel less need for a union to speak for them in the workplace.¹⁸¹

Finally, employees must be willing to share their views on unionization even when management is watching. Doing so demonstrates courage to fellow employees, who in turn can decide for themselves where they stand on the union. Undecided employees can then voice their opinions on the

¹⁷⁸ *Id.* at 276.

¹⁷⁹ *See id.* at 271.

¹⁸⁰ Gene Hammett, *3 Steps Ray Dalio Uses Radical Transparency to Build a Billion-Dollar Company*, INC. (May 23, 2018), <https://www.inc.com/gene-hammett/3-steps-ray-dalio-uses-radical-transparency-to-build-a-billion-dollar-company.html> [<https://perma.cc/U8MK-TDX6>].

¹⁸¹ *See White House Labor Task Force Issues Report on “Worker Organizing and Empowerment”*: *What Employers Should Know and Do*, FISHER PHILLIPS (Mar. 15, 2022), <https://www.fisherphillips.com/news-insights/white-house-labor-task-force-issues-report-on-worker-organizing-and-empowerment-what-employers-should-know-and-do.html> [<https://perma.cc/E2WE-QASC>]:

[T]he main priority [for employers] should always be making sure that current and future employees have effective methods and processes for communicating issues and concerns and providing input on operations. Employees who have regular and effective methods for communications and providing input certainly do not feel the need to pay a third party for representation.

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union accordingly, thereby contributing to the workplace marketplace of ideas. But doing so also shows the continued need for the Act itself and its corresponding protections for workers. The Act continues to be necessary because workers are still organizing, regardless of whether it be at a physical, virtual, or hybrid workplace. In this way, workers can do their part to push the Act fully into the twenty-first century. Whether the Act is protecting workers' Section 7 rights in the physical workplace or the virtual one, it must continue to protect workers who want to express that most basic of desires—to be heard, to be taken seriously, and to know that they are vital contributors to the workplace who have something important to say.