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DIGITAL DISSENT: EXAMINING THE LEGAL IMPLICATIONS OF CYBERPICKETS

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I. Introduction

In an era characterized by the pervasive influence of digital technology and the rapid evolution of online social activism, traditional labor disputes and picketing face a period of transformation. This transformation is exemplified by the emergence of cyberpicketing[1], a form of digital protest that leverages the power of the internet to amplify the voices of workers and unions. Methods can include, inter alia, the use of social media campaigns, online petitions, anonymous blogging, whistleblowing, virtual demonstrations, email initiatives, digital boycotts, and participation in online forums[2]. The legal community needs to interpret and adapt traditional labor laws to address the issues raised by cyberpicketing.

Whether cyberpickets will constitute a legitimate and long-term form of labor activism[3] in the digital age depends on the establishment of formal regulations on their use and limitations. This note will analyze relevant National Labor Relations Board ("NLRB") regulations and case law, labor union activity, legislative developments, and scholarly discourse. [4]By focusing on the legal challenges posed by cyberpicketing, this note seeks to offer insights into potential avenues for regulatory reform and judicial interpretation. The aim is to balance both the right to labor

[1] A cyberpicket refers to a digital form of protest or collective action initiated by employees toward their employer, aimed at expressing concerns, promoting better workplace conditions, and addressing labor-related issues. *See Cyberpicketing to Data Aggregation (Technology Terms)*, WHAT-WHEN-HOW, https://what-when-how.com/technology-terms/cyberpicketing-to-data-aggregation-technology-terms/ (Mar. 9, 2013).
[2] *Id*.
[3] Long-term forms of labor activism refer to sustained, organized efforts by workers and labor groups to advocate for improved working conditions, wages, and labor rights over extended periods. These efforts often include unionization, collective bargaining, strategic litigation, policy advocacy, and public campaigns aimed at systemic change. *See generally* Ruth Milkman*, L.A. Story: Immigrant Workers and the Future of the U.S. Labor Movement* 2–3 (Russell Sage Found. 2006).
[4] The NLRB, established in 1935, operates as an autonomous federal entity tasked with protecting employees' rights. These rights include the ability to organize, collaborate for improved working conditions, decide on representation for collective bargaining negotiations with employers, or opt out of such activities. The NLRB administers and enforces the National Labor Relations Act ("NLRA"), reflecting the need for consistency and adjudication in interactions between laborers and employers. Similarly, the primary purpose of the NLRA is to protect the rights of employees and employers, encourage collective bargaining, and safeguard the rights of employees to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. *See About NLRB: Who We Are*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are (last visited Jan. 27, 2025).

activism and the right of employers to defend themselves against damaging actions by employees.[5] And in doing so connect the broader principles of our established institutional frameworks with digital protest, ensuring that the digital era's innovations do not come at the expense of fundamental legal values.

This paper will be divided into five parts. First, in Part II I will examine the transformation of picketing from traditional street demonstrations to the digital realm and seek to align cyberpicketing with any other form of picketing. Next, Part III discusses the malicious intentions prevalent in cyberspace, highlighting the potential legal ramifications. Parts IV and V of the note examine how statutes and existing case law provide a legal framework for surrounding cyberpicketing activities. Part VI explores the conflicting interests of employers and employees with respect to cyberpicketing. Additionally, it analyzes various responses by employers to cyberpicketing incidents and considers potential regulatory reforms aimed at balancing the interests of both parties. Overall, this comprehensive exploration provides insights into the legal, ethical, and practical implications of cyberpicketing, offering perspectives for policymakers, legal practitioners, and scholars alike.

[5] In sum, this note argues that our established institutional frameworks must ensure that the digital era's innovations do not come at the expense of fundamental legal values.

II. The Evolution of Picketing: From the Streets to Cyberspace

The advent of the internet and digital technology has brought new dimensions to picketing by allowing workers to organize without sharing a physical space.[6] Cyberpicketing[7], a term coined to encapsulate the virtual manifestation of traditional picketing refers to the use of digital platforms, including social media, websites, and online forums in support of labor-related issues. Cyberpicketing involves the use of online platforms to raise awareness, coordinate actions, garner public support, and disrupt a business during a workplace dispute. Examples of cyberpickets include social media campaigns[8], virtual picket lines[9], and global solidarity[10]. Unlike its physical counterpart, the traditional picket, cyberpicketing transcends geographical limitations and temporal constraints, enabling activists to engage in coordinated advocacy efforts on a larger scale, and with increased speed and efficiency.

The evolution of labor pickets in the United States reflects the interplay between workers' rights, societal changes, and technological advancements. This interconnection is shown in the

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[6] Authors Jeroen Van Laer & Peter Van Aelst noted "Internet is not only said to greatly facilitate mobilisation and participation in traditional forms of protest, such as national street demonstrations, but also to give these protests a more transnational character by effectively and rapidly diffusing communication and mobilisation efforts." *See* Jeroen Van Laer & Peter Van Aelst, *Cyber-protest and civil society: the Internet and action repertoires in social movements*, *in* HANDBOOK OF INTERNET CRIME 230-254 (Yvonne Jewkes & Majid Yar eds., 2009) ("Internet is not only said to greatly facilitate mobilisation and participation in traditional forms of protest, such as national street demonstrations, but also to give these protests a more transnational character by effectively and rapidly diffusing communication and mobilisation efforts.")

[7] Sharon Block, Benjamin Sachs & Tascha Shahriari-Parsa, *A Path Forward for Amazon Workers: Digital Picketing*, ON LAB. (Nov. 16, 2022), https://onlabor.org/a-path-forward-for-amazon-workers-digital-picketing/.

[8] *Id*.

[9] With the rise of remote work, unions can adapt by creating virtual picket lines. These pickets can manifest as online protests, coordinated email campaigns, or targeted disruption of digital platforms associated with the employer. *Id.*

[10] Cyberspace enables workers to build international solidarity. Unions and workers from different countries can collaborate and support each other through online networks, creating a more globalized labor movement. Bruce Robinson, *Solidarity Across Cyberspace: Internet Campaigning, Labour Activism and the Remaking of Trade Union Internationalism*, 2 WORK ORG. LAB. & GLOBALISATION 152 (2008), https://doi.org/10.13169/workorgalaboglob.2.1.0152.

history of picketing.[11] Picketing[12] has long been a crucial tool for workers to voice their concerns, demand better working conditions, and/or negotiate with employers. In the late 19th and early 20th centuries, as industrialization took hold in the United States, labor unions emerged to address the challenges faced by workers.[13] Picket lines initially involved physical gatherings of workers outside workplaces to protest unfair labor practices, low wages, and poor working conditions.[14] These pickets often faced violent opposition from employers and law enforcement.[15] The Wagner Act of 1935[16] marked a turning point for labor by statutorily recognizing the rights of workers to organize, engage in collective bargaining, and peacefully picket. Thus, picketing became a form of protected expression[17], empowering people in their economic viability. Soon after, the National Labor Relations Act ("NLRA")[18] established the National Labor Relations Board[19] to enforce these rights and resolve labor disputes. Under the NLRA, an employee cannot be fired for participating in a protected strike or for picketing against any employer[20].

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[11] *A Short History of American Labor*, adapted from AFL-CIO AM. FEDERATIONIST, vol. 88, no. 3 (Mar. 1981), https://oac.cdlib.org/ark:/28722/bk0003z4v2t/?brand=oac4

[12] Picketing is a method of protesting where individuals stand outside of a workplace or organization to publicize an issue, often a labor dispute, and persuade employees or customers to withhold their work or business. Picketing notifies the public of the existence of a strike, disseminates information concerning the controversy, and communicates the facts dealing with their side of the dispute. *See Picketing,* CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/picketing (last updated Jul. 2020).

[13] History.com Editors, *Labor Movement*, HISTORY https://www.history.com/topics/19th-century/labor (last updated Mar. 31 2020).

[14] Clyde E. Willis, *Picketing*, FREE SPEECH CTR. MIDDLE TENN. STATE UNIV., https://firstamendment.mtsu.edu/article/picketing/ (last updated July 5, 2024).

[15] *Id*.

[16] The fundamental and constitutionally protected right to engage in peaceful picketing. *See*

[17] Willis, *supra* note 13.

[18] Congress passed the National Labor Relations Act in 1935, thereby establishing a policy to encourage collective bargaining by protecting workers' full freedom of association and protecting workplace democracy by providing employees at private-sector workplaces the fundamental right to seek better working conditions without fear of retaliation. *See National Labor Relations Act: Guidance*, NLRB. https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act (last visited Apr. 19, 2025).

[19] NLRB*, supra* note 3.

[20] *See Right To Strike and Picket: About NLRB*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/right-to-strike-and-picket (last visited Apr. 19, 2025)

The initial purpose of the NLRA was to "guarantee employees the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection"[21]. The NLRA has been amended several times to address changing labor dynamics, legal interpretations, and societal needs. Some key amendments to and legislation affecting the NLRA include: the Taft Hartley Act of 1947, the Landrum Griffin Act of 1959, the Telecommunications Act of 1996, and the Genetic Information Nondiscrimination Act of 2008[22].

From the early days of industrialization in the late 19th century to the modern labor movement, workers have fought for fair wages, safe working conditions, and the right to organize collectively[23]. One of the most significant developments in the history of labor activism was the emergence of picketing as a powerful tool for workers to voice their grievances. Standard labor picketing evolved from the labor strikes and protests of the late 19th and early 20th centuries[24]. During this period, workers faced harsh working conditions, long hours, and low pay, prompting them to organize and demand better treatment from their employers[25]. As industrialization swept across the nation, workers in industries such as mining, manufacturing, and transportation formed

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[21] *National Labor Relations Act (1935): Milestone Documents*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/national-labor-relations-act (last updated Nov. 22, 2021).
[22] *See generally* J. Warren Madden, *Origin and Early Years of the National Labor Relations Act*, 18 HASTINGS L.J. 571 (1967) (Enactment of the Taft Hartley Act of 1947 and Landrum Griffin Act of 1959); *see* Stuart N. Brotman, *Was the 1996 Telecommunications Act Successful in Promoting Competition?*, BROOKINGS (Feb. 8, 2016), https://www.brookings.edu/articles/was-the-1996-telecommunications-act-successful-in-promoting-competition/ ("The act's legislative history reflects the goal of Congress "'to accelerate the deployment of an advanced capability that will enable subscribers in all parts of the United States to send and receive information in all its forms'"); *see* 29 CFR § 1635 (2010) (The Genetic Information Nondiscrimination Act was enacted to address public concerns about risk of losing access to health coverage or employment if insurers or employers have their genetic information. The Genetic Information Nondiscrimination Act prohibits discrimination based on genetic information and restricting acquisition and disclosure of such information).
[23] *See* Judson MacLaury, *A Brief History: The U.S. Department of Labor*, U.S. DEP'T L., https://www.dol.gov/general/aboutdol/history/dolhistoxford (last visited Apr. 19, 2025)
[24] *See id.*
[25] *See id.*

unions to advocate for their rights[26]. These unions often resorted to picketing outside workplaces as a means of drawing attention to their cause and putting pressure on employers to negotiate. Picket lines became a visible symbol of solidarity and resistance, with workers chanting slogans, carrying signs, and peacefully demonstrating for better working conditions and fair treatment. Picketing has remained a central tactic in labor struggles, helping workers to secure important victories such as the eight-hour workday, workplace safety regulations, and collective bargaining rights[27].

By the mid-20th century, picketing strategies had evolved. In addition to primary picketing[28], which occurs on the premises of the employer with whom the picketers are in dispute, unions began to employ secondary and informational picketing, and to expand the range of issues addressed. Secondary picketing[29] takes place at the workplace of an employer that is not directly involved in the primary dispute. Informational picketing is a public demonstration by a labor union to inform the public about a matter of concern to the union[30].

The Civil Rights, Women's Suffrage, and LGBTQ+ movements, along with protests against the Vietnam War, shaped the mechanisms and strategies in picketing by incorporating broader societal concerns with labor issues[31]. As one scholar noted: "The civil rights and antiwar movements were two of the greatest protest movements of twentieth-century America (the labor movement was a third). They sharpened the cleavages that tore American society asunder from the

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[26] *See* AMERICAN FEDERATIONIST, *supra* note 12.
[27] *See generally Eight-Hour Day Movement*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/eight-hour-day-movement. (last visited Apr. 19, 2025)
[28] *See* CORNELL L. SCH., *supra* note 11.
[29] *See Secondary Boycotts (Section 8(b)(4)): About NLRB*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/secondary-boycotts-section-8b4 (last visited Apr. 19, 2025)
[30] *Informational Picketing Information: Human Resources*, ILL. STATE UNIV., https://hr.illinoisstate.edu/managers/labor-relations/informational-picket/ (last visited Apr. 19, 2025)
[31] *See generally* DANIEL S. LUCKS, SELMA TO SAIGON: THE CIVIL RIGHTS MOVEMENT AND THE VIETNAM WAR (2014).

mid-1960s through the early 1970s"[32]. The influence of these movements on picketing within the labor movement was profound. Labor unions, inspired by the nonviolence and civil disobedience tactics of the civil rights and anti-war movements began to adopt similar strategies in their own campaigns. Picket lines became more than just a means of protesting workplace grievances, they became platforms for advocating broader social and political change[33].

In addition, two major changes to the NLRA noted above, namely the Taft-Hartley Act[34] and the Landrum-Griffin Act[35] affected picketing practices[36]. The Taft-Hartley Act amended the NLRA and introduced regulations on certain union activities, such as prohibiting secondary boycotts, limiting union use of jurisdictional strikes[37] to assert control over certain job functions or tasks[38]. The Landrum-Griffin Act, also known as the Labor-Management Reporting and Disclosure Act ("LMRDA"), introduced reporting and disclosure requirements for labor unions[39]. It also established provisions governing picketing and strike activities, as well as the rights of union

[32] *Id*. at 1-8.
[33] *Id*.
[34] Taft-Hartley defined six additional unfair labor practices, reflecting Congress' perception that some union conduct also needed correction. The Act was amended to protect employees' rights from these unfair practices by unions. *See About NLRB 1947 Taft-Hartley Substantive Provisions* NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions (last visited Apr. 19, 2025).
[35] The Landrum-Griffin Act protected employees' union membership rights from unfair practices by unions, while the National Labor Relations Act protected employee rights from unfair practices by employers or unions. *See 1959 Landrum-Griffin Act: About NLRB*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1959-landrum-griffin-act (last visited Apr. 19, 2025).
[36] *Id*.
[37] "Jurisdictional strike is a worker's strike resulting from a dispute between the members of different unions over work assignments. The Taft-Hartley amendments to the National Labor Relations Act empowered the National Labor Relations Board to resolve such jurisdictional disputes." *See Jurisdictional Strike Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/j/jurisdictional-strike/ (last visited Jan 29, 2025).
[38] Overall, the Taft-Hartley Act was seen as a response to perceived abuses of power by labor unions during the post-World War II period. While proponents argued that it promoted fairness and balance in labor-management relations, critics contended that it unduly restricted the rights of workers to organize and collectively bargain.
[39] The Landrum-Griffin Act "deals with the relationship between a union and its members . . . grant[ing] certain rights to union members and protecting their interests by promoting democratic procedures within labor organizations." *See Landrum-Griffin Act*, UAW, https://uaw.org/landrum-griffin-act/ (last visited Apr. 19, 2025).

members in relation to union leadership. Specifically, the LMRDA provisions in Section 8(b)(4)[40], Section 7[41], and Section 101(a)(1)[42] sought to balance the interests of employers, labor unions, and individual workers, by ensuring that employees have the right to engage in collective action while also protecting the integrity of union processes and preventing unfair labor practices. These LMRDA provisions directly relate to employee labor pickets by safeguarding the rights of employees to engage in collective action, including picketing, while also ensuring that such actions adhere to lawful and fair practices. These provisions aim to protect the integrity of union processes, prevent unfair labor practices, and maintain a balance between the interests of employers, labor unions, and individual workers during picketing activities.

As protest and dissent have moved from the streets to the digital realm, the internet has emerged as a powerful platform for activism, allowing individuals and groups to voice their grievances in new and innovative ways. Virtual protest actions can encompass a spectrum of activities, spanning from online petitions[43], email bombings[44], virtual sit-ins, and hacking the websites of prominent corporations and governmental entities. The classification of a specific tactic as legal or illegal substantially depends upon the context of the time and place.

[40] This provision prohibits labor unions from engaging in secondary boycotts or engaging in activities that coerce or restrain employers in their choice of representatives for collective bargaining purposes. It aims to prevent unions from using picketing as a means to pressure neutral employers in disputes with primary employers. *See* Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, §8(b)(4), 73 Stat. 519 (1959).
[41] *See* § 7 (Guaranteeing the rights of employees to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and protecting the right of workers to participate in strikes, picketing, and other forms of protest to improve working conditions or advance their collective interests).
[42] *See id.* §101(a)(1). This provision ensures that union members have the right to freely express their views and opinions on matters concerning the union's internal affairs and activities. It protects members' rights to attend union meetings, participate in union elections, and engage in discussions about union policies and decisions.
[43] A form of petition which is signed online, usually through a form on a website. *See Online Petition*, WIKIPEDIA, https://en.wikipedia.org/wiki/Online_petition (last updated Jan. 17, 2025).
[44] An email bomb involves sending a huge number of emails to someone's email account, like a minister or CEO, or to a specific computer system. This is done to overwhelm the recipient's email server and show strong support for a particular cause. *See Email Bomb*, DEVX https://www.devx.com/terms/email-bomb/ (last updated Dec. 13. 2023).

Today, labor picketing still stands as a major means of employee protest[45]. Picketing in the United States is regulated by a combination of federal and state laws. The primary federal law governing labor relations is the NLRA[46]. While the NLRA protects the right of workers to engage in picketing as a form of expression and to draw attention to labor disputes, certain types of picketing are unprotected, such as picketing with threats or violence, picketing to achieve unlawful objectives, or secondary boycotts[47]. The NLRB, as the independent federal agency responsible for enforcing the NLRA, plays a key role in adjudicating disputes related to unfair labor practices, such as those involving labor picketing[48]. The NLRB issues guidelines and decisions that interpret and apply the NLRA to specific cases[49]. While the NLRA itself does not explicitly mention digital platforms, its principles have been loosely applied to cover activities conducted through online channels, including picketing through digital platforms[50].

The evolution of labor pickets in the United States reflects a continuous adaptation to the socioeconomic and technological landscape[51]. While digital platforms have empowered workers in many ways, they also introduce challenges to labor, creating a space where employers may use legal and technological means to counteract online activism[52]. Additionally, the instantaneous nature of digital communication requires unions to navigate issues of misinformation and maintain coherent messaging[53].

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[45]Current U.S. strikes. *See Strikes*, THE ASSOC. PRESS, https://apnews.com/hub/strikes (last visited Jan. 28, 2025).
[46]*See generally National Labor Relations Act*. NAT.L LAB. REL.'S. BD., https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act (last visited Feb. 7, 2025).
[47] Summarized breadth of what is under the jurisdiction of the NLRB. *See generally About NLRB: What's the Law?*, NAT. LAB. REL.'S. BD. https://www.nlrb.gov/about-nlrb/rights-we-protect/whats-law/unions (last visited Feb. 7, 2025).
[48] *See generally About NLRB*, NAT.L LAB. REL.'S. BD., https://www.nlrb.gov/about-nlrb (last visited Feb. 7, 2025).
[49] *Id*.
[50] Jessica Mach, *Digital Platform Rules Hazy as NLRB Changes Loom*, LAW360 (Nov. 14, 2022), https://www.law360.com/employment-authority/articles/1549323/digital-platform-rules-hazy-as-nlrb-changes-loom.
[51] *The Cyberpicket: A New Frontier for Labor Law*, 136 HARV. L. REV. 2108 (2023), https://harvardlawreview.org/print/vol-136/the-cyberpicket-a-new-frontier-for-labor-law/.
[52] *Id*. at 2109.
[53] *Id*. at 2125.

Globalization, technological advancement, the changing nature of the traditional workplace, and the influence of public opinion and modern advocacy all shape the strategies of labor picketing today. For example, during the 2012 labor dispute between the International Longshore and Warehouse Union ("ILWU") and the grain exporter EGT Development in the Pacific Northwest, traditional picketing tactics were supplemented with digital tools. ILWU members and supporters utilized social media platforms, online petitions, and email blast campaigns to rally public support, raise awareness, and pressure EGT Development to negotiate a fair labor agreement. The dispute escalated to include acts of civil disobedience and confrontations between protesters and law enforcement[54]. Ultimately, after months of negotiations and legal battles, a tentative agreement was reached between ILWU and EGT Development, securing ILWU representation at the grain terminal and marking a significant resolution to the conflict[55]. This case underscores the dynamic interplay between traditional and modern methods in the ever-evolving practice of labor picketing.

III. Differentiating Hacktivism and Cyberattacks From Cyberpickets

Employee cyberpickets, cyberattacks, and hacktivism[56] represent distinct forms of online actions. Employee cyberpickets use digital platforms, such as social media, websites, or email campaigns, to voice grievances, advocate for workplace changes, or support collective bargaining efforts. Employee cyberattacks, by contrast, involve unauthorized access to computer systems, networks, or data to cause harm, disrupt operations, or steal sensitive information. Unlike cyberpickets, which have the ability to be lawful forms of expression protected by free

[54] Elliot Njus, *Longshore Workers, EGT Settle Dispute over Longview, Wash.,Grain Terminal Staffing*, OREGONLIVE (Jan. 23, 2012), https://www.oregonlive.com/business/2012/01/longshore_workers_egt_settle_d.html.
[55] *Id*.
[56] Patrick Putman, *What is a Hacktivist?*, U.S. CYBERSECURITY MAG., (last visited Feb. 3, 2025), https://www.uscybersecurity.net/hacktivist/.

speech principles, cyberattacks constitute illegal activities that can result in significant harm to organizations, individuals, or critical infrastructure. Cyberpickets can be legitimate forms of activism or advocacy, whereas cyberattacks involve malicious or unlawful actions falling under the umbrella of cybercrime[57]. The line between cyber organizing and cybercrime may be crossed when employees engage in activities such as hacking into company databases, launching distributed denial-of-service attacks[58], or stealing and disseminating confidential information, to name a few.

With the rapid proliferation of digital communication tools and social media platforms, the boundaries between statutorily protected expression and potentially unlawful digital conduct have become increasingly blurred. This ambiguity presents a formidable challenge for lawmakers and legal scholars seeking to balance the rights of digital activists with the legitimate interests of businesses and organizations targeted by cyberpicketing campaigns. It's essential to recognize that while cyberpickets may be a legitimate means for employees to exercise their rights and advocate for change, engaging in cyberattacks and hacktivism is illegal and can have serious legal consequences. Thus, there is a need for clear standards establishing what cyberpicketing methods don't become cyberattacks.

As noted above, cyberpickets typically involve lawful forms of expression and activism, whereby employees use digital platforms to voice grievances, advocate for workplace changes, or support collective bargaining efforts. These actions are often protected by free speech principles

[57] Kate Bush & Michael Cobb, *What is cybercrime and how can you prevent it?*, TECHTARGET https://www.techtarget.com/searchsecurity/definition/cybercrime (last updated Sept. 2024).
[58] *See, e.g.*, United States v. Gottesfeld, 18 F.4th 1 (1st Cir. 2021); United States v. Golightley, 840 F. App'x. 319 (10th Cir. 2020); Computer Fraud and Abuse Act, 18 U.S.C. §1030. (The Computer Fraud and Abuse Act (CFAA) currently prohibits and penalizes any activities associated with denial-of-service attacks, which involve intentionally disrupting or impairing the functioning of computer systems or networks, thereby causing harm or inconvenience to users or organizations relying on these systems for their operations or services.)

and may be conducted within the bounds of applicable laws and regulations[59]. Hacktivism, on the other hand, often involves illegal or unauthorized actions aimed at disrupting operations, causing harm, or obtaining sensitive information[60]. Hacktivists engage in activities such as hacking into computer systems, launching denial-of-service attacks, or stealing and disseminating confidential data. These actions are generally prohibited by various laws, including the Computer Fraud and Abuse Act ("CFAA"), and can lead to criminal prosecution and severe legal consequences[61].

The CFAA[62], is frequently utilized to prosecute hacktivists as it provides a broad legal framework for addressing cybercrimes. The Act criminalizes various actions, including knowingly causing the transmission of harmful programs or commands, accessing protected computers without authorization, and causing damage or loss as a result[63]. The need for a regulatory framework to address cybercrime became apparent in the late 20th century with the more pervasive and widespread use of technology in society[64]. Starting with the CFAA in 1986 and throughout the 1990s and early 2000s governments worldwide began enacting additional laws and regulations to protect digital infrastructure and prosecute cybercriminals[65]. Courts typically evaluate four key elements in a CFAA claim: (1) the defendant's knowing transmission of harmful elements; (2) the

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[59] Ashutosh Bhagwat, *Free Speech Categories in the Digital Age*, *in* FREE SPEECH IN THE DIGITAL AGE 88 (Susan J. Brison & Katharine Gelber eds., 2019); James Weinstein, Cyber Harassment and Free Speech: Drawing the Line Online, in FREE SPEECH IN THE DIGITAL AGE 52 (Susan J. Brison & Katharine Gelber eds., 2019).
[60] Andrew T. Illig, *Computer Age Protesting: Why Hacktivism is a Viable Option for Modern Social Activists*, 119 DICKNSON L. REV. 1033 (2015).
[61] *Id*.
[62] *See* 18 U.S.C. §1030(a)(5) (The CFAA was originally enacted by the United States Congress in 1986 as an amendment to the Comprehensive Crime Control Act. It has been amended several times since its initial passage. The CFAA is the primary federal law in the United States that addresses unauthorized access to computers and computer systems, as well as related offenses such as hacking, fraud, and data theft).
[63] *Id.*
[64] Arctic Wolf, *A Brief History of Cybercrime*, ARCTIC WOLF (Nov. 16, 2022), https://arcticwolf.com/resources/blog/decade-of-cybercrime/.
[65] *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (though mainly directed at counterterrorism efforts, encompassed provisions pertaining to cybercrime); *see also* Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (addressed the safeguarding of consumers' financial information, mandating security measures for financial institutions) *see also* Electronic Communications Privacy Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (laying down guidelines for government surveillance of electronic communications, safeguarding the privacy of digital exchanges such as email).

protection status of the computer involved; (3) the absence of authorization for the defendant's actions; and (4) the demonstration of resulting damage[66].

As noted above, cyberpickets are typically aimed at raising awareness, mobilizing support, or applying pressure on employers to address labor-related issues. They may involve activities such as online protests, petitions, or the dissemination of information to stakeholders. In contrast, hacktivism is often motivated by political or ideological objectives and seeks to achieve broader social or political change through digital means[67]. Hacktivists may target government agencies, corporations, or other entities perceived as oppressive or unjust, aiming to disrupt operations, expose wrongdoing, or promote transparency.

Scholar Xiang Li separates the spectrum of online forms of activism into three categories 1) conventional, 2) transgressive, and 3) violent[68]. Conventional online actions include online voting, online campaign donations, and online petitions. Transgressive actions are characterized as hacktivism and include website defacement, website redirections, denial of service attacks, information theft, site parodies, and virtual sabotage. Violent actions are considered cyberterrorism and include hacking power grids[69]. These categories help to differentiate between lawful and unlawful online activism and provide a framework for understanding the diverse range of online actions and their legal implications.

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[66] United States v. Golightley, 840 F. Appx 319 (10th Cir. 2020).
[67] Marco Romagna & Rutger E. Leukfeldt, *Becoming a hacktivist. Examining the motivations and the processes that prompt an individual to engage in hacktivism*, J. OF CRIME AND JUST. (2023), https://www.tandfonline.com/doi/full/10.1080/0735648X.2023.2216189.
[68] Xiang Li, *Hacktivism And The First Amendment: Drawing The Line Between Cyber Protests And Crime*, 27 HARV. J. OF L. & TECH. 301, 306 (2013), https://jolt.law.harvard.edu/articles/pdf/v27/27HarvJLTech301.pdf.
[69] *Id.*

IV. Case Studies and Examples of Cyberpickets

The NLRA and the NLRB have jurisdiction over labor picketing[70]. However, it is unclear how the NLRB would interpret the provisions of the NLRA in the context of cyberpicketing. Currently, there is no case law specifically determining how the NLRB and NLRA's protections and prohibitions would apply. However, it may be possible to predict how cyberpicketing will be treated within this regulatory framework by examining case law, including the following three case examples involving cyberpicketing-- one in Canada (*British Columbia Automobile Assn. v. O.P.E.I.U.* [71]), the United Kingdom (*Rogers v. Picturehouse Cinemas Limited*[72]), and in the United States (1999 Seattle WTO protests[73]).

British Columbia Automobile Assn. v. O.P.E.I.U., involved a union engaged in a lawful strike. The union created a website resembling that of the British Columbia Automobile Association (BCAA) to redirect internet users using BCAA-related keywords to the union's site[74]. The court viewed the online actions of the union as akin to traditional leafleting or picketing[75]. The central issue in the case was the interpretation of the Canadian Charter of Rights and Freedoms, specifically the freedom of association guaranteed under Section 2(d). The court ruled that BCAA's decision to terminate recognition of OPEIU violated the employees' freedom of association under Section 2(d) of the Charter, holding that employees have a constitutional right to collective

[70] NLRB, *s*upra note 4.
[71] British Columbia Auto. Ass'n v. Off. and Pro. Emp. Int. Union, Local 378 et al, [2001] B.C.S.C 156. ("BCAA v. O.P.E.I.U").
[72] Rogers v. Picturehouse Cinemas Limited, [2019] EAT 1 (Eng.).
[73] The 1999 Seattle World Trade Organization (WTO) protests were a series of demonstrations and civil unrest that took place in Seattle, Washington, during the WTO Ministerial Conference in November 1999. *See* Katherina Casey-Sawicki, *Seattle WTO Protests of 1999*, ENCYC. BRITANNICA (Nov. 21, 2024).
[74] See Teresa Scassa, *Intellectual Property On the Cyder-Picket Line: A Comment on British Columbia Automobile Assn. v. Office And Professional Employees' International Union, Local 378*, 39(4) ALTA L. REV. 934, 936 (2002) (The domain names and meta tags created confusion as they could lead layman internet users to mistakenly assume that these websites were affiliated with the BCAA).
[75] British Columbia Auto. Ass'n et al. v. Off. and Pro. Emp. Int. Union et al., [2001] BCSC 156.

bargaining as part of their freedom of association, and employers have a corresponding duty to recognize and negotiate with the union chosen by the employees[76]. It emphasized that when the use of domain names and metatags is non-commercial, the courts are unlikely to have reason to interfere[77]. The implications here are that cyberpicketing is a form of expressive activity protected by free speech principles. The connection between traditional leafleting or picketing and cyberpicketing lies in their shared objectives and tactics. Both aim to raise awareness, mobilize support, and exert pressure on their targets. Overall, traditional leafleting or picketing and cyberpicketing are interconnected as they represent different manifestations of the same fundamental principles of advocacy and activism. In sum, the courts treated the digital actions in a manner similar to the way previous decisions treated traditional labor activism[78].

In *Rogers v. Picturehouse Cinemas Limited*, an employee utilized cyberpicketing by block booking[79] tickets and leaving the tickets unpaid in their online baskets, thereby preventing them from being sold to other customers by the employer. Picturehouse Cinemas justified its subsequent termination of the employee by arguing that this use of cyberpicketing amounted to a conspiracy to misuse and modify the data on their computer systems with the intent of causing harm[80]. The court ruled that Rogers was wrongfully terminated due to her trade union activity rather than her use of cyberpicketing[81]. However, the court raised questions about the job security of employees

[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] Block booking is when a large number of tickets for a particular event, hotel, flight, etc. are sold to one person or organization. *See Block Booking*, CAMBRIDGE DICTIONARY (last visited Feb. 4, 2025).
[80] *Supra* note 73.
[81] Rogers was dismissed because she had sent an email confirming what had been discussed during a Trade Union meeting. She was not actually dismissed for being a participant in cyberpicketing her employer, but Picturehouse Cinemas believed that her email was indicative that she was going to initiate a cyberpicket. *See* Toby Pochron, *Cyber Picketing in Workplace Disputes*, FREETHS (June 25, 2019), https://www.freeths.co.uk/2019/06/25/cyber-picketing-in-workplace-disputes/.

engaging in cyberpicketing against their employers[82]. The case underscores the legal complexities surrounding cyberpicketing. While the employee was protected against wrongful termination, the limited holding by the court in the lack of addressing the legality of this kind of employee protest, acknowledged the need to address the question of whether employees can safely participate in cyberpicketing[83].

In a striking example of cyberpicketing's potential use equivalent to its physical counterpart, activists at the 1999 Seattle World Trade Organization (WTO) protests harnessed the power of the internet to orchestrate virtual blockades, in the form of flooding websites associated with the WTO and the summit with traffic to overwhelm servers, as part of a collective action for social and political change[84]. The cyberpicketing was not directed at a specific employer but was aimed at disrupting the WTO summit and attracting global attention. The protestors' internet actions contributed to the organization of street blockades, causing disturbances during the WTO summit. The use of cyberpicketing played a role in shaping the narrative of the protests and garnered international media attention. However, during the WTO protests, there were relatively few legal actions specifically targeting online protestors compared to those involved in physical protests. In 1999, legal frameworks for addressing cybercrimes or online protest tactics were still evolving[85], therefore legal actions against online protestors may have been less prominent than those targeting physical demonstrators. Not only does the WTO protest exemplify the simultaneous integrated use of both a cyber and physical picket, but it also exemplifies the faults of not having a clear institutionalized framework to differentiate what is a crime vs. a legally protected action.

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[82] *Id*.
[83] *Id*.
[84] During the blockades, activists with portable computers connected to the Internet were constantly updated with reports from the streets and details of changing police tactics. Groups created a sophisticated parody, a 'spoof site', of the WTO's homepage. Van Laer & Van Aelst, *supra* note 6, at 230.
[85] 18 U.S.C. §1030(a)(5), *supra* note 63.

Although each of the examples differs in their objective and impact, they each used a cyberpicket to achieve their goal. In addition, each used cyberpicketing to gain visibility for their cause. The Seattle WTO cyberpicket attracted global media attention due to disruptions during a high-profile summit, while the Workers Online email jam session sought to amplify the voices of workers and supporters in a legislative context. Within all the examples employees recognize cyberpicketing as a form of expression and activism, akin to traditional forms of labor protest.

Recently, Rideshare Drivers United[86] ("RDU") and Justice for App Workers[87] ("JAW") initiated cyberpickets in their labor protests. RDU has leveraged cyberpicketing as a tool in ongoing strikes and protests advocating for the rights and fair treatment of gig economy workers[88]. Through social media campaigns, targeted emails, and online petitions, they mobilized a "digital army" to disseminate their demands and raise awareness about the challenges faced by rideshare drivers and other app-based workers. These cyberpicketing efforts have effectively targeted the platforms' user bases and stakeholders, putting pressure on companies like Uber, Lyft, and DoorDash to address issues such as low wages, lack of benefits, and precarious working conditions[89]. By utilizing digital platforms to organize and disseminate information, RDU and

[86]*See History*, RIDESHARE DRIVERS UNITED, https://www.drivers-united.org/about-us (last visited Feb. 4, 2025) ("RDU is an organization of drivers who are uniting for a just rideshare industry, where drivers have a real voice in their job and earn fair pay and benefits". Mission points include: developing a hybrid app-based and driver-to-driver organizing model to involve and develop a truly representative, broad group of drivers, while building capacity to develop an organization to scale, and strategically embedding media and social media in our organizing to overcome a well-financed, powerful opposition and gain broad public support for our movement").
[87]*See Who We Are*, JUST. FOR APP WORKERS, https://justiceforappworkers.org/who-we-are/ (last accessed Apr. 19, 2025**)** ("Justice for App Workers is a national coalition movement of more than 130,000 rideshare drivers and delivery workers from the East Coast to the Midwest.").
[88] Kate Gibson, *Uber, Lyft and DoorDash drivers turn off their apps in Valentine's Day pay protest*, CBS NEWS, (Feb. 14, 2024, 3:58 PM) https://www.cbsnews.com/news/valentines-day-2024-uber-lyft-doordash-drivers-strike/.
[89] *See e.g.*, Nate Homan, *Philly Uber, Lyft drivers join nationwide protest as rideshares go public*, METRO PHILA., (Apr. 28, 2019), https://metrophiladelphia.com/philly-uber-lyft-drivers-join-nationwide-protest-as-rideshares-go-public/; Janet Burns, *Uber And Lyft Drivers Strike In LA After Yet Another Uber Pay Cut*, FORBES, (Mar. 25, 2019), https://www.forbes.com/sites/janetwburns/2019/03/25/uber-and-lyft-drivers-strike-in-la-after-yet-another-pay-cut/.

JAW have relied on the power of online activism in their fight for labor rights within the gig economy[90].

All cyber protest actions take advantage of the internet's ability to not only facilitate and bolster conventional offline collective actions but also to concurrently give rise to new and innovative forms of collective action. Therefore, the cyberpicket can further be considered in two contexts, 1) the use of a cyberpicket to protest an offline employer, and 2) the use of the cyberpicket against an online employer[91].

"Context 1": Imagine a situation where unionized employees of an Acme branch grocery store, a traditional brick-and-mortar[92] retail company, are dissatisfied with the company's labor practices, particularly issues related to working conditions, wages, and benefits. In this hypothetical scenario, the employees decide to organize a digital protest to raise awareness about their concerns and advocate for change. The employees, with the help of labor activists or organizers, initiate a cyber picketing campaign. They create a dedicated website or use social media platforms to share their grievances, stories, and demands. The campaign may include compelling visuals, testimonials from workers, and infographics illustrating the perceived issues. Further, the employees strategically use online tools and platforms to amplify their voices, garner support, and pressure the employer to address their concerns. The goal is to create a collective and visible movement that transcends the boundaries of traditional offline protests.

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[90] Thomas Brock, *Gig Economy: Definition, Factors Behind It, Critique & Gig Work*, INVESTOPEDIA, (July 22, 2024), https://www.investopedia.com/terms/g/gig-economy.asp

[91] *See* Van Laer & Van Aelst, *supra* note 6, at 234 ("Some scholars even make a strong case to completely abandon the sharp distinction between the on- and offline worlds, since both spheres are heavily interdependent.")

[92] *See Brick-and-mortar*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/brick-and-mortar (last visited Apr. 19, 2025) (Relating to or being a traditional business serving customers in a building as contrasted to an online business).

The Cyberpicket, of Amazon proposed by Harvard Professors Sharon Black and Benjamin Sachs[93], provides a perfect exemplification of "Context 2", the use of the cyberpicket against an online employer. Employers like Amazon are largely faceless and virtual, Amazon is not "dependent on selling products through brick-and-mortar retail stores"[94], therefore, the use of an in-person picket line is largely useless. Picket lines are dependent upon their access to the consumers of the business, the offline picket line is meant to stand as a physical barrier between the buyer and the seller, enlightening the buyer about the union's position and affording them the opportunity to make an active choice as to whom to support. In any picket line consumers must have the opportunity to decide whether to "cross" the line or not. So how, for any online business, can the primary features of a picket line enter cyberspace? More importantly, if a business is allowed to move itself online, should the same opportunity be awarded to union picketing actions; does the employee's right to protest follow the employer or remain stationary?

Overall, the case studies illustrate the ongoing legal debates and challenges associated with cyberpicketing, emphasizing the need for nuanced legal frameworks to address the intersection of online activism and traditional labor practices[95]. These examples illustrate the diverse ways in which cyberpicketing can be employed for collective action, whether in the context of global political events or specific employment issues. The objectives, targets, and impacts of cyberpicketing may vary based on the underlying social, political, or labor-related motivations.

[93] *See* Van Laer & Van Aelst*, supra* note 7.
[94] *See* Van Laer & Van Aelst*, supra* note 7.
[95] "Cyberpicketing promises to restore to employees of online businesses a long-held tool of economic persuasion, resetting the careful balance of power between labor and capital." *See*, *The Cyberpicket: A New Frontier for Labor Law*, 136 HARV. L. REV. 2108, 2129 (2023).

V. Precedent: Statutory Analysis and Existing Case Law

There are established guidelines and protocols for conducting an employee strike[96], but the application of these principles to cyber striking and picketing raises questions about their practicality and relevance. Under the Garmon Rule[97] states are preempted from regulating conduct, such as labor picketing, that is protected or prohibited by the NLRA[98], where the NLRB has the primary jurisdiction[99]. While the NLRA does not prohibit unions from engaging in primary picketing, it does prohibit secondary picketing[100], defined as picketing a secondary or neutral employer with the aim of putting pressure on them to support the primary employer or to cease doing business with them until the primary dispute is resolved[101]. Employee striking is primarily governed under the umbrella of Section 7[102] of the NLRA. This provision ensures that employees have the right to engage in activities for collective bargaining and mutual aid or protection, both individually and as a group, "Section 7 of the National Labor Relations Act guarantees employees

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[96] The law allows strikes to proceed only when at least 50 percent of workers who participate in a secret ballot support it, and workers have provided 14-day notification of strike action. For "important public services," 40 percent of all eligible union members must vote in favor of the strike action, and ballots require at least a 50 percent turnout to be valid and for strike action to be legal. *See* 29 U.S.C. ch. 7.

[97] The Garmon Preemption Doctrine. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).

[98] *But see* "New Federalism" in labor law, the shift of regulatory authority over labor standards from the federal government to state and local governments, allowing them to create and enforce their own labor laws. *See generally* Janice Fine & Michael Piore, *Introduction to A Special Issue on the New Labor Federalism*, 74(5) ILR Rev. 5, (2021).

[99] Although the NLRA does not contain any express statutory preemption provision, the settled preemption doctrines are, 1) "Garmon preemption" where a state's power to regulate would not be preempted when an activity is merely a peripheral concern of the NLRA or the relevant conduct touches interests "so deeply rooted in local feeling and responsibility that, absent compelling congressional direction," and 2) "Machinists preemption", whether Congress intended the conduct at issue to be unregulated and "controlled by the free play of economic forces" rather than subject to a state's regulation. *See* Jon O. Shimabukuro, *Supreme Court Considers Preemption Under the National Labor Relations Act*, CONG. RSCH. SERV.: L. SIDEBAR (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10912.

[100] Picketing is aimed at a neutral third party with the objective of forcing that party to take action that will afford the union leverage in its dispute with the primary employer. *See* Serv. Emp. Int'l Union Loc. 87 v. NLRB, 995 F.3d 1032, 1041 (9th Cir. 2021).

[101] *Id.*at 1038.

[102] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8" *See* 29 U.S.C. § 158(a)(3).

'the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,'"[103]. These activities include forming or joining labor unions, participating in strikes, or picketing, and advocating for better working conditions. Furthermore, the burden placed on employers to demonstrate business necessity for any constraints on off-duty picketing would extend to cyberpicketing as well. Employers would need to justify any restrictions imposed on employees' digital activities related to picketing, which could involve concerns such as data security, productivity, or maintaining a positive work environment.

There is no explicit language in Section 7 regarding access rights to digital platforms. Unlike physical spaces where the boundaries are more tangible, delineating what constitutes a "nonworking area" in the digital domain is less straightforward. This ambiguity could lead to disputes between employers and employees regarding the permissible scope of cyberpicketing activities. For example, the ruling in *Capital Medical Center v. NLRB*[104] affirmed the statutory right of off-duty employees to picket in nonworking areas of company property, but since the decision focuses on physical access rights, it fails to answer whether such rights would apply in the virtual realm. In the context of cyberpicketing, the notion of "nonworking areas of company property"[105] could extend to digital platforms and communication channels used by employees, such as company email systems or internal social media networks.

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[103] *See* NLRB, *supra* note 19., Section §§ 7 & 8(a)(1).
[104] *See generally* Capital Med. Ctr. v. NLRB, 909 F.3d 427 (D.C. Cir. 2018).
[105] The Court held that outside of immediate patient-care areas, such as in hospital lounges and cafeterias, a prohibition on employee solicitation of union support is presumptively invalid unless the hospital can demonstrate the need for the restriction "to avoid disruption of health-care operations or disturbance of patients.
presumption applies only in "non-patient care areas." In patient-care areas, a hospital is generally free to prohibit Section 7 activity including any holding of picket signs. *See i*d. at 435.

In *Olvera v. State*[106], the Texas Court of Criminal Appeals defined "picketing" to be equivalent to "patrolling"[107]. This narrow construction affirmed that statutes prohibiting picketing near medical facilities were constitutional. Although federal district courts have criticized *Olvera's* decision to allow the state to limit the geographic areas in which picket may take place, it remains good law and establishes precedent in Texas state courts for narrowly construing the meaning of "picketing" in statutes restricting protests and demonstrations. Olvera provides an example of a legitimate state interest and narrow interpretation overpowering a constitutional right to picket. Conversely, in *CF&I Steel, L.P. v. USW, Locals*[108], the court determined that a statute prohibiting residential labor picketing was unconstitutional due to its lack of precision and narrow tailoring, thus indicating a broad interpretation of what constitutes lawful picketing.

In *J.F. Hoff Electric Co. v. NLRB*[109], the court established that picketing aimed at influencing suppliers and customers constitutes lawful primary activity[110], even if it exerts pressure on secondary employers. The court's expansive interpretation of lawful picketing encompasses actions that target the primary employer's employees, customers, and suppliers. This precedent may inform future considerations regarding the legality and legislative regulation of cyberpicketing, particularly in its ability to reach various stakeholders in the digital realm. Hoff provides a precedent for how labor unions can legally picket at common sites, which are locations where both the primary employer and neutral employers operate. This means that in the context of cyberpicketing, a union would need to ensure that its online activities are directed as much as

[106] *See* Olvera v. State, 725 S.W.2d 400 (Tex. App. 1987).
[107] In defining picketing in relation to patrolling the statute states, "'picketing' includes what that word typically calls to mind: persons patrolling at the entrance to a targeted business, carrying signs affixed to sticks. But it is not limited to such conduct." *See.* e.g. 29 U.S.C. § 158(b)(7).
[108] *See generally* CF&I Steel, LP. v. United Steel Workers of Am., et al., 23 P.3d 1197 (Colo. 2001).
[109] *See generally* J. F. Hoff Electric Co. v. NLRB, 642 F.2d 1266 (D.C. Cir. 1980).
[110] Primary activity is activity within the scope of the NLRA, activity directed at the primary employer, not involving neutral employers. It is unlawful for a union to coerce a neutral employer to force it to cease doing business with a primary employer. NLRB *supra note* 30.

possible at the primary employer, and not at neutral parties. Hoff creates an ambiguity on whether the burden/responsibility to inform the union about any virtual "gates" or boundaries that should not be crossed during cyberpicketing rests on the union or the neutral party.

Established cases such as *NLRB v. Town & Country Elec.*[111] and *PHT, Inc. v. NLRB*[112] underscore the protection of off-duty and offsite employees' rights to utilize nonwork areas of company premises for union activities within labor law. By analogy, the use of the internet could be considered akin to engaging in "off-duty" and "offsite" union activities. This precedent may serve as a basis for future considerations regarding the legality and legislative regulation of cyberpicketing, highlighting the potential extension of protections to online spaces for employee expression and organizing efforts.

Statutorily, standard employee picketing practices are indisputably protected, but the devil is in the details. The current protections under the NLRA do not expressly contemplate protection for cyber employee picketing methods. Yet, these statutory provisions contribute to the broader legal framework governing picketing activities and underscore the protection afforded to such expressions of collective action. For instance, NLRA Section 104 of Title 29[113] establishes a prohibition on courts issuing injunctions against individuals engaged in labor disputes to prevent them from picketing, assembling, urging, advising, or notifying others of an intention to picket, or encouraging picketing. This prohibition applies as long as such activities are conducted peacefully

[111] NLRB v. Town & Country Elec. holds that paid union organizers retained NLRA protection and did not abandon their employment by engaging in organizing during nonwork hours, likening it to moonlighting. The Court found union organizing activity specifically protected by the NLRA even if seen as disloyal by the employer. NLRB v. Town & Country Elec., 516 U.S. 85 (U.S. Sup. Ct. 1995).

[112] In PHT, Inc. v. NLRB, the D.C. Circuit upheld an NLRB finding that an offsite employee work stoppage protesting working conditions and perceived unfair labor practices was protected concerted activity under the NLRA. The court held that the location of the work stoppage offsite did not remove the protection, since the stoppage sought to protest terms and conditions of employment. *See* PHT, Inc. v. NLRB, 920 F.2d 71 (D.C. Cir. 1990).

[113] *See* 29 U.S.C. §104 (enumeration of specific acts not subject to restraining orders or injunctions).

and without resorting to fraud or violence. This legal safeguard reinforces the rights of individuals involved in labor disputes to engage in picketing activities within the bounds of peaceful and lawful conduct, parameters that can reasonably be achieved online.

Likewise, Section 158 of Title 29 of the US Code[114] delineates specific forms of picketing deemed unfair labor practices, suggesting the legality of other types of picketing. It affirms the legality of picketing aimed at truthfully informing the public about a labor dispute, provided it does not encourage work stoppages among secondary employers. By extension, this framework could inform future considerations regarding the legality and legislative regulation of cyberpicketing, emphasizing the permissibility of online activities aimed at disseminating accurate information regarding labor disputes while avoiding coercion of secondary entities.

Additionally, 29 USCS §157[115] in conjunction with Section 113 of Title 29[116] grants employees the right to participate in concerted activities, such as picketing, for the purpose of collective bargaining. This provision directly upholds the legality of employee picketing as an essential component of labor rights. This foundational principle may guide future considerations regarding the legality and legislative regulation of employee picketing, including its application to digital platforms and cyberpicketing activities.

For example, hypothetically, a union representing employees at ABC Manufacturing organizes a cyberpicketing campaign targeting the company's suppliers through social media. The campaign encourages the suppliers to cease doing business with ABC until the union's demands are met. The company argues that this activity constitutes illegal secondary picketing. The court

[114] 29 U.S.C. § 158 (unfair labor practices).
[115] 29 U.S.C. § 157 (right of employees as to organization, collective bargaining, etc.).
[116] *See* 29 U.S.C. § 113 (Defines terms pertinent to labor disputes, including the designation of a labor dispute as a controversy between employees and employers within the same industry. It highlights that employees involved in picketing are considered participants in such disputes, clarifying the legal framework surrounding picketing activities and underscoring the recognition of picketing as a form of engagement in labor disputes).

in Hoff Electric Co. v. NLRB[117] ruled that picketing aimed at influencing suppliers and customers can be lawful primary activity, even if it exerts pressure on secondary employers. Here, the union could argue that its cyberpicketing campaign is a lawful extension of this principle, directed primarily at the primary employer's stakeholders. Furthermore, Under Section 158 of U.S. Code 29[118], certain forms of picketing, such as coercing secondary employers, are deemed unfair labor practices and prohibited. However, picketing aimed at truthfully informing the public about a labor dispute is permissible. In this example the union could frame its social media campaign as informational rather than coercive, potentially falling within the scope of lawful activity[119]. Moreover, under the Garmon Rule, states are preempted from regulating conduct protected or prohibited by the NLRA, limiting the ability of ABC's suppliers to seek state-level intervention. ABC Manufacturing may face challenges in proving that the union's cyberpicketing campaign is illegal secondary activity, especially if the union positions it as lawful primary activity intended to inform the public and stakeholders about the labor dispute.

In another hypothetical, DEF Pharmaceuticals enforces a strict policy prohibiting employees from using company-owned digital platforms,[120] for picketing or union-related activities, citing the need to protect sensitive and proprietary information related to drug development and patient data. When employees attempt to organize a cyberpicketing campaign on

[117] J. F. Hoff Electric Co. v. NLRB, 642 F.2d 1266 (D.C. Cir. 1980).
[118] 29 U.S.C § 158 (unfair labor practices).
[119] See Thomas Moyher & Robert T. Szyba, *From The Rat To The Mouse: How Secondary Picketing Laws May Apply In The Computer Age*, 26 HOFSTRA LAB. & EMP. L.J. 291 (2008) (referencing National Labor Relations Act § 8(b)(4)(ii), 29 U.S.C. § 158(b)(4)(ii) (2000)).

> A website may be limited to the extent that it may 'threaten, coerce, or restrain' a party, but may be protected to the extent that the website is used for the 'purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer.' Looking to this language, a court or the NLRB may determine that an informational website is a method of reaching the public that should be protected, barring content on the website that would indicate coercion or threats.

[120] Digital platforms such as email and internal messaging systems.

these platforms to protest working conditions, the company blocks the campaign, arguing that such activities could expose confidential information, leading to legal liabilities and competitive harm. DEF Pharmaceuticals defends its policy by asserting that, under established precedent,[121] employers can impose restrictions on employee activities when there is a legitimate business necessity, such as safeguarding proprietary data. Although Section 7[122] of the NLRA guarantees employees the right to engage in concerted activities, it does not grant an absolute right to use employer-owned resources for such purposes, especially when significant risks are involved. Drawing parallels to cases like *Olvera v. State*,[123] where the court upheld restrictions on union activities in certain circumstances, here DEF Pharmaceuticals argues that digital platforms are an extension of company property, and restricting their use for cyberpicketing is both reasonable and narrowly tailored to a legitimate state interest, making it legally justifiable to protect the company's interests.

These statutory provisions paired with developing case law collectively inform the legality of employee picketing and potentially should be extended to cyberpicketing endeavors in the digital sphere.

VI. Employer Responses and Potential Regulatory Reforms

Lawmakers and regulatory bodies are faced with the task of adapting to the challenges raised by cyberpicketing. This section will explore the responses of government agencies and legislative bodies to cyberpicketing, including any proposed or enacted reforms. It will also

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[121] *See* Lapidus v. Lurie LLP, No. A17-1656, 2018 Minn. App. Unpub. LEXIS 526 (June 18, 2018) (finding noncompete provisions reasonable, noting that the employee's access to confidential information justified the restrictions. Restrictive covenants may be enforced to the extent necessary to protect legitimate business interests, such as goodwill, trade secrets, and confidential information).

[122] *Interfering with employee rights (Section 7 & 8(a)(1)*, NLRB https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1 (last visited Jan. 31, 2025).

[123] Olvera v. State, 725 S.W.2d 400 (1st Cir. 1987).

consider the efficacy of these responses in balancing the rights of digital activists and the interests of targeted entities.

Employers have used various legal methods to combat standard pickets. For example, employers have sought injunctions to limit or stop picketing activities[124]. Injunctions may be pursued when there is evidence that a picket is unlawful or causing disruption. However, an injunction against a strike is only allowed if the underlying issue prompting the strike can be resolved through arbitration[125]. This implies that if the disagreement between the employer and employees can be addressed through arbitration, the court might issue an injunction against the strike until the arbitration process concludes. Essentially, this principle underscores that strikes should not be stopped by injunctions if the issues at hand can be resolved through arbitration, highlighting the significance of employing suitable dispute resolution methods.

Furthermore, in cases of misconduct by strikers, where actions have the potential to violate the rights protected by the NLRA, employers are within their rights to take disciplinary actions to preserve a workplace environment conducive to the exercise of those protected rights. Misconduct by strikers warrants disciplinary measures by employers if, given the circumstances, it could reasonably be interpreted as an attempt to coerce or intimidate other employees in the exercise of their NLRA-protected rights[126]. Considering the hypothetical scenario “Context 2” [127] previously mentioned, where employees engage in online activism against an employer in a cyberpicketing campaign, it becomes pertinent to discern to whom "striker misconduct" can be attributed in such a mass online protest. In this context, identifying the individuals responsible for misconduct in a cyberpicket—such as harassment, dissemination of false information, or other forms of disruptive

[124] *See generally* PG Publ'g Co. v. Pittsburgh Typographical Union #7, 304 A.3d 1227 (PA Super. Ct. 202).
[125] 29 U.S.C. §185 (2023) (Suits by and against Labor Organizations).
[126] NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997).
[127] *See infra* Section IV.

behavior—may present unique challenges. Nevertheless, if certain individuals participating in the cyberpicket engage in activities that could reasonably be construed as coercive or intimidating toward fellow employees, the employer's right to take disciplinary action would still apply[128]. The determination of misconduct and subsequent disciplinary action would need to be guided by the principles established under the NLRA and relevant legal precedents, even within the digital realm.

Employers can present their perspective on the labor dispute to the public, as long as they do not engage in coercive tactics or unfair labor practices[129]. Although legally striking employees typically have the right to seek voluntary public support for their cause, they are prohibited from obtaining such support through coercion, deceit, or cunning tactics. Moreover, they are not allowed to intentionally cause excessive economic harm to their employer beyond what is necessary for the lawful conduct of concerted activities[130]. Employers can take action against picketing on their premises if their property rights and/or regulations governing public safety are implicated. Reflecting on the earlier discussed "Context 1"[131], where employees resort to online measures against an offline employer, it is crucial to consider at what point an online action could yield physical consequences, such as implications for physical property rights.

Existing case law establishes the fundamental principle that any employer's response to picketing must be carefully tailored and justified by a genuine interest[132]. This means that employers must have a valid reason for their actions and ensure they are proportionate to the circumstances. However, if cyberpicketing activities occur outside of work premises and away

[128] *See* Consol. Commc'ns., Inc. v. NLRB, 837 F.3d 1 (D.C. Cir. 2016) (holding that an employer is not required to bargain with a union over changes to employee healthcare benefits if those changes represent a continuation of the existing benefits plan rather than a modification or alteration).
[129] *Interfering with Employee Rights (Section 7 & 8(a)(1)): About NLRB*, NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1.
[130] *The Cyberpicket: A New Frontier for Labor Law, supra* note 96.
[131] *See infra* Section IV, "Case Studies/Examples of Cyberpickets" at pg. 19.
[132] Narrowly tailored and present a legitimate interest.

from direct employer oversight, employers face even stricter limitations on their ability to address and counteract such actions. This presents a complex balancing act between the employees' right to organize and bargain collectively, the employer's need to maintain order and respect within the workplace, and the public's right to safety and security. The reality is that the existing statute has been successfully adapted to the online forum, with established frameworks existing in industries such as business and healthcare[133]. These frameworks lend legitimacy to the regulation of cyberpicketing. The NLRB need not remain passive; by utilizing the precedents set by other industries, it can pave the way for labor law to keep pace with evolving online dynamics.

VII. Conclusion

Employee cyberpickets challenge the traditional limits between online and offline employee collective action, and in doing so distinguish themselves from hacktivism and cyberattacks. To navigate this developing landscape, legal professionals should consider the motivations, consequences, and legal implications of such actions. As the digital age continues to shape the way we engage in activism and dissent, it is crucial to address the complexities of cyberpicketing to safeguard both individual freedoms and organizational security.

When addressing the question of whether these actions should be classified as hacktivism[134] or as a legitimate means of employee protest with a position in the NLRA, the conclusion drawn from this note is that treating cyberpicketing within the same framework as traditional picketing is both appropriate and feasible. The NLRA offers a sufficient base for

[133] The financial sector faces regulatory requirements related to online banking, electronic payments, cybersecurity, fraud prevention, and compliance with financial data protection laws such as the Payment Card Industry Data Security Standard (PCI DSS) and the Gramm-Leach-Bliley Act. The healthcare industry is subject to regulations such as the Health Insurance Portability and Accountability Act (HIPAA) in the United States, which governs the protection of patients' medical records and personal health information (PHI) in electronic form.

[134] A form of digital protest with a political or social agenda, and/or as cyberattacks, malicious acts intended to disrupt or harm an organization. *See What Is Hacktivism*, PROOFPOINT, https://www.proofpoint.com/us/threat-reference/hacktivism (last visited Apr. 19, 2025).

regulating labor activities, including picketing, and has demonstrated adaptability over time to accommodate changes in labor practices. As cyberpicketing becomes increasingly prevalent, the NLRA provides a foundation upon which regulations can evolve to address new challenges and developments in labor activism. Therefore, incorporating cyberpicketing into the existing framework established by the NLRA is not only viable but also essential for effectively regulating modern labor activities. However, the NLRA cannot afford to remain passive and exclusive of the practice of cyberpicketing. The NLRB and its General Counsel have several policymaking tools at their disposal to address the evolving use of the cyberspace in labor realm. Tools such as formal rulemaking to clarify how existing provisions of the NLRA apply to cyberpicketing, case-by-case adjudication of existing NLRA provisions in the context of online activities, and guidance documents and public statements to inform the general public, both employer and employee, about the rights and obligations surrounding cyberpicketing under the NLRA[135]. All of these mechanisms can gradually shape the legal framework surrounding cyberpickets, providing guidance for future cases. Ultimately, any legislation on the topic cannot afford to be fragmented between states, it must be nationwide and sufficiently comprehensive to address future requirements.

History has demonstrated that strikes are persistent, their tactics will continuously evolve to suit the demands of the contemporary landscape. Cyberpickets represent the most recent adaptation for survival in this regard. Employee cyberpickets have the capacity to push against conventional boundaries, setting themselves apart from hacktivism and cyberattacks, thus establishing a distinction that balances employees' rights to express dissent with the need to safeguard corporate interests and cybersecurity. As the digital age continues to shape the way we

[135] *See generally* Robert Iafolla & Parker Purifoy, *Labor Board, General Counsel Forge Different Paths to Same Goal*, BLOOMBERG L., (2024), https://news.bloomberglaw.com/daily-labor-report/labor-board-general-counsel-forge-different-paths-to-same-goal.

engage in activism and dissent, it is crucial to address the complexities of employee cyberpickets to safeguard both individual freedoms and organizational security.