It's a Brave New World (Wide Web):

Why Employees Need Email Access as a Matter of Right.

I. INTRODUCTION

Fifty years have passed since the first email was sent.[1] When Ray Tomlinson developed "SNDMSG," the first method of electronic communication from one computer to another, he had no idea the vast world he was taking the first step into.[2] Although few at the time could have anticipated the breadth of incoming technological innovation, technology has advanced nonetheless. One result of this advancement is that the "Millennial" generation is experiencing nostalgia "more intensely . . . than previous generations."[3] Innovations that were cornerstones of their childhoods have been updated and replaced ten times over.[4] And since "the times they are a-changin,'"[5] the policies and positions governing those times, they must "a-chang[e]" too.

Email began inauspiciously as simple textual communication from one device to another. While the achievement was thrilling, it was accomplished with little fanfare.[6] Today, billions of

1. *See* Rachel Swatman, *1971: First Ever Email*, GUINESS WORLD RECS. (Aug. 19, 2015) https://bit.ly/2TSVKYZ.

2. *See id.* ("I had no notion whatsoever of what the ultimate impact would be.").

3. *See The Virtues of Millenial Nostalgia*, GRATTAN ST. PRESS (Sept. 18, 2020) https://bit.ly/3gjGMlZ; *see also* Allison Matyus, *Why Are We So Nostalgic for the Technology from our Past?*, DIG. TRENDS (Dec. 26, 2019) https://bit.ly/3zqkNTs.

4. *See* Matyus, *supra* note 3.

5. BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

6. *See* Swatman, *supra* note 1 (describing the first "email" that was sent to a computer in the same room with "test messages [that] were entirely forgettable and [Tomlinson] ha[d], therefore, forgotten them").

emails are exchanged all over the world daily.[7] Email has become an integral part of a person's life, whether it be for work, correspondence with friends, or communication with businesses one hopes to patronize.

Despite email's starring role in today's world, the question of whether an employee has any right to use an employer's email system has been repeatedly raised over the last thirty years.[8] A broad spectrum of answers have been proposed, from an employee having no right to an employer's system[9] to an employee presumptively having the right to use an employer's system as long as they have otherwise been granted access.[10] However, email has continually evolved over the last three decades while labor lawyers continue to debate.[11] The most recent technological thrust has come on the heels of the COVID-19 pandemic, which abruptly closed down millions of office spaces in 2020. COVID-19 quarantine orders forced companies to quickly figure out how to optimize their technology and communication systems so that they could continue offering goods and services to the public. Quarantine orders also caused a massive uptick in remote work. In the wake of the pandemic, the time is ripe to craft a new policy on an employee's right to use their employer's email system.

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7. *See* Joseph Johnson, *Number of Emails Per Day Worldwide 2017-2025*, STATISTA (Apr. 7, 2021) https://bit.ly/3v6NGAH.

8. *See* E.I. Du Pont De Nemours & Co., 311 N.L.R.B. 893, n.4 (1993); The Register Guard, 351 N.L.R.B. 1110, 1110 (2007); Purple Communications, Inc., 361 N.L.R.B. 1050, 1050 (2014); Caesars Entm't, 368 NLRB No. 143, *1 (Dec. 17, 2019); *see also* Maureen W. Young, *Can Employers Limit Employee Use of Company Email Systems for Union Purposes?*, 72 N.Y. ST. B.J., Jan. 2000, at 30.

9. *See Register Guard*, 351 N.L.R.B. at 1116.

10. *See Purple Communications*, 361 N.L.R.B. at 1050.

11. *See, e.g.*, Eric Barton, *Love it or Loathe it, Email Changed the World*, BBC (Jan. 13, 2015) https://bbc.in/3wcbxQU.

In this essay, Part II will discuss the legal authority regarding email policies, including the National Labor Relations Act ("NLRA"),[12] Supreme Court Decisions interpreting the NLRA, and National Labor Relations Board ("NLRB") decisions.[13] Part III will discuss the increase in remote work spurred by the COVID-19 Pandemic.[14] Part IV will suggest that our technology-reliant economy must catch up with the times by allowing employees access to their employers' email systems.[15] Part V will offer concluding remarks on the issues raised.[16]

II. BACKGROUND

To determine whether, in light of recent changes to American workplaces, employees should be granted access to an employer's email system, one must first consider the existing legal authority. One must consider, of course, the statutory text of the NLRA. Decisions addressing similar issues in the past are equally important. While the statutory text of the NLRA and Supreme Court decisions interpreting the NLRA support an employee's right to communicate, the NLRB decisions tend to fluctuate based on the majority of members' political affiliations.[17]

A. *The Foundation that the NLRB's Email Jurisprudence Has Been Built Upon*

Consideration of rights guaranteed by the NLRA must begin with consideration of the

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12. *See* National Labor Relations Act, 29 U.S.C. § 151–69.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part V.

17. *Compare* The Register Guard, 351 N.L.R.B. 1110, 1116 (2007), *and* Caesars Entm't, 368 N.L.R.B. No. 143, *10 (2019), *with* Purple Communications, Inc., 361 N.L.R.B. 1050, 1063 (2014).

NLRA's text. Section 7 of the NLRA guarantees three employee rights: "the right of self-organization," the right "to bargain collectively through representatives of their own choosing, and [the right] to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[18] Any employer who "interfere[s] with, restrain[s], or coerce[s] employees in the exercise" of their Section 7 rights has committed an "unfair labor practice" in violation of Section 8(a)(1) of the NLRA.[19]

Until 1945, employees' right to communicate about union organization was not explicit within the NLRA's guaranteed right to organize. However, in 1945 the Supreme Court decided *Republic Aviation*,[20] which has become a landmark decision in labor law.[21] The issue before the court was whether an employer could create a rule broadly prohibiting "[s]olicitation of any type" on the employer's premises.[22] The non-solicitation policy at issue extended to all times that employees were on the employer's premises, including non-working times.[23] Due to a circuit split, the Court granted certiorari.[24]

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18. *See* National Labor Relations Act § 7, 29 U.S.C. § 157.

19. *See* National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1).

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

21. *See* Purple Communications, Inc., 361 N.L.R.B. 1050, 1054 (2014) (describing *Republic Aviation* as "the leading case addressing employees' right to communicate on their employer's property about their working conditions").

22. *See Republic Aviation*, 324 U.S. at 795. The NLRB had determined that such a broad non-solicitation rule violated Section 8(1) (which is now Section 8(a)(1)). *See* Republic Aviation Corp., 51 N.L.R.B. 1186, 1186–87 (1943). The Court of Appeals for the Second Circuit affirmed. *See* Republic Aviation Corp. v. Nat'l Lab. Rels. Bd., 142 F.2d 193, 196 (2d Cir. 1944).

23. *See Republic Aviation*, 324 U.S. at 795.

24. *See Republic Aviation*, 324 U.S. at 796.

In *Republic Aviation*, the Court held that non-solicitation policies are presumptively unlawful if it restrains employee communications during non-working time.[25] In a later case, the Court elaborated that communication is an integral aspect of the guaranteed right of organization because "organization rights are not viable in a vacuum."[26] In pronouncing its rule in *Republic Aviation*, the Court emphasized the desired balance between "the undisputed right of self-organization . . . and the equally undisputed right of employers to maintain discipline in their establishments."[27] To achieve this balance, the Court recognized that an employer can defeat the presumption of unlawfulness if that employer can present special circumstances which justify the restraint.[28] Additionally, if such a restraint is justified by a need "to maintain production or discipline," that restraint is not unlawful.[29]

Although *Republic Aviation* is among the most famous cases in Labor Law, other precedents are also relevant to understand the foundation that the NLRB's email policies have been built upon. For example, courts have addressed how to balance the Section 7 right to

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25. *See id.* at 795–96. Generally, there is a strong presumption that employers are able to limit the types of activities that occur during an employee's working time. *See* Peyton Packing Co., Inc., 49 N.L.R.B. 828, 843 (1943), *enforced*. 142 F.2d 1009 (5th Cir.), *and cert. denied*, 323 U.S. 730 (1944). However, if any policy discriminates against the exercise of Section 7 activity, regardless of whether it is working or nonworking time, it is also an unfair labor practice. *See* The Register Guard, 351 N.L.R.B. 1110, 1119 (2007); *see also* 29 U.S.C. § 158(a)(1), (a)(3).

26. *See Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539, 543 (1972).

27. *See Republic Aviation*, 324 U.S. at 797–98.

28. *See id.* at 798–99. The presence of "special circumstances" that require a restriction of Section 7 rights is a well-developed exception to the general rule of *Republic Aviation*. *See, e.g.*, Beth Israel Hosp. v. N.L.R.B., 437 U.S. 483, 505 (1978) (stating that an employer hospital's "interest in protecting patients from disturbance" is a special circumstance that could justify restriction of the employees' Section 7 rights).

29. *See* Purple Communications, Inc., 361 N.L.R.B. 1050, 1063 (2014) (discussing *Republic Aviation*'s impact on an employer's ability to restrict union-related communications).

organize and employers' property rights in various contexts.[30] The Supreme Court has instructed that Section 7 rights and property rights should be simultaneously enacted "with as little destruction of one as is consistent with the maintenance of the other."[31] Similar to *Republic Aviation*, most judicial bodies addressing this balance state that an employer's right to restrict an employee's use of its equipment for union communications during working hours is indisputable.[32] Such restrictions are generally acceptable, provided that the restrictions are not discriminatory based on whether the activities are union-related.[33] For nonemployees, an employer's property right has to yield only if no reasonable alternatives existed to communicate the benefits of organization to employees.[34]

B. *The National Labor Relations Board's Email Jurisprudence*

The NLRB's first decision analyzing an employee's Section 7-granted right to an employer's email system was *Register Guard*, decided by the Bush-appointed Board in 2007.[35]

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30. *See* N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (addressing nonemployee rights to distribute literature in an employer's parking lot); Eaton Technologies, Inc., 322 N.L.R.B. 848, 853–54 (1997) (discussing an employee's right to use a company's bulletin board for union communications); Union Carbide Corp.-Nuclear Div., 259 N.L.R.B. 974, 978–80 (1981) (discussing an employee's right to use an employer's telephone for union communications), *enforced in part sub nom.*, Union Carbide Corp. v. N.L.R.B., 714 F.2d 657, 663–64 (6th Cir. 1983); Champion Int'l Corp., 303 N.L.R.B. 102, 105–06 (1991) (discussing an employee's right to use an employer's copy machine for union activity).

31. *See Babcock & Wilcox*, 351 U.S. at 112.

32. *See Union Carbide Corp.*, 259 N.L.R.B. at 979.

33. *See Eaton Technologies*, 322 N.L.R.B. at 853; *Union Carbide Corp.*, 259 N.L.R.B. at 979; *Champion Int'l Corp.*, 303 N.L.R.B. at 105 (citing *Union Carbide Corp.*, 714 F.2d at 664).

34. *See Babcock & Wilcox*, 351 U.S. at 113. If an adequate alternative exists, courts are often hesitant to impede upon employers' property rights. *See id.*

35. *See* The Register Guard, 351 N.L.R.B. 1110, 1114–16 (2007).

The issue before the Board, as a matter of first impression, was whether an employer violates Section § 8(a)(1) of the National Labor Relations Act "by maintaining a policy prohibiting the use of email for all 'nonjob-related solicitations.'"[36] Specifically, the employer had a policy stating that the email system was the employer's property and that all "non-job-related solicitations" were a prohibited use of the employer's property.[37] The company had allowed other personal communications through its email system but did not allow solicitations.[38]

Ultimately, the Board held that employees have "no statutory right to use the [employer's] email system for Section 7 matters."[39] The Board reasoned that the "employer has a 'basic property right' to 'regulate and restrict employee use of company property.'"[40] The Board analogized email systems to other "equipment or media," stating that the employer maintains the right to restrict employee use of such property "as long as the restrictions are nondiscriminatory."[41] Repelling a dissent by Members Liebman and Walsh, the Board stated that

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36. *See id.* at 1110. The Board had previously decided one case regarding employee rights to use email services. *See* E.I. Du Pont De Nemours & Company, 311 N.L.R.B. 893, n.4 (1993). However, the Board held that *discriminatory* policies limiting email were unlawful, as provided in Section 8(a)(1). *See id.* The Board never reached the broader question of when an employer may implement a non-discriminatory policy. *See id.*

37. *See Register Guard*, 351 N.L.R.B. at 1111.

38. *See id.* The company email system was regularly used for "baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking." *See id.*

39. *See id.* at 1114.

40. *See id.* (quoting Union Carbide Corp. v. NLRB, 714 F.2d 657, 663–64 (6th Cit. 1983)).

41. *See id.* Later in *Register Guard*, the Board found that the employer had enforced its non-solicitation policy discriminatorily against Section 7 activity, in violation of Section 8(a)(1). *See id.* at 1119.

Republic Aviation does not apply to rules regulating email systems because rules regulating email still leave employees with "the full panoply of rights to engage in oral solicitation on nonworking time and also to distribute literature on nonworking time in nonwork areas."[42] According to the Board, its opinion in *Register Guard* was consistent with guaranteed rights under Section 7 because Section 7 "'protects organizations rights . . . [not] particular means by which employees seek to communicate.'"[43]

The rule of *Register Guard* stood until 2014 when the Obama-appointed NLRB decided *Purple Communications*.[44] Early in the opinion, the Board "overrule[d] the Board's divided 2007 decision in *Register Guard* to the extent it h[eld] that employees can have no statutory right to use their employer's email systems for Section 7 purposes."[45] The Board rooted the urgent need to change the *Register Guard* rule in the rapid expansion of email as a mainstay in workplace communication.[46] Additionally, this Board found that whether an employee has a statutory right to an employer-granted email system must be balanced with the employer's managerial rights, in accordance with *Republic Aviation*.[47] This juxtaposes the Board in *Register Guard*'s opinion that

42. *See id.* at 1115.

43. *See id.* (quoting Guardian Industries Corp v. N.L.R.B., 49 F.3d 317, 318 (7th Cir. 1995).

44. *See* Purple Communications, Inc., 361 N.L.R.B. 1050 (2014).

45. *See id.* at 1050.

46. *See id.*

47. *See id.* at 1054. Under the *Republic Aviation* line of cases, the Board must balance an employee's right to self-organize with their employers' right "to maintain discipline in their establishments." *See* Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 797–98 (1945).

the employee's right must be balanced with the employer's property rights.[48]

Rather than commit to a wholesale reversal of the *Register Guard* rule, the Board carved out a limitation and an exception to employees' entitlement to use an employer's email system for Section 7 communications.[49] The Board quickly noted a limitation on the Section 7-granted right. Specifically, entitlement to an employer's email system extends "only to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide such access."[50] Next, the Board announced that employers can implement a "total ban on nonwork use of email, including Section 7 use on nonworking time" by the same means provided in *Republic Aviation*—by showing "special circumstances that make the ban necessary to maintain production or discipline."[51]

The Board's reasoning was broken down into three main assertions. First, the Board highlighted its past emphasis on the importance of employees' ability to communicate in the workplace.[52] Second, the Board recognized that, since *Register Guard*, email communication had become "'the most pervasive form of communication in the business world,'" and that email was only growing in popularity as a method of communication.[53] Third, the Board stated that the

48. *See Register Guard*, 351 N.L.R.B. at 1114.

49. *See Purple Communications*, 361 NLRB at 1050.

50. *See id.*

51. *See id.*

52. *See id.* at 1054.

53. *See id.* at 1055–56 (quoting *Email Statistics Report, 2014-2018*, THE RADICATI GRP., INC., 2 (Apr. 2014) https://bit.ly/3bZyWga).

Board in *Register Guard*'s comparison of emails to other equipment cases was not appropriate.[54] After weighing those considerations, the Board found that its new framework was the only way to continue the Board's practice of "adjust[ing] its analysis under *Republic Aviation* as needed to accommodate the rights at issue in particular factual variations."[55]

The Board's most recent shift regarding email policies came in 2019 in *Caesars Entertainment*.[56] In *Caesars Entertainment*, the Trump-appointed Board framed the issue as "whether the [NLRA] requires [an employer] to permit employees to use its email and other information-technology (IT) resources for the purpose of engaging in activities protected by Section 7 of the Act."[57] Following closely to the Board's opinion in *Register Guard*, the Board in *Caesars Entertainment* believed that the employee's right was dependent on a balance between the employee's Section 7 rights and the employer's property rights.[58] Also like *Register Guard*, this Board believed that such property decisions could still be read consistently with *Republic Aviation*.[59] Accordingly, the Board decided to overrule *Purple Communications* and return the

54. *See id.* at 1057. The Board in *Register Guard* said an email system should be treated the same as "bulletin boards, telephones, and televisions." *See* The Register Guard, 351 N.L.R.B. 1110, 1114 (2007). The Board's opinion in *Purple Communications* stated that those types of equipment are not analogous to emails. Bulletin boards, telephones, and televisions have a "finite" capacity of information that can be conveyed at one time. Alternatively, email systems have "vastly greater speed and capacity," which grants modern email systems a nearly infinite capacity. *See Purple Communication*, 361 N.L.R.B. at 1057–58. The majority in *Purple Communications* largely repeated the analysis found in Members Liebman and Walsh's dissent in *Register Guard*. *See Register Guard,* 351 N.L.R.B. at 1125–26.

55. *See Purple Communications*, 361 N.L.R.B. at 1061.

56. *See* Caesars Entm't, 368 NLRB No. 143 (Dec. 17, 2019).

57. *Id.* at *1.

58. *See id.*

59. *See id.*

Board to the rule from *Register Guard*.[60] However, the Board also recognized the necessity for an exception; specifically, the Board stated that employees may have a right to an employer's email system "in those rare cases where an employer's email system furnishes the only reasonable means for employees to communicate with one another."[61]

The reasoning in *Caesars Entertainment* is nearly identical to that of *Register Guard*.[62] Both opinions state that *Republic Aviation* only allows protection for face-to-face communications.[63] Both opinions also state that employees' Section 7 rights must be accomplished by disturbing an employer's property rights as little as possible.[64] Additionally, both opinions justify the restrictions of email systems by comparing them to NLRB decisions regarding bulletin boards, telephones, copy machines, and televisions.[65] However, the Board in *Caesars Entertainment* noted that employees' personal smartphones, email accounts, and social media provide "*adequate*" methods of communication that employees can use for Section 7 purposes.[66] Therefore, according to the Board, an employer's rule against nonbusiness use is not

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60. *See id.*

61. *See id.* This exception is in line with the Board's decisions regarding non-employee rights to solicit on employer property. *See* Lechmere, Inc. v. N.L.R.B., 502 U.S. 527, 532 (1992). In *Lechmere*, the Court states that an employer must yield their property rights if "unique obstacles" exist that make organization impracticable. *See id.* at 540–41.

62. *Compare id.* at *6–10, *with* The Register Guard, 351 N.L.R.B. 1110, 1114–16 (2007).

63. *See Caesars Entm't*, 368 N.L.R.B. No. 143, at *7; *Register Guard*, 351 N.L.R.B. at 1115.

64. *See Caesars Entm't*, 368 N.L.R.B. No. 143, at *6; *Register Guard*, 351 N.L.R.B. at 1115.

65. *Compare Caesars Entm't*, 368 N.L.R.B. No. 143, at *6, *with Register Guard*, 351 N.L.R.B. at 1114.

66. *See Caesars Entm't*, 368 N.L.R.B. No. 143, at *9.

an "*unreasonable* impediment" to employees' guaranteed rights as long as employees have some way to communicate and the employer's policy is not discriminatory towards Section 7 activity.[67]

III. The Increase in Remote Work due to COVID-19.

One of the largest employment-related changes in the past couple years is the shift towards remote work. In May of 2020, at the height of the first wave of COVID-19, approximately thirty-five percent of employed people were teleworking.[68] By August 2020, this number had declined to approximately twenty-four percent.[69] Overall, at some point during the COVID-19 pandemic, "billions of people" have had to work from home.[70] However, this shift in increased remote work is not going to be limited to the timeframe that COVID-19 continues to be a threat.[71] Due to the benefits to employers and employees alike, increased remote work is likely a permanent change.[72]

Allowing flexible work arrangements, including remote work, is beneficial to employers both for financial and managerial reasons.[73] Having a schedule in which people are working

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67. *See id.* at *9–10.

68. U.S. Bureau of Labor Stats., One-Quarter of the Employed Teleworked in August 2020 Because of COVID-19 Pandemic (Sept. 1, 2020).

69. *See id.*

70. *See* Phil Lord, *COVID-19 and the Future of Work*, 98 Denv. L. Rev. F. 1, 2 (2021).

71. *See* Gregory K. Orme, *Silver Linings of the Pandemic*, 34 Utah B.J., Mar.-Apr. 2021, at 18; Danielle Davis Roe, *The Best Way to See 2020? In the Rearview Mirror!*, 109 Ill. B.J., Jan. 2021, at 45.

72. *See The Benefits of Remote Work—For Both Employees and Managers*, WeWork (May 4, 2020) https://we.co/3vd0Snu [hereinafter *Benefits*].

73. *See* Lord, *supra* note 70, at 2.

from home part of the week will allow employers to plan their office spaces around their needs.[74] In many instances, employers will be able to lower their overhead costs by renting smaller spaces because they will not have to accommodate as many employees simultaneously.[75] Additionally, working from home grants employees greater flexibility in pursuit of a desirable work-life balance.[76] This flexibility increases employee happiness in their work.[77] Greater employee happiness leads to greater employee retention.[78] In turn, greater employee retention leads to better quality employees and lower training costs for employers.[79] Flexible work arrangements also correlate to increased productivity.[80] Although some traditionalists may oppose this modern work arrangement, the benefits suggest better overall outcomes for employers.[81]

Working from home also helps alleviate inequities that exist in work spaces.[82]

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74. *See* Phil Lord, *The Social Perils and Promise of Remote Work*, 4 J. of Behav. Econs. For Pol'y 63, 64 (2020).

75. *See* Lord, *supra* note 70, at 2; Mary E. Vandenack, *In the Office, Out of the Office: Remote Challenges Outside, Safety Inside*, 47 LAW PRAC., Jan.-Feb. 2021, at 39; Lord, *supra* note 74, at 63.

76. *See Benefits*, *supra* note 72. The same article also discusses the inverse challenge of employees who "[b]lur[] lines between work and home life." *See id.* The article goes on to speculate that the increased time due to those blurred lines evens out due to the time saved from not commuting. *See id.*

77. *See* Laurel Farrer, *5 Proven Benefits of Remote Work for Companies*, FORBES (Feb. 12, 2020) https://bit.ly/35722qb.

78. *See id.*

79. *See Managing for Employee Retention*, SHRM https://bit.ly/2TSBZ3r (last visited June 10, 2021).

80. *See* Orme, *supra* note 71, at 17; *See* Daniel J. Siegel, *Working From Home Works: Law Firms Must Adapt*, 46 LAW PRAC., Nov.-Dec. 2020, at 28; Ferrer, *supra* note 77.

81. *See* Ferrer, *supra* note 77.

82. *See* Lord, *supra* note 74, at 63.

Historically, the lack of flexible work opportunities has had a disparate impact on women, both in terms of salary and in career advancement.[83] The reason for this disparity is the normative expectation that women perform a greater portion of domestic and child-rearing duties.[84] As alluded to above, flexible work arrangements empower greater balance between work and home responsibilities.[85] As a result, women will face fewer hurdles in career advancement and, consequently, will have higher salaries.[86]

In addition to the benefits to employers and employees, remote work has never been simpler due to technological advancements.[87] Video conferencing software like Zoom and group communication tools such as Microsoft Teams and Google Meet have become commonplace in offices.[88] These tools allow more cohesive work products, even when co-workers are working in their respective homes.[89] Admittedly, remote work technology is not a true replacement for the ability to interact and socialize in the office setting.[90] However, the individual benefits outweigh the reduction in possible face-to-face interactions.[91] Therefore, remote work is likely a

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83. *See* Siegel, *supra* note 80, at 26, 28.

84. *See* Lord, *supra* note 74, at 63.

85. *See* Siegel, *supra* note 80, at 29.

86. *See id.* at 27. While remote work is projected to ease the disparate impact on women, working from home does have a disparate impact on lower income individuals, who often have less space and fewer resources to create home offices. *See* Lord, *supra* note 70, at 10–11.

87. *See* Siegel, *supra* note 80, at 27–28; Vandenack, *supra* note 75, at 39.

88. *See* Gergo Vari, *Workplace 2021: Three Trends and the Technologies that can Drive Them*, FORBES (Feb. 16, 2021 9:20 AM) https://bit.ly/3pI8woS.

89. *See* Roe, *supra* note 71, at 45.

90. *See* Orme, *supra* note 71, at 17.

91. *See Benefits*, *supra* note 72.

permanent fixture in many American workplaces.[92]

IV. ANALYSIS

Federal policy supports and protects the organization of employees into unions and the resulting collective action of those unions.[93] Looking to the future, most workspaces are not likely to have a "water cooler" to communicate around.[94] For teleworking employees, they will log off at 5:00 PM and go into the other rooms of their home—presumably not bumping into many co-workers. As a result, if the Section 7-guaranteed right to organize is going to retain any of its teeth, the means that employees can use to organize need to correspond with the utilized means of communication. While the current rule under *Caesars Entertainment* provides that an employee may have access to an employer's email system if communication is otherwise impractical,[95] workforces are going to experience impractical face-to-face communication at an increasing rate due to the rise in remote work.[96] Accordingly, the NLRB should return to the rule from *Purple Communications*, granting employees access to their employer's email system, as long as they have otherwise been given access.[97] Moving forward, this is the most logical position for the NLRB to take for three reasons. First, it is consistent with the federal policy to

92. *See* Orme, *supra* note 71, at 18; Roe, *supra* note 71, at 45.

93. *See* National Labor Relations Act § 1, 29 U.S.C. § 151.

94. Discussions of working conditions around the water cooler or other communal area is what the Court in *Republic Aviation* sought to protect by declaring broad non-solicitation policies unlawful. *See* Purple Communications, Inc., 361 N.L.R.B. 1050, 1057 (2014); *see also* The Register Guard, 351 N.L.R.B. 1110, 1125 (2007) (Members Liebman and Walsh, dissenting).

95. *See* Caesars Entm't, 368 N.L.R.B. No. 143, *10 (2019).

96. *See Benefits*, *supra* note 72.

97. *See* Purple Communications, Inc., 361 N.L.R.B. 1050, 1063–64 (2014).

promote employee organization as stated in the NLRA.[98] Second, it is consistent with the NLRB's property jurisprudence.[99] Third, the recent change in workplaces has made the rule in *Caesars Entertainment* obsolete.[100]

A. Federal Policy Supports Employee Efforts for Organization

The NLRA states that "the policy of the United States [stands to eliminate] obstruction to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[101] Subsequently, the Supreme Court found that the right to organize includes an employee's ability to communicate with other employees about organization during non-working time.[102] In fact, such communication is integral to organizing.[103] Therefore, federal policy must support the communication of employees regarding organization during non-working time.

Following remote work's increase due to the COVID-19 pandemic, as well as email's dominance in modern communication, one of the most efficient ways to support employees organizing is to allow communication via work-provided email addresses. Although the NLRB,

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98. *See* 29 U.S.C. § 151. The Supreme Court found in *Republic Aviation* that communication is a vital aspect of the Section 7 right to organize. *See* Republic Aviation Corp. v. N.L.R.B. 324 U.S. 793, 798 (1945).

99. *See* N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (stating that employer's property rights must yield especially in situations that employee communication is impractical). In addition, the interference with the employer's personal property (i.e., the email system) is minimal.

100. *See Caesars Entm't*, 368 N.L.R.B. No. 143, at *10; *see also* Orme, *supra* note 71, at 18; Roe, *supra* note 71, at 45.

101. *See* 29 U.S.C. § 151.

102. *See Republic Aviation*, 324 U.S. at 798.

103. *See* Central Hardware Co. v. N.L.R.B., 407 U.S. 539, 543 (1972).

on multiple occasions, has suggested that *Republic Aviation* only protects face-to-face communications,[104] this cannot be true for multiple reasons. First, given today's online-heavy work environment, limiting *Republic Aviation* to in-person communication would allow the NLRB to overrule the Supreme Court of the United States *sub silentio*. Second, even if opponents of an employee's right to use an employer's email system stated that *Republic Aviation* is not overruled, the decision would be left with none of its bite or impact because email is a predominant method of modern communication. Third, a blockade of using email as a tool of organization would contravene federal policy of supporting organizing efforts. Therefore, the approach most consistent with federal policy and Supreme Court precedent is to allow employees to utilize their employer's email systems for organizing efforts.

B. Prior Property Decisions Support An Employee's Right to use an Employer's Property Because a Significant Part of the Workforce is Going to be Remote, Making Regular Communication Impractical.

Both *Register Guard* and *Caesars Entertainment* relied on the NLRB's property jurisprudence to decide whether employees have a right to use an employer's email system.[105] However, given recent shifts in the American workforce, the NLRB's property jurisprudence actually supports granting employees this right.[106] Courts have repeatedly stated that an

104. *See* Caesars Entertainment, 368 N.L.R.B. No. 143, *8 (2019); The Register Guard, 351 N.L.R.B. 1110, 1115 (2007).

105. *See Register Guard*, 351 N.L.R.B. at 1114; *Caesars Entm't*, 368 N.L.R.B. No. 143, at *6–7.

106. *See* N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105, 112–13 (1956). Admittedly, this analysis does not address the comparison of email systems to other technology, such as telephones, bulletin boards, and copy machines. *See Register Guard*, 351 N.L.R.B. at 1114; *Caesars Entm't*, 368 N.L.R.B. No. 143, at *6. However, this Author agrees with the Board in *Purple Communications* that the capabilities, functions, and limitations of these technologies are

employee's right to organization and an employer's right to control their property must be simultaneously fulfilled "with as little destruction of one as is consistent with the maintenance of the other."[107] At the same time, courts have provided that when a situation arises that makes employee organization impractical, the employer's property rights must yield.[108]

Since the COVID-19 pandemic began, "impracticality" is a meager understatement to describe the difficulties surrounding communication. One year into the pandemic, nearly one-quarter of the American workforce was still working remotely, at least part-time.[109] Additionally, even if offices are returning part-time, many businesses are staggering the number of employees in the office at one time to mitigate the risk of infection. This is analogous to the exact situation mentioned in *Babcock & Wilcox*: when "the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them."[110] While studies continue to reveal what proper safety protocols are, most employers have no concrete answer as to when a full staff might simultaneously be in the office. Such difficulty is exactly what the Supreme Court stated would justify encroaching upon an employer's property rights. In light of the increase in remote work, the Board's property jurisprudence supports granting employees access to employer's email systems for union-related communications.

Even if the impracticality of communication did not support employees' use of their

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so dissimilar that their comparison is inappropriate in this context. *See* Purple Communications, Inc., 361 N.L.R.B. 1050, 1057–58 (2014).

107. *See Babcock & Wilcox*, 351 U.S. at 112.

108. *See id.* at 113.

109. U.S. BUREAU OF LABOR STATS., WORKERS AGES 25 TO 54 MORE LIKELY TO TELEWORK DUE TO COVID–19 IN FEBRUARY 2021 (MAR. 11, 2021).

110. *See Babcock & Wilcox*, 351 U.S. at 113.

employer's email system, the imposition on employers' property is minimal, if anything. Most email servers do not charge by the message, so no cost will be incurred because the *Purple Communications* rule extends only to employees who have previously been granted access to the employer's email system. Additionally, as the Board notes in *Purple Communication*, the capacity of modern email servers are nearly limitless, so the number of union-related emails should have no effect on the employer's ability to conduct its business.[111] Thus, the only imposition on an employer's property is a moral opposition for its use for a purpose the employer does not approve of. This opposition should not be found to be sufficient to deny an employee's Section 7-granted right to organize.

C. The Rule from Caesars Entertainment *Does Not Accurately Reflect Current Work Environments*

Many things have changed from two years ago due to the COVID-19 pandemic. The *Caesars Entertainment* rule from December 2019 could not have foreseen all of the imminent changes. However, through no fault of its own, the Board's rule does not accurately reflect what modern work-environments look like.

In *Caesars Entertainment*, the Board carved out an exception to its holding that employers can restrict employees' ability to use the employer's email system for organizing.[112] The Board stated that when "an employer's email system furnishes the only reasonable means for employees to communicate with one another," the employer may have to provide employee access.[113] With email's role as the predominant method of workplace communication, and the

111. *See* Purple Communications, Inc., 361 N.L.R.B. 1050, 1057–58 (2014).

112. *See* Caesars Entm't, 368 N.L.R.B. No. 143, *10 (2019).

113. *See id.*

rise in remote work, this exception is going to continue to grow in applicability. If remote work continues to be utilized, as is expected, there will soon be a time where the application of the exception is more common than the application of the rule. Thus, the rule from *Caesars Entertainment* clearly no longer covers today's work environment. Accordingly, the rule should be replaced.

V. CONCLUSION

Email has become an integral part of life today. Email is especially indispensable in work settings. Email is used to communicate with co-workers, supervisors, customers or clients, or even other offices that are trying to work together on a project. In today's increasingly technology-reliant workplace, and in light of recent increases in remote work, email is an invaluable tool for employees' communication with other employees. Employees should be able to utilize this medium to communicate regarding terms and conditions of employment and organization, both of which are protected conversation topics among employees.[114] However, employers continue to challenge whether employees can use *employer-provided* email systems. This essay suggested that the best path forward is to allow employees such access as long as they have otherwise been granted access.

Granting employees access to their employer's email system is the most consistent approach with precedents that bind the NLRB. In *Republic Aviation*, the Supreme Court held that employers cannot promulgate rules restricting employee communication during nonworking time.[115] Although *Republic Aviation* occurred in the context of face-to-face communication, the Court noted that the Board is tasked with adapting existing rules to changes in modern

114. *See* National Labor Relations Act § 7, 29 U.S.C. § 157.

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

workplaces.[116] With today's reliance on email for workplace communication,[117] *Republic Aviation*'s protections should be extended to email. Additionally, the NLRB's property jurisprudence supports NLRA-protected email communications. The Supreme Court mandated that both employees' Section 7 right to organize and employers' property rights must be protected.[118] However, the Court has also said that an employer's property interests must yield to an employee's right to communicate for organization purposes when other channels of communication are impractical.[119] With the increasing frequency of remote work, other channels of communication are becoming more impractical, which justifies the use of an employer's email system for employees to communicate with each other. This additional use of an employer's email system will preserve important channels of communication among employees, will be consistent with the federal policy supporting organization, and will not incur additional costs for employers. Therefore, the NLRB should return to the rule announced in *Purple Communications* and allow employees to use an employer's email system to communicate regarding organization.

116. *See id.* at 798.

117. *See* Johnson, *supra* note 7.

118. *See* N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

119. *See id.* at 113.