Modern Labor Law in the Private and Public Sectors: Cases and Materials

Third Edition

Summer 2022 Supplement

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INTRODUCTION

This Summer Supplement is organized differently than most such supplements. Instead of matching individual parts of this Supplement to specific pages of the Casebook, it identifies and discusses the most important developments in private- and public-sector labor law since the publication of the Third Edition. These include four topics related to the private sector, and three related to the public sector:

Private Sector:

- The Supreme Court's decision in *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063 (2021) on the issue of union organizer access to private property.
- An update on some prominent union organizing campaigns.
- Section 8(a)(3) and *FDRLST Media LLC v. NLRB*, 35 F.4th 108 (3d Cir. 2022).
- An update on developments at the NLRB, including a discussion of the General Counsel's priorities and litigation surrounding President Biden's termination of former General Counsel Peter Robb.

Public Sector:

- The debates over police unions and subsequent statutory reforms in certain jurisdictions.
- The question of what aspects of COVID-19 polices may be mandatory subjects of bargaining in the public-sector.
- Continuing litigation in the wake of the *Janus v. AFSCME* decision.

I. Significant Developments in the Private Sector

A. *Cedar Point Nursery*.

In 2021, the Supreme Court decided *Cedar Point Nursery v. Hassid*, which concerns a California regulation permitting union organizers a degree of access to agricultural employers' property. As you will see in the excerpt that follows, the Court concluded that the regulation constituted a "taking" of property without just compensation. Consider what (if anything) this decision means for the cases concerning access to employer property that are discussed in chapter three.

141 S. Ct. 2063
Supreme Court of the United States.

CEDAR POINT NURSERY, et al., Petitioners
v.
Victoria HASSID, et al.

Decided June 23, 2021

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. KAVANAUGH, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

A California regulation grants labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization. Agricultural employers must allow union organizers onto their property for up to three hours per day, 120 days per year. The question presented is whether the access regulation constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments.

I

The California Agricultural Labor Relations Act of 1975 gives agricultural employees a right to self-organization and makes it an unfair labor practice for employers to interfere with that right. The state Agricultural Labor Relations Board has promulgated a regulation providing, in its current form, that the self-organization rights of employees include "the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." Under the regulation, a labor organization may "take access" to an agricultural

employer's property for up to four 30-day periods in one calendar year. In order to take access, a labor organization must file a written notice with the Board and serve a copy on the employer. Two organizers per work crew (plus one additional organizer for every 15 workers over 30 workers in a crew) may enter the employer's property for up to one hour before work, one hour during the lunch break, and one hour after work. Organizers may not engage in disruptive conduct, but are otherwise free to meet and talk with employees as they wish. Interference with organizers' right of access may constitute an unfair labor practice, which can result in sanctions against the employer.

II

A

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom.

When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. The government commits a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam.

When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies. In *Pennsylvania Coal Co. v. Mahon*, the Court established the proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." This framework now applies to use restrictions as varied as zoning ordinances, orders barring the mining of gold, and regulations prohibiting the sale of eagle feathers. To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.

B

The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.

Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an

easement.

In *Loretto* v. *Teleprompter Manhattan CATV Corp.*, we made clear that a permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss.

We reiterated that the appropriation of an easement constitutes a physical taking in *Nollan v. California Coastal Commission*. The Nollans sought a permit to build a larger home on their beachfront lot. The California Coastal Commission issued the permit subject to the condition that the Nollans grant the public an easement to pass through their property along the beach. As a starting point to our analysis, we explained that, had the Commission simply required the Nollans to grant the public an easement across their property, "we have no doubt there would have been a taking."

The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property—to literally "take access," as the regulation provides. It is therefore a *per se* physical taking under our precedents. Accordingly, the growers' complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments.

C

The Board and the dissent further contend that our decision in *PruneYard Shopping Center v. Robins* establishes that the access regulation cannot qualify as a *per se* taking. There the California Supreme Court held that the State Constitution protected the right to engage in leafleting at the PruneYard, a privately owned shopping center. The shopping center argued that the decision had taken without just compensation its right to exclude. Applying the *Penn Central* factors, we held that no compensable taking had occurred.

The Board and the dissent argue that *PruneYard* shows that limited rights of access to private property should be evaluated as regulatory rather than *per se* takings. We disagree. Unlike the growers' properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.

The Board also relies on our decision in *NLRB v. Babcock & Wilcox Co*. But that reliance is misplaced. In *Babcock*, the National Labor Relations Board found that several employers had committed unfair labor practices under the National Labor Relations Act by preventing union organizers from distributing literature on company property. We held that the statute did not require employers to allow organizers onto their property, at least outside the unusual circumstance where their employees were otherwise "beyond the reach of reasonable union efforts to communicate with them." The Board contends that *Babcock*'s approach of balancing property and organizational rights should guide our analysis here. But *Babcock* did not involve a takings claim. Whatever specific takings issues may be presented by the highly contingent access right we recognized under the NLRA, California's access regulation effects a *per se* physical taking under our precedents.

III

The Board, seconded by the dissent, warns that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property. That fear is unfounded.

First, our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. This basic distinction is firmly grounded in our precedent.

Second, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights.

Third, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. Under this framework, government health and safety inspection regimes will generally not constitute takings. When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy.

* * *

The access regulation grants labor organizations a right to invade the growers' property. It therefore constitutes a *per se* physical taking.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAVANAUGH, concurring.

I join the Court's opinion, which carefully adheres to constitutional text, history, and precedent. I write separately to explain that, in my view, the Court's precedent in *NLRB v. Babcock & Wilcox Co.* also strongly supports today's decision.

As I read it, *Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a "necessity" exception similar to that noted by the Court today.

Babcock strongly supports the growers' position in today's case because the California union access regulation intrudes on the growers' property rights far more than *Babcock* allows.

Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

A California regulation provides that representatives of a labor organization may enter an

agricultural employer's property for purposes of union organizing. They may do so during four months of the year, one hour before the start of work, one hour during an employee lunch break, and one hour after work. The question before us is how to characterize this regulation for purposes of the Constitution's Takings Clause.

Does the regulation *physically appropriate* the employers' property? If so, there is no need to look further; the Government must pay the employers "just compensation." Or does the regulation simply *regulate* the employers' property rights? If so, then there is every need to look further; the government need pay the employers "just compensation" only if the regulation "goes too far."

I

A

Initially it may help to look at the legal problem—a problem of characterization—through the lens of ordinary English. The word "regulation" rather than "appropriation" fits this provision in both label and substance. From the employers' perspective, it restricts when and where they can exclude others from their property.

At the same time, the provision only awkwardly fits the terms "physical taking" and "physical appropriation." The "access" that it grants union organizers does not amount to any traditional property interest in land. It does not, for example, take from the employers, or provide to the organizers, any freehold estate (*e.g.*, a fee simple, fee tail, or life estate); any concurrent estate (*e.g.*, a joint tenancy, tenancy in common, or tenancy by the entirety); or any leasehold estate (*e.g.*, a term of years, periodic tenancy, or tenancy at will).

The majority concludes that the regulation nonetheless amounts to a physical taking of property because, the majority says, it "appropriates" a "right to invade" or a "right to exclude" others.

It is important to understand, however, that, technically speaking, the majority is wrong. The regulation does not *appropriate* anything. It does not take from the owners a right to invade (whatever that might mean). It does not give the union organizations the right to exclude anyone. It does not give the government the right to exclude anyone. What does it do? It gives union organizers the right temporarily to invade a portion of the property owners' land. It thereby limits the landowners' right to exclude certain others. The regulation *regulates* (but does not *appropriate*) the owners' right to exclude.

C

The persistence of the permanent/temporary distinction that I have described is not surprising. That distinction serves an important purpose. We live together in communities. (Approximately 80% of Americans live in urban areas. U. S. Census Bureau, Urban Area Facts (Mar. 30, 2021), https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/ua-facts.html.) Modern life in these communities requires different kinds of regulation. Some, perhaps many, forms of

regulation require access to private property (for government officials or others) for different reasons and for varying periods of time. Most such temporary-entry regulations do not go "too far." And it is impractical to compensate every property owner for any brief use of their land. As we have frequently said, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

The majority tries to deal with the adverse impact of treating these, and other, temporary invasions as if they were *per se* physical takings by creating a series of exceptions from its *per se* rule.

As to the first exception, what will count as "isolated"?

As to the second exception, a court must focus on "traditional common law privileges to access private property." Just what are they? We have said before that the government can, without paying compensation, impose a limitation on land that "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." But we defined a very narrow set of such background principles. To these the majority adds "public or private necessity," the enforcement of criminal law "under certain circumstances," and reasonable searches. Do only those exceptions that existed in, say, 1789 count? Should courts apply those privileges as they existed at that time, when there were no union organizers? Or do we bring some exceptions (but not others) up to date, *e.g.*, a necessity exception for preserving animal habitats?

As to the third, what is the scope of the phrase "certain benefits"?

Labor peace (brought about through union organizing) is one such benefit, at least in the view of elected representatives. They wrote laws that led to rules governing the organizing of agricultural workers. Many of them may well have believed that union organizing brings with it "benefits," including community health and educational benefits, higher standards of living, and (as I just said) labor peace.

II

Finally, I touch briefly on remedies, which the majority does not address. The Takings Clause prohibits the Government from taking private property for public use without "just compensation." But the employers do not seek compensation. They seek only injunctive and declaratory relief. Indeed, they did not allege any damages. On remand, California should have the choice of foreclosing injunctive relief by providing compensation.

***

B. Update on Organizing Campaigns

The past two years have been interesting ones for those following union organizing campaigns. Two stand out: Amazon and Starbucks.

On April 9, 2021, workers at Amazon's Bessemer, Alabama, warehouse voted 1,798–738 against union representation by the Retail, Wholesale and Department Store Union. Later that year in November, the Board found that the Amazon vote was sufficiently tainted to order a new election. The rerun election was held on February 4, 2022. This time the vote was much closer, 993–875, with the union still losing. However, with nearly 500 challenged ballots and litigation, the election results are too close to call. Meanwhile, on April 4, 2022, an independent union won an election at another Amazon warehouse in Staten Island, New York, becoming Amazon's first union warehouse. *See* Beverly Banks, *Amazon Wants NLRB Atty DQ'd From Staten Island Hearing*, LAW360 EMPLOYMENT AUTH., June 3, 2022.

In November 2021, there were nearly no unionized Starbucks employees in the United States, and none of the company's freestanding stores were unionized. Although union organizing campaigns have emerged periodically throughout its history, it was not until recently that those campaigns have met with meaningful success. After several hotly contested union campaigns in the Buffalo area, workers at one Starbucks in Buffalo voted in favor of union representation. *See* Ian Kullgren, *Labor Board Certifies Starbucks Union Win for Buffalo Store*, BLOOMBERG NEWS, Dec. 17. 2021; Josh Eidelson, *Starbucks Workers Vote to Unionize at New York Restaurant*, BLOOMBERG NEWS, Dec. 9, 2021.

The success of these union drives has resulted in a spree of union organizing campaigns at Amazon warehouses and Starbucks coffee shops throughout the country—as of July 20, 2022, workers had prevailed in elections at 166 Starbucks shops, lost elections at 26, withdrawn 21 petitions, and 120 Starbucks representation cases were still open. https://unionelections.org/data/starbucks/ (last visited July 20, 2022). It has also served as an inspiration to the new AFL-CIO President, Liz Shuler, who recently stated that one of her top priorities is to make union organizing more robust. *See* Braden Campbell, *New AFL-CIO Prez Aims To Boost Membership By 1 Million*, LAW360 EMPLOYMENT AUTH., June 13, 2022. One thing that differentiates Starbucks from many other fast-food chains is that Starbucks does not use the franchise model; do you think that fact helps explain why a unionization drive has taken hold at Starbucks, but not other fast-food chains?

C. Section 8(a)(1) and *FDRLST Media LLC v. NLRB*

Since publishing the third edition, labor law under the NLRA has been quiet, but there is one case that has raised some eyebrows.

On May 20, 2022, the Third Circuit issued its decision in *FDRLST Media LLC v. NLRB*, 35 F.4th 108 (3d Cir. 2022), *aff'g in part and denying enforcement*, 370 N.L.R.B. No. 49 (Nov. 24, 2020). In this case, the Company operates an internet magazine, *The Federalist*, with commentary on contemporary issues, including labor issues. Ben Domenech, the Company's executive officer and publisher of the online magazine, posted the following tweet from his personal Twitter account: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine."

A nonemployee, Massachusetts resident with no connection to FDRLST Media, filed an unfair labor practice charge with the Board's New York Region. After issuing a complaint, the Board unanimously found, in agreement the administrative law judge, that Domenech's tweet violated Section 8(a)(1). Applying well-established, court-approved, NLRB precedent that the test for determining whether an employer has committed a ULP in these circumstances is an objective test that does not turn on motive, the ALJ reasoned that an employee would likely read the tweet as meaning that "working conditions would worsen or employee benefits would be jeopardized if employees attempted to unionize. . . . As such, the tweet is reasonably considered as a threat because it tends to interfere with the free exercise of employee rights."

The Board concluded that the Company violated Section 8(a)(1).

The Court denied enforcement. The Court agreed that it must defer to the Board's factual findings and inferences if substantial evidence on the record read as a whole supported those findings. The Court also agreed that an employer "cannot threaten employees with reprisals or promise them benefits in relation to unionization" when communicating its views on unions. The Court departed from the Board, however, in answering the question whether this tweet was threatening. In the Court's view, the Board erred in disregarding the context in which this communication was tweeted (*id*. at 123–25):

- FDRLST Media is a tiny media company with only six employees;
- Those employees are writers, not salt miners;
- Salt miners are engaged in "'tedious and laborious work;
- Writers are not engaged in work analogous to that of salt miners;
- *The Federalist* "'publishes commentary on a wide variety of contemporary newsworthy and controversial topics,' including matters involving politics and labor relations;"
- "Domenech used his personal Twitter account to promote and discuss the magazine's commentary;"
- Domenech never used his personal Twitter account to communicate with employees;
- No employee perceived the tweet as threatening; and
- Domenech sent his Tweet to the public, not to the inboxes of the Company's employees.

Reviewing this context, the Court found that the tweet was "farcical" and therefore that it "cannot conclude that a *reasonable* FDRLST Media employee would view Domenech's tweet as a plausible threat of reprisal." *Id.* at 123.

At first blush, this decision seems merely to be a disagreement between the Court and the Board on what inferences that substantial evidence on the record, read as a whole, supports. But the Court seems to have turned the Board's objective test for determining whether an employer violates Section 8(a)(1) into a subjective test when it writes:

> The Board also went too far when it opined that employees' "subjective interpretations of [an employer's conduct] are irrelevant to determining whether" the employer committed an unfair labor practice. . . . We have held that employees' subjective impressions are *not dispositive*; not

> that they are *irrelevant*. . . . We have acknowledged that subjective impressions can sometimes be helpful to determine how a reasonable employee would objectively view her employer's conduct. * * * Employees' subjective impressions are especially helpful where, as here, the employer claims his statement was made in jest. Humor is subjective. What is funny to a fisherman may be lost on a farmer. A quip about New England winters is unlikely to get a laugh in Alaska. The propensity for jokes to fall flat for want of context or audience understanding has given rise to idioms like "I guess you had to be there" and "too soon?" Excluding context and viewing a statement in isolation, as the Board did here, could cause one to conclude that "break a leg" is always a threat. But when expressed to an actor, singer, dancer, or athlete, that phrase can reasonably be interpreted to mean only "good luck." . . . Consistent with these commonsensical observations, some of our sister courts have considered employees' subjective responses when evaluating whether employer speech or expressive conduct was reasonably viewed as a joke or a threat.

The case raised three additional, well-settled issues, all of which the Court found the Board to have analyzed correctly. First, the Court reaffirmed that the Board's regulatory interpretation of Section 10(b). That regulation, which permits any person—even one with no connection to the labor dispute—to file a charge with the NLRB and that the NLRB has jurisdiction to issue a complaint on any such charges, is also supported by in-Circuit precedent directly on point and analogous Supreme Court precedent. 35 F.4th at 115–19. Second, the Court found that the Board's internal decision to organize the agency into regional offices for administrative convenience did not divest any individual office of the agency's nationwide authority. Third, the Court found that even if the Board violated its own regulation—that unfair labor practice charges be processed in the Region where the ULP occurred—the Board did not violate the Company's due process rights because it could not show prejudice. Instructors could profitably discuss these points at the time they discuss this case to reinforce the concept that federal jurisdictional principles do not necessarily apply, or apply in the same way, to administrative law cases.

D. Update on National Labor Relations Board Activities

BOARD ACTIVITY. The National Labor Relations Board achieved five confirmed Board Members after the Senate confirmation on July 28, 2021, of two experienced, accomplished union lawyers: Gwynne Wilcox, previously senior partner at the New York City law firm of Levy Ratner PC, and David Prouty, most recently General Counsel of SEIU Local 32BJ (and previously General Counsel, respectively, of the Major League Baseball Players Association and UNITE-HERE). Ms. Wilcox and Mr. Prouty joined Chairman Lauren McFerran and Members John Ring and Marvin Kaplan.

The fully constituted Board teed up a number of important issues for decision by issuing public notices seeking briefing on the following matters: (1) *Thryv, Inc.* 371 N.L.R.B. No. 37 (2021), about whether the Board should expand its traditional make-whole remedy to more fully account for discriminatees' actual economic losses by awarding consequential damages; (2) *American Steel Construction* 371 N.L.R.B. No. 41 (2021), about whether the Board should reconsider its standard for determining whether a petitioned-for bargaining unit is an appropriate unit, including whether the Board should return to the rule of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. 934 (2011), previously overruled by *PCC Structurals* 365 N.L.R.B. No. 160 (2017), as revised in *Boeing Co.*, 368 NLRB No. 67 (2019); (3) *Stericycle, Inc.* 371 N.L.R.B. No. 48 (2021), about whether the

Board should adopt a new legal standard to determine whether employer work rules violate Section 8(a)(1) or continue to apply the standard adopted in *Boeing Co.*, 365 N.L.R.B. No. 154 (2017), which was later refined in *LA Specialty Produce Co.*, 368 N..L.R.B No. 93 (2019); and (4) *Ralphs Grocery Company,* 371 N.L.R.B. No. 50 (2021), about whether the Board should adopt a new legal standard to determine whether confidentiality requirements in mandatory arbitration agreements violate Section 8(a)(1).

GENERAL COUNSEL ACTIVITY. Most of the activity at the NLRB has been on the General Counsel's side of the agency.

Discharge of General Counsel Peter Robb. Upon taking office, President Biden fired NLRB General Counsel Peter Robb after Robb refused President Biden's request that Robb resign. President Biden then named long-time Chicago Regional Director Peter Sung Ohr as Acting General Counsel. On February 1, 2021, AGC Ohr promptly issued GC Memorandum 21-02, rescinding a number of GC Robb's more controversial initiatives directed against unions.

Employers have argued that any actions by AGC Ohr were unauthorized because the President did not have the authority to fire his predecessor. On April 22, 2022, a three-judge panel of the United States Court of Appeals for the Fifth Circuit issued a unanimous decision in *Exela Enterprise Solutions, Inc. v. NLRB,* 32 F.4th 436 (5th Cir. 2022), holding that the President had the authority to remove and replace the NLRB's General Counsel. In the decision, the Court explained that the President's power to remove derives from Article II of the Constitution and that no provision of the National Labor Relations Act curbed that power with respect to the NLRB General Counsel. Accordingly, the Court upheld the validity of the NLRB complaint issued by AGC Ohr and enforced the Board's order finding that Exela violated Sections 8(a)(1) and (5) of the NLRA.

General Counsel Jennifer A. Abruzzo. After nomination by President Biden and confirmation by the Senate, Jennifer A. Abruzzo replaced Mr. Ohr on July 22, 2021, and began serving as General Counsel (Mr. Ohr stayed on as GC Abruzzo's Deputy General Counsel).

GC Abruzzo had previously worked for the NLRB for over two decades, holding a series of increasingly senior positions, first in the Miami field office, and then in the Board's Washington, DC headquarters, culminating in her service as the NLRB's Acting General Counsel. Immediately prior to her appointment as General Counsel, she served as Special Counsel for Strategic Initiatives for the Communications Workers of America.

Ms. Abruzzo hit the ground running with an ambitious Mandatory Submission to Advice memorandum, GC 21-04, outlining a number of areas where she is looking to change or modify extant Board law. One issue mentioned in the memorandum that has garnered significant attention involves GC Abruzzo's interest in reviving the doctrine of *Joy Silk Mills* concerning an employer's obligation to voluntarily recognize a union; at page 7 of GC 21-04 she indicates her interest in:

> Cases in which an employer refuses to recognize and bargain with a union where the union presents evidence of a card majority, but where the employer is unable to establish a good faith doubt as to majority status; specifically, where the employer refusing to recognize has either engaged in unfair labor practices or where the employer is unable to explain its reason for

> doubting majority status in rejecting the union's demand. See Joy Silk Mills, Inc., 85 NLRB 1263 (1949).

In rapid succession GC Abruzzo issued a number of other General Counsel's memoranda, emphasizing the use of the Board's authority to seek interim injunctive relief pursuant to Section 10(j) (GC 21-05 and GC 22-02), seeking fuller remedies and to assure that full remedies are obtained in settlement agreements (GC 21-06, GC 21-07, and GC 22-06), contending that certain athletic players at universities are employees with NLRA statutory rights (GC 21-08), and ensuring the rights and remedies for immigrant workers (GC 22-01). Finally, in another memorandum that has garnered considerable attention, GC Abruzzo states that

> employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns...those meetings inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech … I plan to urge the Board to … find mandatory meetings of this sort unlawful.

GC 22-04, *The Right to Refrain from Captive Audience and other Mandatory Meetings*, at p.1.

RULEMAKING. Most of the (non)activity on Board rulemaking involved three matters that remain pending in the courts. *AFL-CIO v. NLRB*, Case No. 20-5223 and 20-5226 (D.C. Cir.), involving revisions to the Board's representation case procedures, where oral argument had taken place in May 2021, has yet to be decided. In that matter, then-District Court Judge Ketanji Brown Jackson had rejected the Board's jurisdictional argument, advanced for the first time, that challenges to Board rules had to be brought in the circuit court, rather than the district court. On the merits, Judge Jackson had enjoined certain of the Board's changes while approving others, and both the Board and the AFL-CIO (the party challenging the Board's rules) took cross appeals to the DC Circuit.

In *AFL-CIO et al. v. NLRB*—a challenge filed by the AFL-CIO and the Baltimore/D.C. Metro Building and Construction Trades Council to the Board's rule addressing blocking charges, voluntary recognition procedures, and Section 8(f)/9(a) conversion rules in the construction industry—the case remained stayed, pending the DC Circuit's ruling in the representation procedure rules case on the jurisdictional issue of whether challenges to Board rules have to be brought initially in the court of appeals rather than the district court.

Finally, and perhaps most intriguingly, *SEIU v. NLRB*—a challenge to the Board's joint employer rule also filed in the federal district court in the District of Columbia—remains stayed based on the Board's representation that it will be publishing a new Notice of Proposed Rulemaking on the joint employer issue no later than the end of August 2022.

INCREASED CASE INTAKE AND BUDGET CRUNCH. On July 15, 2022, the Board issued a press release describing the significant increase in case volume during the first nine months of Fiscal Year 2022 (October 1, 2021–June 30, 2022) as compared to the first three quarters of the prior fiscal year. Union representation petitions increased 58%—up to 1,892 from 1,197 during the first three quarters of FY2021. At the same time, unfair labor practice charges increased 16%—from 11,082 to 12,819.

The press release pointed out that:

> The increase in cases comes during a period of critical funding and staffing shortages for the Agency. The NLRB has received the same Congressional appropriation of $274.2 million for nine consecutive years as costs have risen. Adjusting for inflation, the Agency's budget has decreased 25% since FY2010. Overall Agency staffing levels have dropped 39% since FY2002 and field staffing has shrunk by 50%. The President's Budget for FY2023 requested $319.4 million for the NLRB, a 16% budget increase.

And quoted GC Abruzzo's plea for increased funding:

> The NLRB is processing the most cases it has seen in years with the lowest staffing levels in the past six decades. Our dedicated staff, especially in our 48 field offices, are handling unsustainable caseloads. The Agency urgently needs more resources to process petitions and conduct elections, investigate unfair labor practice charges, and obtain full remedies for workers whose labor rights have been violated. We need Congress to help us restore the capacity that we have lost after years of underfunding.

The high-profile Starbucks and Amazon organizing campaigns—reported elsewhere in this supplement—have drawn increased media attention to the NLRB and the statute it administers. It remains to be seen whether this increase in media attention and uptick in case activity will be met with increased Congressional appropriations to fund the Agency's operations.

II. Significant Developments in the Public Sector

Since the publication of the Third Edition, there has been one significant statutory state statutory development on public-sector collective bargaining rights. In May 2022, Colorado Governor Jared Polis signed SB22-230 into law. This law granted collective bargaining rights, for the first time, to more than 36,000 county workers across the state.

Beyond that, this section will discuss three topics: debates over police unions and related statutory reforms aimed at police union discipline processes; cases on whether COVID-19 vaccine requirements are a mandatory subject of bargaining; and post-*Janus* litigation. The first two topics could be taught as part of Chapter 10, Section III's discussion of Scope of Bargaining in the Public Sector. Alternatively, they could be part of broader and earlier discussions about the proper role of collective bargaining in at least some parts of the public sector. Also, some aspects of the police union topic could be covered in an abbreviated manner in Chapter 12, Section VI's discussion of grievance arbitration in the public sector.

A. Police Unions and Statutory Reforms to Public-Sector Labor Statutes.

The Black Lives Matter movement – a response to police use of excessive and often lethal force against African-Americans – has given rise to broad debates over policing in the U.S. These debates

often include the role of police unions. Some argue that such unions improperly interfere with disciplining officers who commit violent and/or racist acts. As one scholar put it, "[t]here is a growing sentiment that it is difficult or even impossible to fire a bad cop." Tyler Adams, *Factors in Police Misconduct Arbitration Outcomes: What Does it Take to Fire a Bad Cop?*, 32 ABA J. LAB. & EMP. L. 133, 134–35 (2017). *See also, e.g.*, Steven Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545 (2019) (arguing that police disciplinary appeals serve as an underappreciated barrier to officer accountability and organizational reform). Other critics point to common clauses in police union CBAs that offer protections in discipline that go beyond typical protections in CBAs in other contexts. For example, some police union CBAs have unusually long waiting periods before officers suspected of misconduct may be interviewed by superiors, and some bar use of anonymous complaints in discipline. *See* Catherine L. Fisk and L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 741–44 (2017) for a good discussion of these and other controversial provisions .

Those skeptical that collective bargaining rights were a major obstacle to police reform have replied that police officers typically also have "just cause" discharge and discipline protections both from civil service statutes and what are generically called Law Enforcement Officer Bill of Rights laws. Further, it is not clear that levels of police abuse are lower in states that do not grant police collective bargaining rights (Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Indiana, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, Virginia, and Wyoming). *See* RICHARD KEARNEY AND PATRICE MARESCHAL, LABOR RELATIONS IN THE PUBLIC SECTOR (5th ed., 2014). Also, one study critical of collectively bargained disciplinary protections showed that, of the 1,881 officers fired for misconduct in the nation's largest police departments in the previous several years, the disciplinary appeals process reinstated the employment of just over 450 of these officers, or about 24 percent. Rushin, *supra*, 579–80. Note that includes only cases that were litigated to arbitration and does not count discipline that police unions chose not to contest at arbitration. Is losing more than three-quarters of the cases police unions thought were worth litigating to the end indicative of a major problem? Consider what other information you might want to know to evaluate the significance of this statistic.

In addition, consider the role of police management in negotiating and in enforcing rules in labor contracts, and also the political power (independent of union rights) that police unions may have. For more on this debate, *compare* Ben Sachs, "Police Unions: It's Time to Change the Law and End the Abuse," https://onlabor.org/police-unions-its-time-to-change-the-law/ (June 4, 2020) *with* Martin Malin and Joseph Slater, "In Defense of Police Collective Bargaining," https://chicago.suntimes.com/2020/8/12/21365763/chicago-police-fop-collective-bargaining-rights.

In any event, some jurisdictions have recently amended their statutes to make changes to police discipline processes.

In 2020, the District of Columbia amended its public-sector labor statute to make discipline of police officers a management right that was not subject to negotiation. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 states that it was enacted in response to protests of "injustice, racism, and police brutality against Black people and other people of color." Section 116 of this Act added the following to the "Management rights; matters subject to collective bargaining" section of D.C.'s Comprehensive Merit Personnel Act: "(1) All matters pertaining to the

discipline of sworn law enforcement personnel shall be retained by management and not be negotiable." This rule became effective on September 30, 2020. A police union challenged the law, which was upheld by a district court in November 2020. *Fraternal Order of Police, Metropolitan Police Dept. Labor Committee v. District of Columbia*, 502 F.Supp.3d 45 (D.D.C. 2020).

Other states took a more limited approach by restricting who may act as an arbitrator in police discipline cases. In 2021, Washington state enacted SB 5055, which established a commission empowered to appoint a roster of between nine and eighteen people who are allowed to act as arbitrators in police discipline cases and set minimum qualifications for such arbitrators. The statute also provides factors that the commission must consider in choosing such arbitrators, including "experience with labor law, the grievance process, and the field of labor arbitration;" "experience and training in cultural competency, racism, implicit bias, and recognizing and valuing community diversity and cultural differences;" and "familiarity and experience with the law enforcement profession."

Minnesota statute 626.892, enacted in 2020, limits arbitrators in police discipline cases even further: such arbitrators are not allowed to take other labor arbitration cases. Also, under this law, the state Bureau of Mediation Services commissioner, "in consultation with community and law enforcement stakeholders, shall appoint a roster of six persons suited and qualified by training and experience to act as arbitrators for peace officer grievance arbitrations." Similar to the Washington state statute, the Minnesota commissioner may also consider "a candidate's familiarity with labor law, the grievance process, and the law enforcement profession; or experience and training in cultural competency, racism, implicit bias, and recognizing and valuing community diversity and cultural differences."

Also, in response to the killing of George Floyd by police, Connecticut passed a law which nullified the restrictions in the state trooper union's CBA on releasing disciplinary records. The Second Circuit upheld a federal district court's refusal to enjoin this law after a Contracts Clause challenge. *Connecticut State Police Union v. Rovella,* 36 F.4th 54 (2d Cir 2022). For a similar decision on similar facts involving New York state removing privacy protections on police disciplinary records, *see Uniformed Fire Officers Association v. DeBlasio*, 846 F. App'x 45 (2d Cir. Feb. 16, 2021).

B. Negotiability of Public Employer COVID-19 Policies

The COVID-19 pandemic created a number of legal issues, including many workplace law issues. Most relevant here is the question of whether employer-instituted COVID-19 vaccine requirements are mandatory subjects of bargaining. In the private sector, while there is little precedent directly on COVID-19, it appears to be the conventional wisdom that a vaccine requirement itself is a mandatory subject, as are at least most significant details about the procedures, impact, and implementation of the plan ("effects bargaining").

In the public sector, however, the clear majority approach has been that the decision to institute a vaccine policy for employees is *not* a mandatory subject of bargaining, although the "effects" of such a policy likely are mandatory subjects. *See*, *e.g.*, *AFSCME v. Regents of the University of California* 46 PERC ¶38 (Cal. Pub. Emp. Rel. Comm., 2021) (while the decision to impose a mandatory vaccination problem is not negotiable, various "effects" of such a program are, and here, because the employer did not seek an "emergency exception," it must complete effects bargaining before implementation).

Accord, *City of Pittsburgh and Pittsburgh Fire Fights Assoc.*, (Arbitrator Kobel, Dec. 9, 2021): "the City's decision to act on the basis of its municipal authority to impose a vaccine mandate on its employees for prevention and control of disease without bargaining is consistent with applicable law. . . . On the other hand, there is nothing inherently managerial about setting the deadline for compliance as December 22, 2021, rather than some other date, a day or two or slightly more later. The same is true about the other provisions of the Executive Order with respect to exceptions, and reporting requirements. They are clearly related to the firefighters' terms and conditions of employment and are clearly amendable to collective bargaining."

As to effects bargaining, employers have often been successful in the impasse resolution process. *AFSCME v. City of Philadelphia*, an interest arbitration panel decision written by Alan Symonette dated Dec. 29, 2021, upheld the city's decision to impose a general vaccine mandate under which employees without exemptions who failed to comply with the policy would first be placed on leave for 30 days (and allowed to use paid leave) and then, if the employee continued to refuse to comply, would be held to have resigned in good standing. Another interest arbitration case, *State of Illinois*, S-MA-22-12 (Arbitrator Benn, Dec. 29, 2021), involving corrections and juvenile detention employees, held that the "interests and welfare of the public are best served with a vaccine mandate as proposed by the state."

A New Jersey court went even further and held that under its state public-sector labor law, neither the decision to adopt a COVID-19 vaccination policy nor the effects of such policy were negotiable. *Matter of City of Newark*, 469 N.J. Super. 366 (2021). *Local 589, ATU v. Massachusetts Bay Transp. Auth.*, 2021 WL 6210665, rejecting a union request for an injunction against a vaccination mandate policy pending resolution of a grievance challenging that mandate, did not mention effects bargaining, but flatly held that the policy was an "inherent management right."

On the other hand, *International Association of Firefighters v. City of St. Paul*, 2021 WL 6777472 (Dec. 23, 2021) took the very unusual step of granting a TRO against implementation of a COVID-19 vaccination requirement. "Without making a final ruling on the issue, the Court finds that there is a reasonable likelihood that the Policy is a term and condition of employment subject to collective bargaining and not inherent managerial policy. . . ." The court "urged" the parties to "resume negotiations or consider submitting this dispute to binding interest arbitration" using an "expedited arbitration" process.

A further obstacle in seeking injunctive relief against vaccination policies is the general equitable requirement in such cases of showing irreparable harm. For example, in *Civil Service Employees Ass'n, Local 1000, AFSCME, AFL-CIO v. New York State*, 155 N.Y.S.3d 296, 299 (NY Sup. Ct. 2021), the court initially granted a TRO against the New York State Unified Court System implementing a mandatory vaccination program for non-judicial employees. In so doing, the court stated that the "mandatory vaccination requirement potentially implicates a variety of terms and conditions of employment requiring mandatory negotiation, including but not necessarily limited to possible discipline and termination for noncompliance." However, the court later refused to issue a preliminary injunction in this case and allowed the mandate to go into effect on the grounds that being fired for refusing a vaccination was not irreparable harm. "Nobody under the challenged policy will be forced to accept a vaccination against his or her will. Those who willingly choose not to accept the vaccine unquestionably face a significant harm — the potential loss of employment — that can be remedied. For that reason, there is no irreparable harm and the law forecloses Petitioners' request for injunctive relief." *Civil*

Service Employees Ass'n, Local 1000, AFSCME, AFL-CIO v. New York State 157 N.Y.S.3d 675, 691 (Sup. Ct. 2021). The rule that loss of employment does not constitute "irreparable injury" is well established in labor and employment law generally.

Also relevant here, *City of Chicago and Coalition of Unionized Public Employees* (Arbitrator Roumell, Dec. 15, 2021), a grievance arbitration case, held that a COVID-19 vaccine policy did not violate relevant CBAs, as none of them barred such a policy. *Amalgamated Transit Unions Local 241 and 308 and the Chicago Transit Authority* (Arbitrator Bierig, Sept. 10, 2021), another grievance arbitration case, held that the employer had the management right to implement a vaccine mandate.

Of course, COVID-19 policies raise a plethora of other legal issues at the workplace, *e.g.*, involving religious objections. The public sector has seen more of these cases than the private because the Constitution gives public employees certain rights that private employees lack. A full description of all the cases involving employer COVID policies would be beyond the scope of a labor law course. It is worth noting that courts have rejected many requests for injunctions against COVID vaccine rules that have used a wide variety of legal theories. *See*, *e.g.*, *Burcham v. City of Los Angeles*, 562 F. Supp. 3d 694 (C.D. Cal. 2022) (dismissing challenge to vaccine mandate under, *inter alia*, the Fourth Amendment, California Constitutional right to privacy, substantive due process, and Title VII); *Bacon v. Woodward*, 2021 WL 5183059 (E.D. Wa,, Nov. 8, 2021) (rejecting challenge by firefighters to state vaccination mandate on due process, freedom of religion, ADA, privacy, and bodily autonomy claims, and stating that "This Court recently joined other district courts around the country in finding that public interest is not served by enjoining vaccination requirements designed to reduce the spread of COVID-19 and to mitigate the dangers posed by the disease." *Slip op.* at 7 (citations omitted).

On the other hand, the Supreme Court struck down OSHA's Temporary Emergency Standard on COVID-19 that would have required at least most large employers, among other things, to require vaccination or testing regimes for their employees. *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022).

C. Post-*Janus* Litigation

In 2018, the Supreme Court decided *Janus v. AFSCME*, excerpted in Chapter 14. In *Janus*, the Court held that public-sector workers could not be required to pay any money to the union that represented them. As the notes following the *Janus* excerpt describe, the decision led to an explosion of litigation attempting to expand *Janus*'s scope in various ways. For example, whereas *Janus* held that employees could not be required to pay union dues or fees going forward, litigants in a long list of subsequent cases sought to recover up to three years' worth of back dues and fees. In other cases, litigants argued that other aspects of public-sector labor law, such as exclusive representation, violated the First Amendment.

When the third edition of the casebook was published, it was too early to know how these legal theories would fare. Since then, unions have racked up an unbroken streak of wins, and it seems safe to say that their opponents' theories have failed in the courts of appeals. *See, e.g.*, *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (union had good faith defense to claim for back fees); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019) (same); *Diamond v. PA State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020) (same); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019) (applying the Supreme Court

decision in *Minn. State Bd. for Comm'ty Colleges v. Knight*, 456 U.S. 271 (1984) to conclude that exclusive representation did not violate the First Amendment); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021) (same). Thus far, the Supreme Court has denied certiorari in post-*Janus* cases on every occasion that it has been sought. *See, e.g.*, *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019) ("*Janus Remand*"), *cert. denied*, 141 S.Ct. 1282 (2021); *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019), *cert. denied*, 141 S.Ct. 1283 (2021); *Danielson v. Inslee*, 945 F.3d 1096 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 1265 (2021); *Lee v. Ohio Educ. Ass'n*, 951 F.3d 386 (6th Cir. 2020), *cert. denied*, 141 S.Ct. 1264 (2021); *Ogle v. Ohio Civil Serv. Emps. Ass'n*, 951 F.3d 794 (6th Cir. 2020), *cert. denied*, 141 S.Ct. 1265 (2021); *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332 (2d Cir. 2020), *cert. denied*, 141 S.Ct. 1735 (2021); *Diamond v. Pa. State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020), *cert. denied*, 141 S.Ct. 2756 (2021); *Doughty v. State Emps.' Ass'n of New Hampshire*, 981 F.3d 128 (1st Cir. 2020), *cert. denied*, 141 S.Ct. 2760 (2021).