# Modern Labor Law in the Private and Public Sectors

## Cases and Materials

## Third Edition

# 2023 Supplement

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## Chapter 1

**Page 84, replace the first full paragraph with the following**:

In 2018, Missouri enacted H.B. 1413, which was in many ways like the revised laws in Iowa and Wisconsin. The Missouri Supreme Court, however, struck this law down on equal protection grounds. *Missouri National Education Association v. Missouri Department of Labor and Industrial Relations*, 623 S.W.3d 585 (Mo. 2021). The main reason for this was the unusual definition of "public safety" union in the Missouri law. Unlike the Wisconsin and Iowa laws, the Missouri statute combined locals with the larger union bodies with which the locals were affiliated in determining whether a given local had enough "public safety" members to be considered a "public safety" union. So, for example, school maintenance workers who voted to affiliate their local with the American Federation of Teachers would not count as a 'public safety union," and therefore would be subject to the severe restrictions in the new law. But if that same local of school maintenance workers voted to affiliate with the International Association of Firefighters, that same local would be exempted from the restrictions of the law because it would be considered a public safety union. The court held that this definition and accompanying distinction in rights did not survive rational basis scrutiny.

On the other hand, in *AFSCME Council 61 v. State of Missouri*, 63 S.W.3d 111 (Mo. 2022), the Missouri Supreme Court held that a more recent state law removing civil service "just cause" discharge protections from most state employees and stating that unions representing such employees could not negotiate over that topic did not violate Missouri's state constitutional right to bargain collectively.

**Page 84, add to the end of the penultimate paragraph:**

Further, in May 2022, Colorado enacted SB22-230 into law. This law granted collective bargaining rights, for the first time, to more than 36,000 county workers across the state.

**Page 85, add to the end of the first full paragraph**:

This law, codified as Virginia Code Section 40.1.57.2, *et seq*., requires that such an ordinance "shall provide for procedures for the certification and decertification of exclusive bargaining representatives, including reasonable public notice and opportunity for labor organizations to intervene in the process for designating an exclusive representative of a bargaining unit." Sec. 40.1-57.2.A. For a list of jurisdictions that have adopted such ordinances as of mid-2022, see https://www.virginiamercury.com/2022/07/28/where-can-public-sector-employees-collectively-bargain-in-virginia/

**Page 84, second full paragraph, add the following to the end of the second full paragraph**:

Further, in 2023, Florida enacted Senate Bill 256, which bars most public-sector unions from having dues deducted directly from workers' paychecks and requires that affected

unions maintain at least 60% membership in their bargaining units. Unions that do not meet that requirement will be decertified and lose their contracts. Police and firefighter unions are not covered by this law.

**Page 85, insert this paragraph before the final paragraph:**

Additionally, in 2022, Washington enacted HB 2124, which grants legislative branch employees to right to bargain collectively (beginning May 1, 2024). Also, in July 2023, Michigan enacted HB 4233, HB 4354, and HB 4820, which removed bars on dues deduction and removed limits on the scope of bargaining for teachers' unions that the state had added in 2011 and previously. See Chapter 10-III-C for more on these changes to scope of bargaining.

**Page 85, add this new section at the end of the Chapter:**

**Police Unions and Statutory Reforms to public-sector labor statutes.**

The Black Lives Matter movement – a response to incidents of police using excessive and sometimes lethal force against African Americans – has given rise to new debates over the role of police unions and labor laws. Critics argue that police unions improperly interfere with disciplining officers who commit violent and/or racist acts. "There 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 a 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 for other types of employees. 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 discussion of these and other controversial provisions .

Others are skeptical that collective bargaining rights are a major obstacle to police reform. They reply 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). Consider also that one study critical of collectively bargained disciplinary protections found 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?

In addition, consider the role of police management in negotiating and in enforcing rules in labor contracts, and 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 labor law statutes to change the police discipline process.

In 2020, the District of Columbia amended its public-sector labor statute to make discipline of police officers a management right that is 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 states that "All matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable." A district court upheld this change. *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, Connecticut passed a law which nullified the restrictions in the state trooper union's contract 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).

**Chapter 2**

**Pages 104-105, add the following to the end of note 4:**

In *The Atlanta Opera, Inc.*, 372 N.L.R.B. No. 95 (June 13, 2023), the Board overruled *SuperShuttle DFW, Inc.,* 367 N.L.R.B. No. 75 (2019), and returned to its prior standard —*FedEx Home Delivery*, 361 N.L.R.B. 610 (2014) (*FedEx II*)—for distinguishing statutory employees entitled to the Act's protections from independent contractors excluded from the NLRA's coverage. The Board found the bargaining unit the union sought to represent—makeup artists, wig artists, and hairstylists—was comprised of employees, not independent contractors. In doing so, the Board explicitly disagreed with the D.C. Circuit's view, expressed in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) and reiterated in *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (with which the *SuperShuttle* Board had agreed), that all of the common law independent contractor factors had to be examined through the prism—the "animating principle"—of entrepreneurial opportunity. The *Atlanta Opera* Board pointed to the Supreme Court's and its own prior reliance on the multifactor test described in Section 220 of the Restatement (Second) of Agency, without assigning any controlling weight to any one factor. The Board further noted that, in addition to the factors explicitly listed in the Restatement, it also "has assessed whether purported contractors had the ability to work for other companies, could hire their own employees, and had a proprietary interest in their work. Crucially, the Board has weighed these considerations alongside the Restatement factors without assigning to them any special significance or weight. In no case did the Board find that "entrepreneurial opportunity" was sufficient to establish independent-contractor status by itself." *Id.*, at 3 (footnotes omitted).

This case reflects the Board's doctrine of nonacquiescence to circuit court decisions. Why do you think the Board chose to disagree with the D.C. Circuit on this particular issue? Do you think the Board's determination should be entitled to any deference? Note that the Board typically does not get deference on its application of common law, but the Board's decision in *The Atlanta Opera* contends that the D.C. Circuit's *FedEx* decisions misinterpreted the Board's own line of independent contractor decisions, and that the Board is entitled to deference when it is interpreting its own decisions. *The Atlanta Opera*, at 3-4 and note 28.

**Page 140, add a new part 5:**

5. Workers In Rehabilitative Settings.

In a series of cases, the Board has addressed the "employee" status of disabled individuals working in rehabilitative settings. Under the lead case, *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 983-84 (2004), the status determination turns on whether the relationship between worker and employer is best characterized as "typically industrial" or "primarily rehabilitative." The Fourth Circuit recently summarized the Board's thinking:

> The Board declines to assert jurisdiction over 'primarily rehabilitative' employment relationships as a prudential matter, in recognition of the fact that the Act 'contemplates a primarily economic relationship between employer and employee,' wherein 'employees who do not possess full freedom of association or actual liberty of contract' will experience an inequity of bargaining power as compared to their better-organized employers. . . . But '[i]t is well-established that the Board is not precluded from asserting its jurisdiction merely because an employer is ...engaged in a worthy purpose,' and the Board classifies individuals working in rehabilitative settings as 'employees' if there is a classically economic working relationship with the employer that is 'typically industrial' and reflects 'private sector working conditions.'

*Sinai Hospital of Baltimore, Inc., v. NLRB*, 33 F. 4th 715, 722-723 (4th Cir. 2022) (citations omitted).

In *Sinai Hospital*, a case involving disabled janitors working in Social Security Administration facilities, the Fourth Circuit reviewed the Board's application of the non-exhaustive list of five factors—(1) The existence of employer-provided counseling, training, or rehabilitative services; (2) The existence of any production standards; (3) The existence and nature of disciplinary procedures; (4) The applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the same facility); and (5) The average tenure of employment, including the existence/absence of a job-placement program—used to make the status determination under *Brevard*, and upheld the Board's decision that the janitors in question were employees.

**Page 163, add the following to paragraph 1, on the General Counsel:**

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. See also *NLRB v. Aakash, Inc.*, 58 F.4th 1099 (9th Cir. 2023) (reaching the same conclusion).

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.

**Chapter 3**

**Page 174, add the following to the first paragraph of note 7:**

In *Tesla, Inc.*, 371 N.L.R.B. No. 131 (2022), the Biden Board reversed *Wal-Mart*. An employer policy required "production associates" to wear a uniform, including a black cotton shirt with the Tesla logo, or all-black clothing. Tesla stated two reasons for this policy: ensuring that workers were not wearing clothing with zippers, etc., that might damage cars; and making it easy to identify production associates by sight. However, this policy was not strictly enforced until employees began wearing black cotton shirts with the United Auto Workers logo and a union slogan. The Board concluded that the policy interfered with employees' *Republic Aviation* rights, and so was presumptively invalid. Further, Tesla did not meet its burden to show "special circumstances" justifying its policy. Finally, the Board rejected Tesla's argument that workers' Section 7 rights were adequately protected because they were permitted to wear UAW stickers on their shirts: "an employer is not free to restrict one statutorily protected means of communication among employees, so long as some alternative means remains unrestricted."

**Page 190-191, add the following to the discussion of *Bexar Cty. Performing Arts Center Fdn.*:**

The union successfully sought review of the Board's 2019 *Bexar County* decision in the D.C. Circuit, *Local 23, Am. Fed. Of Musicians v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021). The Court held that the Board's explanation and application of its new test were both arbitrary. On remand, the Biden Board returned to the *New York, New York* standard, emphasizing that "the D.C. Circuit upheld that test, and no court has questioned it." The Board also held that the *New York, New York* test should be applied to any pending cases presenting a contractor-access issue.

**Page 191, add the following new case:**

California's Agricultural Labor Relations Act governs union organizing among agricultural employees. (Recall that agricultural employees are excluded from NLRA coverage.) The state Agricultural Relations Board established a more robust access

right for union organizers than exists under the NLRB. In 2021, the Supreme Court held that this right constituted a "taking" of property without just compensation. Consider what (if anything) this decision means for Lechmere and related cases.

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.

***

**Page 204, add a new note 6:**

Employees can also lose Section 7 protection if they express themselves using sufficiently offensive language. In *Lion Elastomers*, 372 N.L.R.B. No. 83 (May 2023), the NLRB returned to its context-dependent approach to this topic. Under that approach, the following rules apply:

- When an employee is speaking to a manager in the workplace, the Board considers the factors articulated in *Atlantic Steel*, 245 NLRB 814 (1979): "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."
- When an employee is expressing themselves on social media and when employees are talking amongst themselves in the workplace, the Board will consider the totality of the circumstances.
- When an employee is on a picket line, the Board will apply the test from *Clear Pine Mouldings*, 268 NLRB 1044 (1984), which considers "whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the picket-line conduct."

The *Lion Elastomers* decision overruled the Trump Board's decision in *General Motors*, 369 N.L.R.B. No. 127 (2020), which held that the *Wright Line* burden-shifting approach applied whenever employees were disciplined for use of offensive language.

**Page 214, add the following to the bottom of note 9:**

In *FDRLST Media LLC*, 370 N.L.R.B. No. 49 (Nov. 24, 2020), the NLRB held that commentary website *The Federalist* violated labor law when its executive officer and publisher tweeted 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." 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."

However, the Third Circuit denied enforcement on this point, concluding 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." Significantly, the Court wrote that the Board had erred in disregarding evidence of the employees' subjective understanding of the tweet: "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."

**Page 230, add a new note 4:**

The NLRB's General Counsel has urged the Board to hold that captive audience meetings violate employees' Section 7 rights. She explained her position in a memorandum, stating 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*.

**Page 239, add the following to note 6:**

In a memorandum, the NLRB's General Counsel identified a need for a new approach to analyzing when "intrusive or abusive forms of electronic monitoring and automated management" violate Section 7:

> I will urge the Board to find that an employer has presumptively violated Section 8(a)(1) where the employer's surveillance and management

> practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act. If the employer establishes that the practices at issue are narrowly tailored to address a legitimate business need—i.e., that its need cannot be met through means less damaging to employee rights—I will urge the Board to balance the respective interests of the employer and the employees to determine whether the Act permits the employer's practices. If the employer's business need outweighs employees' Section 7 rights, unless the employer demonstrates that special circumstances require covert use of the technologies, I will urge the Board to require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains.

GC 23-02, *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights*.

**Page 307, add a new paragraph at the bottom of the page:**

*Severance Agreements*: Employees retain their Section 7 rights after they leave their employer, which means that severance agreements can implicate the NLRA. In *McLaren Macomb*, 372 N.L.R.B. No. 58 (Feb. 2023), the Board held that "an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights," such as confidentiality or non-disparagement provisions. The inquiry focuses on whether the substance of the proffered agreement requires the employee to waive their Section 7 rights, such as by promising not to communicate with former co-workers, or to avoid participating in NLRB investigations. *McLaren Macomb* overturned two cases that limited the inquiry to focus on the circumstances under which severance agreement was offered, rather than the language of the agreement. *Baylor University Med. Ctr.*, 369 N.L.R.B. No. 43 (2020); *IGT*, 370 N.L.R.B. No. 50 (2020).

The General Counsel has argued that non-compete agreements violate Section 7 because "they reasonably tend to chill employees in the exercise of Section 7 rights, when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work." Memorandum GC 23-08 (May 30, 2023).

## Chapter 4

**Page 311, add the following to the end of note 2:**

In *Trey Grove*, 371 N.L.R.B. No. 138 (2022), the Board held that replacement workers who were brought in during a strike by unionized workers had Weingarten rights. The

Board's reasoning -- that Weingarten rights are derived from Section 7, which covers union and non-union workers -- could signal the Board's willingness to again hold that Weingarten rights apply to both unionized and non-union workers.

**Chapter 6**

**Page 419, add the following to Subsection b, on affirmative relief orders:**

In *Thryv, Inc.*, 372 N.L.R.B. No. 22 (2022), the Board revisited and clarified its existing practices, expressly requiring its standard make-whole remedy to include an obligation for respondents to compensate affected employees for "all direct or foreseeable pecuniary harms" that employees suffer as a result of the respondent's unfair labor practice. The Board gave as examples of significant financial costs employees may incur as a result of unfair labor practices "out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet." *Id.*, at 9. The Board stated:

> [w]e stress today that the Board is not instituting a policy or practice of awarding consequential damages, a legal term of art more suited for the common law of torts and contracts. Instead, we ground our decision in the make-whole principles of Section 10(c) of the Act, the guidance of the examples in our precedent … and our affirmative duty to rectify the harms caused by a respondent's unfair labor practice by attempting to restore the employee to the situation they would have been in but for that unlawful conduct. These considerations persuade us that clarifying that our traditional make-whole remedy should also include compensation for direct or foreseeable pecuniary harms in all cases will better effectuate the purpose of the Act.

*Id.*

**Chapter 7**

**Page 457, add the following to the end of Section II(A):**

On January 17, 2023, the D.C. Circuit finally issued its decision in *AFL-CIO v. NLRB*, 57 F.4th 1023 (D.C. Cir. 2023), affirming in part and reversing in part then-District Court Judge Ketanji Brown Jackson's decision on the Board's rule revising its representation case procedures. On the jurisdictional question of whether district courts, rather than circuit courts, have jurisdiction over challenges to Board rules, the D.C. Circuit held that, at least as to rules that are exclusively concerned with representation elections, district courts had jurisdiction over such challenges. On the merits of the rule itself, the D.C. Circuit reversed Judge Jackson with respect to two parts of the rule—(1) giving parties the right to litigate most voter eligibility and inclusion issues prior to the election, and (2) in directed elections, providing that a Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election—and

held that these provisions fell within the procedural exemption to the Administrative Procedure Act's notice and comment requirement.

The D.C. Circuit agreed with Judge Jackson that three other provisions—(1) giving employers five business days (rather than two business days) to furnish the required voter list following the issuance of a direction of election; (2) limiting a party's selection of observers to individuals who are current members of the voting unit whenever possible; and (3) instructing Regional Directors to not issue certifications following elections if a request for review is pending or before the time has passed during which a request for review could be filed—were unlawfully promulgated without notice and comment.

Finally, the D.C. Circuit also struck down, as contrary to the explicit language of Section 3(b) of the Act, the rule's requirement that ballots be automatically impounded if a request for review of a decision and direction of election is filed within 10 business days of the issuance of the decision, and direction of election and has not been ruled on (or has been granted) prior to the ballot count. The court remanded the case for further consideration of arguments raised by the AFL-CIO as to whether certain specific provisions were arbitrary and capricious and/or contrary to the Act. Judge Rao, in dissent, would have upheld the 2019 Final Rule in its entirety.

In response to the D.C. Circuit's decision, on March 10, 2023, the Board published a notice rescinding the four provisions of the representation elections procedures rule the D.C. Circuit found unlawful and reinstating the prior regulations on these topics. In addition, the Board postponed the implementation of two provisions—(1) allowing parties to litigate disputes over unit scope and voter eligibility prior to the election, and (2) instructing Regional Directors not to schedule elections before the 20th business day after the date of the direction of election—as the AFL-CIO litigation remains pending, and while the Board considers whether to revise or repeal the 2019 Rule.

**Page 466, add the following to the end of Section II.C, on blocking charges:**

On November 3, 2022, the Board issued a Notice of Proposed Rulemaking that would rescind the rule adopted by the prior Board majority on April 1, 2020, including rescinding the provisions regarding the blocking charge policy. The proposed rule would restore the Board's prior law, including the traditional "blocking charge" policy. Thus, as stated in the Board's announcement accompanying the proposed rule, under the proposed rule "when unfair labor practice charges are filed while an election petition is pending, a Regional Director may delay the election if the conduct alleged threatens to interfere with employee free choice. The Board's view, subject to public comments, is that the proposed rule promotes employee free choice and conserves the Board's resources, and those of the parties, by ensuring that the Board does not conduct elections—that might well have to be re-run—in a tainted environment." https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-notice-of-proposed-rulemaking-on-fair-choice-and-employee

**Page 479, add the following to the end of Section III.B, on appropriate bargaining units:**

In *American Steel Construction, Inc.*, 372 N.L.R.B. No. 23 (2022), the Board modified the test used to determine whether additional employees must be included in a petitioned-for unit, overruling *PCC Structurals*, 365 N.L.R.B. No. 160 (2017) and *The Boeing Co.*, 368 N.L.R.B. No. 67 (2019), and returning to the rule set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. 934 (2011). Under *American Steel*, the employees in the petitioned-for unit must be "readily identifiable as a group" and share a "community of interest." If a party argues that a proposed unit meeting these criteria must add additional employees, the burden is on that party to show that the excluded employees share an "overwhelming community of interest" to mandate their inclusion in the bargaining unit.

Shortly after deciding *American Steel*, the Board clarified the principles applicable to finding a petitioned-for craft unit appropriate. In *Nissan North America, Inc.*, 372 N.L.R.B. No. 48 (2023), the Board overturned the Regional Director's determination and found appropriate a petitioned-for unit of 86 tool and die maintenance technicians, relying on Board precedent finding tool and die workers to be an appropriate craft unit. In rejecting the employer's contention that the only appropriate unit had to include all of the approximately 4300 production and maintenance employees at Nissan's Smyrna facility, the Board made clear that when a petitioned-for unit is an appropriate craft unit, no further inquiry is required.

**Chapter 8**

**Page 578, add the following to the end of note 17:**

GC Abruzzo has argued that the Board should revive the *Joy Silk Mills* approach. In a brief filed in *Cemex Constr. Materials Pac*ific, LLC, Case No. 28-RC-232059, the GC's office argued "the Board should reinstate *Joy Silk* in its original form, with the employer bearing the burden to demonstrate its good faith doubt as to majority status without requiring an increased threshold of 'substantial unfair labor practices' to demonstrate the lack of good faith." This approach, the brief continued, would "disincentivize[] an employer from engaging in unfair labor practices during organizing campaigns to avoid a bargaining obligation."

**Chapter 9**

**Page 700, add the following to the end of note 4:**

In *Valley Hospital Medical Center, Inc.*, *372 N.L.R.B. No. 23 (2022) (Valley Hospital II),* on remand from the Ninth Circuit, the Board reversed *Valley Hospital I* and returned to the rule of *Lincoln Lutheran*: that an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in that contract until either the parties have reached a successor collective-bargaining agreement, or a valid overall

bargaining impasse permits unilateral action by the employer. In doing so, the Board explained: "We are persuaded that the Board's well-supported analysis in *Lincoln Lutheran*, which more judiciously limits exceptions from the duty to maintain the status quo, better effectuates the Act's policy (as expressed in Sec. 1) to "encourag[e] the practice and procedure of collective bargaining" and protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. In short, we find that a dues-checkoff provision properly and reasonably belongs in the broad category of mandatory bargaining subjects that Section 8(a)(5) of the Act bars employers from changing unilaterally after the expiration of a contract, rather than in the small handful of exceptions to the rule. Thus, we again reject the *Bethlehem Steel* rule that *Valley Hospital I* improvidently reinstated." *Valley Hospital II*, at 2.

**Chapter 10**

**Page 837, page 837, add the following to the end of note 5:**

Among her many initiatives, NLRB General Counsel Jennifer Abruzzo is asking the Board to revisit *Ex-Cell-O*, to provide a compensatory remedy for Section 8(a)(5) bad faith bargaining violations. The General Counsel's position was fully articulated in Counsel for the General Counsel's brief to the Board in *Pathway Vet Alliance, LLC*, Case 03-CA-291267, but that case was resolved pursuant to a non-Board settlement where the employer agreed to recognize and bargain with the union. However, the Board has other opportunities to address the issue. See, for example, *Hudson Institute of Process Research*, 372 N.L.R.B. No. 73 (April 4, 2023), where the Board ruled that the employer unlawfully failed to bargain with the union, and, in addition, noted that:

> the General Counsel requests that the Respondent be required to make its employees whole for the lost opportunity to bargain at the time and in the manner contemplated by the Act. To do so would require overruling *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), and outlining a methodological framework for calculating such a remedy. The Board has decided to sever this issue and retain it for further consideration to expedite the issuance of this decision regarding the remaining issues in this case. The Board will issue a supplemental decision regarding a make-whole remedy at a later date.

*Id.*, at 3 (citations and footnote omitted).

**Chapter 11**

**Page 850, insert the following material after the last full paragraph on the page, concerning strike misconduct:**

The following case involves a labor dispute between a concrete company and the union of its concrete-delivery truck drivers. In the case, the company alleges that union truck drivers went on strike while in the middle of delivery concrete, resulting in destruction of

some of that concrete. The company filed in Washington state court tort claims alleging that the union intentionally destroyed the company's concrete during a labor dispute. The state court dismissed the claims on grounds that they were preempted by the NLRA. (*See infra* chapter 16, for a discussion of preemption.)

The Court granted certiorari to determine whether the NLRA preempts the company's tort claims. To determine whether the state law claims were preempted, the Court decided that it needed to determine whether the truck drivers' strike was protected. The Court held that it was not.

**Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174**
The Supreme Court of the United States
143 S. Ct. 1404 (June 1, 2023)

Barrett, J.

I
* * *

We relay the facts as alleged in the complaint. Glacier Northwest sells ready-mix concrete to customers in Washington State. Each batch must be mixed to the customer's specifications. After Glacier combines the raw ingredients—cement, sand, aggregate, admixture, and water—in a hopper, it transfers the resulting concrete to one of its trucks for prompt delivery.

In this business, time is of the essence. Concrete is highly perishable—it begins to harden immediately once at rest. Ready-mix trucks can preserve concrete in a rotating drum located on the back of the truck, but only for a limited time. If concrete remains in the rotating drum for too long, it will harden and cause significant damage to the truck. Worse still, the hardening begins right away if the drum stops revolving.

The International Brotherhood of Teamsters Local Union No. 174 (Union) serves as the exclusive bargaining representative for Glacier's truck drivers. After the collective-bargaining agreement between Glacier and the Union expired in the summer of 2017, the parties negotiated in an attempt to reach a new deal. Things did not go smoothly.

Tensions came to a head on the morning of August 11. According to the allegations in Glacier's complaint, a Union agent signaled for a work stoppage when the Union knew that Glacier was in the midst of mixing substantial amounts of concrete, loading batches into ready-mix trucks, and making deliveries. Although Glacier quickly instructed drivers to finish deliveries in progress, the Union directed them to ignore Glacier's orders. At least 16 drivers who had already set out for deliveries returned with fully loaded trucks. Seven parked their trucks, notified a Glacier representative, and either asked for instructions or took actions to protect their trucks. But at least nine drivers abandoned their trucks without a word to anyone.

Glacier faced an emergency. The company could not leave the mixed concrete in the trucks because the concrete's inevitable hardening would cause significant damage to the vehicles. At the same time, the company could not dump the concrete out of the trucks at random because concrete contains environmentally sensitive chemicals. To top it all off, Glacier had limited time to solve this conundrum.

A mad scramble ensued. Glacier needed to determine which trucks had concrete in them, how close the concrete in each truck was to hardening, and where to dump that concrete in an environmentally safe manner. Over the course of five hours, nonstriking employees built special bunkers and managed to offload the concrete. When all was said and done, Glacier's emergency maneuvers prevented damage to its trucks. But the concrete that it had already mixed that day hardened in the bunkers and became useless.

Glacier sued the Union for damages in Washington state court. Relying on the allegations detailed above, Glacier claimed that the Union intentionally destroyed the company's concrete and that this conduct amounted to common-law conversion and trespass to chattels.

The Union moved to dismiss Glacier's tort claims on the ground that the NLRA preempted them. In the Union's view, the NLRA at least arguably protected the drivers' conduct, so the State was powerless to hold the Union accountable for any of the strike's consequences.

The trial court agreed with the Union. After the appellate court reversed, the Washington Supreme Court reinstated the trial court's decision. In its view, "the NLRA preempts Glacier's tort claims related to the loss of its concrete product because that loss was incidental to a strike arguably protected by federal law." [198 Wash.2d 768, 774 (2021)].

* * *

II

[The Court explains that this case turns on whether the truck drivers' striking activity was even arguably protected by the NLRA by "putting forth 'enough evidence to enable the court to find that' the NLRA arguably protects the drivers' conduct. *Davis*, 476 U.S. at 395 ... ." The Court determined that the Union failed to do so.]

All agree that the NLRA protects the right to strike but that this right is not absolute... . The Board has long taken the position—which both the Union and Glacier accept—that the NLRA does not shield strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work. *Bethany Medical Center*, 328 N.L.R.B. 1094 (1999) ("concerted activity" is "indefensible where employees fail to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work") … . Given this undisputed limitation on the right to strike, we proceed to consider whether the Union has demonstrated that

the statute arguably protects the drivers' conduct. *Davis*, 476 U.S. at 395... . We conclude that it has not.

The drivers engaged in a sudden cessation of work that put Glacier's property in foreseeable and imminent danger. The Union knew that concrete is highly perishable and that it can last for only a limited time in a delivery truck's rotating drum. It also knew that concrete left to harden in a truck's drum causes significant damage to the truck. The Union nevertheless coordinated with truck drivers to initiate the strike when Glacier was in the midst of batching large quantities of concrete and delivering it to customers. Predictably, the company's concrete was destroyed as a result. And though Glacier's swift action saved its trucks in the end, the risk of harm to its equipment was both foreseeable and serious. See *NLRB v. Special Touch Home Care Services, Inc.*, 708 F.3d 447, 460 (CA2 2013) ("The appropriate inquiry is focused on the *risk* of harm, not its realization").

The Union failed to "take reasonable precautions to protect" against this foreseeable and imminent danger. [*Bethany Med. Ctr.*, 328 N.L.R.B. at 1094]. It could have initiated the strike before Glacier's trucks were full of wet concrete—say, by instructing drivers to refuse to load their trucks in the first place. Once the strike was underway, nine of the Union's drivers abandoned their fully loaded trucks without telling anyone—which left the trucks on a path to destruction unless Glacier saw them in time to unload the concrete. Yet the Union did not take the simple step of alerting Glacier that these trucks had been returned. Nor, after the trucks were in the yard, did the Union direct its drivers to follow Glacier's instructions to facilitate a safe transfer of equipment. To be clear, the "reasonable precautions" test does not mandate any one action in particular. But the Union's failure to take even minimal precautions illustrates its failure to fulfill its duty.

. . . [T]he Union executed the strike in a manner designed to compromise the safety of Glacier's trucks and destroy its concrete. Such conduct is not "arguably protected" by the NLRA; on the contrary, it goes well beyond the NLRA's protections. See *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 411, 413 (C.A.5 1955) (strike unprotected when employees abandoned their posts without warning "when molten iron in the plant cupola was ready to be poured off," even though "a lack of sufficient help to carry out the critical pouring operation might well have resulted in substantial property damage").

Thus, accepting the complaint's allegations as true, the Union did not take reasonable precautions to protect Glacier's property from imminent danger resulting from the drivers' sudden cessation of work. The state court thus erred in dismissing Glacier's tort claims as preempted on the pleadings.

III

The Union resists this conclusion. First, it emphasizes that the NLRA's protection of the right to strike should " 'be given a generous interpretation.' " [Union's Brief (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234–35 (1963))]. A strike, it points out, consists of a "concerted stoppage of work." § 142(2). So, the argument goes, by

engaging in a concerted stoppage of work to support their economic demands, the drivers engaged in conduct arguably protected by § 7 of the NLRA.

This argument oversimplifies the NLRA. As we explained, the right to strike is limited by the requirement that workers "take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work." [*Bethany Med. Ctr.*, 328 N.L.R.B. at 1094]. So the mere fact that the drivers engaged in a concerted stoppage of work to support their economic demands does not end the analysis. We must also ask whether the strike exceeded the limits of the statute.

Second, the Union argues that "workers do not forfeit the Act's protections simply by commencing a work stoppage at a time when the loss of perishable products is foreseeable." [Union Brief]. It points out that the Board has found strikers' conduct protected even when their decision not to work created a risk that perishable goods would spoil. See, *e.g.*, *Lumbee Farms Coop.*, 285 N.L.R.B. 497 (1987) (raw poultry processing workers), enf'd, 850 F.2d 689 (C.A.4 1988); *Central Oklahoma Milk Producers Assoc.*, 125 N. L. R. B. 419 (1959) (milk-truck drivers), enf'd, 285 F.2d 495 (C.A.10 1960); *Leprino Cheese Co.*, 170 N. L. R. B. 601 (1968) (cheese factory employees), enf'd, 424 F.2d 184 (CA10 1970). If the mere risk of spoilage is enough to render a strike illegal, the Union insists, then workers who deal with perishable goods will have no meaningful right to strike.

The Union is swinging at a straw man. It casts this case as one involving nothing more than a foreseeable risk that the employer's perishable products would spoil. But given the lifespan of wet concrete, Glacier could not batch it until a truck was ready to take it. So by reporting for duty and pretending as if they would deliver the concrete, the drivers *prompted the creation* of the perishable product. Then, they waited to walk off the job until the concrete was mixed and poured in the trucks. In so doing, they not only destroyed the concrete but also put Glacier's trucks in harm's way. This case therefore involves much more than "a work stoppage at a time when the loss of perishable products is foreseeable." . . . .

Third, the Union maintains that the timing of the strike and Glacier's lack of notice cannot render the drivers' conduct unprotected. ... It argues that workers are not required to time their strikes to minimize economic harm to their employer, see *Lumbee Farms*, 285 N.L.R.B. at 506, and that the NLRA does not impose a legal requirement that workers give specific notice of a strike's timing, see *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 257 (CA6 1990).

We agree that the Union's decision to initiate the strike during the workday and failure to give Glacier specific notice do not themselves render its conduct unprotected. Still, they are relevant considerations in evaluating whether strikers took reasonable precautions, whether harm to property was imminent, and whether that danger was foreseeable. See *International Protective Services, Inc.*, 339 N.L.R.B. 701, 702–703 (2003) (attempt " 'to capitalize on the element of surprise' " stemming from a lack of notice weighed in favor

of concluding that a union failed to take reasonable precautions). In this instance, the Union's choice to call a strike *after* its drivers had loaded a large amount of wet concrete into Glacier's delivery trucks strongly suggests that it failed to take reasonable precautions to avoid foreseeable, aggravated, and imminent harm to Glacier's property.

Finally, the Union points out that the drivers returned the trucks to Glacier's facility. And it maintains that all of the drivers left the drums of their trucks rotating, which delayed the concrete's hardening process. In the Union's view, this establishes that the drivers took reasonable precautions to protect the trucks. [Union Brief ].

We see it differently. That the drivers returned the trucks to Glacier's facility does not do much for the Union—refraining from stealing an employer's vehicles does not demonstrate that one took reasonable precautions to protect them. And Glacier's allegations do not support the Union's assertion that all of the drivers left the drums rotating. The Union relies on a vague remark by an unspecified Union agent to another unspecified person to leave a truck running. ... This snippet does not show that all of the drivers left their trucks running, and even if it did, that would not necessarily mean that the delivery trucks' drums continued rotating. In any event, Glacier alleged that if concrete remains in a ready-mix truck for too long, it will harden and cause significant damage to the truck. The rotating drum forestalls that hardening for a time, but not indefinitely. And the Union concedes that the NLRA does not arguably protect its actions if they posed a material risk of harm to the trucks. . . .

* * *

Glacier alleges that the drivers' conduct created an emergency in which it had to devise a way to offload concrete "in a timely manner to avoid costly damage to [its] mixer trucks." ... The Union's actions not only resulted in the destruction of all the concrete Glacier had prepared that day; they also posed a risk of foreseeable, aggravated, and imminent harm to Glacier's trucks. Because the Union took affirmative steps to endanger Glacier's property rather than reasonable precautions to mitigate that risk, the NLRA does not arguably protect its conduct. We reverse the judgment of the Washington Supreme Court and remand the case for further proceedings not inconsistent with this opinion. . . .

Justice Thomas's concurrence (joined by Justice Gorsuch), which discusses preemption, is omitted.

**J. Alito, with whom J.J. Thomas and Gorsuch join, concurring in the judgment.**

… The [NLRA] protects the right to strike, but that right is subject to certain limitations and qualifications, see 29 U.S.C. § 163, and this Court's decisions make clear that the Act does not protect striking employees who engage in the type of conduct alleged here.

This Court has long recognized that the Act does not "invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's

property." [*NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939)]. To justify "despoiling [an employer's] property" or "the seizure and conversion of its goods," … "would be to put a premium on resort to force instead of legal remedies." [*Id.* at 253]. …

Nothing more is needed to resolve this case. Glacier's complaint alleges that the Union and its members acted "with the improper purpose to harm Glacier by causing [its] batched concrete to be destroyed." .... As the Court recognizes, they succeeded by "prompt[ing] the creation of the perishable product" and then ceasing work when the concrete was in a vulnerable state. ... Because this Court has long rejected the Union's claim that this kind of conduct is protected, *Garmon* preemption does not apply. See [*ILA, AFL-CIO v. Davis*, 476 U.S. 380, 395 (1986)].

**J. Jackson, dissenting.**

* * *

IV

[T]he majority misapplies the reasonable-precautions principle to the allegations here in a manner that threatens to impinge on the right to strike and on the orderly development of labor law.

A

1

A strike, by definition, is a "concerted stoppage of work by employees," or "any concerted slowdown or other concerted interruption of operations by employees." § 142(2). When employees stop working, production may halt, deliveries may be delayed, and services may be canceled. At the risk of stating the obvious, this means that the workers' right to strike inherently includes the right to impose economic harm on their employer.

Congress was well aware that organized labor's exercise of the right to strike risks harm to an employer's economic interests. See § 151; [*NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963)] (Congress's protection of the right to strike reflects its understanding that strikes are authorized "economic weapon[s]"). Yet, Congress protected that right anyway. In fact, the threat of economic harm posed by the right to strike is a feature, not a bug, of the NLRA. The potential pain of a work stoppage is a powerful tool, and one that unquestionably advances Congress's codified goal of achieving "equality of bargaining power between employers and employees." § 151. Unions leverage a strike's economic harm (or the threat of it) into bargaining power, and then wield that power to demand improvement of employees' wages and working conditions—goals that, according to Congress, benefit the economy writ large. [See *Sears, Roebuck & Co.*, 436 U.S. at 190.]

Still, the right to strike is, of course, not unlimited. But when "Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgment in exacting detail." [*Erie Resistor*, 373 U.S. at 234.] Section 8 enumerates several limitations. For example, a union must notify an employer that it intends to terminate or

modify its contract—and thus that a strike is possible—at least 60 days before striking. § 158(d). A union cannot strike for unlawful purposes, such as putting economic pressure on parties other than the primary employer. § 158(b)(4)(i)(B). And, in certain healthcare settings, unions must provide at least 10 days' notice of the precise date and time of a strike. § 158(g).

Additionally, § 163 of the NLRA (which Congress added via the 1947 Taft-Hartley Amendments …) states that "nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Thus, the text of the NLRA allows for only two kinds of limitations on the right to strike: those enumerated in the Act itself, and the "limitations or qualifications" on the right that existed when the Taft-Hartley Amendments were enacted. See [*NLRB v. Drivers*, 362 U.S. 274, 281–82 (1960).] The only relevant limitation here is the one set out in [*Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939)].

Our *Fansteel* decision stands for the principle that "employees ha[ve] the right to strike but they ha[ve] no license to commit acts of violence or to seize their employer's plant." [*Id*. at 253.] The facts of that case involved 95 striking employees who effected a "sit-down strike by taking over and holding two of [their employer's] key buildings." [*Id.* at 248] (internal quotation marks omitted). The employees subsequently engaged in "a pitched battle" in which they "resisted the attempt by the sheriff to evict and arrest them." [*Id.* at 249.] We held that the NLRA did not condone this conduct, which would "put a premium on resort to force" and would "subvert the principles of law and order which lie at the foundations of society." [*Id.* at 253.]

Congress's incorporation of *Fansteel*'s limitation into the NLRA establishes that, while employees have the right to withhold their labor peaceably, subsequent affirmative acts of violence, or seizure of an employer's premises, are not protected labor practices.

2

As a general matter, the dispute in this case is over whether employees can withhold their labor if doing so risks damage to their employer's property. As explained above, by carefully restricting limitations on the right to strike in the NLRA itself, Congress has indicated that the act of peacefully walking off the job is protected strike conduct even if economic harm incidentally results. What is *not* protected is any subsequent affirmative step to destroy or seize the employer's property. This is the statutory backdrop against which the Board has developed the narrow requirement that striking employees must take reasonable precautions before or when they strike in order to forestall or address foreseeable, imminent, and aggravated injury to persons, premises, and equipment that might otherwise be caused by their sudden cessation of work.

The Board first applied this "reasonable precautions" principle to rank-and-file employees in *Marshall Car Wheel & Foundry Co., Inc.*, 107 N.L.R.B. 314, 315 (1953), enf. denied on other grounds, 218 F.2d 409 (C.A.5 1955). There, employees at a

foundry walked off the job at a time when the foundry's furnace was full of hot molten iron, threatening severe damage to the employer's plant and equipment. 107 N.L.R.B. at 315. The Board concluded that the employees' strike conduct was not protected by the NLRA, because the employees had a "duty to take reasonable precautions to protect the employer's physical plant from such imminent damage as for[e]seeably would result from their sudden cessation of work." ...

The Board has also applied this principle in other similar cases. It determined, for example, that strikers who walked out of a certain kind of chemical plant—a plant that handled "extremely hazardous" chemicals that were "a hazard not only to employees but also to individuals living in the vicinity"—without shutting down the equipment had engaged in unprotected conduct. *General Chemical Corp.*, 290 N.L.R.B. 76, 77, 83 (1988). Similarly, the Board held that the strike conduct of security guards whose walkout exposed a federal building's occupants to "imminent" danger was not protected by the NLRA. *International Protective Servs., Inc.*, 339 N.L.R.B. 701, 703 (2003).

But the narrow duty that *Marshall Car Wheel* and its progeny impose does not—and cannot—displace the general rule that labor strikes are protected even when the workers' withdrawal of their labor inflicts economic harm on the employer. So the Board has also repeatedly held that employees have no duty to prevent the loss of perishable goods caused by their sudden cessation of work.

In a leading case, employees at a raw poultry plant decided to walk out at 8 a.m. "because by that time all employees would have reported to work and [the employer] would be in full operation with its largest number of chickens on the line." *Lumbee Farms Co-op.*, 285 N.L.R.B. 497, 503 (1987). The Board affirmed the ALJ's reasoning that "[t]he fact that the strike occurred during the workday when chickens were on the line and vulnerable to loss does not mean employees automatically lost protection under the Act," because "[s]trikers are not required under the Act to institute the strike at a specific time of day." [*Id.* at 506.] Indeed, it is "[n]orma[l]" for "planned employee strikes [to be] timed to ensure the greatest impact on an employer." ...

The Board has applied this same reasoning in cases involving, for example, cheese and milk. See *Leprino Cheese Co.*, 170 N.L.R.B. 601, 605 (1968); *Central Okla. Milk Producers Assn.*, 125 N.L.R.B. 419, 435 (1959). In those cases, the Board also explained that the reasonable-precautions principle is "*limited* to situations involving a danger of 'aggravated' injury to persons or premises"—a danger "[o]bviously" not posed by the loss of, for example, cheese. [*Leprino Cheese*, 170 N.L.R.B. at 607] (emphasis added). The Board has consistently reiterated that "[l]oss is not uncommon when a strike occurs." [*Central Okla. Milk Producers*, 125 N.L.R.B. at 435].

In short, it is indisputable that workers have a statutory right to strike despite the fact that exercising that right risks economic harm to employers. Congress has, in effect, drawn a line between those economic harms that are inherent in the act of peacefully walking off the job (which do not render the strike unprotected), and those that result from workers taking subsequent affirmative steps to seize the employer's premises or

engage in acts of violence (strike conduct that is not protected by the NLRA). The Board has further recognized a narrow duty that arises if a sudden cessation of work risks foreseeable, imminent, and aggravated harm to persons, premises, or equipment. Beyond this narrow reasonable-precautions requirement, however, employees have no obligation to protect their employer's economic interests when they exercise the right to withhold their labor.

B

Glacier does not allege that the cement truckdrivers committed acts of violence or seized its plant or property as part of the strike the Union orchestrated. Instead, the thrust of its complaint is that the Union was aware of "the perishable nature of batched concrete," …, and that the drivers' walkout was intentionally timed so as to risk harm to that product. ...

I agree with the majority that the risk of losing the batched concrete alone would not be sufficient to divest the striking drivers of statutory protection. As Glacier acknowledges, wet concrete is a perishable good. … And the Board has repeatedly reaffirmed that the loss of such perishable goods due to a mere work stoppage does not render a strike unprotected.

There is also no duty to take reasonable precautions to prevent this kind of economic loss, which—standing alone—posed no risk to persons, premises, or equipment, let alone a risk of aggravated harm. While it seems that the drivers were in a position to save the batched concrete that was inside their trucks when the strike was called (by, for instance, continuing to deliver it to the intended customers), that is beside the point. Employees have a protected right to withhold their labor. And it would undercut that right if they could be held liable for the incidental loss of the perishable goods (which includes concrete no less than raw poultry, cheese, or milk) that they tend to as part of their job.

Where I disagree with the majority is the conclusion it draws from the fact that the batched concrete also risked harm to the drivers' trucks, at least as alleged in Glacier's complaint. The majority repeatedly ties the loss of the concrete—in particular, the risk that it would harden in the trucks—to the alleged risk of harm to the delivery trucks themselves. But, to me, the alleged risk of harm to Glacier's trucks involves a relatively complex factual analysis under the Board's reasonable-precautions principle.

Glacier alleges that, "[o]nce at rest, concrete begins hardening immediately, and depending on the mix can begin to set within 20 to 30 minutes." ... Its complaint also asserts that "[i]f batched concrete remains in the revolving drum of the ready-mix truck beyond its useful life span, the batched concrete is certain or substantially certain to harden in the revolving drum and cause significant damage to the concrete ready-mix truck." … But Glacier's own submissions in Washington state court suggest that the Union instructed the drivers to return their trucks to Glacier's yard after the strike began and to keep the ready-mix trucks running. ... Glacier's submissions also suggest that those precautions actually provided the company's managers and nonstriking employees with sufficient time to decide how to address the situation to prevent any

harm to the trucks. ...

Was any risk of harm to the trucks here "imminent," given the allegation that the Union instructed the drivers to keep the trucks running? Is the risk of concrete hardening in a delivery truck "aggravated," in the way *Marshall Car Wheel* contemplates? Was returning the trucks to the employer's premises and leaving them running a sufficient "reasonable" precaution, because it gave the employer sufficient time to address any risk of harm? Making the call about whether the NLRA protects the Union's conduct raises these questions and others. Importantly, these kinds of questions not only involve making nuanced factual distinctions but also demonstrate that applying the Board's reasonable-precautions precedents is, at bottom, a line-drawing exercise. Under circumstances like these, a court can confidently declare that a union's conduct is not even arguably protected for *Garmon* purposes only where the allegations make out a clear *Fansteel* claim or where the alleged facts implicate a reasonable-precautions case that is directly on point. Because neither is true here, the Court should have concluded that the Union's conduct was at least arguably protected.

… I cannot agree with the majority's conclusion that the risk to the trucks rendered the drivers' strike unprotected by the NLRA. Instead, I would have credited Glacier's own account, and thus would have concluded that the Union took reasonable precautions when it instructed the drivers to return the trucks and leave them running to avoid the concrete hardening imminently in the drums. The majority reaches the opposite conclusion by giving far too little weight to the allegation that the drivers returned the trucks, and also by substantially discounting the allegations that support the Union's claim that the drivers left their trucks and revolving drums running. ...

To the extent that the majority's conclusion rests on the alleged fact that "by reporting for duty and pretending as if they would deliver the concrete, the drivers *prompted the creation* of the perishable product" that "put Glacier's trucks in harm's way," … I see nothing aggravated or even untoward about that conduct. Glacier is a concrete-delivery company whose drivers are responsible for delivering wet concrete, so it is unremarkable that the drivers struck at a time when there was concrete in the trucks. While selling perishable products may be risky business, the perishable nature of Glacier's concrete did not impose some obligation on the drivers to strike in the middle of the night or before the next day's jobs had started. To the contrary, it was entirely lawful for the drivers to start their workday per usual, and for the Union to time the strike to put "maximum pressure on the employer at minimum economic cost to the union." [*NLRB v. Insurance Agents'*, 361 U.S. 477, 496 (1960).] …

Nor was the onus of protecting Glacier's economic interests if a strike was called in the middle of the day on the drivers—it was, instead, on Glacier, which could have taken any number of prophylactic, mitigating measures. What Glacier seeks to do here is to shift the duty of protecting an employer's property from damage or loss incident to a strike onto the striking workers, beyond what the Board has already permitted via the reasonable-precautions principle. In my view, doing that places a significant burden on the employees' exercise of their statutory right to strike, unjustifiably undermining

Congress's intent. Workers are not indentured servants, bound to continue laboring until any planned work stoppage would be as painless as possible for their master. They are employees whose collective and peaceful decision to withhold their labor is protected by the NLRA even if economic injury results.

* * *

**Notes**

1. The Court held that Section 7 does not protect (or even arguably protect) the truck drivers' strike because the drivers' intentionally destroyed their employers' property —the concrete. To reach this conclusion the Court read the facts as alleged by the employer and then applied the Board's reasonable precautions test, under which "concerted activity" is "indefensible where employees fail to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work." *Bethany Medical Center*, 328 N.L.R.B. 1094 (1999). Applying that test to the facts as alleged, do you agree with the Court's conclusion?

2. The Court majority rejected the Union's argument that "workers do not forfeit the Act's protections simply by commencing a work stoppage at a time when the loss of perishable products is foreseeable." *See Glacier*, 143 S. Ct. at 1414 (2023). The Court majority distinguished several cases in which the Board found strikers' conduct protected even when the strike created a risk that perishable goods would spoil. *See*, *e.g.*, *Lumbee Farms Coop.*, 285 N.L.R.B. 497 (1987) (raw poultry processing workers), *enforced*, 850 F.2d 689 (4th Cir. 1988); *Central Oklahoma Milk Producers Assoc.*, 125 N.L.R.B. 419 (1959) (milk-truck drivers), *enforced*, 285 F.2d 495 (10th Cir. 1960); *Leprino Cheese Co.*, 170 N.L.R.B. 601 (1968) (cheese factory employees), *enforced*, 424 F.2d 184 (10th Cir. 1970). Does the Court persuasively distinguish these cases?

**Chapter 12**

**Page 1013, add a new note 2:**

In *US v. Hansen*, the Supreme Court considered the constitutionality of a statute that imposes criminal penalties on anyone who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law," 8 U.S.C. § 1324(a)(1)(A)(iv). Note that Section 8(b)(4)(i) also uses the language "induce or encourage." The *Hansen* Court upheld the statute, but construed the terms "induce" and "encourage" narrowly, limiting them to their specialized meanings in the law of criminal solicitation and facilitation.

## Chapter 14

**Page 1220, add the following to the end of note 2:**

At least two states have begun to experiment with authorizing union to charge non-members for representation services. California enacted Assembly Bill 2556, which authorizes firefighter unions to charge non-dues-paying bargaining unit members for the reasonable costs related to providing individual representation in a discipline, grievance, arbitration, or administrative hearing. And New Jersey SB3810 allows a public-sector union to charge a non-dues-paying bargaining unit member for the cost of representation in arbitration proceedings, and to decline to represent those who do not pay dues.

**Pages 1220-21, add the following additional citations:**

Rejecting claims for reimbursement of dues paid before the decision in *Janus*: *Diamond v. PA State Educ. Ass'n*, 972 F.3d 262 (3d Cir. 2020).

Upholding exclusive representation: *Hendrickson v. AFSCME Council 18*, 992 F.3d 950 (10th Cir. 2021).

In addition, the Supreme Court has now denied cert. in a list of post-*Janus* cases: *See, e.g.*, *Janus v. AFSCME Council 31*, 942 F.3d 352 (7th Cir. 2019), *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).

## Chapter 16

The major development in the law of labor preemption is the Supreme Court's decision in *Glacier Northwest*, which is excerpted in the supplemental materials for Chapter 11, above.

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The doctrinal developments reflected in the 2022 supplement have been incorporated to the preceding material. However, the 2022 supplement also included an update on prominent union organizing campaigns, including at Starbucks and Amazon. For ease of reference, that discussion is re-printed below:

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?