Modern Labor Law in the Private and Public Sectors

CASES AND MATERIALS

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Note to users:

This supplement includes a detailed discussion of recent constitutional challenges to the NLRB's structure, including ongoing litigation over President Trump's removal of Member Wilcox. That discussion begins on page 14.

Chapter 1

Replace the material beginning with the last full paragraph on page 78 through page 85 with the following:

Notably, unlike private-sector law, even in the 21st century, public-sector labor statutes are routinely significantly amended, and indeed the very right of public workers to bargain collectively remains a live issue. After the 9/11 attacks in 2001, the Bush administration insisted that the bill creating the Department of Homeland Security (DHS) remove DHS employees from coverage under the existing federal sector statute and created a new system that significantly reduced union rights. In 2004, governors of Indiana and Missouri withdrew executive orders permitting state employees to bargain collectively. On the other hand, a number of states strengthened their public-sector statutes. For example, New Mexico enacted a public-sector labor law with more robust union rights than an earlier statute that had "sunset" four years earlier.

The year 2011, however, was a watershed year for public-sector labor laws. Many states enacted laws or amendments that significantly limited or eliminated union rights.

Changes and attempted changes around 2011

The most famous of the 2011 laws was Act 10 in Wisconsin. Prior to 2011, Wisconsin had two fairly similar public-sector labor statutes, one covering local and county government employees (WIS. STAT. ANN. § 111.70, *et seq.*), and the other state employees (WIS. STAT. ANN. § 111.81, *et seq.*). But in 2011, Act 10 made sweeping revisions to these laws. except for certain employees in "protective occupations," mainly police and fire. For the unions it covered, Act 10 eliminated collective bargaining rights entirely for some employees, including but not limited to University of Wisconsin (UW) system employees. It limited the scope of negotiations for employees it covered to bargaining over a percentage increase in total base wages, and even that could be no greater than any increase in the consumer price index. No other issues could be negotiated. It imposed "right to work" rules (note, this was before the *Janus* case made all union security agreements in the public sector illegal, *see* Chapter 14). Act 10 also limited the duration of collective bargaining agreements to one year. It further required what was then an unprecedented mandatory recertification system under which every union must face a recertification election every year and could only be recertified if 51 percent of the employees in the collective bargaining unit — not merely those voting in the election — voted for recertification. This was a change from the prior system under which (consistent with the NLRA and other public-sector laws) a request from 30 percent of the bargaining unit was required to schedule a decertification election, decertification elections could not take place during the terms of valid union contracts (except that there had to be a "window period" every three years allowing a decertification election), and the majority of those voting determined the outcome. *See* Chapter 7. Further, the law made it illegal for an employer to agree to automatic dues deduction, even for employees who voluntarily wish to pay dues.

Act 10 survived several legal challenges. In *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013), the court reversed a district court decision and upheld Act 10 in full. The lower court had found Equal Protection and First Amendment problems with the recertification provision and bar on dues check-off. But the Seventh Circuit noted that while all five unions that had endorsed then-Governor Scott Walker were excluded from Act 10 as "public safety unions," some of other excluded unions had not endorsed Governor Walker. 705 F.3d 640, 643. The court added:

> Admittedly, the Unions do offer some evidence of viewpoint discrimination in the words of then-Senate Majority Leader Scott Fitzgerald suggesting Act 10, by limiting unions' fundraising capacity, would make it more difficult for President Obama to carry Wisconsin in the 2012 presidential election. While Senator Fitzgerald's statement may not reflect the highest of intentions, his sentiments do not invalidate an otherwise constitutional, viewpoint neutral law. Consequently, Act 10's prohibition on payroll dues deduction does not violate the First Amendment.

705 F.3d at 645.

The court also held that the distinctions Act 10 makes between "public safety" unions and other public-sector unions survive rational basis scrutiny. This was mainly because of the state's claimed concern that if public safety officers were denied the rights Act 10 denies most public-sector unions, public safety officers might strike. 705 F.3d at 653–57.

The Seventh Circuit later rejected another challenge to Act 10. In *Laborers Local 236 v. Walker*, 749 F.3d 628 (7th Cir. 2014), the court held that barring covered unions from negotiating over topics other than base wages did not violate the unions' First Amendment right of association or their right to petition the government. It also rejected the union argument that Act 10 violated the Equal Protection clause because unionized employees could only discuss base wages with their employers, while non-unionized employees were not so limited. Citing *Smith v. Arkansas State Highway Employees Local 1315*, *supra*, the court reasoned that the First Amendment right to petition does not mean that the government must listen. The Wisconsin Supreme Court, over a dissent by two justices, also rejected challenges to Act 10 based on, among other theories, the First Amendment and Equal Protection Clause, in *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014).

More recently, Wisconsin elections shifted control of the state Supreme Court, and unions have brought renewed challenges to Act 10. In 2024, a Dane County Circuit Court Judge struck down the law on Equal Protection grounds. An appeal is pending. *Abbotsford Education Ass'n v. Wisconsin Employment Relations Commission*, case no. 2023CV3152 (Wisc. Cir. Ct., Dec. 2, 2024). *See* https://pbswisconsin.org/news-item/what-to-know-about-wisconsins-act-10-and-the-2024-court-battle-over-the-law/#:~:text=The%20law%2C%20known%20as%20Act,and%20vacations%2C%20are

%20not%20negotiable. The court stayed its order pending the outcome of appeals.

Ohio, in the early 1980s, enacted a robust public-sector labor law applicable to most public employees. OHIO REV. CODE Ch. 4117.1-24. In 2011, Ohio Governor John Kasich signed SB-5, which was designed to greatly restrict the rights this law provided. However, SB-5 never went into effect. It was put on hold pending a voter referendum in November 2011, and in that referendum, the voters overwhelmingly rejected SB-5. Among other things, SB-5 would have eliminated collective bargaining rights for some employees, including at least most college and university faculty, and lower-level supervisors in police and fire departments. For employees who could bargain, SB-5 would have eliminated both the right to strike for those who had that right (all covered employees except police, fire, and a few other small categories), and it would have eliminated the right to binding interest arbitration at impasse for employees who could not strike. Instead, the parties would have been left to mediation and fact-finding, and if those did not lead to an agreement, the governing legislative body could have, essentially, simply chosen to adopt the employer's final offer. SB-5 also would have greatly restricted the scope of bargaining and imposed "right to work" rules. Notably, unlike Act 10, SB-5 would have applied to public safety employees.

While Ohio and Wisconsin were the most publicized cases, other states (generally where Republicans controlled most or all of state government) also passed bills in or around 2011 limiting the collective bargaining rights of public workers.

Idaho enacted SB 1108, which limited collective bargaining by teachers to "compensation" (defined, essentially, as wages and benefits). It also limited collective bargaining agreements to one year, and it eliminated the requirement of fact-finding (only mediation remained). However, in the November 2012 elections, voters in Idaho, via three ballot proposals, rejected the changes made by SB 1108.

Illinois, in SB 10, amended its Educational Labor Relations Act such that in the Chicago Public Schools, the length of the school day and school year are permissive, not mandatory subjects of bargaining. The law also made minor adjustments to the right to strike for most public education employees and imposed more significant restrictions on that right for Chicago public school employees. For example, such a union cannot strike unless at least 75% of the bargaining unit authorizes the strike. *Id.* § 13(b)(2.10).

Indiana enacted SB 575, which limited the scope of bargaining for teachers to wages and benefits, explicitly barring other subjects (including binding arbitration of grievances). Even as to wages and benefits, contracts that would put a school district in a deficit are forbidden.

Michigan passed a series of bills limiting the rights of public sector unions around this time. In 2011, MICH. P. A. 103, limited the scope of bargaining for teachers. Among other things, educational employers and employees could not bargain over placement of teachers, reductions in force and recalls, performance evaluation systems, the policies regarding employee discharge or discipline, and how performance evaluation is used to determine employee compensation. In 2012, Michigan enacted P.A. 53, which provides that union dues for employees of public schools may no longer

be collected through payroll deductions. In *Bailey v. Callaghan*, 715 F.3d 956 (6th Cir. 2013), the Sixth Circuit reversed a district court order halting implementation of P.A. 53, rejecting First Amendment and Equal Protection claims. In a separate bill, P.A. 45, Michigan attempted to remove collective bargaining rights from graduate assistants at Michigan public universities. This rule was then struck down in *Toth v. Callaghan*, 995 F. Supp. 2d 774 (E.D. Mich. 2014, *appeal dismissed*, No. 14-1351 (6th Cir. July 8, 2014) on the grounds that it violated Article IV § 24 of Michigan Constitution, which bars changing the original purpose of the bill during the enactment process. Also in 2012, Michigan S.B. 1018, ended collective bargaining for home healthcare workers funded by the state by declaring that they were not public employees. In 2014, Michigan Public Act 414 specifically excluded student-athletes at Michigan's public universities and colleges from the state's public-sector labor statute.

In 2011, Nebraska, Legis. Bill 397 changed its interest arbitration rules to be more favorable to public employers. In Nebraska, interest arbitration is performed by the Commission of Industrial Relations (CIR). The revised Nebraska law provides detailed criteria for selecting an array of "comparable communities" for interest arbitrations (*see* Chapter 11, Sec. III-B-3 for more on that topic). Also, it mandated that if the employer at issue pays compensation between 98 and 102 percent of the average of the comparables, then the CIR must leave compensation as it is. If the employer's compensation is below 98 percent of the average, then the CIR must order it raised to 98 percent, and if it is above 102 percent, the CIR must order it lowered to 102 percent. The targets are reduced to 95-100 percent during periods of recession.

Nevada enacted S.B. 98, which reduced the number of public employee supervisors eligible for collective bargaining. It also mandated that labor contracts contain clauses that would reopen the contract during fiscal emergencies.

New Hampshire enacted SB-1, which eliminated the requirement that the terms of a collective bargaining agreement automatically continue if an impasse is not resolved at the time of the expiration of such agreement. It also enacted HB-589, which repealed a 2007 law that provided for mandatory card check recognition (*i.e.*, mandatory certification of a union when a majority of the employees in a bargaining unit sign cards indicating they want that union to represent them, *see* Chapter 8, Sec. 5).

In late December 2010, New Jersey enacted N.J. Laws 2010, Ch. 105, which capped wage increases at 2 percent for New Jersey police and firefighter arbitration awards for contracts expiring between Jan. 1, 2011 and April 1, 2014. Further, this law placed serious restrictions on interest arbitrators. Arbitrators would now be randomly selected (as opposed to the previous process of mutual selection); arbitrator compensation is limited to $1,000 per day and $7,500 per case; and arbitrators will be penalized $1,000 per day for failing to issue an award within forty-five days of a request for interest arbitration.

New York Bill A. 8086, passed in June 2013, required interest arbitration panels to give 70 percent weight in their decisions to the public employer's ability to pay.

Oklahoma, in H.B. 1593, repealed a 2004 law that required cities with

populations of at least 35,000 to bargain collectively with unions. As in Wisconsin, though, this change did not affect police and firefighters, who, in Oklahoma, are covered by a separate statute.

Tennessee, in H.B. 130/S.B. 113, repealed a 1974 law that authorized collective bargaining for public school teachers. Teachers are now permitted only "collaborative conferencing." Teachers now will be represented by groups that receive 15 percent or more of votes in a confidential poll rather than by a particular union. The law also bars discussing certain issues during such conferences, including but not limited to various matters relating to pay, evaluations, staffing decisions, assignments, certain "innovative educational programs," and payroll deductions for political activities. Even on the issues the parties are permitted to "conference" about, the parties are not required to reach any agreement, and if no agreement is reached, the school board will set the terms and conditions of employment through school board policy.

In 2012 and early 2013, a number of states passed or proposed legislation limiting or eliminating the use of dues check-off for public-sector unions. For example, Kansas HB 2022, signed into law in 2013, bars public-sector unions from using money deducted from paychecks for political activities. *See* Ann C. Hodges, *Maintaining Union Resources in an Era of Public Sector Bargaining Retrenchment*, 16 EMPL. RTS. & EMPL. POL'Y J. 599 (2012).

2017 to the present

More recently, the anti-union trend continued in some jurisdictions, but unions have won some significant victories in others.

In 2017, Iowa enacted House File 291, which was largely modeled after Wisconsin Act 10. Among other things, HF 291's severe restrictions apply to most public-sector unions, specifically all bargaining units that consist of less than 30 percent public safety employees. For the employees it covers, this amendment limited contract negotiations to "base wages and other matters mutually agreed upon." Further, affected unions must undergo mandatory recertification elections and will only be recertified if a majority of the entire bargaining unit votes to do so; automatic dues-deduction is barred; and interest arbitrators cannot grant wage increases in excess of whichever is lower, 3 percent or the increase in the cost of living.

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, it 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.

In 2018, Florida enacted CS/HB 7055. Among other things, this requires unions of public-school employees to seek recertification if a majority of bargaining unit members are not dues-paying members. 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% union 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.

In contrast, in recent years several states have expanded collective bargaining rights to public employees. In 2017, California Senate Bill 201 amended its Higher Education Employer-Employee Relations Act to include student employees whose employment is contingent upon their status as students. In 2019, California House Bill 378 extended collective bargaining rights to in-home childcare providers. In 2023, California enacted Assembly Bill 2556 which, among other things, authorizes firefighter unions to charge non-dues-paying bargaining unit members for the reasonable costs related to providing individual representation. Traditionally, labor laws in both the public and private sectors barred such charges. *See* Chapter 14. California also enacted Senate Bill 931 which provides for a civil penalty up to $100,000 against employers who are found by the state Public Employment Relations Board to have committed an unfair labor practice by discouraging or deterring public employees from becoming union members or paying dues.

In 2017, Nevada Senate Bill 493 extended collective bargaining rights to school administrators, including school principals. Then in 2019, Nevada Senate Bill 135 granted collective bargaining rights to employees of the state's government (local government employees already had such rights).

In 2020, Colorado enacted HB20-1153, which grants collective bargaining rights to employees of the state government. Also in 2022, Colorado enacted SB22-230, which granted collective bargaining rights to county workers across the state (for counties with a population of at least 7,500). This trend started in 2013, when Colorado enacted S.B. 13-025. That law permits local governments to allow collective bargaining for firefighters if certain requirements are met. It also requires public employers to at least "meet and confer" with firefighters regarding safety issues. In 2024, voters in Denver passed Referred Question 2U, which gave collective bargaining rights to city

employees who did not already have them under state law, and provided a right to strike for most types of these employees.

In 2020, Virginia enacted House Bill 582, codified as Virginia Code Section 40.1.57.2, *et seq*., which permits local governments to adopt ordinances permitting collective bargaining. Before this law, Virginia had outlawed all public sector collective bargaining, even if a union and employer wished to engage in it voluntarily. 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/

In 2022, New Jersey enacted Senate Bill 3810 which expanded the definition of mandatory subjects of bargaining to those that "intimately and directly affect employee work and welfare." It also 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 arbitrations on behalf of bargaining unit members who refuse to pay these costs.

In 2022, Washington enacted HB 2124, which grants legislative branch employees to right to bargain collectively (beginning May 1, 2024).

In 2022, Illinois amended its constitution via the the Illinois Workers' Rights Amendment. This amendment added language to the state constitution stating that "employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work." It adds that "no law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively."

In 2023, Michigan enacted HB 4233, HB 4354, HB 4820, and SB 0359, 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. Among other things, teachers' unions can once again bargain about performance evaluations, staff reductions, teacher placements, discipline, and classroom observations. Also, language requiring teachers in the Detroit Public Schools to be evaluated solely based on student performance was eliminated. *See* Chapter 10-III-C for more on these changes to scope of bargaining.

In 2023, Maryland enacted two laws that extend collective bargaining rights to new groups of public employees. House Bill 90 extended those rights to deputy public defenders, district public defenders, and assistant public defenders. House Bill 580 extended such rights to Maryland Transit Administration police sergeants and supervisors.

In 2024, Minnesota amended H.F. 5247 to extend collective bargaining rights to undergraduate student workers at the University of Minnesota and revised bargaining unit rules to be more favorable to unionization for university employees generally. The year before, Minnesota began requiring public employers to recognize unions as bargaining representatives of their employees based on "card check" elections.

In early 2025, Utah enacted HB 267, which generally eliminated collective bargaining rights in that state for all types of public employees.

Also in early 2025, Ohio enacted SB-1 which among other things took away the right to strike from faculty at state universities, replacing it with the right to binding interest arbitration (as with police and fire). It also limited or eliminated the right of faculty to bargain over evaluations and "retrenchment" (layoffs).

In the federal sector, the second Trump administration has tried to eliminate collective bargaining for most unions. In late March 2025, the Trump administration issued an Executive Order, "Exclusions From Federal Labor-Management Relations Programs" that would remove collective bargaining rights from vast swaths of federal-sector employees previously covered by the Federal Service Labor-Management Relations Statute (FSLMRS). The Order claimed authority under Section of the FSLMS which permits exclusion from that asserted that the "national security" exemption. It applies to employees in the U.S. Department of Defense, Veterans Affairs, National Science Foundation, Coast Guard, Department of Homeland Security (DHS), State Department, Department of Energy, Department of the Interior, Environmental Protection Agency, Treasury Department, and Justice Department, and employees in the Department of Health and Human Services and Department of Department of Agriculture who work on responding to pandemics. But the order does not cover police officers and firefighters who work for these agencies.

On June 24, 2025, a California federal judge issued a preliminary injunction against this order. The judge found, among other things, that the union plaintiffs had shown a substantial likelihood of prevailing on the merits of their claim that the E.O. was issued in retaliation for plaintiffs' exercise of their First Amendment rights. *American Federation Of Government Employees, AFL-CIO v. Trump et al.*, case number 3:25-cv-03070 (N.D. Cal.). However, the Ninth Circuit stayed this injunction because, in its view, the lower court had been wrong to conclude that the union plaintiffs were likely to succeed on the merits. This was because, the appellate court held, the government likely would have reached the same decision even without retaliatory animus. *AFGE, et al.* v. *Trump, et al.* No. 25-4014 (9th Cir., Aug. 1, 2025). Previously, on May 16, 2025, the D.C. Circuit ordered a stay pending appeal of a similar lower court order, on the grounds that the union plaintiff had not made a sufficient showing of irreparable harm. *National Treasury Employees Union v. Trump*, case 1:25-cv-00935-PLF. Also, on June 2, 2025, a federal judge in Washington state blocked the DHS from rescinding its collective bargaining agreement with the AFGE union, also finding likelihood of success on the merits of a First Amendment retaliation claim and an Administrative Procedures Act claim. *American Federation of Government Employees et al. v. Noem et al.*, case number 2:25-cv-00451 (W.D. WA).

Further, on July 14, 2025, the Supreme Court paused injunctions against mass layoffs in a variety of federal agencies in a "shadow docket" ruling. *See* https://www.nytimes.com/2025/07/14/us/politics/supreme-court-education-department.html.

At the time of this writing, the ultimate resolution of these and related issues involving the labor rights of federal employees are yet to be determined.

Police Unions and Statutory Reforms to Public-Sector Labor Statutes

The Black Lives Matter movement prompted 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,* 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.

But others are skeptical that collective bargaining rights are a major obstacle to police reform. They note 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 even that includes only cases 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. *See* Michael Z. Green, *Black and Blue Police Arbitration Reforms*, 84 OHIO ST. L.J. 1 (2023). 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). Related, California S.B. 16, enacted in 2021, expanded the types of law officer personnel records subject to disclosure, including documents relating to findings of unreasonable or excessive force, failure to intervene against another officer using such force, and conduct involving prejudice or discrimination on the basis of certain legally protected classes.

Thus, public-sector labor law is still changing, often rather dramatically (evolving or regressing, depending on one's perspective and the statutory revision at issue). The "history" continues to be volatile. Consider, as you go through these materials, which legal rules you think are best. If you practice in this area, always keep your eyes open for new developments.

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 147, add the following before the notes start:

In late 2023, the Biden Board vacated the 2020 Rule and promulgated a new joint employer rule that, in its view, "more explicitly ground[s] the joint-employer standard in established common-law agency principles" and "provide[s] guidance to parties covered by the Act regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment." The Board added that, "an entity may be considered a joint employer of another employer's employees if the two

share or codetermine the employees' essential terms and conditions of employment." *See* Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (Oct. 27, 2023). The Board has published a summary of this rule at: https://www.nlrb.gov/about-nlrb/what-we-do/the-standard-for-determining-joint-employer-status-final-rule. Shortly thereafter, the Chamber of Commerce and others filed a complaint in the Eastern District of Texas facially challenging the 2023 joint-employer rule. The parties then filed cross-motions for summary judgment.

The district court granted the Chamber's motion for summary judgment. It found the Board's new rule to be arbitrary and capricious under the APA. It then used its discretion under the Declaratory Judgment Act to enjoin the 2023 Rule. Using Fifth Circuit precedent, it also vacated the 2023 Rule both as to the new standard and to the extent that the 2023 Rule vacated the 2020 Rule. Simply put, under the district court's decision, the Trump Board's 2020 Rule is the joint employer rule. See Chamber of Commerce v. NLRB, Opinion and Order, Docket No. 23-cv-00553, slip op. at 30 (Mar. 8, 2024).

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 Peter Ohr on July 22, 2021, and began serving as General Counsel (Mr. Ohr stayed on as GC Abruzzo's Deputy General Counsel). Ms. Abruzzo hit the ground running with an ambitious Mandatory Submission to Advice memorandum, GC 21-04, outlining a number of areas where she aimed to change or modify extant Board law. Some of GC Abruzzo's most significant later initiatives included:

- 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);
- Ensuring rights and remedies for immigrant workers (GC 22-01);
- Arguing that captive audience meetings were unlawful (GC 22-04);[1]
- Proposing a framework for analyzing when electronic surveillance or algorithmic management violates the NLRA (GC-23-02); and
- Contending that non-compete agreements violate the NLRA (GC-23-08 and GC-25-01)

President Trump fired GC Abruzzo and Deputy General Counsel Jessica Rutter shortly after he took office. He then appointed Region 21 Regional Director William B. Cowen as Acting General Counsel. Since then, AGC Cowen has rescinded GC memoranda issued by GC Abruzzo (GC 25-05), and issued memoranda emphasizing the quick settlement of cases (GC 25-06), arguing that surreptitious recording of collective bargaining sessions violates the NLRA (GC 25-07), and indicating that regions investigating "salting" cases (discussed at page 189 of the casebook) should be more skeptical of potential salts' "genuine interest" in obtaining employment with the target employer (GC 25-08), among other topics.

Subsequently, the President nominated Crystal Carey, a management lawyer in the Morgan Lewis law firm, to be General Counsel.

Page 166, add a new Section IV.E:

E. Unfolding Constitutional Challenges to the Board's Structure

In recent years, parties before the Board have increasingly challenged the NLRA on constitutional grounds. They may three main arguments. First, that the NLRB as an agency is unconstitutionally structured because administrative law judges (ALJs) and Board members are insulated from being fired by the President without good cause. Second, that the NLRB violates the principle of separation of powers. Third, that the Board's expanded remedies under the *Thryv* decision violate the Seventh Amendment. All three arguments can be found in several cases filed by Space Exploration Technologies Corporation. *See, e.g.*, Complaint, *Space Exploration Techs. Corp. v. NLRB*, Docket No. 24-cv-00001 (filed W.D. Tex. Jan. 4, 2024) (SpaceX Cmplt.). We have outlined the first two of those issues below; the third is discussed in Chapter 6, which covers NLRA remedies.

[1] The NLRB agreed with this position in *Amazon.com Services LLC*, 373 NLRB No. 136 (2024), which is discussed in Chapter 3 of this supplement.

1. The Argument That ALJs and Board Members Are Unconstitutionally Insulated from Being Fired by the President

Article II of the United States Constitution vests executive power in the President, who must "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §§ 2, 3. As part of that constitutional duty, the President exercises oversight over federal agencies. At the same time, Congress sometimes acts to insulate executive-branch employees from arbitrary or partisan firings. The term "independent agency" refers to one whose top leadership can be removed from office only because they have reached the end of their statutorily defined period in office, or for good cause. The NLRB is an independent agency because its five members sit for five-year terms, subject to earlier removal only "for neglect of duty or malfeasance in office." 29 U.S.C. § 153(a). Additionally, administrative law judges who hear NLRB cases in the first instance are removable from office only for good cause, and by the NLRB rather than the President. *See* 5 U.S.C. § 7521(a-b) (ALJs removable only for "good cause established and determined by the Merit Systems Protection Board").

Does insulation from removal without good cause impede the President's oversight function? Several recent Supreme Court decisions have chipped away at Congress's ability to insulate agency leaders and other policymakers from removal from their posts by the President. *See, e.g., Seila Law v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020) (Congress could not insulate the Director of the CFPB from removal without good cause because CFPB was led by a single director instead of a multi-member body, and was also partially insulated from congressional oversight because CFPB was not dependent on congressional appropriations); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (Congress could not protect PCAOB members from removal without cause when PCAOB oversight was vested in the SEC, whose Commissioners were also protected from removal without cause). These decisions are aimed at increasing presidential control over actions taken within the Executive Branch.

The following discussion covers the legal dispute over removal protections for Board members, and then turns to the (slightly different) argument that relates to ALJs.

Unprecedented NLRB Board Member Firing. Coming into the end of President Biden's term in 2024, there were four sitting NLRB Board Members—Chair Lauren McFerran (D), Marvin Kaplan (R), David Prouty (D), and Gwynne Wilcox (D)—with one vacancy. Chair McFerran's term was up on December 16, 2024. President Biden renominated her and nominated Josh Ditelberg, a management-side lawyer, for the vacant seat. On December 11, 2024, Chair McFerran's nomination failed by a 49-50 vote in the Senate, and Mr. Ditelberg's nomination was not advanced, leaving the Board with three sitting members and two vacancies. On December 17, 2024, President Biden appointed Ms. Wilcox Chair of the Board.

A hallmark of President Donald Trump's second administration has been his aggressive assertion of executive authority. One of the initial exercises of that authority was his unprecedented firing of a sitting, confirmed Board Member—an action that no

President had taken during the 90-year history of the Board. President Trump designated Marvin Kaplan as Chairman of the Board on January 21, 2025. One week later, Trent Morse, Deputy Director of the Office of Presidential Personnel, fired Board Member Wilcox and General Counsel Jennifer Abruzzo via an email sent in the middle of the night on behalf of President Trump. The email relied on the President's executive authority under Article II of the U.S. Constitution and specifically the President's duty under the "Take Care" clause. The email acknowledged that the NLRA limited the President's ability to discharge Board members, but asserted that that limitation was unconstitutional. Thus, the email stated in a footnote: "While the National Labor Relations Act purports to limit removal of Board members to 'neglect of duty or malfeasance in office, but for no other cause,' 29 U.S.C. § 153(a), this limitation is inconsistent with the vesting of the executive Power in the President and his constitutional duty to take care that the laws are faithfully executed and thus does not operate as a restriction on my ability to remove Board members."

The discharge of Member Wilcox left the Board with only two Members, lacking a quorum. Without a quorum, the Board could not act. *New Process Steel v. NLRB*, 560 U.S. 674 (2010). However, pursuant to 29 CFR §§ 102.178-102.182, Regional offices continued to investigate unfair labor practice charges, issue complaints, and conduct representation elections.

In response to her discharge, Board Member Wilcox filed a suit in the federal district court of the District of Columbia, *Wilcox v. Trump*, Case 1:25-cv-00334-BAH (D.D.C.), alleging that her firing was contrary to law and seeking to be returned to her position. Judge Beryl Howell granted Ms. Wilcox's expedited motion for summary judgment and returned her to her job. In a lengthy opinion, Judge Howell discussed the "unitary theory" of the executive, characterized the President's actions as "blatantly illegal," and found that limitations on the President's authority to discharge such as the one contained in the NLRA were constitutional, relying on *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), a case in which the Supreme Court had upheld a similar limitation in a case involving President Franklin Delano Roosevelt's discharge of a Commissioner of the Federal Trade Commission. While later Supreme Court decisions had seemingly narrowed *Humphrey's Executor* to cases involving Commissioners or Board Members of a multi-member panel with primarily adjudicative functions, it had explicitly decline to overrule the decision.[2]

The government sought a stay pending appeal of Judge Howell's order to return Board Member Wilcox to work. (On appeal, the case was consolidated for hearing with a similar case challenging President Trump's discharge of Cathy Harris as a Member of the Merit Systems Protection Board.) That stay was initially granted, in a 2-1 decision of the D.C. Circuit motions panel, but then lifted by a 7-4 *en banc* decision of the D.C.

[2] In other cases, employers have sought to distinguish *Humphrey's Executor*, arguing that the "NLRB's Members exercise substantial executive power under the Constitution." *See Space X* Cmplt., ¶ 9

Circuit. The government then sought a stay from the Supreme Court, which the Court granted in a 6-3 vote. The majority stated:

> The application for stay presented to THE CHIEF JUSTICE and by him referred to the Court is granted. Because the Constitution vests the executive power in the President, see Art. II, §1, cl. 1, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents, see *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 215–218 (2020). The stay reflects our judgment that the Government is likely to show that both the NLRB and MSPB exercise considerable executive power. But we do not ultimately decide in this posture whether the NLRB or MSPB falls within such a recognized exception; that question is better left for resolution after full briefing and argument.

In the meantime, the case on the merits has been fully briefed and argued in the D.C. Circuit and is awaiting decision.

Administrative Law Judges. Additionally, some employers have argued that good-cause protections for ALJs violate Article II. *See Space X* Cmplt, ¶ 3. This argument relies chiefly on *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), in which the Court held that Congress may not insulate "inferior officers" from removal without good cause if removal authority rests with agency leaders who are *also* subject to removal only for cause – though it also reserved the issue of whether its holding would apply to ALJs.

The Court has previously held in the context of presidential appointments that ALJs qualify as "inferior officers." *Lucia v. SEC*, 585 U.S. 237 (2018). And ALJs are subject to removal only by the NLRB, and may challenge removal decisions before the Merit Systems Protection Board; as discussed above, both Boards are (for now) independent agencies. District courts hearing these arguments have reached different results. *Compare VHS Acquisition Subsidiary No. 7 v. NLRB*, 759 F.Supp. 3d 88 (D.D.C. 2024) (holding ALJs are unconstitutionally insulated from removal) *with* Alivio Medical Ctr. v. Abruzzo, no. 24-cv-7217, 2024 WL 4188068 (Sept. 13, 2024) (holding employer was unlikely to succeed in its argument that ALJs were unconstitutionally protected from removal).

If any of these arguments succeed, courts will then have to decide what to do next – one option would be to simply excise the relevant good-cause protections from the statute, and otherwise leave the statute as-is. This would mean that the President could fire Board members or ALJs at will, but labor law would not otherwise change.

2. The Argument that the NLRB Violates Separation of Powers Principles

Employers next allege that "the NLRB is also unconstitutionally structured because its Members exercise all three constitutional powers—legislative, executive, and judicial—in the same administrative proceedings," particularly when the Board authorizes injunctions under section 10(j) of the Act. *See Space X* Cmplt., ¶ 23. SpaceX illustrates its concern using the facts before the district court. In that case, the Region

informed Space X that it intended to ask NLRB Members for approval to request from a district court injunctive relief against Space X. Seeking injunctive relief is a "quintessentially prosecutorial act of the Executive." *See id.*, ¶ 24. Yet, the "same NLRB Members would later preside in a quasi-legislative, quasi-judicial capacity in the unfair labor practice proceeding involving the same alleged violations of the NLRA." *See id*.

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 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."

The Fifth Circuit refused to enforce this decision, holding that the NLRB had relied on inapposite precedent, and had not properly weighed employers' interests in applying their uniform policies. *Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. 2023).

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 197, add a new paragraph to the end of the discussion on how the Board has assessed the legality of work rules:

In *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the Biden Board rejected *Boeing* and *Specialty Produce*. Instead, the Board adopted a "modified version of the basic framework set forth in *Lutheran Heritage*." Under this approach:

> As under *Lutheran Heritage*, our standard requires the General Counsel to prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. We clarify that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.

Id. at *3.

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 (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."

Lion Elastomers 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. However, on review, the Fifth Circuit held that the Board had mishandled the case at an earlier stage of litigation, vacated the Board's decision, and ordered the Board to apply *General Motors* on remand. *Lion Elastomers v. NLRB*, 108 F.4th 252 (5th Cir. 2024).

Page 212, add the following to the end of note 1:

In one of the many cases arising out of unionization efforts at Starbucks stores across the country, the NLRB revised its approach to evaluating employers' predictions about the effects of unionization, overruling its earlier decision in *Tri-Cast*, 274 NLRB 377 (1985). *Siren Retail Corp d/b/a Starbucks*, 373 NLRB No. 135 (Nov. 8, 2024).

Starbucks involved a manager's statement that:

> If you want a union to represent you--uh--you want to give your right to speak to leadership through a union, you're going to check off "yes" for the election. If you want to maintain a direct relationship with leadership, you'll check off "no." … [A] representation of a union is the rules of employment will then be grounded in a contract. And if it's not in that contract, it's not a conversation in my opinion that's going to happen with leadership. We'll be bound by the contract. So the union will be bound. And Starbucks will be bound. So I want to be clear on that. That a third party comes in and speaks for you. And everything will be grounded, from my experience and my opinion through the lens of that contract.

Id. at *2.

The Board concluded that its earlier standard had been too permissive in allowing managers to couch as predictions anti-union statements about the nature of the employee-employer relationship following unionization. That standard, the *Starbucks* Board continued, effectively immunized even employer statements that conflicted with the NLRA, which preserves unionized employees rights to individually or collectively "present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of" a CBA. 29 U.S.C. § 159(a).

The Board considered the prior approach to be inconsistent with *Gissel*'s admonition that the Board "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." 395 U.S. at 617. Further, *Gissel* required that employer predictions be based on "objective fact," which, the *Starbucks* Board observed, meant that "when an employer makes a statement explicitly or implicitly based on what the Act allows or requires, the statement must be measured against what the Act actually allows or requires." At *12.

Accordingly, the *Starbucks* Board concluded that:

> statements concerning the consequences of unionization on the relationship between individual employees and their employer, including the ability of employees to address issues individually with their employer, are to be treated the same as all other employer statements concerning the consequences of unionization. Consequently, employers retain robust protection under Section 8(c) to express their views to employees about unionization. However, to be protected under Section 8(c), all such employer predictions must be grounded in objective fact.

Id. at *14.

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 229-230, Replace notes 2 and 3 with the following two notes:

2. General Counsel Abruzzo 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*.

In a November 2024 decision, the NLRB agreed with this position. *Amazon.com Services LLC*, 373 NLRB No. 136 (Nov. 13, 2024). The case involved a high-profile union drive at an Amazon warehouse located in Staten Island, NY. Amazon responded to the union's campaign by holding a series of meetings, which employees were required to attend on pain of discipline: "At one point in the campaign, the Respondent held meetings at its JFK8 facility every 45 minutes from 9 a.m. to p.m. and 7 p.m. to 4 a.m. 6 days a week. Managers personally notified employees that they were scheduled to attend, escorted them to the meetings, and scanned their ID badges to digitally record attendance." Id. at *11.

The *Amazon.com* Board concluded that captive audience meetings were unlawful because of their high potential to coerce employees. It wrote:

> An employer can hold these meetings repeatedly, for whatever length of time it wants, and whenever it wants, with the sole exception, pursuant to *Peerless Plywood*, that it cannot do so within 24 hours of a representation election. An employer can observe employees at these meetings, seeing, among other things, with whom they associate and how they react to what they hear. An employer can silence, or even banish, employees who would express their own views or even just ask questions. It should be clear, then, that a captive-audience meeting is an extraordinary exercise and demonstration of employer power over employees in a context where the Act envisions that employees will be free from such domination. We thus prohibit captive-audience meetings.

Id. at *19.

Further, the Board rejected the employer's argument that either Section 8(c) of the NLRA or the First Amendment protected its right to hold captive audience meetings. As to Section 8(c), the Board concluded that neither statutory text nor legislative history indicated that the section protected employers' rights to compel employees to listen. And First Amendment law accommodates the interests of "unwilling listeners" who object to speech.

However, the Board also held that employers could hold voluntary meetings to express their views on unionization. Anticipating that the line between voluntary and captive meetings could be unclear in some cases, the Board established a safe harbor:

> an employer will not be found to have violated Section 8(a)(1) if, reasonably in advance of the meeting, it informs employees that:
>
> 1. The employer intends to express its views on unionization at a meeting at which attendance is voluntary;

> 2. Employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting; and
>
> 3. The employer will not keep records of which employees attend, fail to attend, or leave the meeting.
>
> An employer may avail itself of this "safe harbor" by giving employees these assurances. Then, of course, the employer must also follow through on these assurances to stay on the right side of the law.

Id. at *29.

3. At least ten states have passed laws barring employers from holding captive audience meetings about certain controversial or personal topics, such as religion or politics. These statutes usually define prohibited topics to include unionization. *See, e.g.*, IL SB 3649 (Illinois "Worker Freedom of Speech Act"). Employers are likely to argue that these laws are preempted by the NLRA. Preemption is discussed in Chapter 16.

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*.

This memorandum was subsequently withdrawn by Acting GC Cowen.

Chapter 4

Page 296, add a new note following the problem:

Some employers have prohibited employees from wearing masks or clothing reading "Black Lives Matter" or bearing other political messages, and these policies (or disciplinary decisions arising from them) have generated several NLRB cases. A main issue in many of these cases is whether the message is linked to working conditions so as to qualify as concerted activity "for mutual aid or protection." However, that question was not presented in the only Board decision involving employees who wore BLM messages on their clothing at work.

In *Home Depot USA, Inc.*, 373 NLRB No. 25 (2024), a Home Depot employee wrote "BLM" on their uniform apron to express their view that store management was failing to address racist incidents by co-workers. The question, though, was whether this action met the NLRA's concertedness requirement because it was "a logical outgrowth of prior group activity." In a fairly straightforward application of existing law on the question, the Board concluded that it was. Additionally, the Board concluded that the employer – which generally encouraged employees to personalize their aprons with messages of their choosing – had not shown that special circumstances existed that would permit it to prohibit BLM messages.

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 (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).

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

In *Troy 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 5

Replace Section IV.B., including the notes, pp. 408–11, with the following:

Since at least 1944, the Supreme Court has given considerable deference to the Board's reasonable interpretation of the NLRA. *See NLRB v. Hearst Publications*, 322 U.S. 111, 130–31 (1944). At issue in *Hearst* was whether newsboys who distribute newspapers on the streets of Los Angeles were employees for purposes of the 1935 Act. Recall that under the NLRA, as passed in 1935, there was no exception for independent contractors. The Court, in agreement with the Board, concluded that newsboys were employees.

Significantly, the Court expounded on what constitutes deference to the Board concerning legal interpretations of the NLRA. The Court explained:

> It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board. . . .
>
> Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. . . . But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing

> court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, . . .) or that he was injured 'in the course of his employment' (Parker v. Motor Boat Sales, Inc., 314 U.S. 244, . . .) and the Federal Communications Commission's determination that one company is under the 'control' of another (Rochester Telephone Corp. v. United States, 307 U.S. 125, . . .), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law.

See Hearst, 322 U.S. at 130–31 (footnotes omitted).

The Court repeatedly reaffirmed this deference, most famously in *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978), where the Court held that the Board may, "in light of its experience," extend to acute hospitals *Republic Aviation*'s rule that "absent special circumstances, a particular employer restriction is presumptively an unreasonable interference with § 7 rights constituting an unfair labor practice under § 8(a)(1)." *See Beth Israel Hosp.*, 437 U.S. at 493 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804–05 (1945)). The Court wrote:

> In light of Congress' express finding that improvements in health care would result from the right to organize, and that unionism is necessary to overcome the poor working conditions retarding the delivery of quality health care, we therefore cannot say that the Board's policy—which requires that absent such a showing solicitation and distribution be permitted in the hospital except in areas where patient care is likely to be disrupted—is an impermissible construction of the Act's policies as applied to the health-care industry by the 1974 amendments. Even if the legislative history arguably pointed toward a contrary view, the Board's construction of the statute's policies would be entitled to considerable deference.

Beth Israel Hosp. v. NLRB, 437 U.S. 483, 499–500 (1978) (citing *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); NLRB v. Weingarten, Inc., 420 U.S. 251, 266–267 (1975)).

The Court added:

> Arguing that the Board's conclusion regarding the likelihood of disruption to patient care which solicitation in a patient-access cafeteria would produce is essentially a medical judgment outside of the Board's area of expertise, it contends that the Board's decision is not entitled to deference. Rather, since it, not the Board, is responsible for establishing hospital policies to ensure the well-being of its patients, the Board may not set aside such a policy without specifically disproving the hospital's judgment that solicitation and distribution in the cafeteria would disrupt patient care. . . . We think that this argument fundamentally misconceives the institutional role of the Board.

> It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. Because it is to the Board that Congress entrusted the task of "applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms," [*Republic Aviation*, 324 U.S. at 798] that body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions. It is true that the Board is not expert in the delivery of health-care services, but neither is it in pharmacology, chemical manufacturing, lumbering, shipping, or any of a host of varied and specialized business enterprises over which the Act confers jurisdiction. But the Board is expert in federal national labor relations policy, and it is in the Board, not petitioner, that the 1974 amendments vested responsibility for developing that policy in the health-care industry. It is not surprising or unnatural that petitioner's assessment of the need for a particular practice might overcompensate its goals, and give too little weight to employee organizational interests. Here, as in many other contexts of labor policy, "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." [*NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957)]. The judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced.

Beth Israel Hosp., 437 U.S. at 500–01 (citing NLRB v. Erie Resistor Corp., 373 U.S. 221, 235–236 (1963); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941)) (footnotes omitted).

In 1984, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court reviewed deference to agencies' interpretations of the law Congress charged them with administering and announced the following standard for reviewing those interpretations:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the

> question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842–43.

Chevron thereby created a two-step process by which courts review agency interpretations of the statute which it is charged by Congress with administering. Under *Chevron* prong one, the court must determine whether the language is plain and clear. In such circumstances, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843, n.9. Under *Chevron* prong two, if the court under prong one determines that the statute is silent or ambiguous, then it must defer to the agency's "permissible construction of the statute." *Id.* at 843. Here, it is important to note, as the Court did, that a reviewing "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843, n.11.

In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Court revisited the question of deference to agencies' construction of the law they administer and overruled *Chevron*. The Court wrote:

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

See id.

But the Court did not overrule *Hearst* or *Beth Israel*. Nor is it clear what *Loper Bright* means for the Board's construction of the Act. Although *Loper Bright* says that "courts must exercise independent judgment in determining the meaning of statutory provisions," it explains that "[i]n exercising such judgment, . . . courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA." *See id*. at 394 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Court added that "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." *Loper Bright Enters.*, 603 U.S. at 394 (quoting *Skidmore*, 323 U.S. at 140, and citing *U.S. v. American Trucking Assns., Inc.*, 310 U.S. 534, 549 (1940)).

Professors Jacob and Lofaso recently posted a paper arguing that there is a clear division between two expository tasks, interpretation and construction. According to the authors, "[i]nterpretation discovers a statute's linguistic meaning or semantic content; conversely, construction determines the statute's legal effect and how it applies to the fact patterns adjudicators confront." Whereas interpretation is a judicial function, construction is an agency function.

In drawing this distinction, the authors argue that much of what the Board does is unaffected by *Loper Bright* because Congress delegated power to the Board to construe the NLRA in a process the authors label "iterative construction":

> The Board's statutory construction sits beyond *Loper Bright*'s domain. In the Wagner and Taft-Hartley Acts, Congress adopted an adjudicative model to protect worker rights and resolve labor conflict based on the common law tradition, labor arbitration, and prior successful federal experiments in resolving labor disputes. It provided for limited judicial review. Congress employed general language delegating broad authority to the Board, as it intended that the Board would make that language specific through its precedential administration of the Act. As Secretary of Labor Frances Perkins testified before Congress in support of the NLRA, the Board would build a "common law of industrial relations" one case at a time. [Hearings Before the Committee on Education and Labor on S. 2926, 73d Cong. 19 (1935) (statement of the Hon. Frances Perkins, Secretary of Labor), reprinted in 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 49 (1949).]
>
> We call the Board's delegated authority iterative construction. As Congress wanted, the Board resolves labor disputes by reviewing myriad fact patterns, identifying commonalities, and establishing legal rules that advance the Act's statutory goals consistent with its continuum of experience. Unlike agencies that develop policy primarily through prospective quasi-legislative rulemaking—the methodology of civil law—Congress wanted the Board to prevent industrial strife and protect organizing rights through adjudication— the methodology of common law. A civil law regime turns primarily on the drafting and interpretation of codes; a common law regime, such as the NLRA's, turns primarily on experience. [OLIVER WENDELL HOLMES, THE COMMON LAW 3 (Harvard U. Press ed. 2009) ("The life of the law has not been logic; it has been experience.").] Courts may have expertise in reading codes. They may even have experience with criminal and civil legal disputes. But they do not have experience resolving labor conflict.

See Fred B. Jacob and Anne Marie Lofaso, *Beyond Loper Bright: Iterative Construction at the National Labor Relations Board*, ___ U. Cal. L. J. ___ (forthcoming 2025), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5129926.

Post-*Loper Bright* Developments

Following the Supreme Court's rejection of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, seven federal appellate courts—the Third, Fourth, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits—have addressed Board decisions under the new framework. Although each court claims to apply *Loper Bright*, their interpretations and applications vary, underscoring the doctrinal uncertainty that scholars like Jacob and Lofaso have anticipated.

Four key themes have emerged in the courts' handling of statutory interpretation post-*Loper Bright*:

- De Novo Review as Default: Several circuits now treat statutory interpretation as a purely judicial function, conducting independent analysis without deferring to agency views. This reflects a formal embrace of *Loper Bright*'s core holding. *See, e.g.*, *Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519, 528 (6th Cir. 2024) (explaining that the courts "do not defer to the NLRB's interpretation of the NLRA").
- Procedural Avoidance via Waiver: Some courts sidestep *Loper Bright* entirely by finding that the issue was not adequately preserved. *See, e.g.*, *Dist. Hosp. Partners, L.P. v. NLRB*, 141 F.4th 1279, 1289 n.2 (D.C. Cir. 2025) (acknowledging *Loper Bright* but declining to address the employer's invitation to give any deference to the Board's interpretation of the duty to bargain in good-faith' under the NLRA because that argument was not adequately briefed before the court and therefore it was waived).
- Substantial Evidence Avoidance: Some courts have avoided the issue by turning the question presented into a factual question, which indisputably receives deferential substantial evidence review. For example, in *Garten Trucking LC v. NLRB*, 139 F.4th 269 (4th Cir. 2025), the Board found that the employer violated Section 8(a)(1) when it told employees "if it wasn't for [the union] trying to steal money out of your paychecks you would already have your raises;" as the Board explained, the statement tends to coerce reasonable employees in the exercise of their statutory organizational rights. *See id.* at 276, 280. On petition for review, the court reviewed the Board's "factual findings and application of undisputed law to facts under a substantial-evidence standard." *Id.* at 276. The court found that substantial evidence supported the Board's finding that the employer's statement was coercive in violation of the Act. *Id.* at 280–81.
- Cautious, Contextual Application: A few courts have adopted a more nuanced approach, recognizing *Loper Bright* while still factoring in agency expertise or practical implications. These decisions suggest an emerging middle ground that resists rigid formalism. For example, in *Alaris Health at Boulevard East v. NLRB*, 123 F.4th 107 (2024), in upholding the Board's finding that COVID-19 bonuses were hazard pay and thus a mandatory bargaining subject, the court addressed the impact of *Loper Bright* on judicial deference. The court noted that its deference to the Board's classification of bargaining subjects stems from pre-

> *Chevron* precedent recognizing the Board's special expertise, and it distinguished this form of deference from *Chevron* itself. Although the court questioned whether those earlier cases survive *Loper Bright*, the court ultimately sidestepped the issue, holding that the Board's conclusion was correct under either standard.

Together, these themes reveal a transitional moment in administrative law: while *Chevron* is formally gone, its legacy continues to shape judicial behavior in subtle ways. The full implications of *Loper Bright* remain in flux.

EO No. 14215 and the Coalition for a Democratic Workplace letters to Attorney General Bondi seeking her direction that the NLRB reverse precedent and abide by *Loper*. In another exercise of President Trump's unitary executive theory, on February 18, 2025, he issued Executive Order (EO) No. 14215, "Ensuring Accountability For All Agencies." After declaring the President's constitutional authority over the entire executive branch, the EO asserted that "so-called 'independent regulatory agencies'…currently exercise substantial executive authority without sufficient accountability to the President, and through him, to the American people." Section 7 of the EO, entitled: "Rules of Conduct Guiding Federal Employees' Interpretation of the Law," provides that:

> The President and the Attorney General, subject to the President's supervision and control, shall provide authoritative interpretations of law for the executive branch. The President and the Attorney General's opinions on questions of law are controlling on all employees in the conduct of their official duties. No employee of the executive branch acting in their official capacity may advance an interpretation of the law as the position of the United States that contravenes the President or the Attorney General's opinion on a matter of law, including but not limited to the issuance of regulations, guidance, and positions advanced in litigation, unless authorized to do so by the President or in writing by the Attorney General.

Following up on the EO, the Coalition for a Democratic Workplace (CDW), a group consisting of many national, regional, and local employer associations including the U.S. Chamber of Commerce, sent a letter on April 3, 2025 to Attorney General Pamela Bondi to encourage her to "direct the National Labor Relations Board (NLRB or Board) not to treat as binding precedent the legal interpretations set forth in certain Board adjudication decisions issued under the prior administration" set forth in an appendix to the letter. The letter suggested that the Attorney General make "an immediate announcement by you and, at your direction, the Chair of the Board, repudiating these decisions."

Subsequently, on April 24, 2025, CDW sent a second, follow-up letter to Attorney General Bondi, criticizing arguments attorneys in the NLRB's appellate court branch had made in the D.C. Circuit concerning the standard of review of NLRB decisions. The letter argued that the standard advocated by Board counsel was contrary to the

Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024). The letter also criticized the Board attorneys' arguments in support of enforcing an order pursuant to the Board's decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023)[3], and contended that *Cemex* was inconsistent with the Supreme Court's decisions in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969) and *Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974), because 1) *Gissel* recognized that NLRB-conducted elections were a superior means for determining whether a majority of employees supported a union, and 2) *Linden* established that the burden of filing a petition with the NLRB seeking a representation election was on the union, not the employer. The letter requested that the Attorney General: "1) clarify to the DC Circuit that the administration does not support the Acting General Counsel's position with respect to *Loper Bright* or *Cemex Construction Materials Pac.*, 372 NLRB No. 130 (2023); and 2) direct the Acting General Counsel to file necessary documents with the DC Circuit to amend his brief accordingly."

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

[3] Pursuant to the rule the Board adopted in *Cemex*, an employer confronted with a union's demand for recognition in a unit for which the union is claiming majority support may agree to recognize the union that enjoys majority support, or promptly file an RM petition to test the union's majority support and/or challenge the appropriateness of the unit; or, if the union has previously filed an RC petition, await the processing of that petition. If the employer does not recognize the union in response to the demand, or does not file an RM petition within two weeks of that demand, and there is no other petition for a Board-conducted election being processed by the Region, the employer is obligated to bargain with the union. If the employer fails to recognize the union and bargain, the union may file a Section 8(a)(5) charge against the employer. The employer will be able to challenge the basis for its bargaining obligation during the Region's investigation of the unfair labor practice charge. However, if the union demonstrates majority support in an appropriate unit, an unfair labor practice complaint will issue and, if the Board agrees, it will find that the employer violated the Act by failing and refusing to recognize and bargain with the union as the employees' designated collective-bargaining representative. The Board will issue a remedial bargaining order based on the demonstrated majority support, with bargaining obligation commencing upon the date of the union's demand for recognition.

In addition, where a petition has been filed, if the employer commits an unfair labor practice sufficient to warrant the setting aside of an election, the petition will be dismissed and a remedial bargaining order will obtain, relying on the evidence of majority support that occasioned the demand for recognition.

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.

Page 431, add the following to the end of Section II(B):

In *NLRB v. Jones & Laughlin*, 301 U.S. 1, 48 (1937), as part of its decision upholding the constitutionality of the NLRA, the Supreme Court considered a Seventh Amendment challenge: "Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. This part of the order was also authorized by the Act. § 10 (c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury." The Court noted that the Seventh Amendment jury trial right "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law… It does not apply where the proceeding is not in the nature of a suit at common law." *Id.* (Citations omitted). The Court then summarily dismissed the Seventh Amendment challenge: "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." *Id.*, at 48-49.

Despite this long-standing precedent, some employers have recently tried to revive the argument that they are entitled to jury trials in NLRB proceedings, as part of broader constitutional attacks on the administrative state. The Supreme Court recently addressed the Seventh Amendment issue in the context of a Securities and Exchange Commission (SEC) enforcement action. In *SEC v. Jarkesy*, Case 22-859 (June 27, 2024), the Supreme Court, by a 6-3 vote, held that the SEC could not impose a civil penalty on investment fund managers who violate the anti-fraud provisions of the Securities Exchange Act without a jury trial. Under the Act, the SEC can pursue civil

penalties either by filing an action in court where a jury trial is available or by prosecuting the action before an ALJ. Prior to the Dodd-Frank Act, the SEC could only seek such penalties in court; that Act made civil penalties available in both types of enforcement actions.

The Court held that the right to a jury trial turned on whether the cause of action created by the statute is analogous to one that existed at common law and whether the remedies provided are legal or equitable, with the remedy being the "more important consideration." *Id.*, at 9. And, in considering the nature of the relief, the Court stated: "While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. . . . What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to 'restore the status quo.'" *Id.* (Citations omitted).

Applying these principles, the Court found that a right to a jury trial attached to the SEC enforcement action, as the statutory cause of action was analogous to common law fraud, with the penalty clearly intended to punish and not to restore the status quo.

Traditional remedies under the NLRA are not punitive like the SEC civil penalties in *Jarkesy,* as they are intended to restore the status quo and to be remedial. As described above, the Court held as much in *Jones & Laughlin*, and *Jarkesy* does not seem to displace that case's holding. Accordingly, the Seventh Amendment would appear not to require a jury trial in an NLRB proceeding. Moreover, in distinguishing rather than overruling *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n,* 430 U. S. 442 (1977), which holds that an employer has no right to a jury trial in the context of OSHA imposing penalties for violations of safety standards, the *Jarkesy* Court noted that *Atlas Roofing* relied on *Jones & Laughlin* to determine that there was no common law equivalent to an OSHA enforcement action. The Court expressed skepticism about *Atlas Roofing*, but it did not question *Jones & Laughlin*.

However, several employers have argued that the expanded remedies announced in the *Thryv* decision violate the Seventh Amendment's right to trial by jury "[i]n Suits at common law." U.S. CONST. amend. VII. For example, in Space Exploration Technologies Corporation v. NLRB, Docket No. 24-cv-00001, Space X alleges the Board's attempt to subject Space X to an administrative proceeding violates the Seventh Amendment because the Board seeks expanded damages defined in Thryv. *See* Complaint, Space Exploration Technologies Corporation v. NLRB, Docket No. 24-cv-00001 (filed W.D. Tex. Jan. 4, 2024) (*SpaceX* Cmplt.). Space X argues that the Seventh Amendment grants the right to trial by jury where legal damages are in play, but not where equitable remedies, such as injunctive relief, are at issue. Money damages to compensate for loss are "the classic form of legal damages." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). Space X acknowledges that, where the Board finds that an employer violates the NLRA, Section 10(c) authorizes the Board to issue a cease-and-desist order and "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act." 29 U.S.C. § 160(c). Space X further acknowledges that backpay under Section 10(c) is a form of constitutionally permissible equitable relief. *See Chauffeurs,*

Teamsters & Helpers, Loc. No. 391 v. Terry, 494 U.S. 558, 570–73 (1990). Space X alleges, however, that the Board's *Thryv* remedies are "traditional forms of legal relief that go far beyond the equitable restitutionary backpay remedy permitted by the statute." *Space X* Cmplt., ¶¶ 17, 19–22.

Page 440, add the following to the end of Section II(C):

In an 8-1 decision, the Supreme Court clarified the standard to be applied when the NLRB seeks interim injunctive relief from a federal district court under Section 10(j). *Starbucks v. McKinney*, No. 23-367 (June 13, 2024). Section 10(j) authorizes the Board to seek temporary injunctive relief after an unfair labor practice complaint issues and while the Board's administrative adjudicative process is underway. The statutory language states the court "shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." In the *Starbucks* case, after the NLRB Regional Office issued a complaint alleging, inter alia, that Starbucks had unlawfully fired seven workers in one of its Memphis stores in response to their union activity, the Board sought temporary relief, including the reinstatement of the discharged workers, while the unfair labor practice complaint was being administratively adjudicated. The district court granted a preliminary injunction for some of the requested relief, including reinstating the fired workers, and the Sixth Circuit affirmed.

When considering the Board's request for injunctive relief, the courts had developed different tests. Some courts, including the district court in *Starbucks*, applied a two-part test used by the Third, Fifth, Sixth, Tenth, and Eleventh Circuits—whether "there is reasonable cause to believe that unfair labor practices have occurred" and whether injunctive relief is "just and proper." Other courts, notably the Fourth, Seventh, Eighth, and Ninth Circuits, applied the four-factor preliminary injunction test from *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)—considering likelihood of success on the merits, likelihood of irreparable harm absent the relief, the balance of the equities, and the public interest. Finally, courts in the First and the Second Circuits used their own variations on the two tests. In *Starbucks*, the Supreme Court, in an opinion by Justice Thomas, held that "district courts considering the Board's request for a preliminary injunction must apply the *Winter* framework." *Starbucks*, at 8. Justice Jackson was the lone dissenter.

On July 16, 2024, in response to the *Starbucks* decision, NLRB General Counsel Jennifer Abruzzo issued Memorandum GC 24-05, "Section 10(j) Injunctive Relief and the U.S. Supreme Court's Decision in Starbucks Corp. v. McKinney." After emphasizing the importance of 10(j) relief in the NLRA's remedial scheme and summarizing the Court's decision, General Counsel Abruzzo stated:

> Please be advised that the Supreme Court's decision does not change my approach to seeking Section 10(j) injunctive relief in appropriate cases … [W]hile the Supreme Court's decision in Starbucks Corp. provides a uniform standard to be applied in all Section 10(j) injunctions nationwide, adoption of this standard will not have a significant impact on the Agency's

> Section 10(j) program as the Agency has ample experience litigating Section 10(j) injunctions under that standard. See, e.g., Small v. Avanti Health Sys., LLC, 661 F.3d 1180, 1187 (9th Cir. 2011); Muffley v. Spartan Mining Co., 570 F.3d 534, 541-42 (4th Cir. 2009); Lineback v. Spurlino Materials, LLC, 546 F.3d 491, 500 (7th Cir. 2008). And, not only do we have experience litigating under that standard, Regions have a high rate of success in obtaining Section 10(j) injunctions under the four-part test, a success rate equivalent to or higher than the success rate in circuit courts that applied the two-part test.

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.

On August 25, 2023, the Board published in the Federal Register a Final Rule largely reversing the amendments made by the Board's 2019 Election Rule. The new rule put back in place the expedited election procedures contained in the Board's 2014 rule. The new rule became effective December 26, 2023. The Board also rescinded the two provisions of the 2019 Rule that had been previously enjoined by the DC District Court.

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

Pages 567–73, delete notes 3 through 7.

Pages 575–78, delete notes 14 through 16.

Page 578, replace note 17 with the following new note 17 as renumbered, and later in the chapter, delete Section III.B, pp. 584–91:

Gissel and its progeny changed two major doctrines in this area. First, under *Joy Silk Mills*, an employer could refuse to bargain with a union that had a card majority only if the employer had a "good faith doubt" about the legitimacy of the proffered card majority. Without such a doubt, the employer would violate § 8(a)(5) if it refused to bargain. As *Gissel* notes, the lawyer for the Board did not defend this rule at oral argument. 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." As discussed in *Cemex*, excerpted below, the Board decided not to revive the Joy Silk Mills doctrine but to modify it instead.

Second, the Court in *Gissel*, 395 U.S. at 601 n. 18, left open the following question:

> [W]hether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless

> of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute. In short, a union's right to rely on cards as a freely interchangeable substitute for elections where there has been no election interference is not put in issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held. . . .

The answer to this question is significant. If the employer is obligated to file a petition for election once it rejects a union's bargaining demand based on a showing of cards signed by a majority, and the employer does not, then a union would be able to petition the Board for certification based on the card check alone. If, however, the union is obligated to file a petition for election once the employer rejects the union's bargaining demand, then the union would not be certified based on the card check.

In *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974), the Court upheld as permissible the Board's interpretation of the NLRA — that an employer can insist on a Board-conducted, secret- ballot election when presented with a card majority. Once again, in Cemex, the GC argued that *Linden Lumber* should be overruled.

In *Cemex*, excerpted below, the Board explained its reasoning for reinstating a modified *Joy Silk* approach and for overruling Linden Lumber and replacing it with a new framework for determining when employers must bargain with unions without an election.

Cemex Construction Materials Pacific, LLC and

International Brotherhood of Teamsters

372 N.L.R.B. No. 130 (2023)

National Labor Relations Board

August 25, 2023

Editors' note: This case consolidates eight unfair labor practice cases and one election case. Nearly all footnotes have been removed.

SUMMARY

The full Board unanimously adopted the Administrative Law Judge's conclusions that [Cemex Construction Materials Pacific, LLC ("Cemex")] violated Section 8(a)(3) and (1) by suspending and discharging an employee because of her union activity and Section 8(a)(1) by: threatening employees with various repercussions including plant closure and job loss if they selected the Union as their bargaining representative or engaged in union activities; instructing employees not to speak with union representatives; disciplining an employee for speaking with union representatives on non-working time; interrogating employees about their union membership, activities, and

sympathies; placing employees under surveillance while they engaged in union activities; threatening to investigate an employee because of their union activity; blaming the Union for delayed wage increases; and promising benefits to an employee if they opposed the Union or voted against representation. The Board unanimously reversed the judge's conclusion that [Cemex] violated Section 8(a)(1) making certain statements about the impact of selecting the Union on employees' relationships with [Cemex]. The Board also unanimously adopted the judge's recommendation to set aside the election.

A Board majority (Chairman McFerran and Members Wilcox and Prouty; Member Kaplan, dissenting) adopted the judge's conclusions that [Cemex] additionally violated Section 8(a)(1) by: creating the impression that it was engaged in surveillance of its employees' union activities; threatening employees with plant closure by telling them that, even if they unionized, [Cemex] would retain the right to convert plants to "satellite" status at any time; threatening employees by implying that wage increases would be delayed indefinitely if they selected union representation; promulgating an overly broad directive not to talk with union representatives while on "company time" or "during working hours"; and hiring security guards to intimidate union supporters immediately before the election.

A Board majority (Chairman McFerran and Members Wilcox and Prouty) concluded that [Cemex] violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union while engaging in conduct described above that undermined the Union's support and prevented a fair rerun election, and ordered that [Cemex] bargain with the Union under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Dissenting, Member Kaplan would not have ordered bargaining under *Gissel* because of the passage of time and employee and management turnover between the unfair labor practices and the Board's order.

A Board majority (Chairman McFerran and Members Wilcox and Prouty) overruled *Linden Lumber Division, Summer & Co.*, 190 N.L.R.B. 718 (1971), and announced a new framework for determining when employers are required to bargain with unions without a representation election. Under the new framework, when a union requests recognition on the basis that a majority of employees in an appropriate bargaining unit have designated the union as their representative, an employer must either recognize and bargain with the union or promptly file an RM petition seeking an election. However, if an employer who seeks an election commits any unfair labor practice that would require setting aside the election, the petition will be dismissed, and—rather than re-running the election—the Board will order the employer to recognize and bargain with the union. The Board majority concluded that [Cemex] was subject to a bargaining order under both *Gissel*, above, and the newly announced standard, applied retroactively in this case.

Member Kaplan, dissenting, would not have overruled *Linden Lumber* and adopted the newly announced standard because he found that the new standard undermines employees' statutory rights, is inadequately supported by reasoned explanation or justification, and conflicts with the Supreme Court's decisions in [*Linden*

Lumber, 419 U.S. 301, 310 (1974)], and *Gissel*, above. Member Kaplan further found that the majority erred by applying the new standard retroactively.

* * *

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

* * *

The [NLRB] . . . has decided to affirm the [administrative law] judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

On March 7, 2019, employees of [Cemex] in a unit of about 366 ready-mix cement truck drivers and driver trainers voted against representation by the Charging Party, International Brotherhood of Teamsters (the Union), by a margin of 179 to 166. The General Counsel and the Union allege that [Cemex] engaged in extensive unlawful and otherwise coercive conduct before, during, and after the election, which requires, among other remedial measures, setting aside the results of the election and affirmatively ordering [Cemex] to bargain with the Union under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

After a hearing conducted on 24 days between November 2020 and February 2021, the judge found that [Cemex] violated Section 8(a)(1) . . . more than two dozen times, including by threatening employees with plant closures, job loss, and other reprisals if they selected the Union, surveilling employees and interrogating them about their union activity, prohibiting employees from talking with union organizers or displaying prounion paraphernalia, and hiring security guards . . . to intimidate employees immediately before the election. The judge also found that [Cemex] violated Section 8(a)(1) before the election by disciplining lead union activist Diana Ornelas for talking with union organizers on "company time" and Section 8(a)(3) and (1) after the election by suspending Ornelas for 8 days on July 10, 2019, and by discharging her on September 6, 2019, because of her union activity. In addition, the judge found merit in the Union's election objections alleging coercive threats of plant closure and other repercussions, surveillance, and increased use of security . . . to intimidate employees. Most of the judge's findings and conclusions [concerning Cemex's] unlawful and objectionable conduct are firmly rooted in his record-supported credibility resolutions, and, with minor exceptions and clarifications discussed below, we affirm them.

In addition to the Board's ordinary remedies for the violations found, the judge recommended setting aside the election and ordering [Cemex] to provide for the Board's remedial order to be read aloud to employees and to provide the Union with several special access remedies [before] a rerun election. The judge did not recommend the General Counsel's requested *Gissel* bargaining order. . . . [W]e agree

with the judge that [Cemex's] conduct requires setting aside the election. We also adopt the judge's recommended notice-reading remedy. However, contrary to the judge, we find that [Cemex's] conduct also warrants a remedial affirmative bargaining order, and we shall amend the judge's recommended remedy and Order accordingly.[6]

Finally, the General Counsel asks the Board, inter alia, to overrule [*Linden Lumber Division, Summer & Co.*, 190 N.L.R.B. 718 (1971), *rev'd sub nom. Truck Drivers Union Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *aff'd*, 419 U.S. 301 (1974)] and reinstate a version of the [*Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949), *enforced in relevant part,* 185 F.2d 732 (D.C. Cir. 1950)] standard. We find merit to the General Counsel's arguments, and . . . we shall modify the Board's approach . . . in certain respects.

i. Background

[Cemex] is a Delaware-registered subsidiary of a multinational building materials company that provides ready-mix concrete, cement, and aggregates to construction-industry customers including . . . in Southern California and Las Vegas, Nevada.

In late 2017 or early 2018, a group of [Cemex's] ready-mix drivers in Ventura County, California, approached the [the Union] about organizing . . . . The Union had already been working with a group of [Cemex's] drivers who were trying to organize in Las Vegas, Nevada, and decided . . . to expand its campaign to organize a large unit which would ultimately encompass approximately 366 ready-mix drivers and driver trainers employed by [Cemex] at approximately 24 facilities in Southern California and Las Vegas.

During the spring and summer of 2018, a union organizing committee consisting of more than 35 drivers from various facilities met by conference call every other week to coordinate organizing efforts. Union organizers, both employees and nonemployees of [Cemex], distributed union paraphernalia and information and spoke with drivers during nonworking time at [Cemex's] numerous plants and jobsites. The Union also set up public social media accounts, including YouTube and Facebook pages, which supported the campaign with photos and videos of prounion drivers. The Union's efforts achieved broad support: it gathered [valid] authorization cards signed by at least 207 drivers (approximately 57 percent of the unit) during October and November 2018. The Union filed a petition for a Board-supervised representation election on December 3, 2018.

[Cemex] reacted quickly and aggressively to the Union's campaign. Bryan Forgey, [Cemex's] vice president/general manager for ready-mix business in Southern California, learned in October 2018 that the Union was collecting authorization cards. He alerted [Cemex's] national labor relations team, and [Cemex] established a "steering committee" to coordinate its response. The steering committee consisted of Forgey, Iris Plascencia ([Cemex's] human resources manager for Southern California ready-mix), [Cemex's] vice president for national labor relations, and in-house and outside legal counsel. Before the end of October, the steering committee hired a company called Labor Relations Institute (LRI) to help execute [Cemex's] campaign against the Union.

The steering committee also reviewed all formal discipline issued during the campaign, and a version of the steering committee continued to operate as of the hearing in this matter.

. . . LRI supplied as many as five independent consultants, who trained [Cemex's] managers and supervisors about the legal limits on their efforts to persuade unit employees not to support the Union. Between late October 2018 and early March 2019, LRI consultants also met with unit employees, as often as daily, in small group and individual encounters at the various plants. The consultants presented PowerPoint displays and answered questions at the small-group meetings. . . . [T]he content presented in these small-group meetings was pre-scripted so that the same message would be presented to drivers across the unit. In December 2018, [Cemex] recorded two video messages [the "25th hour videos"], urging employees to reject the Union.[16] LRI consultants presented these videos to all unit employees in small-group meetings shortly before the March 7 election. Throughout the campaign, [Cemex] also distributed stickers, flyers, pamphlets, and letters encouraging employees to reject the Union, with a special emphasis on the Teamsters' strike history and the potential economic impact of a strike on unit employees. [Cemex] also monitored the Union's social-media messaging and communicated its antiunion message through its own social media sites.

… [T]he Union lost the March 7, 2019 election by a margin of 166 to 179 and subsequently filed the election objections and unfair labor practice charges at issue here.

ii. Discussion

A. The unfair labor practice allegations

Unfair labor practices before the critical period:

[Cemex] violated Section 8(a)(1) of the Act on five occasions in August 2018, when [Cemex's plant foreman/batchman Dickson]: (1) threatened drivers [Rida] and [Lauvao] that they could be fired or written up for having union stickers on their hardhats; (2) threatened Rida and Lauvao with discharge or reduced hours or benefits if they unionized; (3) instructed drivers [Orozco] and Lauvao that they were not to speak to "these union guys"; (4) instructed Orozco and Lauvao to "take those damn [union] stickers" off their hats; and (5) threatened Orozco and Lauvao with discharge or discipline if they refused to remove union stickers from their hardhats.

Critical period unfair labor practices:

[Cemex] further violated Section 8(a)(1) four more times in January 2019—after the Union filed its petition—when Dickson: (1) threatened driver [Collins] that "if the Union comes in . . . Cemex is just going to close their doors and take all their trucks to another state, because they don't want the Union"; (2) interrogated Collins by asking why he was wearing a union sticker on his hardhat and what the union was going to offer; (3) implicitly threatened Collins by inviting him to go work for a different company if he

wanted to be represented by the Union, and (4) repeatedly instructed Collins to remove union stickers from his hardhat.

[Cemex] violated Section 8(a)(1), in January 2019, when [Cemex's area manager Turner] interrogated driver [Daunch] about his union sympathies by asking him "where's your 'Vote No' sticker? How come I don't see a 'Vote No' sticker on your hardhat?"

[Cemex] violated Section 8(a)(1) twice on January 28, 2019, when [plant foreman/batchman Ponce], and [Superintendent Nunez] engaged in surveillance and created an impression of surveillance by lingering for an unusually long time at the entrance to the Inglewood plant and waving to drivers entering and exiting the plant while organizers standing near the same plant gate were displaying a poster and answering driver questions about comparative wages and benefits.

Finally, as discussed in more detail below, [Cemex] issued a series of unlawful discriminatory disciplines to Ornelas because of her union activity, beginning before the election and culminating in her discharge on September 6, 2019.

With respect to the January 29 meeting [when VP/GM Forgey addressed drivers at a group meeting with LRI consultant Rosado], we affirm the judge's conclusions . . . that [Cemex] violated Section 8(a)(1) three times when Forgey: (1) threatened drivers by telling them that their work opportunities would be limited by strict contract classifications if they unionized; (2) blamed the Union for a delay in wage increases; and (3) threatened drivers by implying that wage increases could be delayed for years if employees unionized. . . .

. . . [W]e affirm the judge's conclusion that [Cemex] violated Section 8(a)(1) when Forgey implicitly threatened employees with job loss by misstating striking employees' legal reinstatement rights.

[Cemex] violated Section 8(a)(1) when Forgey told employees that, even if they unionized, the company would retain a management right to turn plants into "satellites," meaning that Cemex could shift work from one plant to another, thereby "turning plants on and off as needed." . . . . Forgey's statements were unlawful threats, [because] . . . employees would reasonably have understood Forgey's comments as a threat to close individual plants rather than as a threat to unilaterally transfer work. . . .

[Cemex] violated Section 8(a)(1) on February 21, 2019, when plant superintendent [Faulkner] told Ornelas and two other drivers that if the Union came in it might strip him of the ability to teach drivers to batch (i.e., work as a plant foreman/batchman) or drive a loader because the Union has a classification system and that he would lose the power to teach employees who wanted to learn and grow with the company if the drivers unionized.

[Cemex] violated Section 8(a)(1) on February 25, 2019, when Faulkner and Daryl Charlson, [Cemex's] director of plant and fleet maintenance, orally promulgated an overly broad directive not to talk to union representatives "on company time." . . . [Plant foreman/batchman Torres] instructed [Ornelas] not to talk to the union representatives,

[and told Ornelas] "you can't be talking to them. Everybody knows it . . . . we told everybody." . . . Faulkner told Ornelas that drivers had been informed about this in prior meetings, including meetings with the LRI consultants. In addition, Faulkner's contemporary written account of the disciplinary meeting recounts that he told Ornelas that she had previously been informed "during meetings with the consultant" that she was not allowed to talk to union organizers "on Company time," or "during working hours." We accordingly conclude that [Cemex's] unlawful instruction to Ornelas not to talk with organizers on company time was not merely a one-time instruction to one employee, but a generally promulgated rule, broadly communicated to unit drivers by managers and LRI consultants.

[Cemex] violated Section 8(a)(1) when Faulkner and Charlson issued a disciplinary verbal warning to driver Ornelas for her protected conduct of talking with Union organizers during downtime while waiting to load her truck. … [W]e note Ornelas's uncontradicted testimony that drivers waiting to load could ordinarily eat lunch, get water, go to the bathroom, talk to coworkers, or take a phone call. Accordingly, we find that the actual conduct for which [Cemex] disciplined Ornelas—talking with union organizers during downtime in which personal activity was generally allowed—was itself protected and could not have been prohibited even under an appropriately narrowly drawn policy [under *Republic Aviation*]. Furthermore, . . . [Cemex] had in place at the time a formal progressive discipline policy with steps including verbal warning, written warning, suspension, and discharge. [Cemex's] human resources manager Plascencia testified that there was no difference between a verbal coaching or counseling and a documented verbal warning for the purposes of the progressive discipline policy. We accordingly find . . . that [Cemex's] February 25, 2019, verbal warning to Ornelas was a formal disciplinary action within the scope of [its] progressive discipline policy.

[Cemex] violated Section 8(a)(1) three more times in late February or early March 2019, when area manager Ryan Turner: (1) told Corona (Inland Empire) driver Bernard Molina that Turner would no longer be able to provide help as he had done in the past if drivers selected the Union; (2) told Temecula (Inland Empire) driver Donald Shipp that he would be granted a previously requested transfer if he voted against the Union; and (3) impliedly threatened Corona (Inland Empire) driver Richard Daunch with a loss of benefits by telling him that if employees selected the Union, Turner would no longer be able to approve Daunch's periodic requests for time off in order to perform music.

[We affirm the judge's finding] that [Cemex] violated Section 8(a)(1) when it deployed security guards at numerous plants for 2 weeks prior to the election and at all the plant polling places on the day of the election for the purpose of intimidating unit employees. . . .

Postelection unfair labor practices:

We affirm the judge's conclusion . . . that [Cemex] violated Section 8(a)(3) and (1) when it suspended Ornelas without pay from July 10 through July 17, 2019. [Cemex] contends that the suspension was warranted under its progressive discipline policy in light of Ornelas's prior disciplinary record. But . . . Ornelas's prior disciplinary record

included the unlawful verbal warning [Cemex] issued to her on February 25, 2019 for her protected union activity. Because [Cemex] does not contend that it would have issued the same discipline to Ornelas absent the prior unlawful warning, the suspension was unlawful . . . because it relied in part on the earlier unlawful warning. We also affirm the judge's conclusions that [Cemex] violated Section 8(a)(1) twice in relation to the same incident when Charlson interrogated Ornelas by asking whether she had called the Union for assistance at the Hallin & Herrera jobsite and when he threatened her by telling her that [Cemex] had to do an investigation because Hallin & Herrera had reported that she had called a union organizer. Finally, we affirm the judge's conclusion that [Cemex] violated Section 8(a)(3) and (1) when it discharged Ornelas on September 6, 2019, . . . because of [Cemex's] express reliance, in its discharge decision, upon both the earlier unlawful July 10 suspension and the earlier February 25 unlawful verbal warning.

B. The election and election objections

The Board ordinarily sets aside the results of a representation election whenever an unfair labor practice has occurred during the critical period between the filing of the petition and the election, unless it is virtually impossible to conclude that the misconduct has affected the outcome of the election. In determining whether misconduct could have affected the results of the election, the Board considers the number and severity of the violations and their proximity to the election, the size of the unit and margin of the vote, and the number of employees affected and extent of dissemination of the misconduct. A party seeking to set aside an election has the burden of establishing that coercive conduct was sufficiently disseminated to affect the election's result.

Here, the impact of [Cemex's] coercive conduct on the election is clear. . . . [Cemex] engaged in more than 20 distinct instances of objectionable or unlawful misconduct spanning the entire critical period, including, but not limited to, numerous unfair labor practices related to the Union's election objections. Specifically, the Union's second objection alleges that Cemex threatened employees with the closing of batch plants or other adverse consequences if they supported the Union. Among the most serious threats supporting this objection were plant foreman/batchman Dickson's telling drivers that "if the Union comes in . . . Cemex is just going to close their doors and take all their trucks to another state," and VP/GM Forgey's telling drivers that [Cemex] retained the right to turn plants into "satellites," which could be turned on and off as needed. We also affirm the judge's finding that [Cemex] delivered a third coercive threat of plant closure . . . when LRI consultant Amed Santana told drivers during a meeting at [Cemex's] Perris (Inland Empire) plant on January 28, 2019, that Cemex was a multibillion dollar company that did not need the ready-mix part of its business mix and could close its ready-mix operation if employees pushed enough and unionized.

We also find that [Cemex] made at least 10 more coercive threats of adverse consequences during the critical period.[58] While all of these threats were serious, [Cemex's] implied threat of termination for engaging in protected strike activity, in the context of [its] pervasive and persistent message that a strike would be likely if employees selected the Teamsters, likely had a particularly significant impact because .

. . it was conveyed not only by VP/GM Forgey, but also by LRI consultant Rosado and by consultant presentation material that was shown to all or most unit employees. Furthermore, the Board and the Courts have long recognized the particularly coercive nature of threats to close or transfer operations such as those delivered by Dickson, Santana, and Forgey.[59]

In addition to these numerous coercive and unlawful threats, we have affirmed the judge's findings of unfair labor practices supporting the Union's seventh and eighth objections, alleging coercive surveillance and intimidation by increased use of security guards, respectively. We have also affirmed the judge's findings of at least seven more critical-period unfair labor practices not directly related to the Union's objections.[60] Of these remaining unfair labor practices, [Cemex's] unlawful directive to employees not to talk with union representative on "company time" may have had a particularly broad impact because . . . LRI consultants conveyed the same unlawful directive to drivers across the unit during individual and small group campaign meetings.

In short, [Cemex] engaged in a large number of severe unfair labor practices and otherwise coercive conduct throughout the critical period. While some of these instances would likely have directly affected only the individual employee involved, many others included threats or other coercive conduct with unitwide consequences that would directly affect any unit employee who learned of them. Though the unit here was large, the election margin was small--a change of only 7 votes in the Union's favor from a total of 345 voting employees would have reversed the outcome. On this record, the Union clearly carried its burden of establishing sufficient dissemination of [Cemex's] coercive conduct to affect the election result . . . . For these reasons and those given by the judge, we adopt the judge's recommendation to set aside the results of the election.

C. The Gissel order

[Editor's note: The Board next ordered a Gissel bargaining order.]

iii. Joy Silk, Gissel, and Linden Lumber

A. Statutory framework

Section 9(a) of the Act provides that "[r]epresentatives *designated or selected* for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining[.]" . . . In turn, Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." . . . [Section 9(c)(1)(A) & (B)] of the Act describes the Board's procedures for conducting representation elections and certifying unions that prevail in Board-conducted elections. . . . Finally, Section 8(a)(2) prohibits an employer from recognizing and bargaining with a union that does not enjoy majority support. [*ILGWU (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 738–739 (1961)].

. . . Section 9 is animated by the principle that representation cases should be resolved fairly and expeditiously. See *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946) . . . .

When interpreting Section 9, the Court has relied on the Act's legislative history, which reflects Congress's judgment that delays in resolving questions of representation can risk undermining employees' choice to seek union representation and increase the risk of labor disputes and disruptions to interstate commerce. In interpreting Section 9(a), the Supreme Court has acknowledged that "a 'Board election is not the only method by which an employer may satisfy itself as to the union's majority status' since § 9(a), "which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen."' [*Gissel*, 395 U.S. at 497]. . . . [B]ecause Section 9(a) "refers to the representative as the one 'designated or selected' by a majority of the employees without specifying precisely how that representative is to be chosen," a union may establish a valid bargaining obligation "by convincing support, for instance, . . . by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes." *Gissel*, 395 U.S. at 596–597.

. . . Congress [rejected] an amendment to Section 8(a)(5) in an early version of the Taft-Hartley legislation that would "permit the Board to find a refusal-to-bargain violation only where an employer had failed to bargain with a union 'currently recognized by the employer or certified as such [through an election] under section 9[.]"'. . . In *Gissel*, the Supreme Court relied upon this legislative history to reject the contention that the Taft-Hartley amendments undermined the use of signed union-authorization cards to establish an enforceable statutory bargaining obligation.

The Taft-Hartley amendments . . . create[d] an avenue for employers to petition for a Board election when confronted with a demand for recognition. Taft-Hartley expanded employers' access to the Board's election machinery by adding Section 9(c)(1)(B). . . .

However, an employer's right to invoke the Board's election machinery is not inviolate. The Board, with Supreme Court approval, has long issued remedial bargaining orders for violations of Section 8(a)(5) of the Act. . . . In *Gissel*, the Supreme Court made plain that "the 1947 amendments" creating the 9(c)(1)(B) election option "did not restrict an employer's duty to bargain under § 8(a)(5) solely to those unions whose representative status is certified after a Board election." Id. at 601. The Court "agree[d] with the Board's assertion . . . that there is no suggestion that Congress intended § 9 (c)(1)(B) to relieve any employer of his § 8 (a)(5) bargaining obligation where, without good faith, he engaged in unfair labor practices disruptive of the Board's election machinery." Id. at 600

B. Administrative/ judicial interpretations

In the years immediately following the passage of the Wagner Act in 1935, the Board exercised the power "to certify a union as the exclusive representative of the employees in a bargaining unit when it had determined, by election or 'any other suitable method,' that the union commanded majority support." *Brooks v. NLRB*, 348 U.S. 96, 98 (1954) . . . After an employee or a union filed a petition requesting certification, the Board investigated the petition and conducted a hearing if it found that a question concerning representation existed. If the union presented evidence during the hearing sufficient to

establish that employees had designated the union as bargaining representative, the Board would certify the union without an election.

By 1939, the Board reversed course. In *Cudahy Packing Co.*, 13 N.L.R.B. 526 (1939) . . ., the Board held that a Board-conducted election was a prerequisite to certification. In the Taft-Hartley amendments that followed in 1947, Congress amended the text of Section 9(c) of the Act to codify the requirement that an election precede Board certification. However, after *Cudahy Packing* and the passage of the Taft-Hartley amendments, the Board continued to enforce an employer's statutory bargaining obligation, regardless of certification, in unfair labor practice cases where a union that had not won a Board election could prove that it represented a majority when it requested recognition.

Then, in *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1264 (1949), enfd. 185 F.2d 732 (D.C. Cir. 1950), . . . the Board reaffirmed and restated the principles that had begun to emerge in unfair labor practice cases involving allegations that an employer violated Section 8(a)(5) and (1) . . . by refusing to recognize and bargain with a union that claimed majority support in an appropriate unit. In *Joy Silk*, the Board held that an employer unlawfully refuses to recognize a union that presents authorization cards signed by a majority of employees in a prospective unit if it insists on an election motivated "not by any *bona fide* doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union."' . . . The Board explained that, in analyzing an employer's good-faith doubt, it would consider "all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct." Id.

Applying that standard, the Board found that because the employer in *Joy Silk* had "engaged in unfair labor practices during the preelection period . . . ," [and] "[Cemex's] insistence upon an election was not motivated by a good faith doubt of the Union's majority," but was instead intended "to gain time within which to undermine the Union's support." . . . . The Board rejected the employer's contention that a remedial order directing it to bargain with the Union would "deprive the [employer] of its right under Section 9(c)(1)([B]) of the Act to petition the Board for an election" as "untenable" because the employer's refusal to recognize and bargain with the Union was not based on "an honest doubt as to the Union's majority status." . . .

The District of Columbia Circuit enforced the *Joy Silk* decision. *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950). . . . In the years immediately following the District of Columbia Circuit's enforcement, every circuit similarly approved the *Joy Silk* framework.

Subsequent Board cases modified the *Joy Silk* framework [first by placing the burden on the General Counsel to demonstrate that a majority of employees had once signed authorization cards and the employer's lack of good-faith doubt in its refusal to recognize and bargain with the union, *John P. Serpa, Inc.*, 155 N.L.R.B. 99, 100 (1965),

and second by requiring a showing of "substantial unfair labor practices" to establish the lack of that doubt, *Aaron Bros.*, 158 N.L.R.B. 1077, 1079 (1966)].

[I]n *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963), the Board held that authorization cards that clearly state their purpose are valid. Certain reviewing courts disagreed, priming the issue for consideration by the Supreme Court in *Gissel*.

In *Joy Silk* cases, the General Counsel was also required to establish that the union sought recognition in a "unit appropriate for" collective bargaining within the meaning of Section 9(b) . . . to establish an unlawful refusal-to-bargain allegation. . . .

Although the employer in *Joy Silk* itself committed unfair labor practices that served to undermine the claim that it had a good-faith doubt as to the union's majority support, the Board also applied *Joy Silk*'s requirement that an employer recognize a union not certified through an election to another category of cases where the employer's actions at and after the presentation of signed authorization cards were deemed inconsistent with it having a good-faith doubt as to the union's majority support, even absent independent unfair labor practices. . . .

The Supreme Court in *Gissel* explained that this "second category" of ""*Joy Silk* doctrine" cases were cases in which:

> [T]he Board could find [ ] that the employer had come forward with no reasons for entertaining any doubt and therefore that he must have rejected the bargaining demand in bad faith. . . .

As reviewing courts considered more cases involving the *Joy Silk* framework, some courts began to criticize the Board's application of the good-faith doubt standard. . . .

Joy Silk[, as modified], remained Board law until the late 1960s. . . . During oral argument in *Gissel*, the Board's attorney stated that the Board had abandoned *Joy Silk*. The *Gissel* Court acknowledged the Board attorney's statement, but it found that . . . it "need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." . . .

. . . [T]he Supreme Court held in *Gissel* that, where a union has achieved majority support and an employer engages in unfair labor practices which "have the tendency to undermine majority strength and impede the election processes," the Board "should issue" an order for the [employer] to bargain with the union without an election if "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." In this context, the Court emphasized, the bargaining order serves the two equally important goals of "effectuating ascertainable employee free choice" and ""deterring employer misbehavior." The Court in *Gissel* also explicitly approved the Board's view that union-authorization cards provided reliable evidence of employees' views regarding unionization in *Cumberland Shoe*, concluding that "[w]e cannot agree with the employers here that employees as a rule are too

unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else."

In *Linden Lumber*, the Board formally abandoned the *Joy Silk* doctrine and held that an employer does not violate Section 8(a)(5) "solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election." The Board emphasized the criticism that *Joy Silk* required the Board to enter the "'good-faith' thicket" by incorporating an assessment of the employer's subjective state of mind and relied significantly on its doubts as to "the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition." . . .

Following the Supreme Court's approval of the Board's decision in *Linden Lumber*, the Board permitted employers to insist on a Board-conducted election as a precondition to an enforceable statutory bargaining obligation. . . .

C. New standard

The General Counsel asks that the Board overturn *Linden Lumber* and reinstate the standard from *Joy Silk*, under which an employer would violate Section 8(a)(5) and (1) by refusing to bargain upon request with a union that had majority support absent a showing that the employer had a good-faith doubt as to the union's majority status. [Cemex] opposes this request . . . .

We find merit in the General Counsel's argument . . . that the Board should overrule *Linden Lumber*. The Supreme Court has held that the Board's authority to fashion remedies "is a broad discretionary one." . . . Section 1 . . . sets forth the central policies of the Act, including "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing[.]" . . . Because we find that the current scheme for remedying unlawful failures to recognize and bargain with employees' designated bargaining representatives is inadequate to safeguard the fundamental right to organize and bargain collectively that our statute enshrines, we hereby overrule *Linden Lumber*. . . .

Instead, "draw[ing] on enlightenment gained from experience," . . . we announce the following framework for determining when an employer has unlawfully refused to recognize and bargain with a designated majority representative of its employees.

Under the standard we adopt today, an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A). Section 9(c)(1)(B) of the Act grants employers an avenue for testing the union's majority through a representation election if the Board, upon an investigation and hearing, finds that a

question of representation exists. In order to reconcile the provisions of Section 8(a)(5) and Section 9(a), which require an employer to recognize and bargain with the "designated" majority representative of its employees, with the language of Section 9(c)(1)(B) granting employers an election option, we conclude that an employer confronted with a demand for recognition may, instead of agreeing to recognize the union, and without committing an 8(a)(5) violation, promptly file a petition pursuant to Section 9(c)(1)(B) to test the union's majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union.

However, if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order. Thus, this accommodation of the Section 9(c) election right with the Section 8(a)(5) duty to recognize and bargain with the designated majority representative will only be honored if, and as long as, the employer does not frustrate the election process by its unlawful conduct. As the Supreme Court observed in *Gissel*, Section 9(c)(1)(B) was not intended to confer on employers "an absolute right to an election at any time; rather, it was intended, as the legislative history indicates, to allow them, after being asked to bargain, to test out their doubts as to a union's majority in a secret election which they would then presumably not cause to be set aside by illegal antiunion activity." . . . If the employer commits unfair labor practices that invalidate the election, then the election necessarily fails to reflect the uncoerced choice of a majority of employees. In that situation, the Board will, instead, rely on the prior designation of a representative by the majority of employees by nonelection means, as expressly permitted by Section 9(a), and will issue an order requiring the employer to recognize and bargain with the union, from the date that the union demanded recognition from the employer.

Our focus, then, is on the unlawful conduct of the employer that prevents a free, fair, and *timely* representation election. Given the strong statutory policy in favor of the prompt resolution of questions concerning representation, which can trigger labor disputes, we do not believe that conducting a *new* election—after the employer's unfair labor practices have been litigated and fully adjudicated—can ever be a truly adequate remedy. Nor is there a strong justification for such a delayed attempt at determining employees' free choice *again* where the Board has determined that employees had *already* properly designated the union as their majority representative, consistent with the language of the Act, before the employer's unfair labor practices frustrated the election process. Simply put, an employer cannot have it both ways. It may not insist on an election, by refusing to recognize and bargain with the designated majority representative, and then violate the Act in a way that prevents employees from exercising free choice in a timely way.

An employer that refuses to bargain without filing a petition under Section 9(c)(1)(B) may still challenge the basis for its bargaining obligation in a subsequently filed unfair labor practice case. However, its refusal to bargain, and any subsequent unilateral

changes it makes without first providing the employees' designated bargaining representative with notice and an opportunity to bargain, is at its peril.

In overruling *Linden Lumber* and limiting the employer's ability to insist on an election as a preliminary threshold step to a duty to bargain, we will no longer look to *Gissel* bargaining orders—that is, bargaining orders imposed based on employer unfair labor practices only where the unlikelihood of holding a future fair election is proven. Decades of experience administering the *Gissel* standard have persuaded us that *Gissel* bargaining orders are insufficient to accomplish the twin aims of "effectuating ascertainable employee free choice" and "deterring employer misbehavior" that the Supreme Court identified in that case. . . . Specifically, the *Gissel* standard's focus upon the potential impact of an employer's unfair labor practices upon a *future* rerun election creates perverse incentives to delay, which we believe can be diminished by a modified standard. Representation delayed is often representation denied. Our experience leads us to conclude that the application of the *Gissel* standard has resulted in persistent failures to enable employees to win timely representation despite having properly designated a union to represent them, and thereby satisfying the Act's requirement for recognition. In our view, the standard we announce today, by making remedial bargaining orders more readily available, will ""deter [] employer misbehavior" in the period before a Board election. *Gissel*, 395 U.S. at 614. This approach has several important advantages over the current remedial framework.

First, as the facts of this case illustrate, employees are harmed by delay when they must wait for their chosen representative to be able to bargain on their behalf. Under the standard we adopt, once a majority of employees has designated a union as their bargaining representative, the employer has a duty to bargain under Section 8(a)(5), subject to its right to file an election petition. Its refusal to immediately do so—while simultaneously committing unfair labor practices that frustrate the election process—contravenes both the fundamental purpose of the Act in "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of . . . designation of representatives of their own choosing." 29 U.S.C. § 151. This approach better ensures that employees enjoy the ability to bargain through their designated representative.

Second, even when the employer responds to the union's bargaining demand by promptly filing a petition for an election, our standard places the Board's focus on the appropriate time period: the runup to an initial election. In *Gissel* cases, the Board focuses on "the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." 395 U.S. at 614. Reviewing courts have sometimes disagreed with the Board's assessment of the likely continuing effects of an employer's unfair labor practices, particularly where the fair adjudication of unfair labor practice allegations has resulted in substantial delays. However, the Board has unquestioned authority to protect the integrity of its election processes. See *NLRB v. A.J. Tower Co.*, 329 U.S. at 330 ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining

representatives by employees."); *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940) ("The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone."). It is our considered view that our new standard will more effectively disincentivize employers from committing unfair labor practices prior to an election. It thus protects the interests of an employer that prefers an election while protecting the election's integrity by increasing the chance that employees can participate with less chance of unlawful employer interference. Because a Board-conducted election "can serve its true purpose only if the surrounding conditions enable employes to register a free and untrammeled choice for or against a bargaining representative," this standard will advance the Board's interest in "provid[ing] a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 N.L.R.B. 124, 126–127 (1948). As the Supreme Court has recognized, it is "the duty of the Board . . . to establish the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973) (internal quotation omitted).

In contrast to current Board case law, requiring that employers who insist on an election do not frustrate a timely election by committing unfair labor practices addresses one of the greatest weaknesses of *Gissel*: under the new standard, we expect that employers seeking an election will be incentivized *not* to commit unfair labor practices in response to a union campaign, both before and after the filing of the election petition. It is our judgment that the risks to an employer of a *Gissel* bargaining order, with its emphasis on whether a future, often second (or even third) election can be fairly conducted, has not served as an adequate deterrent to employer unfair labor practices during the election period. Under current Board law, there is no effective remedy to deter an employer bent on defeating a union campaign by committing serious unfair labor practices that tend to make a free and fair election unlikely. In particular, the remedies available for violations of Section 8(a)(3) and (1) of the Act, no matter how serious, are, in many cases, incapable of rectifying the harm that can be caused to the election process by the unlawful conduct of an employer intent upon delaying or altogether avoiding its bargaining obligations under the Act. Under the new standard, by contrast, if the Board finds that an employer has committed unfair labor practices that frustrate a free, fair, and timely election, the Board will dismiss the election petition and issue a bargaining order, based on employees' prior, proper designation of a representative for the purpose of collective bargaining pursuant to Section 9(a) of the Act. This standard disincentivizes unlawful employer conduct during an election campaign because such conduct would be counterproductive for the employer. The employer who commits unlawful conduct to dissipate support for a union that has already been designated by employees as their representative gains no ultimate advantage. Its misconduct ensures that it will be subject to a Board order requiring good-faith bargaining with the union.

Third, in response to the criticisms of reviewing courts and our recognition of relevant intervening changes in Board law, our standard does not rely on an employer's subjective "good-faith doubt" of a union's majority status. In order to invoke the Board's

election machinery in response to a union's demand for bargaining, an employer will not need to prove a good-faith doubt of the union's majority status, nor will the General Counsel have to prove a lack of good-faith doubt. Rather, the employer is free to seek a Board election in which the union's majority can be tested. However, in the event of employer unfair labor practices that make a fair election unlikely, the bargaining order imposed under the revised standard appropriately focuses on the best objective evidence of a union's majority support at the time of a request for recognition—before the employer's unfair labor practices were committed. The Board has similarly abandoned the good-faith doubt standard in cases involving alleged unlawful withdrawals of recognition. See [*Levitz Furniture Co.*, 333 N.L.R.B. 717, 717 (2001)]. And the Supreme Court has long recognized that an employer violates Section 8(a)(2) by recognizing a minority union and that such "prohibited conduct cannot be excused by a showing of good faith." *Bernhard-Altmann* . . . . By declining to examine an employer's subjective belief about a union's majority status, the standard we announce today aligns our treatment of "good faith" in this context with current law in these related areas.

D. Application and retroactivity

Having announced our new approach to remedial bargaining orders, we apply that framework to this case.

Here, the General Counsel alleged that [Cemex] violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union after the Union requested, by filing the December 3, 2018 petition, that [Cemex] recognize it as the exclusive bargaining representative of the employees. Further, . . . the parties litigated the question of the Union's card majority, and we have affirmed the judge's conclusion that a majority of unit employees had designated the Union as their bargaining representative by the end of November 2018. In addition, the parties stipulated to the appropriateness of the unit at issue. Finally, [Cemex's] extensive unfair labor practices detailed above required the election in this case to be set aside. Thus, we conclude, based upon the complaint allegations and record, that: (1) [Cemex] refused the Union's request to bargain; (2) at a time when the Union had in fact been designated representative by a majority of employees; (3) in a concededly appropriate unit; and then (4) committed unfair labor practices requiring the election to be set aside, violating Section 8(a)(5) under the standard we announce today.

The "Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage,"' unless retroactive application would work a "manifest injustice." . . . The Supreme Court has acknowledged the Board's authority to reconsider and change its law, characterizing the administrative process as a "constant process of trial and error."

[**Editor's note**: The Board found no manifest injustice here.]

iv. Response to the Partial Dissent

Our dissenting colleague advances several reasons for declining to join Section III of the majority's decision. We address these each in turn.

As a threshold matter, our colleague contends that our decision to overrule *Linden Lumber* is without precedential effect because it does not change the result for [Cemex] in this case. We respectfully disagree. Congress has delegated to the Board the authority to interpret the National Labor Relations Act and to set national labor policy. The Supreme Court has long recognized the Board's authority to change national labor policy through adjudication by adopting alternate permissible interpretations of the Act. Historically, the Board has modified policies through adjudication, including in cases in which the change in standard has not changed the result for the respondent in the case. . . .

Our dissenting colleague further contends that the Supreme Court's decision in *Linden Lumber* precludes judicial enforcement of bargaining orders issued under the new standard, and that we have provided no reasoned justification for overruling the Board's decision in *Linden Lumber*. These assertions fundamentally misapprehend both the several decisions in *Linden Lumber* and our decision today. . . .

[**Editor's note:** The Board next rejected the dissent's contention that the majority opinion conflicts with the Supreme Court's decision in Linden Lumber. The Board majority explained that the Court's five-Justice majority "held that in adopting the policy established in *Linden Lumber*, the Board acted within its discretion—not that the policy was mandated by the Act."]

Next our colleague contends that we present no reasoned justification for "overruling *Linden Lumber*, shifting the burden to file a representation petition from the union to the employer, and finding an 8(a)(5) violation and imposing a bargaining order if the employer fails to file that petition." . . . Contrary to our colleague, our decision places no burden on any employer beyond those imposed by the Act itself: to bargain collectively with a representative designated or selected by its employees pursuant to Sections 8(a)(5) and 9(a), and should it choose to petition for an election, to refrain from engaging in conduct that would interfere with that election. . . .

The core of our dissenting colleague's disagreement with the merits of our decision to overrule *Linden Lumber* is his contention that, in all but the most extreme circumstances, requiring an employer to bargain with a "card-majority union" runs counter to the policies of the Act because it deprives employees of their "right to vote in a secret-ballot election" and predictably risks forcing unions upon nonconsenting majorities of unit employees. This contention cannot bear scrutiny in the light of the plain language of the Act and controlling Supreme Court precedent.

To begin at the heart of the Act, the plain language of Section 7 guarantees employees the "right . . . to bargain collectively through representatives of their own choosing." . . . Section 9(a), in turn, defines a collective-bargaining representative as one "designated

or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." . . . And Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain collectively with a representative its employees have designated or selected pursuant to Section 9(a). . . . Accordingly, to the extent that the Act ensures, as our colleague asserts, a "right to vote in a secret-ballot election," this right derives from, and is exercised in the service of, the statutory right to bargain collectively through a representative designated or selected for that purpose by a majority of the employees in an appropriate unit. What our colleague calls a "card-majority union" is simply a representative "designated," within the plain meaning of the Act, by a majority of unit employees. Thus, any true statement about a "card-majority union" should also ring true if the phrase "card-majority union" is replaced by the statutory phrase "representative designated for the purposes of collective bargaining by a majority of employees in an appropriate unit." But our dissenting colleague's core contention cannot bear such a substitution: No one could seriously argue that a Board bargaining order entered as a remedy for an employer's refusal to bargain with the representative designated for that purpose by a majority of its employees in an appropriate unit frustrates the policies of the Act, deprives employees of a distinct "right to vote in a secret-ballot election," or risks forcing a union on a nonconsenting majority of unit employees.

The key to this apparent contradiction is that, based on our colleague's partial dissent, he does not appear to accept that a "card-majority union" *could be* a representative freely designated for the purposes of collective bargaining by a majority of employees. He expresses concern that workers who truly do not want to be represented may nevertheless sign cards designating a representative to avoid offending their coworkers, or because of ""group pressures," or because their employer has not yet had the opportunity to fully inform them of its views on the question of representation. In these circumstances, he posits, employees' freedom to choose for themselves is not a real freedom.

Our experience of labor relations and the administration of the Act suggests that our dissenting colleague exaggerates the inevitable impact of these concerns on the reliability of a union's card-based showing of majority support. But both our colleague's instincts about this matter and our own are really beside the point, because . . . the Supreme Court long ago authoritatively settled the issue as a matter of law. The *Gissel* Court addressed the specific question of whether authorization cards are such inherently unreliable indicators of employee desire that they may not establish a union's majority status and an enforceable bargaining obligation. The Court expressly rejected the several contentions underlying our dissenting colleague's position, that:

> [A]s contrasted with the election procedure, the cards cannot accurately reflect an employee's wishes, either because an employer has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth; and . . . that quite apart from the election comparison, the cards are too often

> obtained through misrepresentation and coercion which compound the cards' inherent inferiority to the election process. [*Gissel*, 395 U.S. at 602.]

The [*Gissel*] Court noted that "[t]he Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support," but concluded that "[t]he acknowledged superiority of the election process . . . does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice." The Court went on to hold that "[a]s for misrepresentation, in any specific case of alleged irregularity in the solicitation of the cards, the proper course is to apply the Board's customary standards . . . and rule that there was no majority if the standards were not satisfied. It does not follow that because there are some instances of irregularity, the cards can never be used; otherwise, an employer could put off his bargaining obligation indefinitely through continuing interference with elections."

The standard that we announce today is fully consistent with the *Gissel* Court's recognition that a free and fair election is the preferred method of ascertaining whether a union has majority support, as well as with its recognition that, where an employer engages in conduct disruptive of the election process, authorization cards or other nonelection evidence of majority status "may be the most effective—perhaps the only—way of assuring employee choice." Under this standard, an employer faced with a request for recognition is always free, without reference to its subjective belief about the validity of a union's claim of majority status, to test the union's claim by petitioning the Board for an RM election. Whether or not the employer chooses to petition for an election rather than recognizing the union, it is fully free, either after recognizing the union or prior to any election, consistent with Section 8(c), to express to its employees its views, arguments, or opinions on the question of representation, so long as such expressions contain no threat of reprisal or force or promise of benefit. The employer is also fully free to contest the union's claim by presenting evidence in a [Section 9(c)(1)(B)] hearing . . . that the union's showing of majority support is deficient because of irregularities in the procurement of cards or otherwise, or that the unit claimed by the union is inappropriate. In those circumstances, employees will have a genuine opportunity "to register a free and untrammeled choice for or against a bargaining representative." [*General Shoe.*, 77 N.L.R.B. at 126–27.] What the employer is not free to do, however, is to "put off [its] bargaining obligation indefinitely through continuing interference with elections." [*Gissel.*] If an employer, having petitioned for an election, proceeds to undermine the validity of that election as a showing of the true preferences of unit employees, the Board may, consistent with *Gissel*, rely on a prior nonelection showing such as authorization cards as "the most effective--perhaps the only--way of assuring employee choice." [*Gissel.*] The authorities cited by our dissenting colleague affirming that elections are the "preferred" method of determining employees' preference are based on a fundamental premise: that an election will be untainted by the employer's unlawful misconduct. As the Court in *Gissel* recognized, where that premise does not hold, elections may not adequately assure employee choice.

Because the new standard meets an employer's interference with a free and fair election by imposing a bargaining order based on its employees' objectively demonstrable current preferences, it properly focuses the analysis on the union's current majority status, rather than depending—as under the prior standard—upon speculation about the impact of the employer's coercive conduct on the free choices of some future contingent of employees. In this way, the new standard safeguards the freely expressed choice of a majority of current employees while minimizing the risk of imposing a union on a future majority whose support for the union has predictably eroded or been undermined during delays caused by the employer's unlawful conduct. By guarding against interference with employee free choice both at the time of card solicitation and in the runup to an election, the standard announced today thus preserves, rather than undermines employees' fundamental statutory right to bargain collectively through representatives of their own choosing.

Our dissenting colleague further contends that our decision today is unenforceable in the federal courts of appeals because it contemplates that bargaining orders may issue based on employer misconduct that the *Gissel* Court held would not sustain a bargaining order. This is incorrect, because bargaining orders under the new standard rest upon a fundamentally different rationale than those under *Gissel*.

The Court in *Gissel* held that the Board should issue a bargaining order if it concluded (1) that a future reliable election could not be held because of an employer's "outrageous" and "pervasive" conduct whose impact could not be eliminated by the Board's traditional remedies; or (2) that the possibility of conducting a future reliable election was slight because of the continuing impact of an employer's "less pervasive" misconduct; but that a third category (3) of "minor or less extensive unfair labor practices," would not sustain a bargaining order because they would not prevent the Board's traditional remedies from assuring a free and fair election at some undefined future date. [*Gissel*.] As discussed above, the Board and reviewing courts of appeals have regularly reached different conclusions about the likely impact of employers' unlawful conduct and the Board's traditional remedies upon employees' ability to exercise free choice in an election at an undefined future date—that is, whether particular misconduct supports a bargaining order under the *Gissel* framework's first or second categories, or falls short, in the third category. The inability of the Board and the courts to reach common ground on the line between conduct that will or will not sustain a bargaining order under the forward-looking *Gissel* framework has had the predictable, and unfortunate, result that Board bargaining orders in individual cases become increasingly less likely to issue or be enforced the longer litigation over unfair labor practices persists, creating obvious perverse incentives to prolong litigation, as discussed above.

The standard we adopt today addresses this persistent problem by replacing the *Gissel* standard's necessary speculation about the likely continuing impact of an employer's misconduct over some unpredictable span of time with an appropriate focus on the best currently existing objective evidence of a union's current majority status. Thus, . . . the Board may find a current bargaining obligation based on nonelection evidence where an

employer's misconduct has rendered a recent or pending election a less reliable indicator of current employee sentiment. Contrary to our dissenting colleague, then, a bargaining order under the new standard could not issue as a remedy for such "minor or less extensive unfair labor practices" as the Court found would not sustain a bargaining order under the *Gissel* rationale, but only as a remedy for an employer's violation of Section 8(a)(5) by refusal to bargain with a union whose status as a current majority-designated bargaining representative—within the plain meaning of Section 9(a)—has been established by the most reliable available means. . .

Editor's note: The Board next rejected the dissent's argument that under the new standard "it is virtually impossible for an employer *not* to commit a critical-period unfair labor practice that would require setting aside the results of an election, which means it is virtually impossible for an employer's RM petition *not* to be dismissed, for the employer *not* to be found to have violated Section 8(a)(5), and for a bargaining order *not* to issue." The Board majority concluded that the dissent's argument "depends upon an attenuated chain of speculative and exaggerated suppositions about how the Board will apply this and other standards going forward."

Editor's note: The Board also rejected the dissent's contention that the new standard should not be applied retroactively.

Editor's note: Amended Conclusions of Law deleted.

Amended Remedy

Having found that [Cemex] engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we amend the judge's remedy in the following respects. . . .

Having found that [Cemex] violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of its employees in an appropriate bargaining unit, while engaging in the conduct described above that undermined the Union's support and prevented a fair rerun election, we shall order [Cemex] to meet with the Union on request and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees, and, if an agreement is reached, embody such agreement in a signed contract.

The Board has held that where a union has not made a demand for recognition, [an employer] will be ordered to bargain with the union retroactively as of the date on which the [employer] initiated its campaign of unfair labor practices if, as of that date the union had obtained majority status in the bargaining unit. Alternatively, where [an employer] has denied a union's majority-supported request for recognition, the Board has ordered the [employer] to bargain with the union as of the date of the [employer's] denial of recognition. Here, . . .[Cemex] stipulated on December 13, 2018, that it declined to recognize the Union's claim to represent its employees in an appropriate unit. While [Cemex's] earliest unfair labor practices in this case began before the union had achieved majority status, the bulk of its misconduct took place after it had rejected the

Union's claim to represent its employees. Accordingly, we find that, consistent with precedent, [Cemex's] bargaining obligation should attach as of December 13, 2018, the date of [Cemex's] denial of the Union's majority-supported claim to recognition. . . .

Editor's Note: Board's Order omitted.

Footnotes

6 In light of our determination that an affirmative bargaining order is warranted, we find it unnecessary to order the judge's recommended access remedies or to reach [Cemex's] related exceptions. Absent a bargaining order, we would adopt these recommended remedies.

For the reasons stated in his separate partial dissent, Member Kaplan would not issue an affirmative bargaining order. Instead, he would order certain special remedies.

16 The term "25th hour video" reflects [Cemex's] strategy to present the videos to employees at the last permissible hour under the Board's prohibition on mass campaign speeches during the 24 hours preceding an election. *See Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953).

58 These include unfair labor practices found above: (1) foreman/batchman Dickson inviting driver Collins to quit; (2) VP/GM Forgey's threats of limited work opportunities; (3) Forgey's threat of discharge for engaging in protected strike activity; (4) Forgey's threat of indefinitely delayed wage increases; (5) superintendent Faulkner's threats of lost ability to learn and grow in the company; (6) area manager Turner's threat to driver Molina to discontinue help provided in the past; and (7) Turner's threat to driver Daunch to cease allowing Daunch to leave early for musical performances. We also affirm the judge's findings of several more objectionable threats not alleged as unfair labor practices: (1) Santana separately threatened employees with futility by telling drivers that they would not be able to achieve anything with the union because of Cemex's size; (2) Forgey threatened employees that [Cemex's] policy of providing work boots would be up for negotiation, a false assertion because California regulations require employers like Cemex to pay for footwear protection for their employees; and (3) Forgey threatened driver Ornelas individually by asking her to consider what she had to lose by supporting the Union in the context of various other threats at the January 29, 2019 Oxnard meeting. [Cemex] does not except to the judge's findings of these last two threats.

59 See, e.g., *Gissel*, above, 395 U.S. at 611 fn. 31 ("[C]ertain unfair labor practices [such as threats to close or transfer plant operations] are more effective to destroy election conditions for a longer period of time than others.").

[60] These are: (1) Dickson's instructions to Collins to remove union stickers; (2) Dickson's interrogation of Collins; (3) Turner's interrogation of Daunch; (4) Forgey's blaming the Union for delayed wage increases; (5) Charlson and Faulkner's overly broad directive against talking to union representatives on "company time"; (6) Charlson and Faulkner's discipline of Ornelas for talking to union representatives; and (7) Turner's promise of benefit to Shipp in exchange for opposing the Union.

Notes

1. Why does the Board order both a *Gissel* bargaining order and a *Cemex* bargaining order?

2. The new rules announced in *Cemex* are currently under challenge in the courts of appeals.

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 788. Replace the text of Note 2 with the following:

2. *Claremont* involves the concept of "effects" bargaining: even where a decision by management imposing a policy is not itself a mandatory subject of bargaining (here, recordkeeping designed to prevent racial bias in traffic enforcement), certain effects of the policy may be mandatory (*e.g.*, potential discipline resulting from the recordkeeping). Consider the critique of *Claremont's* rule by the *amici* for the employer along with the concurrence. Recall that even if only "effects" bargaining over a policy is mandatory, such bargaining usually must take place before the employer may implement the policy. Does "effects" bargaining raise different issues in the public sector than in the private sector?

During the COVID-19 pandemic, effects bargaining was a major issue in a number of jurisdictions regarding vaccination requirements and related policies. While jurisdictions varied, the most common approach was to hold that a public employer's decision to require a vaccine was a management right and therefore not a mandatory subject, but various aspects of a vaccination requirement were mandatory as effects (*e.g.*, exceptions to the policy, discipline for violating the policy, time off, and costs). *See* Will Aitchison, *Vaccine Mandate Litigation*, Public Safety Labor Group (Jan. 31, 2022) (collecting cases). *King County*, Decision 13825-A (Washington PECB, 2024), in holding that a COVID vaccine requirement was a permissive topic, distinguished NLRB precedent holding an annual flu vaccine requirement was a mandatory topic, *Virginia Mason Hospital*, 357 NLRB 564 (2011). The Washington board reasoned that the difference was that the COVID was a once-in-a-century global pandemic where the public possessed limited immunity to the virus. Is that distinction convincing?

While most of these cases involve employers imposing safety requirements, the same rules apply when removing such requirements. In *Rutgers v. AAUP-AFT*, 49 NJPER ¶ 49 (N.J. PERC Oct. 11, 2022), the union demanded to bargain over the employer's decision to drop a masking requirement. PERC rejected the union's request for a temporary injunction to keep the mandate but also held that the employer must make reasonable accommodations for certain employees.

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.

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 truck drivers 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?

3. As we have seen, the majority's *Glacier* opinion was very dependent on the allegations in the complaint stated as fact, and the Court's extrapolations from those "facts." Justice Jackson's dissent argued that a determination in such a fact-intensive matter should be left to the Board after a hearing, particularly where such a proceeding was already underway

In fact, a nine-day administrative hearing on the unfair labor practice charges had taken place before an Administrative Law Judge, and the matter had been fully briefed by the parties when the Supreme Court issued its decision on June 1, 2023. The next day, the ALJ promptly issued an Order directing the parties to file supplemental briefs addressing at a minimum:

> (1) whether and why the evidence adduced by the parties at the NLRB hearing is significantly the same or different from Glacier's complaint and additional factual allegations in the state proceeding that the Court accepted as true in finding that the Union "did not take reasonable precautions to protect Glacier's property from imminent danger resulting from the drivers' sudden cessation of work," and that the drivers' alleged conduct was therefore not even arguably protected by the National Labor Relations Act; and
>
> (2) whether and why that evidence warrants the same or a different finding in the NLRB proceeding.

The parties filed their briefs on June 20, 2023, and the ALJ issued his decision on December 27, 2023. In his decision, the ALJ found that the strike was protected and that Glacier violated Section 8(a)(3) and 8(a)(1) by disciplining the drivers. He held that

the union took reasonable precautions to protect Glacier's property from imminent danger.

In so holding the ALJ found that the facts as demonstrated in the witness testimony at the administrative hearing differed materially from the complaint allegations relied on by the Supreme Court. The facts the ALJ found that differed from the complaint's allegations were:

> •The Union called the strike on a day designed to avoid disrupting a mat pour—a complex nighttime job that, if interrupted, could have jeopardized the building's structural integrity. ALJD 6.
>
> •The Union called the strike at a time when the drivers could show greatest solidarity by walking off the job together. ALJD 6. It knew, though, that non-unit employees would be available to take care of the trucks and any leftover concrete could be safely dumped without environmental threat. ALJD 33
>
> •At the time the strike began, drivers were in various stages of their work. Only 19 of 53 drivers had full or nearly full loads. ALJD 11.
>
> •The Union gave repeated instructions to the striking drivers to return their vehicles to the employer's yard, secure them, wash them out, and let their supervisor know of the return. ALJD 6–8.
>
> •Most drivers followed these instructions. A few went above and beyond and finished their deliveries before striking. ALJD 12. Several drivers who returned trucks with concrete in them dumped the concrete and rinsed out the drums. ALJD 15. Others didn't dump the concrete but notified management they were returning the trucks. ALJD 15, 33.
>
> •All but one driver returned the trucks running, which automatically kept the drums turning, *Id.*
>
> • There was no emergency. When the mixer drums are turning, as happened here, it takes 2–3 hours before concrete hardens, and this time can be extended multiple times by adding water, sugar, or readily available chemicals. ALJD 15, 17, 32–33.
>
> • The Union did not time the strike to cause maximum damage to the Employer. ALJD 34.

The ALJ also found no violation arising from other aspects of the case, including that Glacier's filing of and maintenance of its lawsuit did not violate Section 8(a)(1). The parties have filed exceptions to the Judge's decision.

Page 896, add a new Note 5 as follows.

5. California has multiple public-sector labor statutes, and whether and under what circumstances unions have the right to strike remains unclear in some cases. For example, *Oakland Unified School Dist. v. Public Relations Board*, 2025 WL 1823225

(Cal.App., July 2, 2025) held that a one-day teachers' strike caused by employer ULPs was legal under the state Educational Employment Relations Act (EERA). The court first found that the language of the EERA was unclear as to the strike rights of employees it covered. After a detailed historical analysis, including a discussion of the *County Sanitation District* case, the court held that it should defer to the decision of the relevant state agency that the strike in this case was protected.

Page 899, add a new Note 6 as follows and renumber the remaining notes accordingly:

6. The COVID pandemic created some new issues in this area as well. *Andover Education Ass'n* and *Andover School Committee*, Case No. S.I.-20-8176 (Mass. Commonwealth Employment Relations Board, Sept 8, 2020) held that teachers had engaged in an illegal strike when, citing health risks, they attempted to perform pre-school year professional development activities in the school parking lot while refusing to enter school buildings. The decision stated that CERB was "not unsympathetic" to the union's concerns. But it cited the statutory definition of "strike," which included a refusal to "report to duty," and held that this phrase "means reporting not only when but where the employer has ordered its employees to report."

Pages 938-49, replace the *City of Helena* case with the following:

IN THE MATTER OF INTEREST ARBITRATION BETWEEN

EASTERN ILLINOIS UNIVERSITY AND IL FOP LABOR COUNCIL

Case No. S-MA-22-303 (Nov. 12, 2022), Marvin Hill, Arbitrator

I. BACKGROUND, FACTS AND STATEMENT OF JURISDICTION

This matter comes before the undersigned Arbitrator upon agreement of the parties, the Illinois Fraternal Order of Police Labor Council ("Police" or "Union") and Eastern Illinois University (EIU or "the Administration"). The parties have reached a tentative agreement on all but one issue: Wages. . . .

Of special note with regard to the bargaining unit, the FOP is the only police officers on campus. Currently, the unit consists of seven (7) full-time officers and two (2) trainees. The so-called authorized head count is 12 to 13, including sergeants but excluding lieutenants, potentially resulting in a net savings to EIU. . . .

It is undisputed that the University has both budget problems and declining enrollment issues (from 10,788 in 2010, to currently around 5,300, 4,585 if on-line students are excluded), two (2) situations that have not been duplicated in the Administration's view. Retention rates at the University have also declined. Compounding the problem for EIU and other schools, both nationally and in the State of Illinois, less people had children 18 years ago, meaning that less students are in high school and less

students eligible for universities. Enrollment is expected to drop by 15% in 2029.

The Parties' Wage Offers

At issue is salary for the bargaining unit for 2022, 2023, 2024 and 2025.

The Police final offer is 7.5% for 2022, 2.5% for 2023, 2.5% for 2024, and 3.0% for 2025 for patrol officers and sergeants, or 13.5% for the four-year period. The Union has elected to focus on two (2) of the Section 14 (h) criteria, *infra:* cost-of-living and external comparables. As noted, the Union's relatively high offer for the first year of the contract is based on the high cost-of-living (CIP).

The Employer's final offer is 1.25% for 2022, 1.50% 2023, 1.50% for 2014, and 1.50% for 2025 for both patrol officers and sergeants, or 5.75% over a four-year period.

The increase for 2019-2020 was 1.4%.

Evaluative Criteria - Section 14 (h) of the Statute

It was stipulated that the undersigned Arbitrator was to base his findings and decision upon the applicable factors set forth in Section 14(h) of the Illinois Labor Relations Act which, in relevant part reads as follows:

* * * *

5 ILCS 315/14(h) . . . the arbitration shall base its findings, opinions and order upon the following factors, as applicable:

(a) The lawful authority of the employer;

(b) Stipulations of the parties;

(c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs;

(d) Comparison of the wages, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

(e) In public employment in comparable communities. In private employment in comparable communities.

(f) The average consumer prices for goods and services, commonly known as cost of living;

(g) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all to her benefits received;

(h) Changes in any of the foregoing circumstances during the pendency of the arbitration proceeding; and

(i) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or private employment.

Furthermore, "It is well settled that where one or the other of the parties seeks to obtain a substantial departure from the party's *status quo,* an 'extra burden' must be met before the arbitrator resorts to the criteria enumerated in Section 14(h)." Additionally, where one party seeks to implement entirely new benefits or procedures (as opposed to merely increasing or decreasing existing benefits) or to markedly change the product of previous negotiations, the onus is on the party seeking the change." *Village of Maryville and Illinois Fraternal Order of Police,* S-MA-10-228 (Hill, 2011).

II. DISCUSSION

As indicated, this dispute involves one (1) *economic* issue (wages). All other issues have been resolved. The Act restricts an Arbitrator's discretion in resolving economic issues to the adoption of the final offer of one of the parties. 5 ILCS 315/14. Thus, and especially unfortunate in this case, under the statute there is no Solomon-like "splitting of the child." . . . .

Although the University has not entered an inability-to-pay defense, there is no serious argument that ability to pay considerations in the public sector simply amount to governmental priorities. Is the Employer funding a new roof in its pavilion or putting another half percent on the bargaining unit's base? To this end Arbitrator Peter Myers reflected on the weight that should be given to the current financial difficulties in the economy as follows:

> The economic situation that now faces all employers, public and private, is one factor that "normally or traditionally" should be taken into account when considering wages, hours and conditions of employment, pursuant to Section 14(h)(8) of the Act. The financial difficulties facing the Village as a result of the ongoing economic downturn therefore must be given appropriate weight and considered here. *Village of Western Springs and Metropolitan Alliance of Police, Western Springs Police Chapter #456,* S-MA-09-019 (Myers, 7/30/2010).

Arbitrator Ed Benn devoted most of his opinion in *State of Illinois and International Brotherhood a/Teamsters, Local 726,* S-MA-08-262 (1/27/2009, Benn) to an analysis of the "economic free-fall" which occurred in 2007. . . . Furthermore, many arbitrators have awarded a zero percent wage increase in the context of a multi-year award since the recession discussed by Mr. Benn. . . .

Overall, the University's financial picture is anything but enviable and cannot be dismissed from consideration. Indeed, the fact that the University has not entered an inability-to-pay argument is not dispositive of anything. As correctly outlined by Arbitrator Edward Clark in *City of Gresham* & *IAFF 1062* (1984), the fact that public management is able to pay a specific wage proposal is not grounds for awarding it. In the Arbitrator's words:

> Having observed that the City has the ability to pay an increase does not mean that the City ought to pay an increase unless it is satisfied that there will be some public benefit from such expenditure. The City exists for the service and benefit its residents not for the benefit of its employees. The careful management which characterizes the City of Gresham in matters such as this is confirmed by the high bond rating from Moody's, the widely respected financial rating service. Residents need many services such as police, parks, street repairs, court, in addition to fire services. In our system, the elected representatives of the people of Gresham make policy decisions on the apportionment of funds among a variety of public services based upon recommendations of its professional staff. The City must also consider the salary expectation of other employees besides firefighters and the reciprocal impacts from decisions relating to one classification of employee compared to another.
>
> * * * *

I credit the Administration's numbers and projections regarding its financial situation at EIU. Most problematic is the appropriation category of its income stream. Starting in 2016, appropriations took a huge hit with the state budget impasse. As indicated by Mr. McCann, Director of Business Services and Treasurer for EIU (16 years at Eastern): "It did recover by the time we got to '18 and then leveled off. We never did receive about 10 to $15 million of what our steady appropriation would have been." Mr. McCann went on to elaborate on the financial condition of the University: "Since 2012, which was the high point of our revenue, our revenue has been declining. The one exception is in '22. We did see some recovery at that point, but in general our revenue has been going down. In 2015, 2016, and 2017, that was basically caused by the loss of state appropriation." Asked the reason for EIU's revenue to continue to go down after the impasse, Mr. McCann replied: "It is lack of enrollment at the University. Our numbers have continued to decline. In 2021 we made a small recovery, but certainly not to the levels that we had before." In his view, pointing to EIU's ending fund balance, McCann asserted "there are no dollars there to spend." He maintained that EIU has been trying to build back unrestricted balances up to a level of three to six months' worth of expenditures. Right now we're running about two months' worth of expenditures at 19 million. . . . So if the state would stop funding us, we would have roughly two months' worth of expenditures within our fund balance to operate."

The financial criterion favors the Administration's position.

A. Focus of an Arbitrator in an Interest Dispute

> . . . .[A]rbitrators and advocates are unsure whether the object of the entire interest process is simply to achieve a decision rather than a strike, as is sometimes the case in grievance arbitration, or whether interest arbitration is really like mediation-arbitration, where, as noted by one practitioner, "what you do is to identify the range of expectations so that you will come up with a settlement that both sides can live with and where neither side is shocked at the result." . . . .
>
> . . . .[A]rbitrators attempt to issue awards that reflect the position the parties would

have reached if left to their own impasse devices. Recently, one Arbitrator/Mediator traced the genesis of this concept back to Arbitrator Whitley P. McCoy who, in the often-quoted *Twin City Rapid Transit Company* decision, 7 LA (BNA) 845, 848 (1947), stated the principle this way:

> Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon consideration of policy, fairness, and expediency, of the contract rights ought to be. In submitting … to arbitration, the parties have merely extended their negotiations, having agreed upon. . . . [T]he fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men, have voluntary agreed to? . . . . [The] endeavor is to decide the issues as, upon the evidence, we reasonable negotiators, regardless of their social or economic theories, might have decided them in the give and take process of bargaining. See, *City of Galena, IL,* Case S-MA-09-164 (Callaway, 2010).

Similarly, the late Chicago Arbitrator Harvey Nathan, in *Sheriff of Will County and AFSCME Council 31, Local 2961,* Case S-MA-88-9 (1988), declared that the award must be a natural extension where the parties were at impasse:

> [I]nterest arbitration is essentially a conservative process. While obviously value judgments are inherent, the neutral cannot impose upon the parties' contractual procedures he or she knows that parties themselves would never agree to. Nor is his function to embark upon new ground and to create some innovative procedural or benefits scheme which is unrelated to the parties' particular bargaining history. The arbitration award must be a natural extension of where the parties were at impasse. The award must flow from the peculiar circumstances these particular parties have developed for themselves. To do anything less would inhibit collective bargaining . . .
>
> The well-accepted standard in interest arbitration when one party seeks to implement entirely new benefits or procedures (as opposed to merely increasing or decreasing existing benefits) or to markedly change the product of previous negotiations is to place the onus on the party seeking the change … In each instance, the burden is on the party seeking the change to demonstrate, at a minimum:
>
> (1) that the old system or procedure has not worked as anticipated when originally agreed to or
>
> (2) that the existing system or procedure has created operational hardships for the employer (or equitable or due process problems for the union) and
>
> (3) that the party seeking to maintain the status quo has resisted attempts at the bargaining table to address these problems.
>
> Without first examining these threshold questions, the Arbitrator should not consider whether the proposal is justified based upon other statutory criteria.

> These threshold requirements are necessary in order to encourage collective bargaining. Parties cannot avoid the hard issues at the bargaining table in the hope that an arbitrator will obtain for them what they could never negotiate themselves. . . .

Chicago Arbitrator Elliott Goldstein had it right and said it best: "Interest arbitrators are essentially obligated to replicate the results of arm's-length bargaining between the parties, and to do no more." *Metropolitan Alliance of Police, Chapter 471,* FMCS 091103-0042-A (2009).[4]

There is no question that arbitrators, operating under the mandates of the Illinois statute (mandating final offer arbitrator by impasse item), apply the same focus as articulated by Arbitrator Goldstein and others. Interest arbitration is not the place to dispense one's own sense of industrial justice. . . . Careful attention is required regarding adherence to the evidence record put forth by the parties and, however difficult, coming up with an award that resembles where the parties would have placed themselves if left to their own devices. There is indeed a presumption that the bargains the parties reached in the past mean something and, thus, are to be respected.

B. Relevant Comparables

The parties are close, but not in complete agreement, on the relevant comparables.

1. External Comparables.

The parties agree that under IPLRA Section 14(h)(4), the following six (6) university entities and one City (Charleston) are deemed comparable to the Employer:

Comparable University	Enrollment Approximate	Census Population
University of Illinois, Champaign/Urbana, IL	45.578	127,795

[2] See also, *City of East St. Louis & East St. Louis Firefighters Local No. 23,* S-MA-87-25 (Traynor, 1987), where the Arbitrator, back in 1987, recognized the task of determining where the parties would have landed had management been able to take a strike and the union able to withhold its services. In Arbitrator Traynor's words.

> Because of the Illinois law depriving the firefighters of the right to strike, the Union has been deprived of a most valuable economic weapon in negotiating a contract with the City. There seems to be little question that if the firefighters had been permitted to strike, and did so, insisting on increased wages, public pressure due to the lack of fire protection would have motivated the City Council to settle the strike by offering wage increases. . . .

Management advocate and author R. Theodore Clark has argued that the interest arbitrator should not award more than the employees would have been able to obtain if they had the right to strike and management had the right to take a strike. . . .

Illinois State University, Normal, Illinois	22,932	53.594
Western Illinois University, Macomb, Illinois	13,339	15.052
Northern Illinois University, DeKalb, Illinois	23,486	40.290
Southern Illinois University, Carbondale, Illinois	20,310	21,741
Southern Illinois University, Edwardsville, Illinois	16.103	25,218
City of Charleston Illinois Police Department	NA	17,347
Eastern Illinois University, Charleston, Illinois	6,637	17,347

The Union also proposes the inclusion of the University of Illinois, Springfield, Illinois (with a population of 1113,394, enrollment 6,628), The Union notes that it has included U. of IL, Springfield, because it was established in the comps found by Arbitrator Briggs.

At all times the Administration differs on the importance of external comparables. In the Employer's view, “We believe you should give little weight to the comparables listed, essentially because Eastern is very different. At most, if you look at the universities, our testimony will be of those listed we're more like Western, less like the others.” The better comparables, argues Counsel for EIU, “are internal people.”

In a prior interest decision between these same parties . . . Chicago Arbitrator Steven Briggs found the following comparables relevant in resolving an interest dispute:

Illinois State University

Northern Illinois University,

DeKalb Southern Illinois University at Carbondale

Southern Illinois University at Edwardsville Western Illinois University

University of Illinois at Champaign University of Illinois at Springfield

To this end, the Union asserts it has a long-standing practice in this jurisdiction that it is imperative to take into consideration the labor-market influences of police departments in similarly-situated universities. While the University of Illinois at Champaign, Illinois is problematic as a comparable (because of its size), there is no dispute that unit members' work is comparable to Illinois. Geography, of course, also plays a part.

Arbitrator Steven Briggs, in *City of Mt. Vernon* & *IFOP,* S-MA-94-215 (1995) found geographic proximity and local labor markets as primary considerations in selecting comparables:

> . . . .It is axiomatic that communities used for comparability purposes in an interest arbitration proceeding should be located within the same local labor market as the community where the interest dispute exists. . . .Suffice it to say that in attracting and retaining qualified police officers, Mt. Vernon competes with communities lying within a reasonable commuting distance. The City has defines that distance as fifty miles, which is certainly not inordinately restrictive.

Significantly, Arbitrator Briggs found many of the comparables proposed by the Union as "just too far away to be meaningful for comparison purposes." Briggs determined that Dixon, Macomb, and Jacksonville -- more than 100 miles from Mt. Vernon -- were inappropriate comparables. He likewise found Mattoon, at 75 miles from Mr. Vernon, "as being outside of the local labor market in which Mt. Vernon competes for police officers." . . . .

Arbitrator Herbert Berman, in *City of Peru & IFOP,* S-MA-93-153 (1995), likewise provided an analysis of selecting comparables and declared:

> Geographic proximity and comparable population are the primary factors used to determine comparability. But these factors only establish the baseline from which comparisons may be drawn. . . . An adjacent city may draw largely from the same general labor market, but the nature of the work performed by the alleged comparable employees as well as bench-mark economic considerations may preclude its consideration for purpose of comparison. At some point, distance may foreclose consideration. Where that point lies is conjectural and might require a detailed study of the labor market and other economic and demographic factors. . . .
>
> In addition to population and proximity, critical factors are the number of bargaining-unit employees, tax base, tax burden, current and projected expenditures, and the financial condition of the community upon which the government must rely in order to raise taxes.

Arbitrator Lisa Kohn, in *City of Aurora & Aurora Firefighters Union, Local 99,* S-MA- 95-44 (1995) summarized the thinking of the arbitral community on comparability as follows:

> Thus, in selecting a comparability group, the arbitration panel should look to "those features which form a financial and geographic core from which a neutral can conclude that the terms and conditions of employment in the group having similar core features represent a measure of the marketplace." The features often accepted are population of the community, size of the bargaining unit, geographic proximity, and similarity of revenue and its sources. (emphasis mine).

For purpose of this award the six (6) comparables agreed to by the parties are adopted as relevant bench-mark jurisdictions. In addition, the City of Charleston, and its police department, where relevant, will be considered as an additional comparable.

2. Internal Comparables

Arbitrator Neil Gundermann, in *Village of Skokie & IAFF Local 3033* (1993), discussed the importance of the internal criterion and had this to say on the subject:

> Arbitrators in interest disputes frequently consider not only external comparables,

which the Illinois Public Labor Act mandates be considered, but internal comparables as well. Internal comparables are considered for at least two purposes: first, to determine if there is a pattern of settlements between the employer and its bargaining units which may be applicable to the dispute before the arbitrator; and second, to determine if there has been an historical pattern of settlements involving bargaining units.

Generally, where internal comparables are considered for the purpose of determining if there is a pattern of settlements it involves a situation where agreements have been reached between the employer and a number of bargaining units and either the union or the employer is attempting to break the settlement pattern.

* * * *

. . . [T]he University offers the following table with respect to relevant internal comparables:

Date	Non-Negotiated *	FOP	UPI**	AFSCME ***	CPI-U
FYlO	1.5%	3.0%	1.5%	3.0%	1.50%
FY 11	1.25%	1.00%	1.25%	1.0%	3.0%
FY12	1.00%	1.00%	1.50%	1.0%	1.7%
FY13	1.00%	1.25%	1.50%	1.00%	1.50%
FY14	0.00%	1.25%	1.50%	1.00%	0.80%
FY15	0.00%	1.25%	1.50%	0.00%	0.70%
FY16	0.00%	1.00%	0.00%	0.00%	2.10%
FY17	0.00%	0.00%	1.50%	1.00%	2.10%
FY18	1.00%	1.00%	1.50%	1.00%	1.90%
FY19	1.00%	1.00%	1.50%	1.00%	2.50%
FY20	1.00%	1.00%	1.40%	1.50%	0.60%
FY21	1.00%	1.00%	2.00%	1.25%	5.4%
FY22	1.25%	1.25%	2.25%	1.25%	9.10%
FY23	TBD		TBD	1.25%	

FY24	TBD	TBD	TBD
FY25	TBD	TBD	TBD

* Administrators, secretaries, office help

** University Professionals for Illinois include tenured and non-tenured track employees and a group of employees called ASFPs, which are assistants to the faculty.

*** Clerical and BSWs. Or building service workers, approximately 250.

Of special note here is the CPI for FY21 and FY 22, totals 14.5%.

While the above numbers favor the Administration, the trend in the CPI favors the Union's proposal (more on this later).

C. Wages

In *City of Aurora & IAFF 99* (Kohn, 1995), S-MA-95-44, Arbitrator Lisa Salkovitz Kohn . . . had this to say regarding the City's burden when requesting a change in benefits:

> When one party proposes to modify a benefit, that party bears the burden of demonstrating a need for a change . . . . [A] "break-through" of this sort is best negotiated at the bargaining table, rather than being imposed by a third-party process.

The importance of where the parties placed themselves in past contracts is an important consideration in rendering an award in an interest proceeding. . . .Research of arbitral case law indicates that the presumption is to leave any non *de minimis* changes in long-time benefits, especially insurance, to the parties themselves.

To this end, Arbitrator Paul Lansing. . . . considered changing the parties' health insurance benefit. The City proposed changing the *status quo* to an employee contribution of $25.00/month toward family coverage. Significantly, the City had already mandated a change in contribution rate by the non-unit employees. Concluding that the employer "has not demonstrated why the historic contract relationship between the parties should be changed at this time" (emphasis in original), the Arbitrator had this to say on the importance of the parties coming up with their own solution to rising insurance costs:

> While I think both parties recognize the necessity of formulating a new method of dealing with the rapidly increasing costs of health insurance, the better solution would be for the parties to negotiate the issue themselves rather than an outside neutral suggest or impose a solution upon them. For example, one objection of the Union was that a contribution to health insurance would effectively mean a reduction in the wage increase. Perhaps, the City would consider a one-time increase in wages above the comparables in exchange for the Union's acceptance of a required contribution to their own health insurance coverage.

Of note here, the Union accepted a 1.25% in a last contract. Asked why, Officer Shores had this to offer:

> . . . [I]t was still a big concern of the University of their financial wellbeing of where they've come from to where they've been. With the caveat that this would be the last contract that they could- that they would need this exception.
>
> . . . [T]he biggest thing for our officers was to lock in a twelve-hour work schedule and that was their goal and their hope in order to spend more time at home with their families.
>
> At the time it did work well because we did have the staffing. This was 2018- 2019 . . . [a]nd at that point in time we were between eleven and thirteen officers fluctuating. Fast forward to now, we're at seven. . . [I]t's gotten to the point with our staffing levels and our inability to retain or to hire new officers that we're not getting home time
>
> Important in the resolution of this dispute are the following tables:

2021 Patrol Salaries in the Union's Comparable Chart

Average for Union Comparables (7)	Starting Salary	After 1 Year	After 3	After 6	After 9	After 12	After 15	After 18	After 21	Top Pay
* * *										
Average	20.35	32.17	33.12	35.32	36.19	37. 35	38.02	38.26	38.93	9.68
EIU	23.04	26.76	28.04	28.20	28.37	28.54	28.69	28.88	29.06	29.55
Dollar difference from average	(-7.31)	(-5.41)	(-5.08)	(-7.12)	(-7.82)	(-8.81)	(-9.33)	(-9.38)	(-9.87)	(-10.13)
Percent from average	-31.73%	-20.22%	-18.11%	-22.25%	-27.55%	-30.88%	-32.53%	-32.47%	-33.97%	-34.28%

What stands out for a patrol officer in 2021 is this: The bargaining unit is dead last in every category relative to the bench-mark jurisdictions, and the difference only gets worse as an officer progresses to the top pay (which is a staggering 34% less than the average for the comparables). The rankings are consistent for 2022, 2023, 2024 and 2025) given, of course, that the Union's assumptions (where the Union based assumptions on averages) are used. The trends are even worse for the sergeant classification.

* * * *

Similar to patrol officers, the sergeants' salaries relative to the comparable bench-mark jurisdictions get worse as one progresses through the schedule. To illustrate, after 21 years the sergeants are almost 45 percent lower than the average for the

comparables. A sergeant will go from (negative) -34% to (negative) -45% as he or she travels up the schedule.

Is there cause to reverse these trends?

The situation at EIU is comparable to the problem of inequality in America. In short, the rich will always get richer relative to the poor because they start from a higher base. If everyone in the comparable bench-mark jurisdictions advance at, say, a constant average rate, 2.0 to 3.0%, EIU will fall further and further back as the unit is starting from dead last. EIU is not even close, as I read the numbers. While one seldom sees a 7.5% increase in the first year of a four- year contract, anything less really places the unit in a comparative "black hole." . . . .

The Administration's response that "this is Eastern's culture," that "we are not going to be the top payer, we're going to be near the bottom, unfortunately," however well-intended and true, is not acceptable under the statute. Again, the bargaining unit is not only behind their comparables, they are declining at an increasing rate, especially at the higher steps.

Effect of the CPI in Evaluating the parties' Final Offers

In recent years, a non-factor. Circumstances, however, have changed.

The inflation forecasts from October 2022 until the end of 2023 produced by the Federal Planning Bureau (FPB) are based on observations until September 2022 from Statbel (the Belgian statistical office). . . . On the basis of these monthly inflation forecasts, average consumer price inflation are estimated to be 9.3% in 2022 and 6.7% in 2023, compared to 2.44% in 2021 and 0.74% in 2020. The average growth rate of the so-called "health price index," which is used for the price indexation of wages, social benefits and house-rent, should be at 9.0% in 2022 and 7.3% in 2023,compared to 2.01% in 2021 and 0.99% in 2020. . . .

Using the Union's numbers, the increase in the consumer price index (CPI) is around 15% for the last two years. And notwithstanding the recent efforts of the federal reserve to quell inflation, there is no reason to believe that inflation (which is worldwide) will moderate.

Bottom line here, while not dispositive of the outcome in this case, trends in the CPI clearly favor acceptance of the Union's offer. The Union is not only dead last relative to the comparables, but is experiencing a high cost of living, the worst of both worlds.

Size of the Bargaining Unit and its Functions Aside From Law Enforcement

The Union, through Officer Jeremy Shores, testified that when he joined the force in 2018, there were 12 officers in the unit. In 2019 there were 13. Four officers have left since the current Administration has taken over, three of the four for financial gain, according to Mr. Shores.

Officer Shores went on to assert that the unit is the only 24-hour operation on campus other than a couple of individuals who operate the steam plant. He continued:

> Anything in the middle of the night, fire alarms, electrical issues, and kind of plumbing leaks . . . it's the police department that will find these and call in the appropriate people. When it snows here, we kind of act as grounds crew to make sure that the lots are cleared off. . . We get any type of flood, we're shutting down buildings. . . . So it's more than just the law enforcement role. It's essentially campus caretaking.

* * * *

Currently, the unit works 12-hour shifts. Mr. Shores asserted that "night shifts are at a bare minimum and "attached to the not having enough officers, officers struggle to take time off." Further, 18-hour shifts are becoming more and more frequent. . . . Apparently, because of staff shortages, EIU cannot operate at any other shift than a 12-hour assignment.

Management counters by asserting that EIU may hire officers at this time, but there is a process that must be observed. Candidates have to take the knowledge test and also have to pass the "power" test, which EIU has scheduled for October 29th.

The attrition factor in the unit and current work schedule of officers favors the Union's final offer. Also of note is a realization that the unit at EIU really is a campus guardian, making it eligible for a good citizen recognition regarding the job performed. . . .

D. Conclusion

This case engenders a "Draconian choice," one on the low and the other on the high side for the first year. This, alas, is the task under final offer arbitration. Awarding of the Administration's offer will do little to alleviate the abysmal wage situation the bargaining unit finds itself in. In contrast, awarding the Union's final offer is contrary to the internal comparables (at least for year one) and the overall financial and enrollment situation facing the university. Still, even with the Union's offer the unit will hover near the bottom of the external comparables. Of note here, the unit has been cut to the bone, with officers performing functions external to that traditionally performed by police officers. Add to this the high rate of inflation for the prior two years, on balance the FOP advances the better case. . . .

The Union's final offer on wages is awarded.

Page 950, replace Note 2 with the following:

2. The Illinois statute applicable to this case requires "final offer" arbitration for economic issues. First, why might a statute distinguish between "final offer" for economic issues and "conventional" arbitration for other types of issues? Second, even though there was only one issue in the *Eastern Illinois University* case, the arbitrator still explicitly bemoaned the "Draconian choice" between offers he believed were on the high and low sides respectively. This is a common complaint of arbitrators about "final offer" systems.

For example, In *City of Helena Montana and IAFF, Local 448* (BOPA Case #5-2010 (407-2010) (April 19, 2010), another case that featured only one economic issue, arbitrator Jeffrey Jacobs criticized the final offer total package model of the relevant Montana statute. "[T]here are many times when one party's position is reasonable and justifiable in one respect while in some others another party's position may also have considerable merit." But the final offer model does not permit finding "a figure somewhere in the middle." To the extent arbitrators comment on the type of arbitration in their decisions, this is by far the most common attitude.

Washington State Dept. of Corrections v. Teamsters Local 117, (Case 140162-1-24 (Sept. 24, 2024) is an exception. There, the arbitrator encouraged the parties to adopt ground rules for their bargaining that would require final offer, issue-by-issue arbitration, in order to get more realistic final offers.

What are the best arguments in favor of and against final offer models? For and against conventional arbitration?

Page 950, add to the end of Note 5:

Does the model of making economic issues final offer while using conventional arbitration for non-economic issues help alleviate this problem? Might it cause other problems?

Page 951, add a new Note 9, as follows.

9. The arbitrator in *Eastern Illinois University* explained that the goal of interest arbitration is to try to achieve the result the parties most likely would have reached. This is a common claim. *See, e.g.*, *Iowa City Ass'n of Professional Firefighters, IAFF Local 610 & City of Iowa City*, Case #0323 (Arbitrator Loconto, May 30, 2024): "As a substitute for a bargained resolution, interest arbitration proceedings are intended to approximate the intent of the parties and produce a result that tracks the agreement that most likely would have been reached absent an arbitrator's intervention." How, specifically, should an interest arbitrator try to implement this goal? Consider also, when reading the next subsection, whether there is any potential tension between this approach on one hand, and on the other, using the criteria that statutes require interest arbitrators to use in making their decisions.

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.

Page 1058, add a new note 8:

For a recent § 8(e) case, see UFCW, Local 135, 373 NLRB No. 77 (Jul. 19, 2024). The Board held that a contract term that (first negotiated by the union and Ralph's Grocery in 1964) was an unlawful hot-cargo clause. Specifically, the contract contained a work-preservation clause that covered employees working in "leased departments" – store departments run by "lessees, licensees and concessionaires" – as well as typical store employees. Applying decades-old precedent, the Board held that this clause went beyond preserving unit work, because it regulated decisions by other employers.

Chapter 13

Page 1123, delete final paragraph starting with "Moreover," including the block quote and replace with the following:

Moreover, with respect to how cases will be handled where deferral where *Collyer* deferral is inappropriate, typically where the unfair labor practice issue is being processed through the grievance-arbitration machinery and there is a reasonable chance that use of that machinery will resolve the dispute or put it to rest, the Regions will follow the deferral procedures under *Dubo Manufacturing Corp.*, 142 N.L.R.B. 431 (1963), in accordance with the NLRB, UNFAIR LABOR PRACTICE CASEHANDLING MANUAL, § 10118.1(c) (citing GENERAL COUNSEL MEMORANDUM, GC 73-31, ARBITRATION DEFERRAL POLICY UNDER *COLLYER*—REVISED GUIDELINES, May 10, 1973, at p. 38). That section states:

> Under the Board's *Dubo* policy, unlike the *Collyer* policy, a charging party is not required to utilize a grievance procedure or face dismissal of its charge and is not entitled to appeal the *Dubo* deferral to the General Counsel. Thus, the Regional Office will defer under Dubo only if the charging party has initiated, and continues to process a grievance involving the same issue, and elects to remain in the grievance procedure.

Page 1129, insert note 5:

5. In 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA), 9 U.S.C. §§ 401–402, Pub. Law No. 117-90, 136 Stat. 26, which amended the Federal Arbitration Act (FAA) to invalidate and make unenforceable mandatory arbitration of sexual harassment and sexual assault cases.

What effect will this law have on collective bargaining agreements that call for mandatory arbitration of sexual harassment cases?

Page 1140, after Problem 13.2, add the following Note:

In an unpublished decision, a Pennsylvania appellate court, over a dissent, cited a "dominant public policy interest in prohibiting discrimination" in refusing to enforce an arbitrator's decision. The arbitrator had reinstated a campus police officer who had made various social media posts that denigrated, *e.g.*, Muslims, Blacks, Mexicans, and gays and lesbians. *Pa. System of Higher Educ., Kutztown University v. Pa. State System of Higher Educ. Officers Ass'n, PASSHE Officers Ass'n*, 2024 WL 190117 (Pa. Cmmwlth Ct., May 1, 2024). The court used a more expansive reading of the public policy exception than courts use for private sector cases. What are the best arguments for and against this result? Does it matter why the arbitrator granted reinstatement? In this case, the parties had agreed that the arbitrator's award drew its essence from the relevant CBA. The arbitrator's rationale for reinstatement was that the University did not have a social media policy, and that therefore the employee lacked notice that his off-duty Facebook posts could result in discipline.

Chapter 14

Page 1172, add the following to the end of note 3:

For a recent example DFR case, see *Amalgamated Transit Union, Local 689*, 373 NLRB No. 49 (Apr. 26, 2024) (union did not violate DFR when union steward slapped member for insulting her, because the slap was personal rather than union-related; additionally, the union did not violate the DFR by suggesting that if the employer fired the steward, it should also fire the employee who was slapped, because the union's statement was intended to convince the employer not to fire the steward).

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 (enacted in 2022) allows public-sector unions to charge non-dues-paying bargaining unit members for the cost of representation in arbitration proceedings, and to decline arbitrations on behalf of bargaining unit members who refuse to pay these costs.

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?