Work Law

CASES AND MATERIALS

FOURTH EDITION

2024 SUPPLEMENT

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Chapter 1 – Origins

C. The New Deal Labor Legislation

1. The Labor Laws

Page 31, Note 3.

Add the following text at the end of Note 3:

Unfair Labor Practices During the Pendency of a Representation Election. In *Cemex Construction Materials Pacific, LLC*, 372 N.L.R.B. No. 130 (2023), the Biden Board established a new framework requiring employers to respond to a union bargaining demand based upon a majority authorization card count either (1) by recognizing the union and bargaining, or (2) by promptly filing itself a petition seeking an election. If the employer chooses the second path and commits an unfair labor practice, the election petition will usually be dismissed and the Board will order the employer to bargain with the union based upon employees' prior designation of the union through authorization cards as their representative for collective bargaining purposes. Under prior law, an employer could simply decline the union's demand for recognition and force the union to initiate the filing of an election petition, and if the employer committed unfair labor practices while the petition was pending, the Board would issue a remedial order and order a re-run election. Only where the employer committed egregious or hallmark violations that destroyed the possibility for a free and fair election would the Board issue a bargaining order. Unions had long advocated for a card check recognition requirement, arguing that authorization cards are the best evidence of uncoerced employee views. Legislative efforts, including the Employee Free Choice Act and most recently the Protect the Right to Organize Act, failed. While not a card check recognition right, the *Cemex* framework functions as a deterrent for employer election misconduct by conferring majority status on the union for bargaining purposes based on cards.

Remedies. In typical cases when employers violate workers' NLRA rights, employers have been required to make wrongfully terminated employees whole through backpay and reinstatement. The NLRB recently clarified the scope of its power to order make-whole relief. In *Noah's Ark Processors, LLC*, 372 N.L.R.B. No. 80 (2023), *aff'd*, *NLRB v. Noah's Ark Processors*, 98 F.4th 896 (8th Cir. 2024), the Board imposed a wide range of potential remedies in cases involving parties who "have shown a proclivity to violate the Act or who have engaged in egregious or widespread misconduct." The Board ordered the employer to "make unit employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms" suffered as a result of the employer's unfair labor practices. *Id.* at *13. It also provided a non-exhaustive list of additional potential remedies, including an explanation of rights, a reading of rights aloud to the employees, an explanation of rights mailing, the presence of managers or supervisors at the reading of rights, a requirement that responsible representatives of the offending party sign the Board's notice, the publication of notices and explanations-of-rights in local publications, an extended posting of notices and explanations of rights, and visitation by the Board to inspect bulletin boards to ensure that the required postings are in place. The make-whole remedy has obvious significance for employees. Why do notice postings and readings of rights matter? What benefits do they have for unions?

Chapter 2: The Contemporary Era—Shifts in the Demographics and Structure of Work

A. Changes in the Structure of Work

Add the following text on page 57, at the end of Section A.

The Effects of the COVID Pandemic on Workers and Employers

Excerpt from BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK: ADVANCED INFORMATION TECHNOLOGIES, LABOR LAW, AND THE NEW WORKING CLASS (2023):

Introduction: COVID and the Technological Class Divide. COVID-19 upended the American economy—but not its class, gender, and racial hierarchies. While the coronavirus did not discriminate based on income or race, exposure, complications, and death skewed heavily along those lines. A major factor in individuals' total risk was whether they could work remotely, which revealed a longstanding technological class divide. Under social distancing mandates, professionals retreated to their homes or second homes, using new videoconferencing platforms to keep working—designing products, analyzing data, writing legal briefs, coordinating strategies, and so on. This was especially trying for parents who had to care for children as they did their own jobs, and the burdens of childcare fell disproportionately on women. Yet professionals had it comparatively easy. Their relative comforts depended on armies of low-wage workers in a vast service economy, who had to perform their jobs in person. Those workers, who are disproportionately nonwhite, had a very different relationship with technology. Rather than using it to create goods and services or to manage enterprises, those workers were often managed *by* technology, receiving orders and even official discipline through apps, tablets, and the like.

Many canonical images from the pandemic juxtaposed US companies' stunning technological sophistication with their workers' vulnerability. Amazon warehouse staff—who work alongside armies of robots and whose every task is assigned and monitored by artificially intelligent devices—became infected early on because the company did not maintain physical distancing or provide masks in the workplace. Workers at grocery stores and many restaurants faced similar risks of infection even as they were monitored by point-of-sale devices that tracked how long they took to perform certain tasks. The potential scope of the app-based gig economy also came into focus as delivery platforms like Instacart and DoorDash scaled up to meet consumer demand. Their workers needed to enter businesses and homes and interact directly with customers, leaving them at a high risk of infection, and were supervised, demoted, and even fired via smartphone apps.

The pandemic therefore highlighted and exacerbated long-simmering grievances in the US's economy and society. Many workers simply reached their breaking point and began to protest against dangers and mistreatment. Early in the pandemic, health-care workers who used cutting-edge medical technologies called out their employers' failure to provide them with adequate safety

equipment. Many others followed suit, walking out of warehouses, meatpacking and poultry plants, fast food restaurants, and other businesses, to the point that some believe that COVID sparked a bona fide strike wave. As pandemic restrictions began to ease in 2021, many companies struggled to staff back up, especially in the hospitality industry. Some longtime restaurant and hotel workers told reporters that they were unwilling to tolerate such risks again, or they were exhausted after years of physically grueling service work. COVID was the final straw. Then, 2022 saw a major upsurge in worker organizing, including successful unionization drives at numerous Starbucks locations, and at an Amazon warehouse on Staten Island where key worker grievances included lax safety protocols and automated productivity monitoring.

A decade from now, scholars may view the coronavirus pandemic as the end of an era in the American political economy. That era began in the late 1970s and was defined both by astonishing technological progress and by exponential growth in precarious service jobs….[T]hose trends—in technological development and in the degradation of work—were completely intertwined, in the sense that companies increasingly used new technologies to limit workers' power. [Moreover], our labor laws—that is, the entire complex of US laws constituting and governing work—enabled companies to use technology in that manner. Over the same period, companies established broad rights to gather data on workers and their performance, to exclude others from accessing that data, and to use that data to preempt worker organizing. Put more formally, companies have used their *legal* and *technological powers* to suppress workers' *associational power*, driving down wages and eroding working conditions. These long-running developments yielded many of the problems that exploded into the public eye under COVID: low wages, meager benefits, lean staffing, unpredictable schedules, lack of basic safety protocols, and misclassification of employees as independent contractors.

Notes

1. The Ambiguities of "Essential Work." Americans' relationship to work changed during the pandemic, in ways that are still coming into focus. On the one hand, the sacrifices endured by health care and other workers, as well as widespread unemployment due to lockdowns, brought public attention to questions of work and welfare. As you may recall, early in the pandemic residents of New York and Northern Italian cities held rounds of applause for health care workers on their apartment balconies each night, and many hospitals put up banners with slogans like "Heroes Work Here." Congress also extended various temporary financial and other benefits to workers. An initial relief package provided federally-funded paid sick leave for COVID-related issues, as well as funding for state unemployment insurance systems to provide supplemental benefits. (The unemployment insurance system is discussed in Chapter 5, and the Family Medical Leave Act—which establishes rights to *unpaid* leave—is discussed in Chapter 9). The paid sick leave mandate expired at the end of 2020. Families First Coronavirus Response Act, Pub. L. No. 116-127 (2020). A second relief bill extended unemployment benefits, gave cash benefits to working families, and increased the child tax credit. American Rescue Plan, Pub. L. No. 117-2 (2021).

At the same time, as historian Gabriel Winant wrote in a recent book, the public's expressions of support and admiration for health care workers "did not make up for weeks with insufficient protective gear, insufficient staffing and training, or refusal of hazard pay." Unable to refuse to work due to economic necessity or a sense of duty, "thousands [of health care workers] became

sick and died," a majority of whom were women. GABRIEL WINANT, THE NEXT SHIFT: THE FALL OF INDUSTRY AND THE RISE OF HEALTH CARE IN RUST BELT AMERICA 264 (2021). Others endured grueling schedules, months in which they barely saw their families, and the mental health toll of witnessing death on a daily basis. Gig economy workers, especially drivers who delivered groceries and other basic goods, were also essential in the sense that many families could not have survived without their efforts. As Winant provocatively asked of health care workers, "What do we mean when we as a society call these workers 'essential'? We evidently do not mean that they are owed substantive recognition or power, money or status, for their efforts. We mean, rather, that whether they like it or not, they owe us something."

2. The "Great Resignation"? Regardless of whether one agrees with Winant's more pessimistic assessment, the combination of federal financial support and very challenging work experiences led many workers to re-evaluate what they wanted from their jobs. Many workers quit their jobs during the pandemic, either to move to another job or to leave the workforce entirely. *See generally* The Daily Podcast, *Stories from the Great American Labor Shortage*, N.Y. TIMES, Aug. 9, 2021. Some did so to start independent businesses. Victoria Gregory, Elisabeth Harding, and Joel Steinberg, *Self-Employment Grows during COVID-19 Pandemic*, FEDERAL RESERVE BANK OF ST. LOUIS, On the Economy Blog (July 5, 2022). Others, especially women, quit because they felt it was not possible to work full-time and supervise their children's learning. As noted in the Rogers excerpt above, many businesses, especially in hospitality, then found it difficult to staff back up after the pandemic. Some companies suggested that generous unemployment benefits were deterring workers from returning—while restaurant and hotel workers told reporters they were simply worn out from years of grueling schedules and low pay. The Daily Podcast, *Great American Labor Shortage*. In popular discourse this development became known as the "Great Resignation."

As time progressed, however, the data didn't fully bear out the story of a widespread retreat from work. One study suggested that the record number of quits in 2021 was largely an effect of older workers' decisions to retire, especially given the acute threats that COVID posed to older individuals. Joseph Fuller and William Kerr, *The Great Resignation Didn't Start with the Pandemic*, HARVARD BUSINESS REVIEW, Mar. 23, 2022. *See also* Miguel Faria e Castro, *The COVID Retirement Boom*, FEDERAL RESERVE BANK OF ST. LOUIS, Economic Synopses, 2021 No. 25 (Oct. 15, 2021) (finding that by August 2021 there were "slightly over 2.4 million excess retirements due to COVID-19," or retirements that would likely not have occurred but for the pandemic). Fuller and Kerr also found that many other workers moved between jobs rather than leaving jobs entirely, in a development they called "reshuffling." Another study compared quit rates in leisure and hospitality to those in manufacturing and construction, and found that "most quits in the leisure [and hospitality] industry were driven by job switches, whereas in manufacturing and construction they were not." In other words, workers in the leisure and hospitality industry tended to move into different jobs, while those in manufacturing and construction tended to leave the workforce. Serdar Birinci and Aaron Amburgey, *The Great Resignation vs. The Great Reallocation: Industry-Level Evidence*, FEDERAL RESERVE BANK OF ST. LOUIS, Economic Synopses, 2022 No. 4 (Mar. 4, 2022).

Nevertheless the high number of quits, and high demand for workers in many sectors, did lead to a bona fide labor shortage, giving workers substantially more bargaining power than they had in recent memory. As a result, a New York Times reporter suggested in May of 2022, workers were "recalibrating what they expected from their employers." Many lower-wage workers moved

into jobs that offered higher pay and guaranteed full-time hours. White collar workers, for their part, often pushed to retain some of the autonomy they had gained while working remotely during the pandemic. As of May 2022, "just 8 percent of Manhattan office workers [were] back in the office five days a week." Emma Goldberg, *All of Those Quitters? They're at Work*, N.Y. TIMES, May 13, 2022. *See also* Paul Krugman, *What Ever Happened to the Great Resignation*, N.Y. TIMES, Paul Krugman Newsletter, Apr. 5, 2022. Those trends are still playing out in 2024.

3. "Striketober." Like the trend toward retirements, the strike wave referred to in the Rogers excerpt may have pre-dated COVID. It arguably began with a major teachers' strike in West Virginia in 2018, which was followed by teachers' strikes in Arizona, Kentucky, Oklahoma, and Chicago, among other places. As a result, more workers participated in major strikes that year—defined as strikes involving at least 1,000 workers—than in any year since 1986. U.S. Dept. of Labor, Bureau of Labor Statistics, *20 Major Work Stoppages in 2018 Involving 485,000 Workers* (Feb. 19, 2019). That trend continued in 2019 then slowed during the pandemic. But in the second half of 2021 there were a number of significant strikes among unionized workers including nurses, telecommunications workers, and factory workers at Kellogg's and John Deere. Jonah Furman and Gabriel Winant, *The John Deere Strike Shows the Tight Labor Market Is Ready to Pop*, INTERCEPT (Oct. 17, 2021). The United Auto Workers won a major strike against the "Big Three" automakers in 2023, then began seeking to organize major non-union auto plants across the country. David Shepardson and Joseph White, *UAW Clinches Record Detroit Deals, Turns to Organizing Tesla, Foreign Automakers*, REUTERS.COM, Nov. 20, 2023.

In some cases, unionized workers decided to strike after making sacrifices to help their employers survive during the pandemic, only for the employers to demand concessions later on. As one unionized worker told a New York Times reporter, "We were essential….They kept preaching, 'You get us through that, we'll make it worth your time.' But we went from heroes to zero." That worker's company, a bottling plant near Louisville, KY, proposed in collective bargaining to reduce overtime pay. Workers at John Deere similarly told reporters they were frustrated that the company was seeking to eliminate pensions for new workers, despite making record profits. Noam Scheiber, *How the Pandemic Has Added to Labor Unrest*, N.Y. TIMES, Nov. 3, 2021.

To be clear, major strike activity remains substantially lower than it was in the 1960s and early 1970s. *Id.* But major strikes don't capture the whole story, because the DOL does not gather systematic data on smaller strikes. During the pandemic, researchers at Cornell University's School of Industrial and Labor Relations began documenting smaller strikes during the pandemic and identified "265 work stoppages involving approximately 140,000 workers in 2021." They also found that the number of strikes and worker involvement "increased considerably in October and November of 2021," in a phenomenon that labor observers called "Striketober." Perhaps most interestingly, almost a third of the strikes were by non-union workers. JOHNNIE KALLAS, LEONARDO GRAGEDA, AND ELI FRIEDMAN, ILR WORKER INSTITUTE LABOR ACTION TRACKER, ANNUAL REPORT 2021 (Feb. 21, 2022). As Chapter 8 discusses, the National Labor Relations Act gives workers the right to act collectively and to strike regardless of whether they are unionized or seeking to unionize.

4. A Unionization Surge. In addition to moving between jobs and striking with greater frequency, workers sought to unionize in substantially higher numbers in recent years. One cause of the increase in representation petitions was ongoing unionization efforts by Starbucks workers.

Starbucks has around 9,000 corporate-owned locations in the United States, none of which were unionized before 2021. After two Starbucks stores in Buffalo, New York unionized in December 2021, workers at hundreds of Starbucks locations across the country began seeking to organize as well. According to data gathered by political science professor Kevin Reuning, as of late July 2024, workers at over 475 Starbucks stores had unionized while just 81 stores voted not to unionize. UNION ELECTION DATA, http://unionelections.org/data/starbucks/ (last checked July 30, 2024). Workers have also formed the first-ever unions at other prominent companies including Amazon, Apple, and REI. *See, e.g.*, Karen Weise and Noam Scheiber, *Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor*, N.Y. TIMES, Apr. 1, 2022; *Apple Workers Vote to Unionize at Maryland Store*, ASSOCIATED PRESS, June 19, 2022.

In addition to creative organizing efforts, at least two macro-level factors may have contributed to the Starbucks workers' success so far. First, Americans' opinion of unions and organized labor has become much more favorable in recent years. Megan Breban, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP, Sept. 2, 2021. Second, the General Counsel of the NLRB under President Biden, who helps to set the agency's priorities, has taken aggressive steps to protect workers' rights to unionize. *See, e.g.*, Noam Scheiber, *N.L.R.B. Counsel Calls For a Ban on Mandatory Anti-union Meetings*, N.Y. TIMES, Apr. 7, 2022.

Add the following text on page 76, at the end of note 1:

Two cases cited in note 1—*Razak v. Uber Techs* and *Lawson v. Grubhub*—were vacated and remanded on appeal. In *Razak v. Uber Techs., Inc*. 951 F.3d 137 (3d Cir. 2020), the Third Circuit found that there was a disputed issue of material fact as to whether the employer exercised sufficient control over the drivers, so summary judgment on the issue of whether drivers are employees under the FLSA was improper. In *Lawson v. Grubhub, Inc.*, 13 F.4th 908 (9th Cir. 2021), the Ninth Circuit ruled that California Proposition 22 did not apply retroactively, and therefore Lawson could proceed under the ABC test for employment (which is discussed in notes 2 and 3, casebook pp. 76-77). The court vacated the judgment for Grubhub on Lawson's minimum wage, overtime, and expense reimbursement claims; and remanded to the district court to apply the ABC test for the minimum wage and overtime claims, and to determine whether the ABC test should apply to the expense reimbursement claim).

Add the following text on page 78, at the end of note 3:

Gig-economy companies sponsored and won a ballot measure in California in 2020, known as Proposition 22, that exempted them from the ABC test and therefore enabled them to continue to treat drivers as independent contractors. California Proposition 22 (2020). Challengers argued that the legislation was unconstitutional because it would limit the state legislature's ability to oversee and govern workers' compensation law. The California Supreme Court rejected the challenge in a unanimous opinion in July 2024, finding the measure constitutional because the electorate through the initiative process has the continuing power to legislate on matters affecting workers' compensation. *Castellanos v. State of California*, 2024 Cal. LEXIS 3981 (July 25, 2024). Other states are considering similar ballot initiatives, including Massachusetts. *See* Katie

Lannan, *Gig-economy driver ballot questions cleared to go before Mass. voters this fall*, GBH NEWS (June 27, 2024), https://www.wgbh.org/news/politics/2024-06-27/gig-economy-driver-ballot-questions-cleared-to-go-before-mass-voters-this-fall.

Joint Employment

Add the following text on page 82:

In February 2020, the Trump NLRB adopted its joint employer rule, pursuant to which an employer would be deemed a joint employer under the NLRA only when the employer possesses and exercises substantial direct and immediate control over one or more essential terms of conditions of employment of another employer's employees. In October 2023, the Biden NLRB issued its own final rule on the same issue, which overturned the February 2020 rule. The rule was expected to be influential for other agencies, as well. The 2023 rule provided that an entity would be considered a joint employer if the entity had an employment relationship with the employees and where it shared or codetermined essential conditions of employment, defined as wages, benefits and other compensation; hours of work and scheduling; assignment of duties to be performed; supervision of the performance of duties; work rules and directions governing the manner, means and methods of performing duties and the grounds for discipline; the tenure of employment, including hiring and discharge; and working conditions related to employee safety and health. The rule was vacated by a U.S. district court in Texas before it could take effect, thus restoring the Trump Board's 2020 rule. *U.S. Chamber of Commerce v. NLRB*, __ F. Supp. 3d __, 2024 U.S. Dist. LEXIS 43016 (E.D. Tex. Mar. 8, 2024).

Chapter 4: Public Policy Protections for Individual Job Security

A. The Public Policy Exception

On page 176, add at the end of note 2:

In 2021, the New York state legislature amended the retaliatory discharge statute to address concerns that it was too limited in coverage. N.Y. LAB. LAW § 215. As originally enacted, it had narrowly defined protected activities as employee reports of or objections to actual violations of law that threatened public health or safety. The amended statute broadens protection to include reports or objections when a worker reasonably believes there is a violation of law *or* a threat to public health or safety. The amended statute further extends protection to workers designated as independent contractors if they "carry out work in furtherance of an employer's business enterprise" so long as they do not have any employees of their own. It also expands the definition of retaliation to encompass a broader range of employer actions, including reporting a worker to U.S. immigration authorities.

On page 190, add after 4:

For an interesting public policy tort claim arising out of public health responses to the COVID pandemic, *see Sharenow v. Drake Oak Brook Resort LLC*, 614 F. Supp. 3d 623 (N.D. Ill. 2022). There the plaintiff, a hotel employee, alleged that she was terminated for refusing to violate an executive order from the Illinois governor that limited the number of attendees at indoor events to fifty. The court denied the defendant's motion to dismiss, observing that "the public policy in question here…cannot be clearer. Protecting the health and safety of Illinoisans is among the most important functions of state government."

Chapter 5: Collective Job Security

C. The Worker Adjustment and Retraining Notification Act

3. Statutory Interpretation Issues

Insert the following after Note 1, p. 275:

The COVID-19 pandemic presented difficult situations for businesses that experienced dramatic drop-offs in customer demand. Many laid off significant portions of their workforces with little notice. Among the first and most severely impacted as a result of early lockdown orders and quarantining requirements were restaurant, travel and tourism industries. The courts were soon presented with the question whether the pandemic qualified as a natural disaster (section 2102(b)(2)(B)) relieving the employer from its 60-day notice obligation under the WARN Act.

One of the first cases to reach the courts involved Enterprise Leasing Company. In April 2020, Enterprise laid off 109 workers at its Orlando airport location and nearly 400 workers at its Tampa airport location, providing no notice or very minimal notice (typically less than one week). Workers brought a class action under the WARN Act. Enterprise sought to dismiss the case and raised the affirmative defenses of natural disaster and unforeseeable business circumstances. *Benson v. Enterprise Leasing Co. of Orlando, LLC*, 2021 WL 1078410 (M.D. Fla. Feb. 4, 2021). The court rebuffed the employer's motion to dismiss, finding that the natural disaster defense did not apply and that plaintiffs had stated a claim for relief raising triable issues of fact relative to the unforeseeable business circumstances defense. The court relied heavily on the Department of Labor's regulations interpreting section 2102(b)(2)(B), which requires the employer to demonstrate that its plant closing or mass layoff is a "direct result" of a natural disaster. 20 C.F.R. § 639.9(c)(2). The court reasoned that even if the pandemic was a natural disaster, the layoffs did not result directly from the pandemic, but instead bore a more tenuous connection to it. Because of concern over the spread of the virus, lockdowns and quarantining requirements, business stalled, travel was reduced to a trickle, and fewer people flew—thus, fewer people rented cars at the airport. Accordingly, rather than being a direct result of the pandemic, the disruption to Enterprise's business was indirect, and the proper focus was the unforeseeable business circumstances defense, not the natural disaster defense. Further, the unforeseeable business defense only softens the notice requirement: employers are still required to "give as much notice as is practicable." *See* 29 U.S.C. § 2102(b)(2)(A), (b)(3). Therefore, the case was inappropriate for resolution on the pleadings because there existed a disputed factual issue—whether no advance notice at all, or only six days in another plaintiff's case, was "as much notice as practicable."

Although the district court granted Enterprise Leasing's motion to certify for interlocutory appeal, the case settled while pending before the Eleventh Circuit Court of Appeals. *See* Patrick Dorrian, *Enterprise's Settlement of Covid-19 Layoff Suit to Pay $175,000*, DAILY LAB. REP. (BNA) (Nov. 30, 2021) (reporting on proposed settlement of $175,000 to be divided among 964

employees laid off in the wake of the Covid-19 pandemic who had joined the class claim, plus attorneys' fees of up to $250,000).

Although Enterprise's situation received the most media attention because the company moved quickly to lay off 20,000 workers nationwide, many other businesses soon found themselves in similar situations. The economic disruption caused by the pandemic ultimately resulted in both supply chain difficulties and staffing shortages that, in turn, challenged businesses that had initially been able to keep operating but eventually found themselves unable to continue. The next case to find its way to the federal court of appeals involved the question whether the pandemic qualified as a natural disaster for WARN Act purposes, and if so, whether the so-called "second generation" disruption issues traceable to the pandemic are sufficiently proximately related to the pandemic to excuse failure to give sufficient notice of layoffs.

Easom v. US Well Services, Inc.

U.S. Court of Appeals for the Fifth Circuit
37 F.4th 238 (2022)

CARL E. STEWART, CIRCUIT JUDGE:

Scott Easom, Adrian Howard, and John Nau (collectively, "Appellants") filed this interlocutory appeal seeking reversal of the district court's order denying their motions for summary judgment and reconsideration. In its order denying Appellants' motions, the district court certified two questions for interlocutory appeal: (1) Does COVID-19 qualify as a natural disaster under the Worker Adjustment and Retraining Notification Act's ("WARN Act" or "the Act") natural-disaster exception, 29 U.S.C. § 2102(b)(2)(B)?; (2) Does the WARN Act's natural-disaster exception, 29 U.S.C. § 2102(b)(2)(B), incorporate but-for or proximate causation?

In response, we hold that the COVID-19 pandemic is not a natural disaster under the WARN Act and that the natural-disaster exception incorporates proximate causation. We therefore REVERSE and REMAND for proceedings consistent with this opinion.

I. FACTS & PROCEEDINGS

Appellants filed a class action complaint against their former employer, US Well Services, Inc. ("US Well") for allegedly violating the WARN Act by terminating them without advance notice. The WARN Act requires covered employers to give affected employees sixty days' notice before a plant closing or mass layoff. 29 U.S.C. § 2102(a). The Act provides three exceptions to the notice requirement—including the natural-disaster exception, under which no notice is required. *Id.* § 2102(b).

By way of background, oil producers hire US Well to perform hydraulic fracturing services known as fracking. When the price of oil drops below a commercially viable price, oil producers—including those that hire US Well—often discontinue work. In early March 2020, oil prices

plummeted to historic lows due to a price conflict between Saudi Arabia and Russia. This effect was compounded by a decline in travel and decreased demand for oil and gas during the COVID-19 pandemic. As a result, several of US Well's customers curtailed or completely shut down the fracking work US Well had been performing at multiple well sites in Texas. When crew members, including Appellants, returned from the well sites to their respective headquarters after shutting down operations, they were immediately informed that they were laid off. Appellants' termination letters, dated March 18, 2020, and effective immediately, stated: "Your termination of employment is due to unforeseeable business circumstances resulting from a lack of available customer work caused by the significant drop in oil prices and the unexpected adverse impact that the Coronavirus has caused."

Appellants filed this suit on August 26, 2020, and amended their complaint on October 14, 2020. The parties cross-moved for summary judgment. US Well argued that COVID-19 was a natural disaster under the WARN Act, and consequently, that it was exempt from the WARN Act's notice requirement pursuant to the natural-disaster exception. Appellants countered that COVID-19 was not a natural disaster and was not a direct cause of their layoffs. The district court concluded that COVID-19 was a natural disaster and that the natural-disaster exception uses but-for causation standards. It denied both motions for summary judgment, however, on grounds that the record did not show whether COVID-19 was the but-for cause of the layoffs.

. . . .

III. ANALYSIS

The WARN Act prohibits an employer from ordering "a plant closing or mass layoff until the end of a [sixty]-day period after the employer serves written notice of such an order" to affected employees. 29 U.S.C. § 2102(a). Employers who violate § 2102 are required to provide aggrieved employees "back pay for each day of violation." *Id.* § 2104(a)(1)(A). "To prove a WARN Act claim, a plaintiff must demonstrate that: (1) the defendant was 'an employer'; (2) the defendant ordered a 'plant closing' or 'mass layoff'; (3) the defendant failed to give to the plaintiff sixty days['] notice of the closing or layoff; and (4) the plaintiff is an 'aggrieved' or 'affected' employee." *In re TWL Corp.*, 712 F.3d 886, 897 (5th Cir. 2013) (quoting §§ 2102, 2104).

"If a plaintiff establishes these requirements, the employer may avoid liability by proving that it qualifies for the Act's 'faltering company' exemption, or that the closing or layoff resulted from 'unforeseen business circumstances' or a 'natural disaster.' " *Id.* at 897–98 (citing 20 C.F.R. § 639.9 (1989)). Relevant here, the WARN Act's natural-disaster exception provides that "[n]o notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States." 29 U.S.C. § 2102(b)(2)(B).

. . . The Department of Labor has explained the following regarding the natural-disaster exception to the notice requirement:

> (1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.
>
> (2) To qualify for this exception, an employer must be able to demonstrate that its plant closing

> or mass layoff is a direct result of a natural disaster.
>
> (3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in [20 C.F.R.] § 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.
>
> (4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the "unforeseeable business circumstance" exception described in paragraph (b) of this section may be applicable.

20 C.F.R. § 639.9(c)(1)–(4) (the "DOL regulation"). Further, the Department of Labor has clarified that "[t]he employer bears the burden of proof that conditions for the exceptions have been met." *Id.* § 639.9. We now turn to the certified questions.

A. Whether COVID-19 qualifies as a natural disaster under the WARN Act's natural-disaster exception

Appellants argue that COVID-19 does not qualify as a natural disaster under the WARN Act. We agree.

When interpreting a statute, a court must "start with the specific statutory language in dispute." *Murphy v. Smith*, —— U.S. ——, 138 S. Ct. 784, 787 (2018). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).

Because the WARN Act does not define "natural disaster," we turn to the "ordinary meaning of the word ... as understood when the [Act] was enacted." *See Carcieri v. Salazar*, 555 U.S. 379, 388 (2009). "Ordinarily, a word's usage accords with its dictionary definition." *Yates v. United States*, 574 U.S. 528, 537 (2015). "But we do not 'make a fortress out of the dictionary.' " *Chapman v. Durkin*, 214 F.2d 360, 362 (5th Cir. 1954) (quoting *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 764 (1949)).

When the WARN Act was enacted in 1988, the term "natural disaster" was not yet defined in leading dictionaries. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY (3d coll. ed. 1988); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d unabridged ed. 1987); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1976). So, our dictionary-based analysis of the term is limited to combining two component definitions. Taking the terms in isolation, "natural" was defined as "of or arising from nature; in accordance with what is found or expected in nature" and "produced or existing in nature; not artificial or manufactured." *Natural*, WEBSTER'S NEW WORLD DICTIONARY (3d coll. ed. 1988). "Disaster" was defined as "any happening that causes great harm or damage; serious or sudden misfortune; calamity." *Disaster*, WEBSTER'S NEW WORLD DICTIONARY (3d coll. ed. 1988). The district court reasoned that COVID-19 qualified as "natural" because human beings did not start or consciously spread it. *Easom v. US Well Servs., Inc.*, 527 F. Supp. 3d 898, 908 (S.D. Tex. 2021). It further reasoned that COVID-19 qualified as a "disaster" based on how many people were killed or infected by the virus. *Id.* Although the dictionary definitions of the words "natural" and "disaster" bear consideration, they are not dispositive of the meaning of "natural disaster" in the WARN Act. *See Yates*, 574 U.S. at 538.

To supplement our combined dictionary definition of "natural disaster," we consider the term's statutory context. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). The natural-disaster exception provides that "[n]o notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, *such as* a flood, earthquake, or the drought currently ravaging the farmlands of the United States." 29 U.S.C. § 2102(b)(2)(B) (emphasis added). Congress's use of the term "such as" "indicat[es] that there are includable other matters of the same kind which are not specifically enumerated by the standard." *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981) (relying on dictionaries from 1967 to 1971). By providing three examples after "such as," Congress indicated that the phrase, "natural disaster" includes events of the same kind as floods, earthquakes, and droughts. Traditional canons of statutory construction further support this interpretation.

In the proceedings below, Appellants argued that the district court should apply the canon of *noscitur a sociis*. *Noscitur a sociis* means "it is known by its associates." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 287 (2010). This canon "counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). The district court rejected Appellants' argument on grounds that the phrase, "any form of natural disaster" signaled intentional breadth. *Easom*, 527 F. Supp. 3d at 910. But the Supreme Court has applied *noscitur a sociis* even where a list begins with the word "any," thus, we apply that canon here. Courts rely on the canon of *noscitur a sociis* to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates*, 574 U.S. at 543. Applying *noscitur a sociis* to this case, the appearance of "natural disaster" in a list with "flood, earthquake, or drought" suggests that Congress intended to limit "natural disaster" to hydrological, geological, and meteorological events.

The canon of *expressio unius est exclusio* is also helpful here. It means that where, as here, "the items expressed are members of an 'associated group or series,' [that] justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). By the late 1980s, Congress was familiar with pandemics and infectious diseases—for instance, H1N1 (1918), H2N2 (1957-1958), and H3N2 (1968). *See Past Pandemics*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 10, 2018), https://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html. As early as 1938, Congress specified coverage for "plant disease" in the Federal Crop Insurance Act, which authorized federal crop insurance to help agriculture recover after the Dust Bowl. 7 U.S.C. § 1508(g)(5)(A). So, by the time agriculture was hit by the North American drought of 1988, Congress knew how to, and could have, included terms like disease, pandemic, or virus in the statutory language of the WARN Act. That it chose not to justifies the inference that those terms were deliberately excluded. *See Barnhart*, 537 U.S. at 168.

Finally, we recognize that the WARN Act was "adopted in response to the extensive worker dislocation that occurred in the 1970s and 1980s." *Hotel Emps. & Rest. Emps. Int'l Union Loc. 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 182 (3d Cir. 1999). Under the Act, employers are required to provide notice to employees and to local government agencies to allow "some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job

market." 20 C.F.R. § 639.1(a). This court has observed that the WARN Act's exceptions permitting a reduction of the notice period run counter to the Act's remedial purpose and thus, are to be "narrowly construed." *Carpenters Dist. Council of New Orleans v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1282 (5th Cir. 1994); *see also San Antonio Sav. Ass'n v. Comm'r*, 887 F.2d 577, 586 (5th Cir. 1989) (noting the "general principle of narrow construction of exceptions"). We therefore decline to expand the definition of "natural disaster" beyond what is justified by the Act's statutory language, context, and purpose.

Accordingly, we hold that COVID-19 does not qualify as a natural disaster under the WARN Act's natural-disaster exception.

B. Whether the WARN Act's natural-disaster exception incorporates but-for or proximate causation

Appellants contend that the phrase "due to" in the natural-disaster exception requires proximate cause. In the alternative, they argue that the phrase, "due to" is ambiguous and that this court should thus defer to the DOL regulation requiring an employer to "demonstrate that its plant closing or mass layoff is a direct result of a natural disaster." 20 C.F.R. § 639.9(c)(2). We agree that deference is appropriate here.

. . . [W]e recognize that Congress explicitly left a gap for the Department of Labor to fill by requiring the Secretary of Labor to "prescribe such regulations as may be necessary to carry out [the WARN Act]." 29 U.S.C. § 2107(a). The Department of Labor's interpretation is not arbitrary, capricious, or manifestly contrary to the Act. Thus, we give controlling weight to the DOL regulation, 20 C.F.R. § 639.9(c)(2): "To qualify for [the natural-disaster] exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster."

Supreme Court and Fifth Circuit precedent equate direct causation and proximate causation. *See, e.g., Paroline v. United States*, 572 U.S. 434, 444 (2014) ("The idea of proximate cause .... generally 'refers to the basic requirement that ... there must be "some direct relation between the injury asserted and the injurious conduct alleged[.]" ' "); *Dixie Pine Prods. Co. v. Md. Cas. Co.*, 133 F.2d 583, 585 (5th Cir. 1943) ("It is well settled that the words 'direct cause' ordinarily are synonymous in legal intendment with 'proximate cause[.]'"). This precedent leads us to the conclusion that the DOL regulation's "direct result" requirement imposes proximate causation.

US Well argues that the DOL regulation's direct causation requirement would require the natural disaster to be the sole cause of the mass layoff and would foreclose the application of the natural-disaster exception in any case with an intermediate event between the natural disaster and the layoff. It points to instances such as when a hurricane causes a power outage, which in turn causes layoffs, or when Hurricane Katrina caused a breach of the levees, which in turn caused the city of New Orleans to flood and forced businesses to shut down. But this argument belies traditional proximate cause principles.

The Supreme Court has explained that "[a]s a general matter, to say one event proximately caused another is a way of making two separate but related assertions." *Paroline*, 572 U.S. at 444. "First, it means the former event caused the latter." *Id.* "This is known as actual cause or cause in fact." *Id.* Second, "[e]very event has many causes ... and only some of them are proximate"—to

wit, those "with a sufficient connection to the result." *Id.* So proximate cause is not synonymous with sole cause. A proximate cause requirement merely "serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Id.* at 445, 134 S.Ct. 1710.

Under Texas law, "there can be more than one proximate cause of an injury," but "a new and independent, or superseding, cause may 'intervene[ ] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause.' " *Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016) (alteration in original) (citation omitted). "In assessing whether an intervening cause disrupted the causal connection between the [initial cause] and the plaintiff's harm and constitutes a new and independent cause, [Texas courts] consider a variety of factors, including foreseeability." *Id.* at 98.

Here, flooding, power outages, layoffs, and shutdowns are among the reasonably foreseeable consequences of hurricanes and other natural disasters. Thus, imposing a proximate cause requirement on employers that must lay off employees due to a natural disaster would not foreclose the natural-disaster exception for all cases involving an intermediate cause.

Accordingly, based on the DOL regulation's "direct result" requirement and binding precedent equating direct cause with proximate cause, we hold that the WARN Act's natural-disaster exception incorporates proximate causation.

IV. CONCLUSION

For the reasons set forth above, we REVERSE the order of the district court and REMAND for further proceedings consistent with this opinion.

Notes

1. The Natural Disaster Defense. The *Easom* and *Benson* courts apply a narrow interpretation of the natural disaster defense, limiting its applicability to situations where the physical plant, the product or the labor supply are ravaged by "hydrological, geological, and meteorological events." Both the *Easom* and *Benson* courts relied upon the DOL's interpretation of the natural disaster defense. As the *Easom* court explained, while the DOL's interpretation is entitled to considerable deference, the ultimate issue depends upon consideration of the statutory text and legislative history as well as any regulations previously promulgated. In light of the WARN Act's history and purpose, and your own knowledge of the ways in which the pandemic impacted businesses, workers and the economy, do you agree with the DOL's interpretation and the courts' deference to it? Does your knowledge of how far-reaching and complex the effects of the pandemic have become influence your conclusion on whether the pandemic should be categorized as a natural disaster?

2. Proximate Cause. In a part of the opinion that is technically dicta, the *Easom* court adopts a proximate cause standard for disruptions caused by natural disasters. The court's resolution of the question whether the pandemic represented a natural disaster for purposes of WARN notice requirements avoided a thorny thicket of issues raised by the proximate cause standard (as opposed to a but-for or sole cause standard). For example, if the pandemic were considered a natural

disaster, should there be limits on how remote in time the business disruption is from the onset of the pandemic? Should there be limits on how many factors combine to produce the disruption (for example, supply chain issues, war in Ukraine and the impact on fuel supplies and costs, labor staffing issues stemming from illness)?

3. The Unforeseeable Business Circumstances Defense. The unforeseeable business circumstances defense certainly has applicability in pandemic-related disruption situations, but recall that it is not a complete defense: the employer must still provide as much notice as practicable. In this respect, the issues raised by the pandemic are the same as those addressed in *Childress* and the Note cases in the main text: at what point in the factual chain of events did the business disruption become foreseeable, and did the employer give notice at that point? While they do not present novel issues, we should expect to see pandemic-related cases raising unforeseeable business circumstances defenses for some time to come, stemming largely from the supply chain disruptions or a combination of other second-order economic trickle-down effects like those in *Easom*.

Chapter 6: Employee Mobility

A. Covenants Not to Compete

Page 364.

12. **FTC Rule Banning Noncompete Agreements**. On May 7, 2024, the Federal Trade Commission ("FTC") issued a final rule that bans almost all noncompete agreements and could also affect non-solicitation agreements. FTC Non-Compete Clauses Rule, 16 C.F.R. § 910 (2024). In a 3-2 vote, the FTC concluded that the agreements constitute an unfair method of competition. Although the rule does not directly affect non-solicitation agreements, it bans agreements that function like noncompetes, which may include non-solicitation and other agreements that effectively limit employee mobility. The rule also invalidates existing noncompete agreements and requires employers to notify their employees that their noncompete agreements are no longer valid. The rule exempts senior executives, defined by those making in excess of $151,164 and engaged in policy making positions, from the ban on existing noncompetes (but not future) and likewise permits agreements that are formed in the context of a sale of a business. The rule is available at https://www.ftc.gov/legal-library/browse/rules/noncompete-rule.

The FTC Rule was immediately challenged by a slew of lawsuits from parties such as the Chamber of Commerce arguing that the FTC lacked the authority to institute the rule. To date, two courts have addressed the Rule. In early July 2024, a district court in Texas enjoined the rule based on the argument that the FTC lacked authority to issue it, but it only enjoined the rule as to the particular plaintiffs in the case rather than issuing a nationwide injunction. The Texas case is *Ryan, LLC v. FTC*, 2024 U.S. Dist. LEXIS 117418, 2024 WL 3297524 (N.D. Tex. July 3, 2024), and is available at https://law.justia.com/cases/federal/district-courts/texas/txndce/3:2024cv00986/389064/153/. Subsequently, a district court in the Eastern District of Pennsylvania declined to issue a preliminary injunction, concluding that the plaintiffs had failed to establish a reasonable likelihood that they would succeed on the merits. That decision, *ATS Tree Servs., LLC v. FTC*, 2024 U.S. Dist. LEXIS 129398, 2024 WL 3511630 (E.D. Pa. July 23, 2024), is available at https://www.faegredrinker.com/-/media/files/insights/ats-v-ftc--order-denying-pi-7232024-80.pdf?rev=67d97ebc5e584a0a8cf325e7923454f5&hash=9F300C47917969DE69A617CA3FA62FC9.

The FTC Rule was set to go into effect on September 4, 2024, 120 days after it was issued, but because of this and other ongoing litigation, the status of the rule is uncertain. Law firms that specialize in employment issues are providing status updates, which can be readily located through any google search.

13. **Other Efforts to Limit the Effect of Noncompete Agreements.** There have also been some developments at the state level (if upheld, the FTC Rule would effectively pre-empt state laws). For example, in Washington D.C. (a non-state but relevant), a ban on most noncompete agreements went into effect in October 2022. The DC law excludes what are defined as highly compensated employees – those making more than $150,000 unless they are a medical specialist where the threshold is $250,000. When the DC law was originally passed in 2020, it banned all noncompete

agreements, but the business community's objections led to an amendment to provide the highly compensated employee exemptions. For some reason, babysitters are also exempt from the ban.

In still another effort to limit the widespread use of noncompetes, the NLRB's General Counsel issued a memorandum taking the position that the proffer, maintenance, and enforcement of non-compete agreements that prohibit employees from accepting certain types of jobs or operating certain types of businesses after the end of their employment can violate Section 8(a)(1) of the NLRA. Gen. Couns. Memo. GC 23-08 (May 30, 2023). Her memo reasoned that noncompete agreements interfere with employees' efforts to improve working conditions by blocking their ability to concertedly resign, carry out concerted threats to resign, concertedly seek or accept employment with local competitors to obtain better working conditions, solicit coworkers to work for local competitors as part of a broader course of concerted activity, or to seek employment in order to engage in concerted activity elsewhere. At least one ALJ has accepted this line of reasoning, ruling that overly broad noncompete and nonsolicitation provisions violate the NLRA. *See J.O. Mory, Inc.*, 25-CA-309577 (June 13, 2024) (applying the Biden Board's *Stericycle* framework for evaluating work rules).

A similar rationale has also been extended to other types of agreements that restrict employee speech indirectly aimed at improving working conditions. In *McLaren Macomb*, 372 N.L.R.B. No. 58 (2023), the Board ruled that an employer's non-disparagement requirement imposed on furloughed workers that prevented them from making negative remarks about the company or disclosing the terms of their severance agreements violated section 8(a)(1) of the NLRA.

Chapter 7: Dignitary Interests

B. Privacy—Sources of Legal Protection

1. Constitutional Protection for Public Employees

On page 364, replace the last paragraph before section 2 with the following:

Public employees have also asserted constitutional privacy claims based on the second aspect of Fourteenth Amendment privacy rights, "the interest in independence in making certain kinds of important decisions." *Whalen*, 429 U.S. at 599. These claims are often joined with claims based on a right of intimate association and challenge adverse employment actions taken because of employees' off-duty relationships. These claims are rarely successful. *See Perez v. City of Roseville*, 926 F.3d 511 (9th Cir. 2019) (granting summary judgment to defendant on grounds of qualified immunity because it was not clearly established that firing a police officer because of her private, off-duty, sexual conduct violated her constitutional rights to privacy and intimate association); *Coker v. Whittington*, 169 F. Supp. 3d 677 (W.D. La. 2016) (finding no constitutional violation when two deputies were fired for off-duty extramarital affairs given the employer's interest in upholding public trust and the reputation of the police department).

Chapter 8: Employee Voice

D. Statutory Protections for Employee Speech

1. State Statutory Protections for Speech and Political Activity

On page 489, insert after the text of the Connecticut statute:

In 2022, the Connecticut legislature amended the statute to make threats of discipline or discharge in retaliation for employee speech unlawful in addition to actual discipline or discharge. It also extended protection to employees who refuse to attend employer-sponsored meetings or to listen to communications intended to convey the employer's religious or political opinions. CONN. GEN. STAT. § 31-51q. Several other states have adopted identical language pertaining to mandatory meetings of these kinds. *See, e.g.*, Maine: ME. STAT. tit. 26, § 600-B; Oregon: OR. REV. STAT. § 659.785; Minnesota: MINN. STAT. § 181.531; New York: N.Y. LAB. LAW § 201-d. To the extent that the provision extends protection to employees who refuse to attend employer meetings is applied to meetings in which the employer expresses its views about unionization (so-called captive audience speeches), it probably conflicts with the NLRA, which generally permits captive audience meetings in which employers can tell employees why they oppose unions. The laws' restrictions on employer political speech, however, should not be preempted by the NLRA.

2. Whistleblower Protections of the Sarbanes-Oxley Act
b. What is Protected Activity?

Page 509, Note 5. In *Murray v. UBS Securities, LLC*, 601 U.S. 23 (2024), the Court ruled that in order to establish the requisite causal connection between the protected activity and the adverse employment action, a whistleblower must establish that his or her protected activity was a contributing factor in the unfavorable personnel action, but does not need to prove that the employer acted with retaliatory intent. Proof of retaliatory intent is one way to establish the causal connection, but it is not the only way.

E. Collective Voice Protections – The NLRA

2. NLRA § 7 Rights in the Non-Union Workplace

Add the following text at the end of Note 1, Page 535:

Under the Trump administration, the NLRB had narrowed the circumstances under which individual employee complaints were considered concerted activity, adopting a restrictive test

requiring mechanical application of a checklist of factors in place of the Board's traditional, fact-sensitive approach. *See Alstate Maintenance LLC*, 367 N.L.R.B. No. 68 (2020). The Biden Board overruled *Alstate* in *Miller Plastic Products, Inc.*, 372 N.L.R.B. No. 134 (2023), returning to the Board's traditional totality of the circumstances test to ascertain whether an employee has engaged in protected concerted activity. The Biden Board applied *Miller* in *Home Depot USA, Inc.*, 373 N.L.R.B. No. 25 (2024), finding that a single employee discharged for refusing to remove hand-drawn letters on his orange work apron spelling out BLM, the acronym for Black Lives Matter, was engaged in protected concerted activity. The Board reasoned the employee's refusal to remove the BLM marking was concerted because it was a "logical outgrowth" of prior group complaints about racially discriminatory working conditions and was part of an attempt to bring those group complaints to the attention of Home Depot managers.

Add the following text to Note 3, Page 536:

The Trump Board revisited the question when profanity or offensive words uttered in the context of otherwise protected concerted activity—whether in person, on social media, or on a picket line—would cause the activity to lose protection. In *General Motors, LLC*, 369 N.L.R.B. No. 127 (2020), the Trump Board established a new standard to assess the impact of offensive speech such as profanity or abusive words, uttered in the context of otherwise protected concerted activity. The Board held that it would no longer consider offensive speech analytically inseparable from the protected conduct or speech of which it is a part, and would instead apply the *Wright Line* test. That standard was developed in the context of mixed motive disciplinary actions or discharges, or situations where the employer may have both a retaliatory motive and a legitimate motive. *See Wright Line*, 251 N.L.R.B. No. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

In 2023, the Biden Board overruled *General Motors*, rejecting application of the *Wright Line* test and returning to its setting-specific standards for determining whether employers have unlawfully disciplined employees engaged in abusive conduct in connection with protected concerted activity. *See Lion Elastomers, LLC*, 372 N.L.R.B. No. 83 (2023). In the context of concerted activity on social media posts, this would mean a return to the totality-of-the-circumstances test applied in *Triple Play* and earlier cases. However, the Fifth Circuit vacated the Board's decision, finding that the Board violated the employer's due process rights by using the remand proceeding to overrule *General Motors*. *Lion Elastomers, LLC v. NLRB*, __F.4th __, 2024 U.S. App. LEXIS 16778 (5th Cir. July 9, 2024) (vacating and remanding the case with instructions to apply the previous *General Motors* standard). The broader impact of the decision, outside the Fifth Circuit, is unclear. The Board, under its non-acquiescence doctrine, typically ignores an appeals court ruling that contradicts its view of the law and continues to apply its preferred standard when pursuing cases in other circuits. Further, even within the Fifth Circuit the Biden Board may continue its pursuit of the totality of the circumstances doctrine, since the Fifth Circuit did not address the merits of the Board's *Lion Elastomers* decision, vacating it solely on procedural grounds.

3. Employer Policies Restricting Collective Action

Add to Page 539.

In August 2023, the Biden Board overturned the Trump Board's *Boeing* standard regarding employer work rules, finding that it gave too little weight to the chilling effect that overbroad work rules could have on employees' exercise of section 7 rights. In *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (2023), the Board rejected *Boeing's* categorical approach to work rules, and adopted the following test, which it characterized as a test that "builds on and revises" the *Lutheran Heritage Village* test. First, the General Counsel must establish that a challenged rule has a reasonable tendency to chill employees from exercising section 7 rights. If the General Counsel does so, the rule is presumptively unlawful. The employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that a more narrowly tailored rule would not advance that interest. The Board explained:

> To begin, the current standard fails to account for the economic dependency of employees on their employers. Because employees are typically (and understandably) anxious to avoid discharge or discipline, they are reasonably inclined both to construe an ambiguous work rule to prohibit statutorily protected activities and to avoid the risk of violating the rule by engaging in such activity. In turn, *Boeing* gives too little weight to the burden a work rule could impose on employees' Section 7 rights. At the same time, *Boeing's* purported balancing test gives too much weight to employer interests. Crucially, *Boeing* also condones overbroad work rules by not requiring the party drafting the work rules—the employer—to narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights.
>
> The standard we adopt today remedies these fundamental defects. We adopt a modified version of the basic framework set forth in *Lutheran Heritage*, which recognized that overbroad workplace rules and polices may chill employees in the exercise of their Section 7 rights and properly focused the Board's inquiry on NLRA protected rights. . . . However, although *Lutheran Heritage* implicitly allowed the Board to evaluate employer interests when considering whether a particular rule was unlawfully overbroad, the standard itself did not clearly address how employer interests factored into the Board's analysis. The modified standard we adopt today makes explicit that an employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests. . . . Because we overrule *Boeing*, *LA Specialty Produce*, and the work rules cases relying on them, including those that placed rules into an "always lawful" category based simply on their subject matter, we reject Boeing's categorical approach, instead returning to a particularized analysis of specific rules, their language, and the employer interests actually invoked to justify them. 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 1-2.

Would the work rules discussed on page 539 of the text be permissible under the new approach announced in *Stericycle*?

Chapter 9: Employment Discrimination Law

B. Claims of Intentional Discrimination: The Disparate Treatment Model

3. Retaliation Claims

Page 575. Add the following text after the discussion of *Burlington Northern & Santa Fe Railway Co. v. White*:

In *Oncale v. Sundowners Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court stated that employees must demonstrate some "disadvantageous" change in their employment terms and conditions to allege a violation of Title VII. *Id.* at 80. Following *Oncale*, a circuit split developed over what proof was necessary in order to challenge a transfer as an adverse employment action. Some concluded that it was only necessary to establish the discriminatory act itself, while others applied a heightened standard for harm, such as proof of a materially significant disadvantage characterized by a reduction in title, salary or benefits. In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Court held that employees who bring retaliation claims are protected only where employer actions are "materially adverse." In *Muldrow v. City of St. Louis*, 601 U.S. __, 144 S. Ct. 967 (2024), the Court distinguished *Burlington Northern* in the context of a sex discrimination case, ruling unanimously that an employee who alleges a discriminatory job transfer need show only that the transfer inflicted "some harm with respect to an identifiable term or condition of employment," but that the harm "need not be significant" to violate Title VII. *Id.* at *2; 144 S. Ct. at 974. Accordingly, a transfer from one position to another was actionable even where the transfer imposed no significant economic injury upon the plaintiff. Questions remain whether employees may use the decision to challenge other employment actions, such as schedule and work assignment changes.

Add the following new section and case on page 629:

E. Sexual Orientation Discrimination

Bostock v. Clayton County, Georgia

United States Supreme Court
590 U.S. 644 (2020)

JUSTICE GORSUCH delivered the opinion of the Court.

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer

can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

Aimee Stephens worked at R.G. & G.R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to " live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 42 U.S.C. § 2000e–2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. 723 Fed.Appx. 964 (2018). Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. 883 F.3d 100 (2018). Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from

firing employees because of their transgender status. 884 F.3d 560 (2018). During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari . . . to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons. 587 U.S. ——, 139 S.Ct. 1599 (2019).

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations. See *New Prime Inc.* v. *Oliveira*, 139 S.Ct. 532, 538–539 (2019).

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1). To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350 (2013) (citation omitted)). In the language of law, this means that Title VII's "because of " test incorporates the " 'simple' " and "traditional" standard of but-for causation. *Nassar*, 570 U.S. at 346, 360. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross v. FBL Finan. Servs., Inc.*, 557

U.S. 167, 176 (2009). In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law. See *Nassar*, 570 U.S. at 350 . . . .

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of " sex. The statute imposes liability on employers only when they "fail or refuse to hire," "discharge," "or otherwise ... discriminate against" someone because of a statutorily protected characteristic like sex. The employers acknowledge that they discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: "otherwise ... discriminate against." By virtue of the word *otherwise*, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. See *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 59 (2006). In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. See, *e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988). So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII. . . .

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's

homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. . . . A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." 883 F.3d at 135 (Cabranes, J., concurring in judgment).

C

If more support for our conclusion were required, there's no need to look far. All that the statute's plain terms suggest, this Court's cases have already confirmed. Consider three of our leading precedents.

In *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*), a company allegedly refused to hire women with young children, but did hire men with children the same age. Because its discrimination depended not only on the employee's sex as a female but also on the presence of another criterion—namely, being a parent of young children—the company contended it hadn't engaged in discrimination "because of" sex. The company maintained, too, that it hadn't violated the law because, as a whole, it tended to favor hiring women over men. Unsurprisingly by now, these submissions did not sway the Court. That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII. Nor does the fact an employer may happen to favor women as a class.

In *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), an employer required women to make larger pension fund contributions than men. The employer sought to justify its disparate treatment on the ground that women tend to live longer than men, and thus are likely to receive more from the pension fund over time. By everyone's admission, the employer was not guilty of animosity against women or a "purely habitual assumptio[n] about a woman's inability to perform certain kinds of work"; instead, it relied on what appeared to be a statistically accurate statement about life expectancy. *Id.*, at 707–708. Even so, the Court recognized, a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals. True, women as a class may live longer than men as a class. . . . The employer violated Title VII because, when its policy worked exactly as planned, it could not "pass the simple test" asking whether an individual female employee would have been treated the same regardless of her sex. *Id.*, at 711.

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. The Court held it was immaterial that members of the same sex as the victim committed the alleged discrimination. . . . Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.

The lessons these cases hold for ours are by now familiar. First, it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart*, the employer called its rule requiring women to pay more into the pension fund a "life expectancy" adjustment necessary to achieve sex equality. In *Phillips*, the employer could have accurately spoken of its policy as one based on "motherhood." In much the same way, today's employers might describe their actions as motivated by their employees' homosexuality or transgender status. But just as labels and additional intentions or motivations didn't make a difference in *Manhart* or *Phillips*, they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. . . .

Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips*, *Manhart*, and *Oncale*, the defendant easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. So, too, it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision. . . .

III

What do the employers have to say in reply? For present purposes, they do not dispute that they fired the plaintiffs for being homosexual or transgender. Sorting out the true reasons for an adverse employment decision is often a hard business, but none of that is at issue here. Rather, the employers submit that even intentional discrimination against employees based on their homosexuality or transgender status supplies no basis for liability under Title VII.

The employers' argument proceeds in two stages. Seeking footing in the statutory text, they begin by advancing a number of reasons why discrimination on the basis of homosexuality or transgender status doesn't involve discrimination because of sex. . . . They warn, too, about consequences that might follow a ruling for the employees. But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.

A

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. . . .

. . . But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause. In *Phillips*, for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman. But the Court did not hesitate to recognize that the employer in *Phillips* discriminated against the plaintiff because of her sex. Sex wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.

* * *

Aren't these cases different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision. Change the hypothetical ever so slightly and its flaws become apparent. Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants. . . .

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically.

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. Same with "motherhood discrimination." See *Phillips*, 400 U.S. at 544. Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of

discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This postenactment legislative history, they urge, should tell us something.

But what? There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt. *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990).

* * *

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand. This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. . . . Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. Cf. *post*, at 1775 (ALITO, J., dissenting). But that has no bearing here. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011). And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the statute's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address. *Oncale*, 523 U.S. at 79. But " 'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' " does not demonstrate ambiguity; instead, it simply " 'demonstrates [the] breadth' " of a legislative command. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985); see also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 101 (2012) (noting that unexpected applications of broad language reflect only Congress's "presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions").

Still, while legislative history can never defeat unambiguous statutory text, historical sources

can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally.. . . .

The employers, however, advocate nothing like that here. . . .Rather than suggesting that the statutory language bears some other *meaning*, the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.

That is exactly the sort of reasoning this Court has long rejected. . . . If anything, the employers' new framing may only add new problems. The employers assert that "no one" in 1964 or for some time after would have anticipated today's result. But is that really true? Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least *some* people foresaw this potential application. See, *e.g.*, *Smith v. Liberty Mut. Ins. Co.*, 395 F.Supp. 1098, 1099 (ND Ga. 1975) (addressing claim from 1969); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (CA9 1977) (addressing claim from 1974). And less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language—which was strikingly similar to Title VII's—might also protect homosexuals from discrimination. See, *e.g.*, Note, The Legality of Homosexual Marriage, 82 Yale L. J. 573, 583–584 (1973).

Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as "expected"? Do we look only at the moment the statute was enacted, or do we allow some time for the implications of a new statute to be worked out? Should we consider the expectations of those who had no reason to give a particular application any thought or only those with reason to think about the question? . . . How specifically or generally should we frame the "application" at issue? None of these questions have obvious answers, and the employers don't propose any. . .

The employer's position also proves too much. If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn. Start with *Oncale*. How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U.S. at 79. Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it. Under the employer's logic, it would seem this was a mistake.

That's just the beginning of the law we would have to unravel. As one Equal Employment Opportunity Commission (EEOC) Commissioner observed shortly after the law's passage, the words of " 'the sex provision of Title VII [are] difficult to ... control.' " Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307, 1338 (2012) (quoting

Federal Mediation Service To Play Role in Implementing Title VII, [1965–1968 Transfer Binder] CCH Employment Practices ¶8046, p. 6074). The "difficult[y]" may owe something to the initial proponent of the sex discrimination rule in Title VII, Representative Howard Smith. On some accounts, the congressman may have wanted (or at least was indifferent to the possibility of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill. See C. Whalen & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115–118 (1985). Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly.

Whatever his reasons, thanks to the broad language Representative Smith introduced, many, maybe most, applications of Title VII's sex provision were "unanticipated" at the time of the law's adoption. In fact, many now-obvious applications met with heated opposition early on, even among those tasked with enforcing the law. In the years immediately following Title VII's passage, the EEOC officially opined that listing men's positions and women's positions separately in job postings was simply helpful rather than discriminatory. Franklin, 125 Harv. L. Rev., at 1340. Some courts held that Title VII did not prevent an employer from firing an employee for refusing his sexual advances. See, *e.g.*, *Barnes v. Train*, 1974 WL 10628, *1 (D DC, Aug. 9, 1974). And courts held that a policy against hiring mothers but not fathers of young children wasn't discrimination because of sex. See *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (CA5 1969), rev'd, 400 U.S. 542 (1971) (*per curiam*).

Over time, though, the breadth of the statutory language proved too difficult to deny. By the end of the 1960s, the EEOC reversed its stance on sex-segregated job advertising. See Franklin, 125 Harv. L. Rev., at 1345. In 1971, this Court held that treating women with children differently from men with children violated Title VII. *Phillips*, 400 U.S. at 544. And by the late 1970s, courts began to recognize that sexual harassment can sometimes amount to sex discrimination. See, *e.g.*, *Barnes v. Costle*, 561 F.2d 983, 990 (CADC 1977). While to the modern eye each of these examples may seem "plainly [to] constitut[e] discrimination because of biological sex," *post*, at 1774 - 1775 (ALITO, J., dissenting), all were hotly contested for years following Title VII's enactment. . . .

* * *

With that, the employers are left to abandon their concern for expected applications and fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Cf. *post*, at 1778 - 1784 (ALITO, J., dissenting). . . .

What are these consequences? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything

else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." , , , Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. § 2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq.* That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. § 2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See § 2000bb–3.

But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too. Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us. So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.

* * *

Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

The judgments of the Second and Sixth Circuits . . . are affirmed. The judgment of the Eleventh Circuit . . . is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." 42 U.S.C. § 2000e–2(a)(1). Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list, and in recent years, bills have included "gender identity" as well. But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H.R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H.R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty. This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution . . . , Title VII's prohibition of discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H.R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall.

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22 (1997). If the Court finds it appropriate to adopt this theory,

it should own up to what it is doing. . . .

The arrogance of this argument is breathtaking. . . . [T]here is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. But the Court apparently thinks that this was because the Members were not "smart enough to realize" what its language means. *Hively v. Ivy Tech Community College of Ind.*, 853 F.3d 339, 357 (CA7 2017) (Posner, J., concurring). The Court seemingly has the same opinion about our colleagues on the Courts of Appeals, because until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex. And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law. Day in and day out, the Commission enforced Title VII but did not grasp what discrimination "because of ... sex" unambiguously means.

The Court's argument is not only arrogant, it is wrong. It fails on its own terms. "Sex," "sexual orientation," and "gender identity" are different concepts, as the Court concedes. And neither "sexual orientation" nor "gender identity" is tied to either of the two biological sexes. . . . Both men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes. And individuals who are born with the genes and organs of either biological sex may identify with a different gender. . . .

Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. In fact, at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were "homosexual."

At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing the biological sex of any job applicants. Her candid answer was that this would "not" be sex discrimination. And she was right.

The attorney's concession was necessary, but it is fatal to the Court's interpretation, for if an employer discriminates against individual applicants or employees without even knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex. Contra, *ante*, at 1746 - 1747. An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge. . . . As explained, a disparate treatment case requires proof of intent—*i.e.*, that the employee's sex motivated the firing. In short, what this example shows is that discrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex, and for that reason, the

Court's chief argument collapses. . . .

Discrimination "because of sex" was not understood as having anything to do with discrimination because of sexual orientation or transgender status. Any such notion would have clashed in spectacular fashion with the societal norms of the day.

For most 21st-century Americans, it is painful to be reminded of the way our society once treated gays and lesbians, but any honest effort to understand what the terms of Title VII were understood to mean when enacted must take into account the societal norms of that time. And the plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment. In its then-most recent Diagnostic and Statistical Manual of Mental Disorders (1952) (DSM–I), the American Psychiatric Association (APA) classified same-sex attraction as a "sexual deviation," a particular type of "sociopathic personality disturbance," *id.*, at 38–39, and the next edition, issued in 1968, similarly classified homosexuality as a "sexual deviatio[n]," Diagnostic and Statistical Manual of Mental Disorders 44 (2d ed.) (DSM–II). It was not until the sixth printing of the DSM–II in 1973 that this was changed.

Society's treatment of homosexuality and homosexual conduct was consistent with this understanding. Sodomy was a crime in every State but Illinois, see W. Eskridge, Dishonorable Passions 387–407 (2008), and in the District of Columbia, a law enacted by Congress made sodomy a felony punishable by imprisonment for up to 10 years and permitted the indefinite civil commitment of "sexual psychopath[s]," Act of June 9, 1948, §§ 104, 201–207, 62 Stat. 347–349. This view of homosexuality was reflected in the rules governing the federal work force. In 1964, federal "[a]gencies could deny homosexual men and women employment because of their sexual orientation," and this practice continued until 1975. GAO, D. Heivilin, Security Clearances: Consideration of Sexual Orientation in the Clearance Process 2 (GAO/NSIAD–95–21, 1995). See, *e.g.*, *Anonymous v. Macy*, 398 F.2d 317, 318 (CA5 1968) (affirming dismissal of postal employee for homosexual acts).

In 1964, individuals who were known to be homosexual could not obtain security clearances, and any who possessed clearances were likely to lose them if their orientation was discovered. . . . "Until about 1991, when agencies began to change their security policies and practices regarding sexual orientation, there were a number of documented cases where defense civilian or contractor employees' security clearances were denied or revoked because of their sexual orientation." GAO, Security Clearances, at 2.

The picture in state employment was similar. In 1964, it was common for States to bar homosexuals from serving as teachers. . . . The situation in California is illustrative. California laws prohibited individuals who engaged in "immoral conduct" (which was construed to include homosexual behavior), as well as those convicted of "sex offenses" (like sodomy), from employment as teachers. Cal. Educ. Code Ann. §§ 13202, 13207, 13209, 13218, 13255 (West 1960). . . . In 1964 and for many years thereafter, homosexuals were barred from the military. See, *e.g.*, Army Reg. 635–89, § I(2) (a) (July 15, 1966) ("Personnel who voluntarily engage in homosexual acts, irrespective of sex, will not be permitted to serve in the Army in any capacity, and their prompt separation is mandatory"). Prohibitions against homosexual conduct by members

of the military were not eliminated until 2010. See Don't Ask, Don't Tell Repeal Act of 2010, 124 Stat. 3515.

Homosexuals were also excluded from entry into the United States. The Immigration and Nationality Act of 1952 (INA) excluded aliens "afflicted with psychopathic personality." 8 U.S.C. § 1182(a)(4) (1964 ed.). In *Boutilier v. INS*, 387 U.S. 118, 120–123 (1967), this Court, relying on the INA's legislative history, interpreted that term to encompass homosexuals and upheld an alien's deportation on that ground. Three Justices disagreed with the majority's interpretation of the phrase "psychopathic personality." But it apparently did not occur to anyone to argue that the Court's interpretation was inconsistent with the INA's express prohibition of discrimination "because of sex." That was how our society—and this Court—saw things a half century ago. Discrimination because of sex and discrimination because of sexual orientation were viewed as two entirely different concepts.

To its credit, our society has now come to recognize the injustice of past practices, and this recognition provides the impetus to "update" Title VII. But that is not our job. Our duty is to understand what the terms of Title VII were understood to mean when enacted, and in doing so, we must take into account the societal norms of that time. We must therefore ask whether ordinary Americans in 1964 would have thought that discrimination because of "sex" carried some exotic meaning under which private-sector employers would be prohibited from engaging in a practice that represented the official policy of the Federal Government with respect to its own employees. We must ask whether Americans at that time would have thought that Title VII banned discrimination against an employee for engaging in conduct that Congress had made a felony and a ground for civil commitment.

The questions answer themselves. . . . Without strong evidence to the contrary (and there is none here), our job is to ascertain and apply the "*ordinary* meaning" of the statute. *Ibid.* And in 1964, ordinary Americans most certainly would not have understood Title VII to ban discrimination because of sexual orientation or gender identity. . . .

[The dissenting opinion of JUSTICE KAVANAUGH is omitted.]

Notes

1. The Opinions. Which opinion is most persuasive to you? Can you articulate Justice Gorsuch's textual argument, namely what is the argument that discrimination based on sexual orientation or sexual identity is necessarily sex discrimination? Are you convinced that a textual analysis leads to the conclusion that majority reaches? What approach would you say the dissent adopts?

2. The Road to Bostock. As the Court notes, the issue of whether Title VII encompassed discrimination based on sexual orientation originally arose (and was rejected) in the 1970s and later returned through a series of cases in the 1990s and early 2000s, several of which involved transgender individuals. *See, e.g.*, *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004). Several successful cases involved claims of sexual harassment, and they often relied on a theory

of sex stereotyping, arguing that gay and transgender individuals were harassed because they did not fit the stereotype of what it meant to be a man or woman. *See, e.g., Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009). Discussion of the sex stereotyping theory was notably absent from the Supreme Court opinions in *Bostock*, though it often played a significant role in lower court decisions.

In 2015, an EEOC administrative opinion, holding that sexual orientation discrimination is prohibited sex discrimination under Title VII, sparked a renewed interest in the area and proved influential in a series of court cases, including those that reached the Supreme Court. *See Baldwin v. Foxx*, EEOC Decision on Appeal No. 0120133080 (June 15, 2015). As discussed in Justice Alito's dissenting opinion in *Bostock*, Judge Posner, in a controversial concurring opinion in a Seventh Circuit case, argued that courts should "update" the statute by incorporating evolving social norms with respect to sexual orientation and gender identity. *See Hively v. Ivy Tech. Community College of Ind.*, 853 F.3d 339, 352 (7th Cir. 2017) (en banc) (Posner, J., concurring). Finally, a number of law review articles were also instrumental in developing the argument that Title VII prohibited discrimination against gay and transgender individuals. *See, e.g.*, Andrew Koppleman, *Why Discrimination Against Lesbians & Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Mary Anne C. Case, *Disaggregating from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protection*, 127 YALE L.J. 322 (2017). It is worth noting that as important as the *Bostock* opinion is for protecting gay, lesbian and transgender individuals against workplace discrimination, the first cases arose more than forty years earlier and bills to amend Title VII to cover sexual orientation discrimination have been introduced in Congress repeatedly but never passed. In other words, the decision was a long time coming during which discrimination based on sexual orientation or transgender status was generally lawful under federal law.

3. Religious Discrimination. Title VII also prohibits discrimination because of religion. We do not cover Title VII's prohibition against religious discrimination and its exemption for certain religious organizations in any depth in this book, but have retained the Court's brief discussion because the issue is likely to become more prominent in the near future. The issue can be complicated, though to this point, private employers that have raised the issue – including the funeral home that fired Aimee Stephens – have not succeeded. The issue may also implicate the Free Exercise Clause of the First Amendment, an area in which the Supreme Court's jurisprudence is evolving. In any event, and without going into detail, traditionally it has not been enough for a non-religious employer (religious employers under the statute are typically associated with a recognized religion) to assert that hiring gay, lesbian or transgender individuals is against one's personal religious beliefs.

4. "But-For" Causation. The Court's discussion of "but for" causation – a long controversial aspect of antidiscrimination law – has sparked interest among academics who see the potential for a broader concept that may make causation easier to establish, at least in some cases, and one that might break down the dichotomy in the case law between Title VII and other areas, such as retaliation and Age Discrimination, where the Court has adopted a more restrictive but-for standard of proof. For a recent thorough discussion of the issue see Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1623 (2021). To date, the few courts that have addressed the issue have rejected the notion that *Bostock* altered the law with respect to issues of causation. *See Pelcha v. MW Bancorp, Inc.*, 984 F.3d 1199 (6th Cir. 2021); *but see Frith v. Whole Foods Mkt.*,

38 F.4th 263 (1st Cir, 2022) (discussing and applying *Bostock* analysis and finding that associational discrimination claims satisfy the but-for standard but advocacy claims on behalf of protected individuals do not).

G. Contemporary Workplace Issues

Page 673.

2. Diversity in the Workplace – Affirmative Action Cases

In 2023, the Supreme Court invalidated the race-conscious admissions programs at the University of North Carolina and Harvard University (whether the Court banned the use of race in admissions is a more difficult question). *Students for Fair Admissions v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023). The opinion in the consolidated cases is available at https://www.supremecourt.gov/opinions/22pdf/20-1199_l6gn.pdf. Whether and how the opinion might affect the workplace is a matter primarily for speculation. The Court's opinion turned on the Equal Protection Clause, which applies only to public employers and Title VI, which, for the most part, does not reach private employers (Title VI applies to entities that receive federal funds). That said, there have already been some developments that would suggest opponents of affirmative action are turning to workplaces and, in particular, efforts that fall under the broad umbrella of Diversity, Equity and Inclusion. For example, following the Supreme Court's decision, thirteen state attorneys general wrote to executives at 100 of the largest United States companies warning them about using race in hiring or other aspects of employment. https://www.latimes.com/world-nation/story/2023-07-15/gop-attorneys-general-shift-the-battle-over-affirmative-action-to-the-workplace. Twenty Democratic Attorneys General then sent a rebuttal letter to the same executives. https://joshbersin.com/wp-content/uploads/2023/07/dem-letter2.pdf.

For a discussion of the possible implications of the Supreme Court's affirmative action decision in the workplace, see this discussion with co-author of this casebook Pauline Kim. https://www.vox.com/politics/2023/7/9/23787408/affirmative-action-in-the-workplace-diversity-equity-inclusion-in-hiring.

Chapter 10: The Regulation of Wages and Hours

C. Who Is Covered?

3. Applying FLSA's Test for Employment Status

a. Independent Contractors

Add the following text to Page 699:

The DOL has promulgated a new interpretive regulation, effective March 11, 2024, that identifies six factors plus a residual catch-all factor to determine whether as a matter of economic reality a worker is dependent upon an employer and thus covered by the FLSA as an employee, or in business for themself and thus an independent contractor. *See* 89 C.F.R. § 795.110. The factors are: opportunity for profit or loss depending on managerial skill; investments by the worker and the potential employer; degree of permanence of the work relationship; nature and degree of control; extent to which work performed is an integral part of the potential employer's business; skill and initiative; and additional factors. For more detail, see https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-B/part-795/section-795.110.

b. Trainees and Interns

Page 717, Note 1—the heading to this note has a typo; it should read "Distinguishing Interns From Employees."

Add the following text on page 717, at the end of note 2:

One case cited in note 2, *Eberline v. Douglas J. Holdings, Inc.*, was reversed and remanded on appeal. *Eberline v. Douglas J. Holdings, Inc.*, 982 F.3d 1006 (6th Cir. 2020), *cert. denied* 2021 U.S. LEXIS 2910 (June 7, 2021). The Sixth Circuit held that the district court had failed to apply the proper test, a "primary beneficiary" test from *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011). The court noted that the *Laurelbrook* test was similar to the test applied by the Ninth Circuit in *Benjamin*, the lead case for this section. *Eberline*, 982 F.3d at 1015-16. The court also emphasized that application of the *Laurelbrook* test to these facts would not necessarily lead to a judgment for the defendant. *Id*. at 1017. Applying that test on remand, the district court held that that no reasonable jury could find that the plaintiffs were the primary beneficiaries of their time performing janitorial tasks, and granted plaintiffs' motion for summary judgment on that question. The court granted defendants' motion for summary judgment regarding the clinic services, holding that the plaintiffs were the primary beneficiaries, and denied both parties' motions for summary judgment regarding retail sales work because there were disputed questions of fact on that issue. *Eberline v. Douglas J. Holdings, Inc*., 629 F. Supp. 3d 640 (E.D. Mich. 2022).

E. The "White-Collar" Exemptions

2. The Overtime Exemptions: Details

a. *Executive, Administrative and Professional Employees*

Page 745. Add the following text:

To fall within the traditional white-collar exemptions, employees must be compensated on a salary basis, rather than hourly and exceed a specified pay threshold, as well as meeting the duties test for a particular exemption. In *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39 (2023), the Court held that a high-earning employee whose paycheck is based on a daily rate rather than on a weekly, monthly or yearly rate, is not paid on a salary basis and thus is not exempt from overtime pay. The case involved a toolpusher on an offshore oil rig who supervised other workers and oversaw the rig's operations, who typically worked 12 hours per day, 7 days a week for 28 days, and then had 28 days off before reporting back to the vessel. He was paid on a daily-rate basis ranging from $963 to $1341 per day, and earned over $200,000 annually. The employer refused overtime pay, claiming that he fell within the executive exemption, or failing that, the highly-compensated exemption. The Court reasoned that his weekly pay was simply a function of how many days he had worked, he was more akin to an employee paid by the hour and not compensated for hours not worked rather than a salaried employee who receives a preset, fixed amount for a week no matter how many days he works. Thus, he failed to satisfy the salary basis requirement applicable to both exemptions.

In April 2024, the DOL issued a new rule raising the salary threshold for exempt employees in the traditional white-collar categories of executive, administrative and professional employees to $43,888, effective July 1, 2024, and raising it further to $58,656 on January 1, 2025. 89 Fed. Reg. 32,842 (to be codified at 29 C.F.R. pt. 541). The rule is designed to automatically update every three years, beginning July 1, 2027. Challenges to the rule are pending, arguing that FLSA focuses primarily on duties, not on salary. One district court has already enjoined application of the rule to Texas in its capacity as an employer. *See Texas v. DOL*, 2024 U.S. Dist. LEXIS 114902, 2024 WL 3240618 (E.D. Tex. June 28, 2024).

d. *The "Combination" and "Highly Compensated" Exemptions*

Page 768. Add the following text:

In April 2024, the DOL also issued a new rule raising the salary threshold for the highly compensated employee exemption to $132,964 as of July 1, 2024, and raising it further to $151,164 as for January 1, 2025. This rule also provides for automatic updates every three years, beginning on July 1, 2027.

Chapter 12: Health and Safety

A. Worker's Compensation

2. Basic Benefits and Coverage

a. Benefits and Procedures

Insert on page 820 before the paragraph on mental stress claims:

The COVID-19 pandemic created further challenges for determining coverage under the category of "occupational disease." Because COVID-19 is not peculiar to a certain trade or industry, it would not be considered an occupational disease under most states' compensation laws. 4 Larson's Workers' Compensation Law § 51.06. Furthermore, claimants would have difficulty proving a causal connection between their employment and an infection given that the virus is pervasive outside the workplace. *Id.* Some states responded to these difficulties by creating presumptions of compensability for certain categories of employees. For example, the Governor of Connecticut signed an executive order on July 24, 2020, creating a rebuttable presumption of compensability for a broad category of employees including health care professionals, grocery store clerks, first responders and other essential workers. Conn. Exec. Order No. 7JJJ (July 24, 2020). A handful of state legislatures also stepped in, amending their state workers' compensation laws to create similar presumptions of compensability. 4 Larson's Workers' Compensation Law § 51.06. *See, e.g.,* New Jersey Senate Bill No. 2380 (2020) (creating presumption of compensability for COVID-19 for workers essential to emergency response and recovery operations; public or private sector employees whose job duties are essential to the public's health, safety and welfare; emergency responders and workers at health care facilities and workers supporting a health care facility, such as laundry, research and hospital food service).

B. OSHA

1. Structure of the Statute

a. Promulgating Standards

On page 858, insert the following text after 1.a.ii.:

iii. COVID-19 and OSHA Emergency Temporary Standards

On November 5, 2021, the Department of Labor, Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard to address the spread of COVID-19, given evidence that significant transmission of the virus was occurring in workplaces. The temporary standard mandated that employers with 100 or more employees require their employees to be fully vaccinated against COVID-19 or to be tested weekly and wear masks while at work. COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov.

5, 2021). OSHA expected the standard would result in approximately 23 million individuals becoming vaccinated and prevent over 6,500 deaths and over 250,000 hospitalizations. *See* Occupational Safety and Health Admin., Summary: COVID-19 Vaccination and Testing ETS, (Nov. 5, 2021), https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf.

Business groups sued, challenging the mandate and the case quickly reached the Supreme Court, which granted applications to stay OSHA's COVID-19 vaccine-or-test standard. *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety and Health Admin.*, 595 U.S. 109 (2022). The Court reasoned that Congress gave the Department of Labor the power to establish "*workplace* safety standards, not broad public health measures." *Id.* at 117. While it recognized that COVID-19 "is a risk that occurs in many workplaces," the Court found that it is not an *occupational* hazard because it spreads "at home, in schools, during sporting events, and everywhere else that people gather." *Id.* As such, "[p]ermitting OSHA to regulate the hazards of daily life — simply because most Americans have jobs and face those same risks while on the clock — would significantly expand OSHA's regulatory authority without clear congressional authorization." *Id.* Finding support in the fact that OSHA has "never before adopted a broad public health regulation of this kind," the Court concluded that the emergency temporary standard exceeded OSHA's authority. *Id.* at 118.

Following the Court's decision, OSHA withdrew the emergency temporary standard. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 87 Fed. Reg. 3928 (Jan. 25, 2022). The withdrawal became effective on January 26, 2022. *Id.*

Chapter 13: Arbitration of Workplace Disputes

B. Arbitration in the Non-Union Workplace

Insert the following after Note 1, Page 899:

In *Southwest Airlines Co. v Saxon*, 596 U.S. 450 (2022), the Court again addressed the scope of the FAA's exclusion of transportation workers "engaged in foreign or interstate commerce." Saxon was a ramp supervisor for the airline whose job involved training and supervising teams of ramp agents responsible for loading and unloading cargo on airplanes. Importantly, Saxon herself frequently loaded and unloaded cargo alongside the workers she supervised. Saxon brought a class action against Southwest Airlines for failure to pay overtime wages due under the FLSA, and Southwest raised the arbitration agreement in her employment contract as a bar to her claim. A unanimous Court ruled that Saxon and airplane cargo loaders more generally are exempt from the FAA's coverage under the exclusion for workers engaged in interstate commerce. *Id.* at 453. The Court reaffirmed its strict textual approach to construing the FAA, eschewing reliance on statutory purpose or policy goals where the text is clear. *Id.* at 463. The Court focused on the particular work performed by Saxon rather than her job title or the fact that she was employed in an industry engaged in interstate commerce. Because cargo loaders are actively involved in transporting goods across borders, they fall within the "class of workers engaged in foreign or interstate commerce" for purposes of the FAA, and thus are excluded from its coverage. *Id.* at 455-58.

The most challenging aspect of the *Saxon* case was how broadly the "class of workers" would be defined. Would it include all employees who carry out the customary work of the airline, as Saxon argued, or was it limited to those transportation workers who physically transport passengers or handle goods in commerce? The broader interpretation could have encompassed many other employees who work for the airlines, including shift schedulers, website designers, and even ticket agents. The Court rejected this argument, finding these other activities too far removed from interstate commerce. *Id.* at 460-61. The Court cited in support of this narrower reading its earlier decisions in *Gulf Oil Corp. v. Copp Paying Co.*, 419 U.S. 186, 194, 198 (1974) (holding that a firm that made intrastate sales of asphalt was not engaged in interstate commerce merely because the asphalt was used to build interstate highways), and *United States v. American Building Maintenance Industries*, 422 U.S. 271, 283 (1975) (holding that a firm supplying localized janitorial services to a corporation engaged in interstate commerce was not therefore itself within the flow of interstate commerce). The Court did acknowledge, however, that the boundaries of the "class of workers engaged in foreign or interstate commerce" were not necessarily clear, citing as illustrative two cases from the Courts of Appeal: *Rittman v. Amazon.com, Inc.*, 971 F. 3d 904, 915 (9th Cir. 2020) (holding that a class of "last leg" delivery drivers were exempt from coverage under the FAA), and *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (7th Cir. 2020) (holding that food delivery drivers were not exempt from coverage under the FAA). 596 U.S. at 457, n.2.

In *Bissonnette v. LePage Bakeries Park St. LLC*, 601 U.S. 246 (2024), the Court refused to read the FAA section 1 exemption as applicable to preclude arbitration only for individuals employed in the transportation industry. According to the Court, a worker "need not be employed in the transportation industry" to fall within the FAA's exemption. The Court did not pass on the alternative arguments favoring arbitration raised below, namely that these petitioners were not transportation workers and that they were not engaged in foreign or interstate commerce because they delivered baked goods only within the state of Connecticut. This leaves open many questions regarding gig economy workers and the firms that contract with or employ them—which workers will qualify as transportation workers? Must they be involved in the active transportation of goods across state borders? What about the transportation of people across state boundaries—would Uber or Lyft drivers fall within the exemption?

How would you advise employers who utilize transportation workers and desire to cover as many workers as possible with predispute arbitration agreements? Some management-side firms have suggested that employers may wish to redraft arbitration agreements to apply state law, where state law does not contain an exemption for transportation workers. Would such contracts ultimately be unenforceable on the basis of FAA preemption of conflicting state law? Or would it be permissible for a state to discriminate *in favor of arbitration* by covering more workers, rather than fewer?

C. The Uses and Limits of Mandatory Employment Arbitration Agreements

2. State Contract Law Principles

Insert the following after Note 5, Page 921.

In *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), the Court clarified that the FAA does not authorize federal courts to create arbitration-specific procedural rules even where the rule favors arbitration. Robyn Morgan, an hourly employee at a Taco Bell franchise owned by Sundance, filed a collective action under the FLSA seeking overtime pay. The employer initially defended the claim in court as if no arbitration agreement existed, and then, eight months later, moved to stay the litigation and compel arbitration pursuant to the FAA. The plaintiff opposed the motion, arguing that the employer had waived its right to arbitrate by litigating for an extended period before asserting it. Federal court precedent from nine circuits held that a party waives the right to arbitration if it knew of the right, acted inconsistently with it, *and prejudiced the other party by its inconsistent actions*. Following this precedent, the Eighth Circuit Court of Appeals found that no showing of prejudice had been made and granted the motion to compel arbitration. In a unanimous opinion authored by Justice Kagan, the Supreme Court ruled that courts may not apply arbitration-specific variants of federal procedural rules or devise novel rules designed to advance the national policy favoring arbitration. *Id.* at 414. Because the usual federal rule of waiver does not require a

showing of prejudice to the other party, the waiver rule applied by the majority of federal circuits conflicts with the FAA's commitment to place arbitration agreements on the same footing as other contracts. *Id.* at 418. The Court explained:

> [T]he FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. *Moses H. Cone Memorial Hospital v Mercury Constr. Corp*., 460 U.S. 1, 24 (1983). Our frequent use of that phrase connotes something different. "Th[e] policy," we have explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302 (2010). Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967) . . . . The federal policy is about treating arbitration agreements like all others, not about fostering arbitration. *See National Federation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (CADC 1987) (The Supreme Court has made clear" that the FAA's policy "is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism.").

596 U.S. at 418-19. Accordingly, on remand to the Eighth Circuit, the only question remaining is whether the employer knowingly relinquished the right to arbitrate by acting inconsistently with that right. *Id.* at 419.

2. State Contract Law Principles

Page 924, Note 8.

The text notes that California passed legislation in 2019 (AB 51) purporting to prohibit employers from requiring job applicants or workers to sign arbitration agreements as a condition of employment. After lengthy litigation, the Ninth Circuit struck the statute down as preempted by the FAA, reasoning that even though the statute did not specifically bar arbitration agreements, the law had the effect of imposing severe burdens on arbitration agreements that do not apply to contracts generally. *Chamber of Commerce v. Bonta*, 62 F.4th 473 (9th Cir. 2023).

Insert the following after Note 8, p. 924:

In March 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended at 9 U.S.C. §§ 401-02) ("Ending Forced Arbitration Act"). The Act permits claimants in sexual assault or sexual harassment disputes to void predispute arbitration agreements at their election. Unlike the other statutory bans on arbitration agreements (discussed in the text at Note 3, pp. 900-01) which involved standalone statutes applicable to all arbitration provisions within the scope of the legislature's power, the Ending Forced Arbitration Act was incorporated within the FAA, which means that the Ending Forced Arbitration Act only applies if the FAA applies. Thus,

for example, transportation workers who are excluded from the FAA's coverage (see, e.g., *Southwest Airlines Co. v. Saxon*, *supra*) are also excluded from the Ending Forced Arbitration Act's coverage, and state law may apply. Where the state law is not hostile to arbitration, sexual assault and sexual harassment complainants may thus fall through the cracks and be required to arbitrate disputes. *See* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. FORUM 1 (2022) (critiquing the law on this basis and others, and proposing reforms to rectify the situation). Alternatively, suppose that the sexual assault or harassment claim is combined with another claim. Could the claimant seek to litigate both or would the sexual assault or harassment claim be severed? Would it depend upon the nexus, if any, between the two claims? *See* Imre S. Szalai, *#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Law of 2021*, 18 NORTHWESTERN J. L. & SOC. POL'Y 1 (2023) (identifying challenges in construing the new amendment).

3. Challenging Waivers of Class Claims

Insert the following after Note 4, Page 939:

Sometimes when the legal pendulum swings too far in one direction, unanticipated outcomes may follow. In the wake of the Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018), plaintiffs' lawyers have become increasingly resourceful, using online marketing and other tools to sign up consumers and workers who may have similar claims against the same firm and then file thousands of individual arbitration claims, causing firms to question the blanket mandatory arbitration agreements they had traditionally imposed upon both workers and consumers. In 2021, Amazon, Inc. changed its terms of service to allow customers to file lawsuits in specified fora, rather than mandating arbitration. The change was made in response to a flood of more than 75,000 individual arbitration claims filed on behalf of Amazon Echo users alleging that the Alexa-powered device recorded people without their permission. The arbitration filings triggered a bill of tens of millions of dollars in filing fees payable by Amazon under its own policies. *See* Sara Randazzo, *Amazon Allows Customers to Sue*, WALL ST. J., June 2, 2021, at A1. In another case involving worker misclassification claims against DoorDash, more than 5,900 drivers filed arbitration claims and triggered significant filing fees payable by DoorDash. When DoorDash balked, plaintiffs' lawyers filed a motion in federal court to compel the individual arbitrations—a strategy typically adopted by employers. The strategy was successful. Ultimately, DoorDash settled the individual claims for a total of $85 million. *Id.* at A2.