

**WORK LAW:
CASES AND MATERIALS
Third Edition**

2018 Supplement

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

B. Changes in the Structure of Work

Insert at end of section on p. 64

In recent years, the rise of “on-demand economy” or “gig economy” firms such as Uber and Lyft has triggered broad concern about the present and future of work. Such companies use mobile apps to link consumers and workers for short-term tasks, most of which involve driving or delivery. Uber and Lyft, for example, have revolutionized how taxi services operate. Rather than waiting at a street corner for a taxi to come by, or calling a dispatch service, today passengers can request a ride at the push of a virtual button on their smartphone screen. Rather than having to carry and pay cash, the cost of a trip is directly transferred from a customer’s credit card. At the end of the ride, passengers and drivers both rate one another on a scale of one to five stars, and the companies use the aggregate ratings to determine whether those parties should be allowed to continue performing or receiving services via their app. The rapid growth of such companies has affected cities and urban residents around the globe, forcing taxi drivers and companies to adapt, and making it less necessary for citizens to own cars or, in some cases, to take public transit.

Silicon Valley has sought to replicate Uber and Lyft’s success in other sectors. Instacart, for example, is a grocery delivery app. Customers place orders online or through their mobile devices, then workers go to local stores, purchase their groceries, and deliver them to consumers. Grubhub uses a similar model, allowing consumers to order food from restaurants and have it picked up and delivered by workers. Rinse is a gig economy startup focused on laundry and dry cleaning. Workers will come to your home, pick up your dirty clothes, get them cleaned, and then bring them back. There are many similar startups operating in major cities today, all of them reliant on small armies of workers who are paid by the job, and who often work whatever hours they choose.

But many such companies have also been accused of mistreating those workers. For example, a study by the Economic Policy Institute found that the average Uber driver made around \$9.21 an hour, after accounting for fees, vehicle expenses, and taxes. That means many Uber drivers are among the lowest paid workers in the country. LAWRENCE MISHEL, ECONOMIC POLICY INSTITUTE, *UBER AND THE LABOR MARKET* (May 15, 2018) *available at* <https://www.epi.org/files/pdf/145552.pdf>. Professionals. Many gig economy companies reserve the right to “deactivate” workers (and consumers) without notice, which many see as a violation of due process norms. Gig economy workers may also suffer discrimination if, for example, customers allow their implicit or explicit biases to inform their ratings, and low ratings lead to deactivation. And gig economy companies have been the subject of numerous lawsuits alleging violations of minimum wage and other employment laws, which we discuss in Section C, below.

NOTES

1. Innovation...Regulatory Arbitrage...Or Both? Just how “innovative” are Uber, Lyft, and other on-demand economy startups? The companies’ boosters argue that they have revolutionized ride-hailing and other services by developing apps that integrate mobile technologies, GPS tracking, electronic payment systems, and data analytics. Their detractors argue that they have kept costs low by avoiding many of the regulations imposed on taxis and other traditional service providers. Taxis in many U.S. cities, for example, must have specialized paint jobs and internal dividers to protect drivers; taxi companies must purchase expensive operating licenses; taxis must carry substantial liability insurance; and taxi fares are set by states or localities. Those regulations create substantial costs for taxis that Uber and Lyft have been able to avoid. *See Malden Transp., Inc. v. Uber Techs., Inc.*, 286 F. Supp. 3d 264 (E.D. Mass 2017) (denying defendants’ motion to dismiss lawsuit by taxi companies alleging that Uber engaged in unfair competition under common law and Massachusetts Consumer Protection Act). Meanwhile, Uber has convinced many localities to re-write local regulations in ways that allow it to operate. *See, e.g., Luz Lazo, New Regulations for Uber and Lyft open the door for expansion*, WASH. POST (Feb. 21, 2015). *See generally* Brishen Rogers, *The Social Costs of Uber*, 82 U. Chi. L. Rev. Online 82 (2015).

2. How Large Is the “On-demand” Economy? There is a dearth of hard data on the size of the “on-demand” or “gig” economy.

Because they are so nascent, relatively little economic research has been done on [the on-demand economy]. Moreover, many of these activities cannot be isolated in official economic statistics and, in some cases, may in fact be omitted from these statistics. At present, this portion of the economy still appears relatively small—estimates suggest that it represents less than 1 percent of the working-age population and only accounts for a miniscule portion of the economy as a whole; PricewaterhouseCoopers estimated global revenues for the on-demand economy to be \$15 billion in 2014. However, these business models are growing rapidly, and McKinsey Global Institute predicts these business models will increase global GDP by \$2.7 trillion by 2025.

ECONOMIC REPORT OF THE PRESIDENT, TOGETHER WITH THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS, 242-245 (2016).

The Department of Labor’s Bureau of Labor Statistics (BLS), which tracks changes in the national workforce, used to gather data and report on what it calls “contingent and alternative employment arrangements,” but stopped doing so in 2005 due to budget cuts. The Obama administration restarted that process, and the BLS’s latest report came out in 2018. That report actually found a *decline* in independent contracting arrangements compared to 2005. Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements, <https://www.bls.gov/news.release/conemp.toc.htm> (last visited June 20, 2018). But the survey asked only about individuals’ main source of income, and therefore it did not account for workers who work as independent contractors to earn extra money on the side. The BLS survey also did not necessarily capture the full extent of subcontracted work due to methodological difficulties.

Annette Bernhardt, *Making Sense of the New Government Data on Contingent Work*, NOTEWORTHY – THE JOURNAL BLOG, (June 10, 2018), at <https://blog.usejournal.com/making-sense-of-the-new-government-data-on-contingent-work-97209bb0c615>.

C. Defining the Boundaries of the Employment Relationship

1. What is the Nature of Employment?

Insert at p. 72

Replace the vignette entitled “Scholar Athletes” with the following vignette:

Graduate Students and Student Athletes

In some cases the compensation element is clearly satisfied and the would-be employer appears to exercise significant control over the work performed, but the relationship has traditionally been seen as falling into another category—an academic relationship, for example. Much of the law in this area has developed under the National Labor Relations Act when students have sought organizing and collective bargaining rights vis-à-vis the university. The NLRB has ruled that medical interns, residents and fellows who are paid to spend 80% of their time providing direct patient care with limited supervision are primarily functioning as employees, not as students, and thus are protected under the NLRA. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999). On the other hand, the NLRB has gone back and forth on the question whether graduate teaching assistants who assist with teaching are primarily students, or primarily employees. Relying on *Boston Med. Ctr. Corp.*, *supra*, the Board held that graduate students were employees compensated by the university for teaching services performed at its direction and under its control. *New York University*, 332 N.L.R.B. 1205 (2000). Four years later, however, the Board reversed itself in *Brown Univ.*, 342 N.L.R.B. 483 (2004), holding that teaching assistants are not employees for NLRA purposes because their relationship with the university is primarily academic rather than economic. The Board emphasized that teaching assistants’ duties are a core element of the educational process for which they receive academic credit and financial aid, they are closely supervised by academic faculty, and the amount of time spent teaching is small compared to the amount of time spent on their own studies. The Board also worried that collective bargaining over matters relating to educational content would undermine academic freedom in the classroom. In *Columbia University*, 364 N.L.R.B. No. 90 (2016), the Board overturned *Brown Univ.* and returned to its position in *New York University*, finding that graduate teaching assistants and research assistants are “employees” under the NLRA who can unionize for bargaining purposes. The Board observed that graduate teaching assistants perform teaching work similar to that of core faculty and are compensated for that work, and took note of the fact that widespread organization of graduate students in the public sector had not undermined the universities’ ability to function. Specifically, collective bargaining had not harmed faculty-student mentoring relationships or diminished academic freedom, since bargaining was focused on traditional subjects such as wages, hours, and terms and conditions of employment.

Now consider this scenario:

A private university competing in Division I athletics provides scholarships to its football players that cover tuition, room and board, health insurance, fees and books for up to five years; benefits may total as much as \$76,000 per calendar year. The scholarships are tied to performing on the playing field and can be withdrawn if the player withdraws from the team or abuses team rules. The football team is profitable for the university, generating as much as \$235 million in revenue with only \$159 million in expenses. The players are engaged in athletic pursuits 50-60 hours per week and their daily itineraries are strictly controlled from 5:45 a.m. until 10:30 p.m. They are required to follow strict rules and policies that other students are not, including restrictions on where they live, on outside employment, on the vehicles they drive, on their interactions with the press and social media, on swearing in public, on selling merchandise or autographs that allow them to profit from their athletic abilities (mirroring an NCAA rule), and on gambling, drug and alcohol use. Their class schedules are organized around their athletic activities.

The players seek to organize a union in order to advocate for the right to control the use of their own images and to obtain post-graduation health care coverage for injuries sustained while on the team. Is their relationship with the university primarily academic, or primarily economic? A Regional Director of the NLRB initially found that it was primarily economic, and that the players were employees covered by the NLRA. On review, the NLRB declined to assert jurisdiction and dismissed the players' petition for union representation without deciding whether they were covered as employees under the NLRA. The Board worried that asserting jurisdiction would not promote labor stability across the league since it lacked jurisdiction over the state-run universities that comprised 108 of the 125 NCAA Division One football teams. [*Northwestern University*, 2014 NLRB LEXIS 221, review granted by full Board and petition dismissed, 362 N.L.R.B. No. 167 (2015)]

Suppose that the players seek minimum wage pay under the Fair Labor Standards Act. Would they be deemed "employees" covered by the FLSA? Should they be? [*Berger v. Natl. Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016) (holding that student athletes are not "employees" covered by the Fair Labor Standards Act because "student-athletic 'play' is not 'work,' at least as the term is used in the FLSA," and noting that the decision to participate is voluntary and occurs against a backdrop of a tradition of amateurism in college sports)].

Suppose that a player is critically injured during a college game while on scholarship, and seeks coverage for medical costs that will continue after his scholarship has terminated. Should he be deemed an employee for purposes of workers' compensation law? [*Waldrep v. Texas Employers' Insurance Ass'n*, 21 S.W.3d 692 (Tex. App. 2000) (declining to find employee status necessary for coverage)]

C. Defining the Boundaries of the Employment Relationship

2. Who Is an “Employee”?

Insert the following text on page 93 after the end of note 5:

6. Employment Status in the Gig Economy. Some gig economy companies including Instacart classify some of their workers as employees. Davey Alba, *Instacart shoppers can now choose to be real employees*, Wired (June 22, 2015). But most classify their workers as independent contractors, which has led to a number of misclassification lawsuits. Those suits typically allege that the companies exerted substantial control over their work, for example by setting pay rates, deciding when to send requests from passengers or clients, and reserving the right to “deactivate” workers for failing to respond quickly to requests. The companies often defend themselves by pointing to the fact that drivers are able to set their own hours and to work for competing companies.

To date, the courts have mainly sided with the companies. *See Razak v. Uber Techs*, 2018 U.S. Dist. LEXIS 61230 (E.D. Pa., Apr. 18, 2018) (granting defendant’s motion for summary judgment in FLSA case because plaintiffs, drivers for UberBLACK limousine service, had failed to show they were employees under six-factor test that considered the right to control, the worker’s opportunity for profit or loss, and other factors); *Lawson v. Grubhub*, 302 F. Supp. 3d. 1071 (N.D. Cal. 2018) (finding, after bench trial, that a driver for Grubhub delivery service was an independent contractor under California law given “Grubhub’s lack of all necessary control over [his] work, including how he performed deliveries and even whether or for how long” he worked); *O’Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1135, 1148-49 (N.D. Cal. 2015); (denying Uber’s motion for summary judgment on the grounds that under California law, Uber drivers were “presumptive employees because they ‘perform services’ for the benefit of Uber,” and that disputed facts remained regarding the extent of Uber’s control over the drivers).

Given your own experience with Uber, Lyft or other gig economy companies, do you think those companies’ drivers are employees? How does the relationship between Uber and its drivers compare to the relationship between FedEx and its drivers?

7. The “ABC Test.” In 2018 the California Supreme Court broadened the test for employment under state wage and hour regulations. *Dynamex Operations West., Inc. v. Superior Ct. of Los Angeles*, 4 Cal. 5th 903 (Cal. 2018). Now in California, any worker performing services for pay is presumed to be an employee unless the company can prove the following:

(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Dynamex 4 Cal. 5th at 916-917. *Dynamex* was a landmark decision, in part because it may make

it more likely that gig economy workers will prevail in their misclassification suits. *See, e.g.*, Noam Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling*, N.Y. TIMES (Apr. 30, 2018). Do you think it will have that effect? How does it compare to the tests applied in *FedEx Home Delivery* and *Alexander*?

Before *Dynamex*, more than half the states already used versions of this “ABC test” to determine coverage under their unemployment insurance laws, and Massachusetts and New Jersey used it for wage and hour laws. Rebecca Smith, *How Two Court Decisions Could Mean Gig is Up For Many Companies That Call Their Workers Independent Contractors*, NATIONAL EMPLOYMENT LAW PROJECT BLOG, (May 18, 2018). States often use the ABC test for unemployment insurance for a few reasons. The harms of unemployment are particularly severe—workers and their families can be left destitute—so state legislatures have instructed that their unemployment insurance laws be construed liberally in favor of finding coverage. Plus, the financial viability of insurance systems depends on having a broad pool of participants, and a key question in unemployment cases is whether a putative employer should have been paying taxes into the state’s unemployment insurance fund on behalf of a worker. Do those policy goals translate to the wage and hour context? How about the collective bargaining context?

C. Defining the Boundaries of Employment

Insert p. 96

3. Who is the Employer?

Significant developments have occurred before the NLRB on the question of joint employer liability for unfair labor practices and collective bargaining, with significant implications for franchises in particular. Historically, the Labor Board required actual, direct and immediate control over wages, hours, or terms and conditions of employment to support a finding of joint employer status sufficient to hold one business liable for the conditions under which another’s employees labor. *See Airborne Express*, 338 N.L.R.B. 587 (2002); *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *enforced sub nom. General Teamsters Local Union No. 26 v. NLRB*, 772 F.2d 894 (3d Cir. 1985). In *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186 (2015), the Obama Board ruled that a company could be considered a joint employer of another business’s workers even if it exerted only indirect control over them, requiring a waste management company to bargain with sorters, screen cleaners and housekeepers provided by a third party contractor to work at one of Browning-Ferris’s recycling plants. The Board reasoned that modern economic realities including the rise of outsourcing, subcontracting, and temporary employment necessitated the change in order to bring essential parties that share control to the bargaining table.

Although the Trump Board has signaled its intent to overturn *Browning Ferris* and return to the “direct and immediate control” test, its initial efforts to reverse the decision were caught up in procedural complications. *See Hy-Brand Industrial Contractors, Ltd.*, 365 N.L.R.B. No. 156 (2017), *vacated*, 366 N.L.R.B. No. 26 (2018). The *Browning-Ferris* indirect control test thus remains the law, at least for now.

Which test applies has significant implications for businesses with franchising structures that permit control by the franchisor over wages, hours, terms of employment and working conditions of franchisee employees, like McDonald's. Labor advocates in the SEIU-backed "Fight for \$15" had sought to hold McDonald's USA liable for unfair labor practices committed by its franchisees, and to press collective bargaining demands directly with McDonald's USA. See *McDonald's USA LLC*, NLRB ALJ, No. 2-CA-93893, Mar. 10, 2015. The test adopted by the Labor Board also has implications for areas beyond labor law, including liability for workplace safety violations under the Occupational Safety and Health Act. After the Board's ruling in *Browning-Ferris*, for example, the Department of Labor reportedly instructed OSHA inspectors to consider factors that might support imposing liability on franchisors for violations at franchised locations. See *House Republican Leaders Ask OSHA to Explain Multi-Employer Work Site Policy*, Daily Lab. Rep. (BNA) No. 198, Oct. 14, 2015, at A-12, A-13.

Chapter 6: Employee Mobility

A. Covenants Not to Compete

Add the following on p. 320 at the end of Note 11:

The antitrust lawsuit against Google, Apple and others, mentioned in the text, settled for \$415 million in 2015.

More recently, an investigation revealed that “no-poaching” clauses have been used to limit the mobility of fast food workers. The franchise agreements of seven large companies (Carls’ Jr., McDonald’s, Jimmy John’s, Cinnabon, Auntie Anne’s, Arby’s and Buffalo Wild Wings) contained clauses that prohibited franchisees from hiring someone who worked at another franchise within the same chain. These agreements prevented, for example, a McDonald’s employee from moving to another McDonald’s franchise. After several state attorneys general offices announced investigations into the agreements as potentially impermissible restraints on trade, the companies quickly agreed not to enforce the clauses. *See* Jeff Stein, *7 Fast Food Chains Agree to Drop No-Poaching Clauses*, WASH. POST, July 12, 2018, https://www.washingtonpost.com/business/2018/07/12/fast-food-chains-agree-drop-no-poaching-clauses/?utm_term=.5857b95ddf45. Investigations into the franchise agreements of a number of other fast food chains, including Burger King and Dunkin’ Donuts, are continuing as the practice of restricting employee movement within chains appears to be widespread.

12. Nondisclosure Agreements. Over the last year, there has been a surge of interest in nondisclosure agreements (“NDAs”) also known as confidentiality agreements. Confidentiality provisions are common in settlements and it appears that Harvey Weinstein relied on such provisions to settle many claims of sexual harassment over the years, and to prevent victims of his harassment and assault from discussing his behavior. (The use of NDAs in connection with serial sexual harassment is discussed in the Supplement to Chapter 9.) Adult film star Stormy Daniels has also engaged in a public dispute over a nondisclosure agreement she entered into with President Trump that was designed to prevent her from disclosing details regarding their relationship.

In addition to settlement agreements, some employers impose NDAs as a condition of employment. First, some employers rely on confidentiality agreements in lieu of restrictive covenants, and traditionally these agreements have been seen as more desirable from an employee’s perspective than a restrictive covenant because they do not specifically restrict employees from moving to competitors. Confidentiality agreements can be difficult to enforce, in large part because the “confidential information” to which they apply is rarely specifically defined.

Second, some employers, including it appears President Trump both before and after he entered the White House, rely on NDAs to prohibit employees from disclosing a broader array of information. For example, an agreement employed prior to becoming President required employees to refrain from disclosing not only confidential information but any “information Mr. Trump insists remain private or confidential.” *See* Callum Borchers, *What’s In the Nondisclosure Agreement Bannon Signed? And Could Trump Actually Win a Lawsuit?* WASH. POST, Jan. 4,

2017, https://www.washingtonpost.com/news/the-fix/wp/2018/01/04/whats-in-the-nondisclosure-agreement-bannon-signed-and-could-trump-actually-win-a-lawsuit/?noredirect=on&utm_term=.0f5cfbe65f72. Many entertainers have similarly broad agreements. The Los Angeles Times recently described an NDA required by Leonardo DiCaprio of all his employees or contractors that prohibits disclosure of virtually anything they learn on the job. In the article, a Hollywood-based attorney called the DiCaprio agreement “pretty standard” for Hollywood. Confidentiality clauses sometimes also contain penalty clauses. The DiCaprio agreement called for a \$250,000 payment for any breach, while a confidentiality agreement for the reality show *Shark Tank* required a \$5 million payment. See James Rufus Koren, *Want to Work in Hollywood? Here’s the Kind of Nondisclosure Agreement You Have to Sign First*, L.A. TIMES, Oct. 21, 2017, <http://www.latimes.com/business/la-fi-hollywood-nondisclosure-20171026-story.html>.

If challenged, these agreements may prove difficult to enforce, and even if the agreements were enforceable, the provisions specifying the remedy may not be. Basic contract law applies to NDAs and to the extent the contract is ambiguous, overbroad, restrains future job opportunities, or violates public policy, it may be deemed invalid under the law. See, e.g., *Metso Minerals Indus., Inc. v. FLSmidth-Excel, LLC*, 733 F. Supp. 2d 980 (E.D. Wisc. 2010) (an overbroad confidentiality agreement with a former employer was invalid based on state statutory grounds); *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663 (Ohio. App. 1988) (NDA that prohibited school district from revealing criminal behavior of former employee was void against public policy). Recently, one court concluded that an overbroad confidentiality agreement that does not include time limits or specific definitions should be analyzed as if it were a noncompete agreement. See *Fay v. Total Quality Logistics, LLC*, 799 S.E.2d 318 (S.C. App. 2017). The case has received widespread attention and the South Carolina Supreme Court granted certiorari in early 2018.

For many years, courts have held that confidentiality agreements that prohibit employees or former employees from assisting the EEOC with investigations are unenforceable as against public policy. See *EEOC v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996). Courts have similarly held that it is impermissible to require, as part of a settlement agreement, that employees waive their right to file a claim with the EEOC, even though it is permissible to require them to waive their right to recover damages. See *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987). Courts have determined that there is a substantial public interest, one that generally outweighs the employer’s interest in confidentiality, in ensuring that the EEOC (and presumably any other agency) has access to information necessary to enforce the laws it oversees. Recently, a court reached a similar conclusion in a whistleblower case under Sarbanes-Oxley, holding that it would be inappropriate for an employer to prevent a whistleblower claim through enforcement of a confidentiality agreement in connection with a severance payment. See *Erhart v. Bofi Holding, Inc.*, 2017 WL 588390 (S.D. Cal. Feb. 14, 2017). For a recent and thorough discussion of confidentiality clauses in the context of suppressing whistleblowers, see Richard Moberly, *Confidentiality & Whistleblowing*, 96 N.C. L. REV. 751 (2018).

Different issues are raised by NDA provisions that require the party disclosing information to pay a specified amount of money. You may recall from your Contracts course that, as a general matter, it is not permissible to penalize parties for breaching a contract; instead a party is required to pay for the damages caused by the breach. Parties can agree to what are known as liquidated

damages provisions to the extent actual damages would be difficult to prove and the amount of the liquidated damages provision is deemed reasonable. *See, e.g., XCO Int'l. Inc. v. Pacific Scientific Co.*, 369 F.3d 998 (7th Cir. 2004) (Posner, J.) (discussing history and current common law on liquidated damages provisions). Thus, given basic contract law principles, the validity of any particular remedies provision would be determined on a case by case basis.

Of course, a significant problem with a broad NDA that may not be legally enforceable in court is that most individuals will have neither the knowledge nor the resources to know whether it is enforceable and therefore are likely to abide by its terms. This is a problem with many contracts that are imposed on employees, including many noncompete agreements, all of which raise significant ethical issues for attorneys drafting such agreements, an issue we touch on in the Chapter 9 Supplemental Materials.

Insert new Note 6 p. 336:

6. Defend Trade Secrets Act. In 2016, Congress enacted the Defend Trade Secrets Act. 18 U.S.C. § 1836. The statute provides for a federal cause of action for trade secrets violations, and largely reflects the law developed in state courts with a couple of exceptions. One potentially significant difference is that the statute permits ex parte property seizures related to the alleged misappropriation. However, the few courts to address the issue to date have generally declined to issue such an order, concluding instead that seizure is appropriate only when all other possible relief is inadequate. *See, e.g., Brunswick Rail Mgt. v. Sultanov*, 2017 WL 67119 (N.D. Ca. Jan. 6, 2017). The federal statute also appears to disfavor the inevitable disclosure doctrine. The statutory language specifically notes that injunctive relief cannot be used to keep an individual from “entering an employment relationship” and must be based on “evidence of threatened misappropriation and not merely on the information the person knows.” 18 U.S.C. § 1836(3)(A)(i)(I). Aside from these variations from state law, the significance of the DTSA is that it makes a federal forum available for trade secrets cases that would otherwise be decided by a state court.

Chapter 7: Dignitary Interests

D. Testing, Screening and Monitoring

3. Monitoring and Data Analytics

Add the following on p. 439 at the end of the subsection 3 and before Section E:

The technological developments described in Part D.3. of the main text have only accelerated in the last few years, making issues of privacy in the workplace even more salient. The following materials explore some of those issues in greater detail by considering several scenarios illustrating workers' concerns. In each situation, do you think employees have legitimate interests that should be legally protected? Are these interests properly understood as privacy rights or something else? Can you think of any laws or doctrines discussed in this chapter that offer protections in these scenarios?

Location Tracking Systems

When geolocation technology became widely available, employers began placing Global Positioning System (GPS) devices on company owned vehicles to track their location and, by extension, the workers who drive them. Use of the technology by employers has expanded further as it has become more powerful and can be integrated into all kinds of devices—most notably cellphones. Consider the following:

A private firm employs field technicians who install, service and repair computer equipment used by businesses throughout a multi-state region. The employer requires all its technicians to upload onto their personal cellphones a workforce management app. Using the app, employees can clock in and out of work and submit timecards remotely. They also receive specific work assignments and customer information from their supervisor throughout the day. Using GPS technology, the app also records and reports to the employer their location, allowing supervisors to see the location of every field technician on a Google Map at any moment in time. It also allows supervisors to “drill down” on an individual worker to see where they were in the past, the routes they took, how long they spent at each location and how fast they were driving. There is no way to turn off the location tracking function without deleting the app from the phone. One of the field technicians complained to her supervisor that the app recorded her whereabouts even when she was off-duty. She explained that she had no objection to using the app while she was working, but objected to the collection of information about her location during her off hours. Her supervisor told her that the app was needed for communication about work assignments and that she was also expected to keep her phone turned on 24 hours a day in case she needed to be reached in an emergency. A week after having this conversation, the employee deleted the app from her phone just before she left on vacation. When she returned to work, she was fired.

Does the fired employee have any legal claims against the employer? In a situation similar to the scenario described above, a fired worker sued under California state law alleging, among

other claims, common law invasion of privacy, wrongful discharge in violation of public policy, and several state statutory claims. *See, e.g.,* Adriana Gardella, *Employer Sued for GPS-Tracking Salesperson* 24/7, *Forbes* (June 5, 2015). Unlike other states, California's constitution expressly protects personal privacy against invasion by private entities. California also has a statute making it a misdemeanor to "use an electronic tracking device to determine the location or movement of a person," except if the device tracks a vehicle and the owner, lessor or lessee of that vehicle consents. Cal. Penal Code § 637.7. In the absence of these California-specific laws, how strong is the employee's legal case? Does the employer have any legitimate interests in tracking its employees, and if so, how should those interests be balanced against the employees' interests?

Would your evaluation of this scenario change if the cellphone had been provided by the employer? If the employer was a government entity rather than a private employer? If the field technicians were represented by a union? Courts are beginning to confront these types of questions. *See, e.g.,* *Elgin v. St. Louis Coca-Cola Bottling Co.*, 2005 WL 3050633 (E.D. Mo. Nov. 14, 2005) (rejecting intrusion upon seclusion claim where employer installed a GPS tracker on a company owned van driven by plaintiff); *El-Nahal v. Yassky*, 835 F.3d 248 (2d Cir. 2016) (rejecting Fourth Amendment claim challenging the city's requirement that licensed taxicabs install GPS tracking systems); *Azam v. D.C. Taxicab Comm'n*, 46 F. Supp. 3d 38 (D.D.C. 2014) (same); *Haggins v. Verizon New Eng., Inc.*, 648 F.3d 50 (1st Cir. 2011) (unionized employees claimed that requiring them to carry cellphones with GPS tracking systems violated their privacy rights and court found those claims preempted by the Labor Management Relations Act).

In recent years, the Supreme Court has addressed how location tracking technologies impact individual privacy in the context of the government's law enforcement activities. In *United States v. Jones*, 565 U.S. 400 (2012), the Court held that placing a GPS device on a suspect's vehicle and tracking his movement continuously over several weeks constituted a search under the Fourth Amendment. Most recently, in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Court affirmed that individuals have a reasonable expectation of privacy in cellphone location data, such that law enforcement cannot access that data without a warrant supported by probable cause. The Court explained what is at stake in allowing government access to cellphone location data:

[This] location information is detailed, encyclopedic, and effortlessly compiled . . . [it] provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual association.' [*citing* *U.S. v. Jones*, at 415 (opinion of Sotomayor, J.)]. . . A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. . . Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user. Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection . . . With access to [cellphone location information], the Government can now travel back in time to retrace a person's whereabouts . . . Only the few without cell phones could escape this tireless and absolute surveillance.

138 S. Ct. at 2216, 2217, 2218. Are these observations relevant to employees' claims of privacy vis à vis their employers? The Court's precedents in *Jones* and *Carpenter* are most directly relevant when a government employer utilizes location-tracking technologies as part of an investigation into employee wrongdoing. See, e.g., *Matter of Cunningham v. N.Y. State Dep't of Labor*, 21 N.Y.3d 515, 974 N.Y.S.2d 896, 997 N.E.2d 468 (holding that employer's use of a GPS device on employee's private vehicle to investigate suspected false time records was an unreasonable search because the employer had also tracked the employee's off-duty activities). As discussed in Chapter 7, section B.1 of the main text, constitutional protections of individual privacy do not apply to private employers; however, when courts consider under what circumstances a "reasonable expectation of privacy" exists under the Constitution, those discussions often influence how claims of invasion of privacy against private actors are evaluated.

Biometric Identifiers

Biometrics refers to the measurement of physical characteristics to identify a person or to infer information about them. The best known example is fingerprints, which are unique to each person and have long been used by law enforcement. With the growth of computing power and the ability of electronic devices to detect and record small physical differences, additional biometric measures are being developed, including hand geometry, iris scans, palm prints, facial recognition and voice prints. Biometric identifiers work by creating a data profile that captures a person's unique physical attributes—for example, the distance between ridges on a fingerprint or the geometries of someone's facial structure. That information is stored by the computer as a known template associated with a unique individual. When a person seeks access to a system, the computer scans the subject's fingerprint or face and analyzes that information to confirm that it matches the existing template, thereby verifying identity. This technology is making its way into the workplace, as in the following scenario.

A large retailer with both brick-and-mortar and online stores recently switched to a timekeeping system that uses biometric information. Retail clerks and warehouse workers now clock in and out of their workplaces by placing their finger on a scanner that analyzes their fingerprint and confirms their identity. The company believes that the new technology keeps much more accurate records than the physical time cards previously used to punch in and out, and has reduced errors and employee cheating (for example, by having a co-worker punch in when someone is running late). Employees also use their fingerprints to purchase food from the cafeteria or goods for their personal use. The company is now deciding whether to expand its use of biometric identifiers. One system under consideration would replace computer passwords with facial scans. In order to log in to their computers or to access sensitive data, employees would first have their faces scanned by a computer, which would then match the data derived from the scan with stored data in order to verify their identity. An enhanced version of the system would also analyze these facial scans to detect emotional states such as enthusiasm, anger, or anxiety. The employer would use this information to intervene to address problems proactively, or to alter assignments or workflow according to employees' emotional states in order to enhance performance and maximize productivity. The facial recognition technology could also be used to screen applicants—for example, by matching the scans with publicly available information and

identifying applicants with a criminal history.

Is there any problem with the use of fingerprint scans for timekeeping purposes? Should the employer expand its use of biometric information in the ways discussed in the scenario? Do you see any legal or ethical concerns with either practice? The use of biometric identifiers in the workplace is relatively new, although their use is likely to expand in coming years.

The unregulated use of biometric identifiers may threaten employee privacy in a number of ways. First, biometric information can be hacked. If the data capturing physical characteristics is stolen, that information can be used to generate fake samples—for example, 3D printed version of someone else's fingerprints—that can then be used to access any systems that rely on that biometric identifier. Because biometric information uniquely identifies an individual, persons whose biometric data has been compromised cannot protect themselves by changing those physical attributes in the same way that they can change a stolen password. In addition, if biometric information is sold or shared with other entities, including the government, it can facilitate pervasive surveillance of an individual beyond the workplace. Finally, increasingly sophisticated algorithms claim to be able to use biometrics to reveal more than just identity, permitting a level of scrutiny and intrusiveness that goes beyond casual observation.

It is currently unclear whether any of the existing privacy protections discussed in this chapter would apply to limit the use of biometrics by employers. Several states, however, have passed statutes regulating their use by private entities. *See, e.g.*, 740 Ill. Comp. Stat. 14/1 (2018); Tex. Bus. & Com. Code Ann. § 503.001 (West 2017); Wash. Rev. Code §§19.375.010 - .900 (2018). Illinois was the first state to do so, and its Biometric Information Privacy Act prohibits private entities, including employers, from collecting or obtaining biometric information unless it first informs the person in writing that the information is being collected or stored and the purpose for collecting, storing or using it. It must also obtain a written release from the subject. The statute further prohibits the sale of individual biometric information, or its disclosure unless the subject has consented or some other exception applies; requires the entity holding such information to protect its security; and to have a written policy establishing a schedule for retaining the information and for permanently destroying it when the reason for obtaining it no longer applies. Do you think a regulation like the Illinois Biometric Information Privacy Act, as applied to employers, adequately protects the legitimate privacy interests of workers? If not, how would you draft a statute that balances the employer and employee interests?

Wellness Programs

In recent years, wellness programs have become increasingly popular. About two-thirds of all U.S. employers offer some kind of wellness program and the third party vendors that operate them for employers constitute an estimated \$6 billion industry. The Affordable Care Act encouraged adoption or expansion of these programs, in part by increasing the permissible level of financial incentives that employers can use to promote participation. As these programs have become more widespread, concerns have been raised about the extensive disclosure of medical and personal information that they require. Consider the following example of such a program:

A large university provides health insurance coverage for its faculty and staff. The

premium for this benefit is \$5000 annually, and the employer and employee contribute equally to cover the cost. Recently, the university announced a new “wellness program” to help its employees achieve better health outcomes (and to control the university’s health care costs). The program, which is operated by a third party vendor, collects health information about participants and uses it to provide individual advice about diet, lifestyle and recommended medical tests. In order to participate, employees must undergo certain medical tests and complete an online questionnaire. The tests include a full lipid panel (Total, HDL, LDL Cholesterol and triglycerides), blood sugar, body mass index, waist circumference and blood pressure. The questionnaire asks about the use of tobacco, alcohol, and street drugs, as well as about psycho-social factors such as whether they have experienced problems recently with a supervisor, have marital problems, or are anxious about their finances. In addition, participants are given free activity trackers, which they are instructed to wear at all times and to register online so that their data can be uploaded automatically. Using the personal data collected, the program develops goals or benchmarks for each participant—such as targets for weight loss, increased exercise or lower cholesterol. On-going data collection—for example, through the activity tracker—allows the program to provide participants with feedback on their progress toward their goals. Participation is entirely voluntary, but the university encourages all its employees to participate and those who do so receive a discount of \$1500 off their annual health insurance premium.

Does the employer’s wellness program raise any privacy concerns? Ifeoma Ajunwa argues that the health data collected by these programs put employees’ medical privacy at risk. Ifeoma Ajunwa, *Workplace Wellness Programs Could Be Putting Your Health Data at Risk*, HARV. BUS. REV.: DATA (Jan. 19, 2017), <https://hbr.org/2017/01/workplace-wellness-programs-could-be-putting-your-health-data-at-risk>. The third party vendors who offer wellness programs amass a great deal of individual medical information, but their handling and use of that data is not closely regulated. They may not adequately secure the data against breaches, or they may sell the health information they collect. Some of the data collected—for example from lifestyle questions or activity trackers—may not be considered medical information at all, and yet, when aggregated and analyzed it can reveal sensitive information—for example, about future health risks or whether an employee is pregnant. Valentina Zarya, *Employers Are Quietly Using Big Data to Track Employee Pregnancies*, FORTUNE (Feb. 17, 2016, 5:36 PM), <http://fortune.com/2016/02/17/castlight-pregnancy-data/>.

Only a handful of laws limit employers’ ability to collect medical information about their employees. Most relevant in this context are the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), which are anti-discrimination laws, but contain some limited privacy protections. The ADA restricts employers from collecting medical information about applicants or employees except in certain well-defined circumstances, 42 U.S.C. § 12112(d), and the GINA prohibits employers from requesting or otherwise acquiring genetic information about an employee absent an authorized exception. 42 U.S.C. § 2000ff-1(b). However, both of these statutory provisions have express exceptions allowing medical inquiries as part of an employee’s voluntary participation in a wellness program. A great deal thus turns on whether a program is deemed voluntary or not.

A few years ago, the EEOC brought several lawsuits challenging employer wellness programs, arguing that they violated the ADA's and GINA's restrictions on medical exams and collection of genetic information and did not fall within the statutory exception for wellness programs because the significant financial incentives involved rendered participation involuntary. For example, in *EEOC v. Orion Energy Sys.*, 208 F. Supp. 3d 989 (E.D. Wis. 2016), the EEOC argued that the employer violated the ADA by requiring employees to complete a health risk assessment or pay 100% of their monthly health insurance premium. The district court found that participation in the program was permissible under the ADA because it was voluntary. It reasoned that employees had a choice to not participate in the wellness program, even though they would pay more as a result. In *EEOC v. Honeywell Int'l, Inc.*, 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 6, 2014), the EEOC similarly argued that the employer violated the ADA because tests required by its wellness program constituted "an involuntary medical examination that is not job related." It also alleged violation of the GINA because the program collected family health information, which can fall within the definition of protected genetic information. The district court denied the EEOC's motion for a preliminary injunction barring Honeywell from imposing costs on employees who did not participate in the program.

Concerns that wellness programs that rely on financial incentives render them involuntary is in some tension with the Affordable Care Act (ACA), which authorizes employers to use incentives of up to 30% of the cost of health coverage to encourage participation. 42 U.S.C.A. § 300gg-4(j)(3)(A). The EEOC tried to reconcile that tension by issuing regulations in 2016 stating that employer wellness programs that offer discounts of up to 30% or impose penalties of up to 30% of the cost of health coverage to incentivize employee participation are considered "voluntary" under the ADA and the GINA. 29 C.F.R. § 1630.14(d)(3); 29 C.F.R. § 1635.8(b)(2). Those regulations were challenged by the American Association of Retired Persons (AARP) on the grounds that the 30% incentive level was so significant that it rendered participation coercive, and that employees would be harmed because they would be pressured to give up their private medical data. *See AARP v. EEOC*, 292 F. Supp. 3d 238 (D.D.C. 2017) (vacating the EEOC's rules permitting wellness programs that offer financial incentives up to 30% of the cost of coverage because the agency failed to adequately explain its decision, but staying enforcement of the court's mandate until January 1, 2019). The legal issues surrounding the use of financial incentives or penalties remain unresolved, creating uncertainty for employers who wish to create wellness programs. For employees, the question is whether the financial cost of declining to participate in these programs in effect forces them to share their medical information, violating their interests in maintaining the privacy of that information.

Chapter 8: Employee Voice

D. Statutory Protections for Employee Speech

3. Whistleblower Protections of the Sarbanes-Oxley Act

b. What is Protected Activity?

Replace note 2. on pp. 517-18 with the following:

2. **Reasonable Belief.** In order to be protected as a whistleblower, a plaintiff must show that she reported conduct that she “reasonably believe[d]” constitutes a violation of one of the laws listed in §1514A. How does the *Wiest* court interpret the “reasonably believes” language in §1514A? In its view, what factual showing will be sufficient to satisfy this requirement? What standard would the dissent require for showing the objective reasonableness of a plaintiff’s belief? Which interpretation is most consistent with the purposes behind the Sarbanes-Oxley whistleblower provisions? Should the types of reports made by *Wiest* be protected against retaliation, or does that stretch the protections of SOX beyond what Congress intended?

In one of the earlier cases interpreting the SOX whistleblower provisions, the Administrative Review Board (ARB) held that a complaining employee must show that her communications “definitively and specifically” related to one of the violations listed in §1514A in order to be protected. *Platone v. FLYI, Inc.* ARB No. 04-154, 2006 WL 3246910 (ARB Sept. 29, 2006). A number of cases followed the *Platone* standard, including *Day v. Staples*, 555 F.3d 42 (1st Cir. 2009), which was cited by the dissent in *Wiest*. The court in *Day* held that “[t]o have an objectively reasonable belief there has been shareholder fraud, the complaining employee’s theory of such fraud must at least approximate the basic elements of a claim of securities fraud.” *Id.* at 56. Thus, the employee “must have an objectively reasonable belief that the company intentionally misrepresented or omitted certain facts to investors, which were material and which risked loss.” *Id.*

Several years after setting out the test in *Platone*, however, the ARB reversed course, rejecting the “definitively and specifically related” standard and holding instead that an employee could satisfy the “reasonable belief” test by showing that a reasonable person with the same training and experience as the plaintiff would believe that a violation had occurred. *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, 2011 WL 2165854 (ARB May 25, 2011) (en banc).

Wiest was the first appellate decision to follow the ARB’s *Sylvester* decision in rejecting the “definitively and specifically” standard. Since then, several other circuits have also rejected *Platone* and followed the *Sylvester* standard, see *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214 (2d Cir. 2014); *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797 (6th Cir. 2015); *Beacom v. Oracle Am., Inc.*, 825 F.3d 376 (8th Cir. 2016), while others have not yet explicitly repudiated *Platone*. See, e.g. [*Wallace v. Tesoro Corp.*, 796 F.3d 468 \(5th Cir. 2015\)](#).

4. Whistleblower Protections of the Dodd-Frank Act

Replace “b. The Interaction Between Dodd-Frank and Sarbanes-Oxley” on pp. 523-25 with the following:

b. The Anti-Retaliation Provisions

In addition to the bounty provision described above, Section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 by adding a new anti-retaliation provision to protect corporate whistleblowers. The anti-retaliation provision reads:

(A) . . . No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the [Securities and Exchange] Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A). Elsewhere in that section of the statute, a whistleblower is defined as a person who provides information relating to a violation of the securities laws to the Securities and Exchange Commission. §78u-b(a)(6).

Thus, although the SOX Act and the DFA both prohibit retaliation against corporate whistleblowers, they differ in terms of *who* is protected. As seen earlier, SOX protects all employees of a covered entity who report one of the listed violations to a federal agency, Congress or a supervisor. 18 U.S.C. § 1514A(a). However, according to the Supreme Court in *Digital Realty Trust v. Somers*, “Dodd-Frank delineates a more circumscribed class.” 138 S. Ct. 767, 772 (2018). Its protections apply only to “person[s] who provide[] ‘information relating to a violation of the securities laws to the [Securities and Exchange] Commission.’” *Id.* According to the Court, the more limited coverage of the DFA whistleblower provisions reflects Congress’ central purpose in enacting that statute—namely, to incentivize people who are aware of securities law violations to share that information with the SEC. *Id.* at 777.

The whistleblower protections in the two statutes also differ in terms of the enforcement procedures and remedies provided. Dodd-Frank permits a complainant to go directly to federal

court without having to first file a complaint with OSHA as required under SOX. *Id.* at 774-75. In addition, the Dodd-Frank anti-retaliation provisions may be brought within six years after the date of the violation or three years after the date the violation becomes known (but no more than ten years after the date of the violation), 15 U.S.C. § 78u-6(h)(1)(B)(iii), a period far longer than the 180-day limit for filing a Sarbanes-Oxley claim. Dodd-Frank also provides different remedies, entitling a successful plaintiff to two times the amount of back pay owed, plus interest, as well as litigation costs and attorneys' fees, § 78u-6(h)(1)(C).

E. Collective Voice Protections – The NLRA

2. Balancing Employer Rights to Manage and Control the Business Against Employees' Section 7 Rights

Page 531-32, Note 2.

Insert the following paragraph at the end of Note 2:

The change in Presidential administration is likely to bring further changes to the rule articulated in *Purple Communications, Inc.*, which accorded employees a presumptive right to use their employer's email system for section 7 protected activities. In *Caesar's Entertainment Corp.*, available at <http://nlrb.gov/case/28-CA-060841> (August 1, 2018), the Board invited briefs from the parties and all interested persons in a case involving the application of the email rule in *Purple Communications*, seeking input on whether it should overturn *Purple Communications* and if so, what standard it should apply. The Board also asked for input on whether the standard should apply to other forms of electronic communication (e.g., instant messaging, texts, social media postings) when made on employer-owned devices. How important is the right to use the employer's email system for organizing and other section 7 protected activities when many employees have their own devices and can communicate with their colleagues through twitter, websites, and social media?

5. Employer Policies Restricting Collective Employee Speech

Pages 556-558.

Replace Notes 3 and 4 with the following:

3. Workplace Civility and Professionalism Policies. In *Karl Knauz*, the Board applied its test in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004) to determine whether the employer's "courtesy" work rule violated section 8(a)(1) by restricting employees' section 7 rights. Under that test, a work rule not explicitly restricting section 7 rights was nevertheless unlawful if (1) employees would reasonably construe the rule's language to prohibit section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule had been applied to restrict the exercise of section 7 rights. *Id.* at 647. In support of its analysis in *Karl Knauz*, the Board quoted language from the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), to the effect that employer expression must be assessed "in the

context of its labor relations setting” and “must take into account the economic dependence of the employees on their employers.” What do you think the Court and Board were alluding to?

The *Lutheran Heritage Village-Livonia* test was widely viewed as highly deferential to employees’ perceptions, and also led to a great deal of uncertainty about the legality of various work rules. In *The Boeing Co., Inc.*, 365 N.L.R.B. No. 154 (2017), the Trump Board established new rules applicable to such cases. Boeing maintained a no-camera rule restricting the use of camera-enabled devices such as cell phones to capture images or video on its property; it required proof of a valid business need and a pre-approved camera permit. The employer justified the rule as necessary to protect its manufacturing process from disclosure to third parties. The rule did not explicitly restrict section 7 protected activity, was not adopted in response to a union organizing drive, and had not been applied to restrict section 7 activity. The ALJ applied *Lutheran Heritage Village-Livonia* and found the employer’s justification not credible since it allowed public access and VIP tours and had produced a DVD depicting its manufacturing process that was in the public domain. Further, the requirement that employees seek advance permission and a permit to use cameras to record protected concerted activities such as a solidarity march would tend to chill the exercise of section 7 rights.

The Board disagreed with the ALJ’s conclusion, and took the opportunity to overrule *Lutheran Heritage Village-Livonia*. The Board established a new test applicable to employer work rules that are facially neutral but which may, reasonably interpreted, potentially interfere with section 7 rights. The Board justified its new test by explaining that the old standard gave insufficient weight to business interests. Under the new test, when a facially neutral rule potentially interferes with section 7 rights, the Board will consider (1) the nature and extent of the potential impact on NLRA rights from the employees’ perspective, and (2) legitimate business justifications associated with the rule’s requirements, and strike the proper balance between them. Applying this test retroactively in *Boeing*, the Board upheld the employer’s “no-camera” rule banning workers from using devices to take photos or videos on job sites without permission.

The Board went on to explain that in this and future cases it would also endeavor to provide greater clarity by delineating three categories of employment policies, rules and handbook provisions. Category 1 would include rules that the Board designates as lawful because the rule, when reasonably interpreted, does not interfere with NLRA-protected rights or the potential impact is outweighed by the justification for the rule, such as general civility policies requiring workplace harmony and the no-camera rule at issue in *Boeing*. (Such rules could, however, be unlawfully applied, for example in a discriminatory fashion). Category 2 would include rules that warrant individualized scrutiny and balancing by the Board. Category 3 would include rules that the Board designates as unlawful because they prohibit or limit NLRA-protected rights and the adverse impact is not outweighed by business justifications associated with the rule, such as a rule that prohibits employees from discussing wages or benefits.

In a subsequent Memorandum, the Board’s General Counsel provided guidance regarding how various types of work rules might be categorized under the Board’s new regime. Memorandum GC 18-04, Office of the NLRB General Counsel, June 6, 2018. According to the Memorandum, Category 1 rules include civility rules (rules barring “rude, condescending, or otherwise socially unacceptable” behavior); rules prohibiting disparagement of the company’s

employees; no-photography and no-recording rules; rules banning insubordination or uncooperative behavior; rules barring disruptive or boisterous conduct at work; rules prohibiting defamation or misrepresentations regarding the company, its products or services; rules banning disloyal conduct; and rules prohibiting employees from commenting to media on behalf of the employer. Category 2 rules include rules regarding disparagement of the employer (as opposed to civility rules regarding disparagement of employees); rules restricting employees from speaking to the media or third parties (as opposed to rules restricting speaking to the media on the employer's behalf); rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordination or disruptive conduct at work); and rules against making false or inaccurate statements (as opposed to rules against making defamatory statements). Category 3 rules include confidentiality rules regarding wages, benefits, or working conditions. The Memorandum signals the positions the Board will be taking in its enforcement efforts, but it does not have the force of law.

Can the Board's new *Boeing* test be squared with the Supreme Court's caution in *NLRB v. Gissel Packing Co.* that employer expression must be assessed within the context of the labor relations setting? Do you agree with the General Counsel's presumptive categorization of the types of rules described above? Note that the courtesy work rule at issue in *Karl Knauz* would have been presumptively lawful under the Board's new test as interpreted by the Board's General Counsel.

4. Confidentiality Policies. Employer policies that prohibit employees from sharing or disseminating "confidential information" such as names, addresses, telephone numbers, and email addresses may also infringe on section 7 rights. Why? Such rules can be perceived as undermining employees' ability to discuss wages and working conditions with one another or with outsiders, including union organizers, and make it more difficult for workers to communicate with one another (consider, for example, their importance to a union seeking to reach workers in order to organize them). The Board confirmed in *The Boeing Co., Inc.*, 365 N.L.R.B. No. 154 (2017) that confidentiality rules directly prohibiting discussion of wages or benefits fall into Category 3 – they are presumptively unlawful. Thus, an employer's confidentiality rule precluding employees from sharing with one another, the media, or others information regarding their salaries, contractual terms, or disciplinary sanctions violates § 8(a)(1). *Banner Health Systems v. NLRB*, 851 F.3d 35 (D.C. Cir. 2017); *see also NLRB v. Long Island Ass'n for AIDS Care, Inc.*, 870 F.3d 82 (2d Cir. 2017) (prohibition on disclosing any non-public information intended for internal purposes, including salaries and contract terms was unlawful). The status of rules prohibiting employees from sharing personnel information other than wages, employment terms or working conditions, however, is less clear under *Boeing*.

What about a confidentiality provision in an arbitration agreement covering all employment claims, would that be unlawful? In *Dish Network, LLC*, 365 N.L.R.B. No. 47 (2017), the Obama Board found such a provision unlawful where it included claims under the NLRA. In an unpublished decision, the Fifth Circuit remanded the case for reconsideration in light of *The Boeing Co., Inc.*, 365 N.L.R.B. No. 164 (2017). *Dish Network, LLC v. NLRB*, 2018 U.S. App. LEXIS 19862 (5th Cir. 2018). How should the Board rule on remand? Suppose the confidentiality restriction covered all employment claims except unfair labor practice claims under the NLRA, or the claim at issue did not implicate section 7 rights—should there be a different result? Or suppose

the employer prohibits employee discussions during ongoing investigations of workplace wrongdoing? In *Banner Estrella Medical Center*, 362 N.L.R.B. No. 137 (2015), *enforcement denied in relevant part on other grounds*, *Banner Health Sys. v. NLRB*, 851 F.3d 35 (D.C. Cir. 2017), the Obama Board required employers to justify such rules with a demonstration of the specific need for confidentiality, such as protecting witnesses and evidence. Would the same reasoning apply under the *Boeing, Inc.* test, or would the rule become a Category 1 type rule?

Chapter 9: Employment Discrimination Law

D. Sexual Harassment Law

1. The Hostile Working Environment Theory.

Insert the following text as part of Note 6 p. 642:

ZARDA v. ALTITUDE EXPRESS, INC.

United States Court of Appeals for the Second Circuit(en banc)
883 F.3d 100 (2018)

KATZMANN, CHIEF JUDGE.

Donald Zarda, a skydiving instructor, brought a sex discrimination claim under Title VII of the Civil Rights Act of 1964 (“Title VII”) alleging that he was fired from his job at Altitude Express, Inc., because he failed to conform to male sex stereotypes by referring to his sexual orientation. Although it is well-settled that gender stereotyping violates Title VII’s prohibition on discrimination “because of ... sex,” we have previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII. *See Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–23 (2d Cir. 2005).

At the time *Simonton* and *Dawson* were decided, and for many years since, this view was consistent with the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission (“EEOC” or “Commission”). *See, e.g., Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); *see also Johnson v. Frank*, EEOC Decision No. 01911827, 1991 WL 1189760, at *3 (Dec. 19, 1991). But legal doctrine evolves and in 2015 the EEOC held, for the first time, that “sexual orientation is inherently a ‘sex-based consideration;’ accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.” *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion)). Since then, two circuits have revisited the question of whether claims of sexual orientation discrimination are viable under Title VII. In March 2017, a divided panel of the Eleventh Circuit declined to recognize such a claim, concluding that it was bound by [a prior 11th Circuit case]. One month later, the Seventh Circuit, sitting en banc, took “a fresh look at [its] position in light of developments at the Supreme Court extending over two decades” and held that “discrimination on the basis of sexual orientation is a form of sex discrimination.” *Hively*, 853 F.3d at 340–41. . . .

Taking note of the potential persuasive force of these new decisions, we convened en banc to reevaluate *Simonton* and *Dawson* in light of arguments not previously considered by this Court. Having done so, we now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination “because of ... sex.” To the extent that our prior precedents held otherwise, they are overruled.

We therefore VACATE the district court’s judgment on Zarda’s Title VII claim and REMAND for further proceedings consistent with this opinion. We AFFIRM the judgment of the district court in all other respects.

BACKGROUND

In the summer of 2010, Donald Zarda, a gay man, worked as a sky-diving instructor at Altitude Express. As part of his job, he regularly participated in tandem skydives, strapped hip-to-hip and shoulder-to-shoulder with clients. In an environment where close physical proximity was common, Zarda’s co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive. That June, Zarda told a female client with whom he was preparing for a tandem skydive that he was gay “and ha[d] an ex-husband to prove it.” J.A. 400 ¶ 23. Although he later said this disclosure was intended simply to preempt any discomfort the client may have felt in being strapped to the body of an unfamiliar man, the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior. After the jump was successfully completed, the client told her boyfriend about Zarda’s alleged behavior and reference to his sexual orientation; the boyfriend in turn told Zarda’s boss, who fired shortly thereafter. Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation.

One month later, Zarda filed a discrimination charge with the EEOC concerning his termination. Zarda claimed that “in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender.” Special Appendix (“S.A.”) 3. In particular, he claimed that “[a]ll of the men at [his workplace] made light of the intimate nature of being strapped to a member of the opposite sex,” but that he was fired because he “honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype.” S.A. 5.

In September 2010, Zarda brought a lawsuit in federal court alleging, *inter alia*, sex stereotyping in violation of Title VII and sexual orientation discrimination in violation of New York law. Defendants moved for summary judgment arguing that Zarda’s Title VII claim should be dismissed because, although “Plaintiff testifie[d] repeatedly that he believe[d] the reason he was terminated [was] because of his sexual orientation ... [,] under Title VII, a gender stereotype cannot be predicated on sexual orientation.” Dist. Ct. Dkt. No. 109 at 3. In March 2014, the district court granted summary judgment to the defendants on the Title VII claim. As relevant here, the district court concluded that, although there was sufficient evidence to permit plaintiff to proceed with his claim for sexual orientation discrimination under New York law, plaintiff had failed to establish a *prima facie* case of gender stereotyping discrimination under Title VII.

While Zarda’s remaining claims were still pending, the EEOC decided *Baldwin*, holding that “allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex.” 2015 WL 4397641 at *10. . . . Shortly thereafter, Zarda moved to have his Title VII claim reinstated based on *Baldwin*. But, the district court denied the motion, concluding that *Simonton* remained binding precedent.

Zarda’s surviving claims, which included his claim for sexual orientation discrimination under New York law, went to trial, where defendants prevailed. After judgment was entered for the defendants, Zarda appealed. As relevant here, Zarda argued that *Simonton* should be overturned because the EEOC’s reasoning in *Baldwin* demonstrated that *Simonton* was incorrectly decided. By contrast, defendants argued that the court did not need to reach that issue because the jury found that they had not discriminated based on sexual orientation. The panel held that “Zarda’s [federal] sex-discrimination claim [was] properly before [it] because [his state law claim was tried under] a higher standard of causation than required by Title VII.” *Zarda*, 855 F.3d at 81. However, the panel “decline[d] Zarda’s invitation to revisit our precedent,” which “can only be overturned by the entire Court sitting in banc.” *Id.* at 82. The Court subsequently ordered this rehearing en banc to revisit *Simonton* and *Dawson*’s holdings that claims of sexual orientation discrimination are not cognizable under Title VII.

DISCUSSION

* * *

II. Sexual Orientation Discrimination

A. The Scope of Title VII

“In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.” *Price Waterhouse*, 490 U.S. at 239. The text of Title VII provides, in relevant part:

It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge ... or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin

42 U.S.C. § 2000e-2(a)(1). This “broad rule of workplace equality,” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), “strike[s] at the entire spectrum of disparate treatment” based on protected characteristics, *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978), “regardless of whether the discrimination is directed against majorities or minorities,” *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71–72 (1977). As a result, we have stated that “Title VII should be interpreted broadly to achieve equal employment opportunity.” *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988).

In deciding whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase “because of ... sex.” However, in interpreting this language, we do not write on a blank slate. Instead, we must construe the text in light of the entirety of the statute as well as relevant precedent. As defined by Title VII, an employer has engaged in “impermissible consideration of ... sex ... in employment practices” when “sex ... was a motivating factor for any employment practice,” irrespective of whether the employer was also motivated by “other factors.” 42 U.S.C. § 2000e-2(m). Accordingly, the critical inquiry for a court assessing whether an employment practice is “because of ... sex” is whether sex was “a motivating factor.” *Rivera v. Rochester Genesee Reg’l Transp. Auth.*, 743 F.3d 11, 23 (2d Cir. 2014).

Recognizing that Congress intended to make sex “irrelevant” to employment decisions, the Supreme Court has held that Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex, such as life expectancy, *Manhart*, 435 U.S. at 711, and non-conformity with gender norms, *Price Waterhouse*, 490 U.S. at 250–51. As this Court has recognized, “any meaningful regime of antidiscrimination law must encompass such claims” because, if an employer is “[f]ree to add non-sex factors, the rankest sort of discrimination” could be worked against employees by using traits that are associated with sex as a proxy for sex. *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 n.9 (2d Cir. 2004). . .

With this understanding in mind, the question before us is whether an employee’s sex is necessarily a motivating factor in discrimination based on sexual orientation. If it is, then sexual orientation discrimination is properly understood as “a subset of actions taken on the basis of sex.” *Hively*, 853 F.3d at 343.

B. Sexual Orientation Discrimination as a Subset of Sex Discrimination

We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination. . . .

1. Sexual Orientation as a Function of Sex

a. “Because of ... sex”

We begin by considering the nature of sexual orientation discrimination. The term “sexual orientation” refers to “[a] person’s predisposition or inclination toward sexual activity or behavior with other males or females” and is commonly categorized as “heterosexuality, homosexuality, or bisexuality.” See *Sexual Orientation*, *Black’s Law Dictionary* (10th ed. 2014). To take one example, “homosexuality” is “characterized by sexual desire for a person of the same sex.” *Homosexual*, *id.* To operationalize this definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted. *Hively*, 853 F.3d at 358 (Flaum, *J.*, concurring) (“One cannot consider a person’s homosexuality without also accounting for their sex: doing so would render ‘same’ [sex] ... meaningless.”). Because one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person’s sex and the sex of those to whom he or she is attracted.

Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.

Choosing not to acknowledge the sex-dependent nature of sexual orientation, certain *amici* contend that employers discriminating on the basis of sexual orientation can do so without reference to sex. In support of this assertion, they point to *Price Waterhouse*, where the Supreme Court observed that one way to discern the motivation behind an employment decision is to consider whether, “if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be” the applicant or employee’s sex. 490 U.S. at 250. Relying on this language, these *amici* argue that a “truthful” response to an inquiry about why an employee was fired would be “I fired him because he is gay,” not “I fired him because he is a man.” But this semantic sleight of hand is not a defense; it is a distraction. The employer’s failure to reference gender directly does not change the fact that a “gay” employee is simply a man who is attracted to men. For purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex. . . . As a result, firing an employee because he is “gay” is a form of sex discrimination.

The argument has also been made that it is not “even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination ‘because of sex’ also banned discrimination because of sexual orientation[.]” *Hively*, 853 F.3d at 362 (Sykes, *J.*, dissenting). Even if that were so, the same could also be said of multiple forms of discrimination that are indisputably prohibited by Title VII, as the Supreme Court and lower courts have determined. Consider, for example, sexual harassment and hostile work environment claims, both of which were initially believed to fall outside the scope of Title VII’s prohibition.

In 1974, a district court dismissed a female employee’s claim for sexual harassment reasoning that “[t]he substance of [her] complaint [was] that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor.” *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974). The district court concluded that this conduct, although “inexcusable,” was “not encompassed by [Title VII].” *Id.* The D.C. Circuit reversed. Unlike the district court, it recognized that the plaintiff “became the target of her supervisor’s sexual desires *because she was a woman.*” *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (emphasis added). As a result the D.C. Circuit held that “gender cannot be eliminated from [plaintiff’s formulation of her claim] and that formulation advances a prima facie case of sex discrimination within the purview of Title VII” because “it is enough that gender is a factor contributing to the discrimination.” *Id.* Today, the Supreme Court and lower courts “uniformly” recognize sexual harassment claims as a violation of Title VII notwithstanding the fact that this was not necessarily obvious from the face of the statute.

The Supreme Court has also acknowledged that a “hostile work environment,” although it “do[es] not appear in the statutory text,” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998), violates Title VII by affecting the “psychological aspects of the workplace environment,” *Meritor*, 477 U.S. at 64. As Judge Goldberg, one of the early proponents of hostile work environment claims, explained in a case involving national origin discrimination,

[Title VII's] language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971). Stated differently, because Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used.

The Supreme Court gave voice to this principle of construction when it held that Title VII barred male-on-male sexual harassment, which “was assuredly not the principal evil Congress was concerned with when it enacted Title VII,” *Oncale*, 523 U.S. at 79–80, and which few people in 1964 would likely have understood to be covered by the statutory text. But the Court was untroubled by these facts. “[S]tatutory prohibitions,” it explained, “often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Id.* Applying this reasoning to the question at hand, the fact that Congress might not have contemplated that discrimination “because of ... sex” would encompass sexual orientation discrimination does not limit the reach of the statute.

The dissent disagrees with this conclusion. . . . According to the dissent, the drafters included “sex” in Title VII to “secure the rights of women to equal protection in employment,” *id.* at 145, and had no intention of prohibiting sexual orientation discrimination, *id.* at 142–43. We take no position on the substance of the dissent’s discussion of the legislative history or the zeitgeist of the 1960s, but we respectfully disagree with its approach to interpreting Title VII as well as its conclusion that sexual orientation discrimination is not a “reasonably comparable evil,” *Oncale*, 523 U.S. at 79, to sexual harassment and male-on-male harassment. Although legislative history most certainly has its uses, in ascertaining statutory meaning in a Title VII case, *Oncale* specifically rejects reliance on “the principal concerns of our legislators,” *id.* at 79–80—the centerpiece of the dissent’s statutory analysis. Rather, *Oncale* instructs that the text is the lodestar of statutory interpretation, emphasizing that we are governed “by the provisions of our laws.” *Id.* The text before us uses broad language, prohibiting discrimination “because of ... sex,” which Congress defined as making sex “a motivating factor.” 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m). We give these words their full scope and conclude that, because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.

b. “But for” an Employee’s Sex

Our conclusion is reinforced by the Supreme Court’s test for determining whether an employment practice constitutes sex discrimination. This approach, which we call the “comparative test,” determines whether the trait that is the basis for discrimination is a function of sex by asking whether an employee’s treatment would have been different “but for that person’s

sex.” *Manhart*, 435 U.S. at 711. To illustrate its application to sexual orientation, consider the facts of the recent Seventh Circuit case addressing a Title VII claim brought by Kimberly Hively, a lesbian professor who alleged that she was denied a promotion because of her sexual orientation. *Hively*, 853 F.3d at 341 (majority). Accepting that allegation as true at the motion-to-dismiss stage, the Seventh Circuit compared Hively, a female professor attracted to women (who was denied a promotion), with a hypothetical scenario in which Hively was a male who was attracted to women (and received a promotion). *Id.* at 345. Under this scenario, the Seventh Circuit concluded that, as alleged, Hively would not have been denied a promotion but for her sex, and therefore sexual orientation is a function of sex. From this conclusion, it follows that sexual orientation discrimination is a subset of sex discrimination. *Id.*

The government, drawing from the dissent in *Hively*, argues that this is an improper comparison. . . . In the government’s view, the appropriate comparison is not between a woman attracted to women and a man attracted to women; it’s between a woman and a man, both of whom are attracted to people of the same sex. Determining which of these framings is correct requires understanding the purpose and operation of the comparative test. Although the Supreme Court has not elaborated on the role that the test plays in Title VII jurisprudence, based on how the Supreme Court has employed the test, we understand that its purpose is to determine when a trait other than sex is, in fact, a proxy for (or a function of) sex. To determine whether a trait is such a proxy, the test compares a female and a male employee who both exhibit the trait at issue.

To understand how the test works in practice, consider *Manhart*. There, the Supreme Court evaluated the Los Angeles Department of Water’s requirement that female employees make larger pension contributions than their male colleagues. 435 U.S. at 704–05. This requirement was based on mortality data indicating that female employees outlived male employees by several years and the employer insisted that “the different contributions exacted from men and women were based on the factor of longevity rather than sex.” *Id.* at 712. . . . [B]ecause life expectancy is a sex-dependent trait, changing the sex of the employee (the independent variable) necessarily affected the employee’s life expectancy and thereby changed how they were impacted by the pension policy (the dependent variable). After identifying this correlation, the Court concluded that life expectancy was simply a proxy for sex and therefore the pension policy constituted discrimination “because of ... sex.” *Id.*

We can also look to the Supreme Court’s decision in *Price Waterhouse* . . . [where] the Supreme Court compared a man and a woman who exhibited the plaintiff’s traits and asked whether they would have experienced different employment outcomes. Notably, being aggressive and not wearing jewelry or makeup is consistent with gender stereotypes for men. Therefore, by changing the plaintiff’s gender, the Supreme Court also changed the plaintiff’s gender non-conformity.

The government’s proposed approach to *Hively*, which would compare a woman attracted to people of the same sex with a man attracted to people of the same sex, adopts the wrong framing. . . . That would be equivalent to comparing the gender non-conforming female plaintiff in *Price Waterhouse* to a gender non-conforming man; such a comparison would not illustrate whether a particular stereotype is sex dependent but only whether the employer discriminates against gender non-conformity in only one gender. . . .

Having addressed the proper application of the comparative test, we conclude that the law is clear: To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently “but for” his or her sex. In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.

2. Gender Stereotyping

Viewing the relationship between sexual orientation and sex through the lens of gender stereotyping provides yet another basis for concluding that sexual orientation discrimination is a subset of sex discrimination. Specifically, this framework demonstrates that sexual orientation discrimination is almost invariably rooted in stereotypes about men and women.

Since 1978, the Supreme Court has recognized that “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females,” because Title VII “strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Manhart*, 435 U.S. at 707 & n.13. This is true of stereotypes about both how the sexes are and how they should be. *Price Waterhouse*, 490 U.S. at 250.

In *Price Waterhouse*, the Supreme Court concluded that adverse employment actions taken based on the belief that a female accountant should walk, talk, and dress femininely constituted impermissible sex discrimination. *See* 490 U.S. at 250–52 (plurality). Similarly, *Manhart* stands for the proposition that “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females,” and held that female employees could not, by virtue of their status as women, be discriminated against based on the gender stereotype that women generally outlive men. 435 U.S. at 707–08, 711. Under these principles, employees who experience adverse employment actions as a result of their employer’s generalizations about members of their sex or “as a result of their employer’s animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII,” *Dawson*, 398 F.3d at 218.

Accepting that sex stereotyping violates Title VII, the “crucial question” is “[w]hat constitutes a gender-based stereotype.” *Back*, 365 F.3d at 119–20. As demonstrated by *Price Waterhouse*, one way to answer this question is to ask whether the employer who evaluated the plaintiff in “sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man.” 490 U.S. at 258. . . . Applying *Price Waterhouse*’s reasoning to sexual orientation, we conclude that when, for example, “an employer ... acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,” but takes no such action against women who are attracted to men, the employer “has acted on the basis of gender.” *Cf.* 490 U.S. at 250. This conclusion is consistent with *Hively*’s holding that same-sex orientation “represents the ultimate case of failure to conform” to gender stereotypes, 853 F.3d at 346 (majority), and aligns with numerous district courts’ observation that “stereotypes about homosexuality are directly

related to our stereotypes about the proper roles of men and women. ... The gender stereotype at work here is that ‘real’ men should date women, and not other men,” *Centola v. Potter*, 183 F.Supp.2d 403, 410 (D. Mass. 2002). . . .

We now conclude that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.

The government resists this conclusion, insisting that negative views of those attracted to members of the same sex may not be based on views about gender at all, but may be rooted in “moral beliefs about sexual, marital and familial relationships.” Gov. Br. at 19. But this argument merely begs the question by assuming that moral beliefs about sexual orientation can be dissociated from beliefs about sex. Because sexual orientation is a function of sex, this is simply impossible. Beliefs about sexual orientation necessarily take sex into consideration and, by extension, moral beliefs about sexual orientation are necessarily predicated, in some degree, on sex. . . .

To be clear, our conclusion that moral beliefs regarding sexual orientation are based on sex does not presuppose that those beliefs are necessarily animated by an invidious or evil motive. For purposes of Title VII, any belief that depends, even in part, on sex, is an impermissible basis for employment decisions. This is true irrespective of whether the belief is grounded in fact, as in *Manhart*, *id.* at 704–05, 711, or lacks “a malevolent motive,” *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). Indeed, in *Johnson Controls*, . . . the Court emphasized, “[t]he beneficence of an employer’s purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination” under Title VII. *Id.* at 200. Here, because sexual orientation is a function of sex, beliefs about sexual orientation, including moral ones, are, in some measure, “because of ... sex.”

The government responds that, even if discrimination based on sexual orientation reflects a sex stereotype, it is not barred by *Price Waterhouse* because it treats women no worse than men. Gov. Br. at 19–20. We believe the government has it backwards. *Price Waterhouse*, read in conjunction with *Oncale*, stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms. *See Price Waterhouse*, 490 U.S. at 251 (“We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”). It follows that the employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right. . . . By the same token, an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women.

* * *

C. Subsequent Legislative Developments

Although the conclusion that sexual orientation discrimination is a subset of sex

discrimination follows naturally from existing Title VII doctrine, the *amici* supporting the defendants place substantial weight on subsequent legislative developments that they argue militate against interpreting “because of ... sex” to include sexual orientation discrimination. Having carefully considered each of *amici*’s arguments, we find them unpersuasive.

. . . [C]ertain *amici* argue that by not enacting legislation expressly prohibiting sexual orientation discrimination in the workplace Congress has implicitly ratified decisions holding that sexual orientation was not covered by Title VII. According to the government’s *amicus* brief, almost every Congress since 1974 has considered such legislation but none of these bills became law.

This theory of ratification by silence is in direct tension with the Supreme Court’s admonition that “subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress,” particularly when “it concerns, as it does here, a proposal that does not become law.” *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). This is because “[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a particular] statutory interpretation.” *Patterson v. McLean Credit Union*, 491 (U.S. 164, 175 n.1 1989). After all, “[t]here are many reasons Congress might not act on a decision ..., and most of them have nothing at all to do with Congress’ desire to preserve the decision.” *Michigan v. Bay Mills Indian Cmty.*, — U.S. —, 134 S.Ct. 2024, 2052 (2014) (Thomas, *J.*, dissenting). For example, Congress may be unaware of or indifferent to the status quo, or it may be unable “to agree upon how to alter the status quo.” *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, *J.*, dissenting). These concerns ring true here. We do not know why Congress did not act and we are thus unable to choose among the various inferences that could be drawn from Congress’s inaction on the bills identified by the government. Accordingly, we decline to assign congressional silence a meaning it will not bear.

Drawing on the dissent in *Hively*, the government also argues that Congress considers sexual orientation discrimination to be distinct from sex discrimination because it has expressly prohibited sexual orientation discrimination in certain statutes but not Title VII. *See* 853 F.3d at 363–64 (Sykes, *J.*, dissenting). While it is true that Congress has sometimes used the terms “sex” and “sexual orientation” separately, this observation is entitled to minimal weight in the context of Title VII.

The presumptions that terms are used consistently and that differences in terminology denote differences in meaning have the greatest force when the terms are used in “the same act.” *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). By contrast, when drafting separate statutes, Congress is far less likely to use terms consistently, *see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 936 (2013), and these presumptions are entitled to less force where, as here, the government points to terms used in different statutes passed by different Congresses in different decades. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61 (2013); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119, 626 (2010); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4704(a)(1)(C), § 4704(a), 123 Stat. 2835, 2837, 2839 (2009). . . .

In sum, nothing in the subsequent legislative history identified by the *amici* calls into question our conclusion that sexual orientation discrimination is a subset of sex discrimination and is thereby barred by Title VII.

CONCLUSION

Based on the foregoing, we VACATE the district court’s judgment on the Title VII claim and REMAND for further proceedings consistent with this opinion. We AFFIRM the judgment of the district court in all other respects.

[The concurring opinion of Dennis Jacobs, Circuit Judge, along with the separate concurring opinions of José A. Cabranes, Circuit Judge, and Raymond J. Lohier, Circuit Judge, have been omitted. The opinion of Sack, Circuit Judge, concurring in the judgment and parts of the opinion is also omitted.]

GERARD E. LYNCH, CIRCUIT JUDGE, with whom JUDGE LIVINGSTON joins as to Parts I, II, and III, dissenting:

Speaking solely as a citizen, I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII of the Civil Rights Act of 1964. I am confident that one day—and I hope that day comes soon—I will have that pleasure.

I would be equally pleased to awake to learn that Congress had secretly passed such legislation more than a half century ago—until I actually woke up and realized that I must have been still asleep and dreaming. Because we all know that Congress did no such thing.

I

Of course, today’s majority does not contend that Congress literally prohibited sexual orientation discrimination in 1964. It is worth remembering the historical context of that time to understand why any such contention would be indefensible.

The Civil Rights Act as a whole was primarily a product of the movement for equality for African-Americans. It grew out of the demands of that movement, and was opposed by segregationist white members of Congress who opposed racial equality. . . . It is perhaps difficult for people not then alive to understand that before the Civil Rights Act of 1964 became law, an employer could post a sign saying “Help Wanted; No Negroes Need Apply” without violating any federal law—and many employers did. Even the original House bill, introduced with the support of President Kennedy’s Administration in 1963, did not prohibit racial discrimination by private

employers. Language prohibiting employment discrimination by private employers on the grounds of “race, color, religion or national origin” was added later by a House subcommittee. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Comm. L. Rev. 431, 434–35 (1966).

Movement on the bill was slow. It was only after the March on Washington in the summer of 1963, the assassination of President Kennedy in November of that year, and President Johnson’s strong support for a civil rights bill that prohibited racial discrimination in employment, that the legislation made progress in Congress. Todd S. Purdum, *An Idea Whose Time Has Come* 111–13, 151 (2014). But the private employment discrimination provision, like other sections of the bill prohibiting racial discrimination in public accommodations and federally funded programs, was openly and bitterly opposed by a large contingent of southern members of Congress. *See* Louis Menand, *The Sex Amendment*, *The New Yorker* (July 21, 2014), <http://www.newyorker.com/magazine/2014/07/21/sex-amendment>. Its passage was by no means assured when the floor debates in the House began.

From the moment President Kennedy proposed the Civil Rights Act in 1963, women’s rights groups, with the support of some members of Congress, had urged that sex discrimination be included as a target of the legislation. Purdum, *supra*, at 196. The movements in the United States for gender and racial equality have not always marched in tandem—although there was some overlap between abolitionists and supporters of women’s suffrage, suffragists often relied on the racially offensive argument that it was outrageous that white women could not vote when black men could.¹ But by the 1960s, many feminist advocates consciously adopted arguments parallel to those of the civil rights movement, and there was growing recognition that the two causes were linked in fundamental ways.

Women’s rights groups had been arguing for laws prohibiting sex discrimination since at least World War II, and had been gaining recognition for the agenda of the women’s rights movement in other arenas. In addition to supporting (at least rhetorically) civil rights for African-Americans, President Kennedy had taken tentative steps towards support of women’s rights as well. In December 1961, he created the President’s Commission on the Status of Women, chaired until her death by Eleanor Roosevelt. Exec. Order No. 10980, 26 Fed. Reg. 12,059 (Dec. 14, 1961). Among other goals, the Commission was charged with developing recommendations for “overcoming discriminations in ... employment on the basis of sex,” and suggesting “services which will enable women to continue their role [] as wives and mothers while making a maximum contribution to the world around them.” *Id.*

The Commission’s report highlighted the increasing role of women in the workplace, noting (in an era when the primacy of women’s role in child-rearing and home-making was taken for granted) that even women with children generally spent no more than a decade or so of their lives engaged in full-time child care, allowing a significant portion of women’s lives to be dedicated to education and employment. *American Women: Report of The President’s Commission on the Status of Women* 6–7 (1963). Accordingly, the Commission advocated a variety of steps to improve women’s economic position. *Id.* at 6–7, 10. While those recommendations did not include federal legislation prohibiting employment discrimination on the basis of sex, they did include a commitment to equal opportunity in employment by federal contractors and proposed such equality as a goal for private employers—as well as proposing other innovations, such as paid

maternity leave and universal high-quality public child care, that have yet to become the law of the land. *Id.* at 20, 30, 43.

Nevertheless, the notion that women should be treated equally at work remained controversial. By 1964, only two states, Hawaii and Wisconsin, prohibited sex discrimination in employment. Purdum, *supra*, at 196. . . . Accordingly, when Representative Howard W. Smith of Virginia, a die-hard opponent of integration and federal legislation to enforce civil rights for African-Americans, proposed that “sex” be added to the prohibited grounds of discrimination in the Civil Rights Act, there was reason to suspect that his amendment was an intentional effort to render the Act so divisive and controversial that it would be impossible to pass. *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (suggesting that the “sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act”). That might not have been the case, however. Like those early suffragettes who were ambivalent about, or hostile to, racial equality, Smith also had a prior history of support for (presumably white) women’s equality. For example, he had been a longstanding supporter of a constitutional amendment guaranteeing equal rights to women. Purdum, *supra*, at 196.

Whatever Smith’s subjective motivations for proposing it, the amendment was adamantly opposed by many northern liberals on the ground that it would undermine support for the Act as a whole. Purdum, *supra*, at 197; Menand, *supra*. Indeed, the *New York Times* ridiculed the amendment, suggesting that, among other alleged absurdities, it would require Radio City Music Hall to hire male Rockettes, and concluding that “it would have been better if Congress had just abolished sex itself.” Editorial, *De-Sexing the Job Market*, N.Y. Times, August 21, 1965.

But despite its contested origins, the adoption of the amendment prohibiting sex discrimination was not an accident or a stunt. Once the amendment was on the floor, it was aggressively championed by a coalition comprising most of the (few) women members of the House. Purdum, *supra*, at 197. Its subsequent adoption was consistent with a long history of women’s rights advocacy that had increasingly been gaining mainstream recognition and acceptance.

Discrimination against gay women and men, by contrast, was not on the table for public debate. In those dark, pre-Stonewall days, same-sex sexual relations were criminalized in nearly all states. Only three years before the passage of Title VII, Illinois, under the influence of the American Law Institute’s proposed Model Penal Code, had become the first state to repeal laws prohibiting private consensual adult relations between members of the same sex.

In addition to criminalization, gay men and women were stigmatized as suffering from mental illness. In 1964, both the American Psychiatric Association and the American Psychological Association regrettably classified homosexuality as a mental illness or disorder. . . . It was not until two years later, in 1975, that the American Psychological Association followed suit and “adopted the same position [as the American Psychiatric Association], urging all mental health professionals to work to dispel the stigma of mental illness long associated with homosexual orientation.” Brief of Am. Psychological Ass’n as *Amicus Curiae*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). Because gay identity was viewed as a mental illness and was, in effect, defined by participation in a criminal act, the employment situation for openly gay Americans was bleak.

Consider the rules regarding employment by the federal government. Starting in the 1940s and continuing through the 1960s, thanks to a series of executive orders repealing long-standing discriminatory policies, federal employment opportunities for African-Americans began to open up significantly. *See, e.g.*, Exec. Order No. 9980, 13 Fed. Reg. 4,311 (July 26, 1948) (prohibiting racial discrimination in civilian agencies); Exec. Order No. 11114, 28 Fed. Reg. 6,485 (June 22, 1963) (extending prohibition against discrimination to all federally-funded construction projects). In sharp contrast, in 1953 President Eisenhower signed an executive order *excluding* persons guilty of “sexual perversion” from government employment. Exec. Order No. 10450, 18 Fed. Reg. 2,489 (April 27, 1953); *see also* Licata, *supra*, at 167–68. During the same period, gay federal employees, or employees even suspected of being gay, were systematically hounded out of the service as “security risks” during Cold-War witchhunts. Licata, *supra*, at 167–68. . . .

The first state to prohibit employment discrimination on the basis of sexual orientation even in the public sector was Pennsylvania, by executive order of the governor, in 1975—more than a decade after the Civil Rights Act had become law. James W. Button et al., *The Politics of Gay Rights at the Local and State Level*, in *The Politics of Gay Rights* 269, 272 (Craig A. Rimmerman et al. eds., 2000). It was not until 1982 that Wisconsin became the first state to ban both public and private sector discrimination based on sexual orientation. *Id.* at 273. Massachusetts followed in 1989. Button et al., *supra*, at 273. Notably, as discussed more fully below, these states did so by explicit legislative action adding “sexual orientation” to pre-existing anti-discrimination laws that already prohibited discrimination based on sex; they did not purport to “recognize” that sexual orientation discrimination was merely an aspect of already-prohibited discrimination based on sex.

In light of that history, it is perhaps needless to say that there was no discussion of sexual orientation discrimination in the debates on Title VII of the Civil Rights Act. If some sexist legislators considered the inclusion of sex discrimination in the bill something of a joke, or perhaps a poison pill to make civil rights legislation even more controversial, evidently no one thought that adding sexual orientation to the list of forbidden categories was worth using even in that way. Nor did those who opposed the sex provision in Title VII include the possibility that prohibiting sex discrimination would also prevent sexual orientation discrimination in their parade of supposed horrors. . . .

II

I do not cite this sorry history of opposition to equality for African-Americans, women, and gay women and men, and of the biases prevailing a half-century ago, to argue that the private intentions and motivations of the members of Congress can trump the plain language or clear implications of a legislative enactment. Although Chief Judge Katzmann has observed elsewhere that judicial warnings about relying on legislative history as an interpretive aid have been overstated, *see* Robert A. Katzmann, *Judging Statutes* 35–39 (2014), I agree with him, and with my other colleagues in the majority, that the implications of legislation flatly prohibiting sex discrimination in employment, duly enacted by Congress and signed by the President, cannot be cabined by citing the private prejudices or blind spots of those members of Congress who voted for it. The above history makes it obvious to me, however, that the majority misconceives the

fundamental *public* meaning of the language of the Civil Rights Act. The problem sought to be remedied by adding “sex” to the prohibited bases of employment discrimination was the pervasive discrimination against women in the employment market . . . By prohibiting discrimination against people based on their sex, it did not, and does not, prohibit discrimination against people because of their sexual orientation.

A

To start, the history of the overlapping movements for equality for blacks, women, and gays, and the differing pace of their progress, as outlined in the previous section, tells us something important about what the language of Title VII must have meant to any reasonable member of Congress, and indeed to any literate American, when it was passed—what Judge Sykes has called the “original *public* meaning” of the statute. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 362 (7th Cir. 2017) (*en banc*) (Sykes, *J.*, dissenting) (emphasis added). That history tells us a great deal about why the legislators who constructed and voted for the Act used the specific language that they did.

The words used in legislation are used for a reason. Legislation is adopted in response to perceived social problems, and legislators adopt the language that they do to address a social evil or accomplish a desirable goal. The words of the statute take meaning from that purpose, and the principles it adopts must be read in light of the problem it was enacted to address. The words may indeed cut deeper than the legislators who voted for the statute fully understood or intended: as relevant here, a law aimed at producing gender equality in the workplace may require or prohibit employment practices that the legislators who voted for it did not yet understand as obstacles to gender equality. Nevertheless, it remains a law aimed at *gender* inequality, and not at other forms of discrimination that were understood at the time, and continue to be understood, as a different kind of prejudice, shared not only by some of those who opposed the rights of women and African-Americans, but also by some who believed in equal rights for women and people of color.

The history I have cited is not “legislative history” narrowly conceived. It cannot be disparaged as a matter of attempts by legislators or their aides to influence future judicial interpretation—in the direction of results they could not convince a majority to support in the overt language of a statute—by announcing to largely empty chambers, or inserting into obscure corners of committee reports, explanations of the intended or unintended legal implications of a bill. Nor am I seeking to infer the unexpressed wishes of all or a majority of the hundreds of legislators who voted for a bill without addressing a particular question of interpretation. Rather, I am concerned with what principles Congress committed the country to by enacting the words it chose. I contend that these principles can be illuminated by an understanding of the central public meaning of the language used in the statute at the time of its enactment.

If the specifically *legislative* history of the “sex amendment” is relatively sparse in light of its adoption as a floor amendment, the broader *political and social* history of the prohibition of sex discrimination in employment is plain for all to read. The history of the 20th century is, among other things, a history of increasing equality of men and women. Recent events remind us of how spotty that equality remains, and how inequality persists even with respect to the basic right of women to physical security and control of their own bodies. But the trend is clear, and it is

particularly emphatic in the workplace.

That history makes it equally clear that the prohibition of discrimination “based on sex” was intended to secure the rights of women to equal protection in employment. . . . The language of the Act itself would have been so understood not only by members of Congress, but by any politically engaged citizen deciding whether to urge his or her representatives to vote for it. . . .

The majority cites judicial interpretations of Title VII as prohibiting sexual harassment, and allowing hostile work environment claims, in an effort to argue that the expansion they are making simply follows in this line. Maj. Op. at 114, 115. But the fact that a prohibition on discrimination against members of one sex may have unanticipated consequences when courts are asked to consider carefully whether a given practice does, in fact, discriminate against members of one sex in the workplace does not support extending Title VII by judicial construction to protect an entirely different category of people. . . . Perhaps it did not occur to some of those male members of Congress that sexual harassment of women in the workplace was a form of employment discrimination, or that Title VII was inconsistent with a “Mad Men” culture in the office. But although a few judges were slow to recognize this point, *see, e.g., Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev’d sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), as soon as the issue began to arise in litigation, courts quickly recognized that for an employer to expect members of one sex to provide sexual favors as a condition of employment from which members of the other sex are exempt, or to view the only value of female employees as stemming from their sexualization, constitutes a fundamental type of discrimination in conditions of employment based on sex. *See, e.g., Barnes v. Costle*, 561 F.2d at 989 (finding that retaliation by plaintiff’s supervisor when she resisted his sexual advances “was plainly based on [plaintiff’s] gender”). . . .

But such interpretations of employment “discrimination against any individual ... based on sex” do not say anything about whether discrimination based on *other* social categories is covered by the statute. . . . Title VII does not adopt a broad principle of equal protection in the workplace; rather, its language singles out for prohibition discrimination based on particular categories and classifications that have been used to perpetuate injustice—but not all such categories and classifications. That is not a matter of abstract justice, but of political reality. Those groups that had succeeded by 1964 in persuading a majority of the members of Congress that unfair treatment of them ought to be prohibited were included; those who had not yet achieved that political objective were not. . . .

None of this, of course, is remotely to suggest that employment discrimination on the basis of sexual orientation is somehow not invidious and wrong. But not everything that is offensive or immoral or economically inefficient is illegal, and if the view that a practice is offensive or immoral or economically inefficient does not command sufficiently broad and deep political support to produce legislation prohibiting it, that practice will remain legal.

B

The majority’s linguistic argument does not change the fact that the prohibition of employment discrimination “because of ... sex” does not protect gays and lesbians. Simply put,

discrimination based on sexual orientation is not the same thing as discrimination based on sex. As Judge Sykes explained,

[t]o a fluent speaker of the English language—then and now—the ordinary meaning of the word “sex” does not fairly include the concept of “sexual orientation.” The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning. ... The words plainly describe different traits, and the separate and distinct meaning of each term is easily grasped. More specifically to the point here, discrimination “because of sex” is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex.

Hively, 853 F.3d at 363 (Sykes, *J.*, dissenting) (footnote omitted).

Of course, the majority does not really dispute this common-sense proposition. It does not say that “sex discrimination” in the ordinary meaning of the term is literally the same thing as “sexual orientation discrimination.” Rather, the majority argues that discrimination based on sex encompasses discrimination against gay people because discrimination based on sex encompasses any distinction between the sexes that an employer might make for any reason. The argument essentially reads “discriminate” to mean pretty much the same thing as “distinguish.” And indeed, there are recognized English uses of “discriminate,” particularly when followed with “between” or “from,” that imply nothing invidious, but merely mean “to perceive, observe or note [a] difference,” or “[t]o make or recognize a distinction.” The Oxford English Dictionary Online, <http://www.oed.com> (search for “Discriminate,” verb, definitions 2a and 2b). But in the language of civil rights, a different and stronger meaning applies, that references *invidious* distinctions: “To treat a person or group in an unjust or prejudicial manner, esp[ecially] on the grounds of race, gender, sexual orientation, etc.; frequently with *against*.” *Id.* (definition 4).

And that is indeed the sense in which Title VII uses the word: the statute prohibits such practices as “fail[ing] or refus[ing] to hire or to discharge” persons on account of their race or sex or other protected characteristic, or “otherwise to discriminate *against* any individual” with respect to employment terms. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In other words, it is an oversimplification to treat the statute as prohibiting any distinction *between* men and women in the workplace, still less any distinction that so much as requires the employer to *know* an employee’s sex in order to be applied, *cf.* *Maj. Op.* at 112–13; the law prohibits discriminating *against* members of one sex or the other in the workplace. . . .

Nor does the example of “discrimination based on traits that are a function of sex, such as life expectancy,” *Maj. Op.* at 112, help the majority’s cause. Discrimination of that sort, as the majority notes, could permit gross discrimination against female employees “by using traits that are associated with sex as a proxy for sex.” *Id.* at 112. That is certainly so as to “traits that are a function of sex,” such as pregnancy or the capacity to become pregnant. But it is not so as to discrimination based on sexual orientation. Same-sex attraction is not “a function of sex” or “associated with sex” in the sense that life expectancy or childbearing capacity are. A refusal to hire gay people cannot serve as a covert means of limiting employment opportunities for men or

for women as such; a minority of both men and women are gay, and discriminating against them discriminates against *them*, as gay people, and does not differentially disadvantage employees or applicants of either sex. That is not the case with other forms of “sex-plus” discrimination that single out for disfavored status traits that are, for example, common to women but rare in men.

C

That “because of ... sex” did not, and still does not, cover sexual orientation, is further supported by the movement, in both Congress and state legislatures, to enact legislation protecting gay men and women against employment discrimination. This movement, which has now been successful in twenty-two states—including all three in our Circuit—and the District of Columbia, has proceeded by expanding the categories of prohibited discrimination in state anti-discrimination laws. In none of those states did the prohibition of sexual orientation discrimination come by judicial interpretation of a pre-existing prohibition on gender-based discrimination to encompass discrimination on the basis of sexual orientation. Similarly, the Executive Branch has prohibited discrimination against gay men and lesbians in federal employment by adding “sexual orientation” to previously protected grounds. *See* Exec. Order No. 13087, 63 Fed. Reg 30,097 (May 28, 1998). Finally, the same approach has been reflected in the repeated (but so far unsuccessful) introduction of bills in Congress to add “sexual orientation” to the list of prohibited grounds of employment discrimination in Title VII. . . .

Although the Supreme Court has rightly cautioned against relying on legislative inaction as evidence of congressional intent, surely the proposal and rejection of over fifty amendments to add sexual orientation to Title VII means something. And it is pretty clear what it does *not* mean. It is hardly reasonable, in light of the EEOC and judicial consensus that sex discrimination did not encompass sexual orientation discrimination, to conclude that Congress rejected the proposed amendments because senators and representatives believed that Title VII “already incorporated the offered change.” *Pension Benefit Guar. Corp.*, 496 U.S. at 650. There may be many reasons why each proposal ultimately failed, but it cannot reasonably be claimed that the basic reason that Congress did not pass such an amendment year in and year out was anything other than that there was not yet the political will to do so.

III

The majority opinion goes on to identify two other arguments in support of its holding: (1) that sexual orientation discrimination is actually “gender stereotyping” that constitutes discrimination against individuals based on their sex, and (2) that such discrimination constitutes prohibited “associational discrimination” analogous to discriminating against employees who are married to members of a different race. . . . [the material on associational discrimination has generally been deleted]

A

Perhaps the most appealing of the majority’s approaches is its effort to treat sexual orientation discrimination as an instance of sexual stereotyping. The argument proceeds from the premises that “sex stereotyping violates Title VII,” *Maj. Op.* at 120, and that “same-sex orientation

‘represents the ultimate case of failure to conform’ to gender stereotypes,” *id.* at 121, quoting *Hively*, 853 F.3d at 346, and concludes that an employer who discriminates against gay people is therefore “sex stereotyping” and thus violating Title VII. But like the other arguments adopted by the majority, this approach rests more on verbal facility than on social reality.

In unpacking the majority’s syllogism, it is first necessary to address what we mean by “sex stereotyping” that “violates Title VII.” Invidious stereotyping of members of racial, gender, national, or religious groups is at the heart of much employment discrimination. Most employers do not entertain, let alone admit to, older forms of racist or other discriminatory ideologies that hold that members of certain groups are inherently or genetically inferior and undeserving of equal treatment. Much more common are assumptions, not always even conscious, that associate certain negative traits with particular groups. A perception that women, for example, are not suited to executive positions, or are less adept at the mathematical and practical skills demanded of engineers, can be a significant hindrance to women seeking such positions, even when a particular woman is demonstrably qualified, or indeed even where empirical data show that on average women perform as well as or better than men on the relevant tasks. Refusing to hire or promote someone because of that sort of gender stereotyping is not a separate form of sex discrimination, but is precisely discrimination in hiring or promotion based on sex. It treats applicants or employees not as individuals but as members of a class that is disfavored for purposes of the employment decision by reason of a trait stereotypically assigned to members of that group as a whole. For the most part, then, the kind of stereotyping that leads to discriminatory employment decisions that violate Title VII is the assignment of traits that are negatively associated with job performance (dishonesty, laziness, greed, submissiveness) to members of a particular protected class.

Clearly, sexual orientation discrimination is not an example of that kind of sex stereotyping; an employer who disfavors a male job applicant whom he believes to be gay does not do so because the employer believes that most men are gay and therefore unsuitable. Rather, he does so because he believes that most *gay* people (whether male or female) have some quality that makes them undesirable for the position, and that because this applicant is gay, he must also possess that trait. Although that is certainly stereotyping, and invidiously so, it does not stereotype a group protected by Title VII, and is therefore not (yet) illegal.

But as the majority correctly points out, that is not the only way in which stereotyping can be an obstacle to protected classes of people in the workplace. The stereotyping discussed above involves beliefs about how members of a particular protected category *are*, but there are also stereotypes (or more simply, beliefs) about how members of that group *should be*. In the case of sex discrimination in particular, stereotypes about how women ought to look or behave can create a double bind. For example, a woman who is perceived through the lens of a certain “feminine” stereotype may be assumed to be insufficiently assertive for certain positions by contrast to men who, viewed through the lens of a “masculine” stereotype, are presumed more likely to excel in situations that demand assertiveness. At the same time, the employer may fault a woman who behaves as assertively as a male comparator for being *too* aggressive, thereby failing to comply with societal expectations of femininity. . . .

I fully accept the conclusion that that kind of discrimination is prohibited, and that it

imposes different conditions of employment on men and on women. Not only does such discrimination require women to behave differently in the workplace than men, but it also actively deters women from engaging in kinds of behavior that are required for advancement to certain positions, and thus effectively bars them from such advancement. The key element here is that one sex is systematically disadvantaged in a particular workplace. In that circumstance, sexual stereotyping is sex discrimination.

But as Judge Sykes points out in her *Hively* dissent, the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women. 853 F.3d at 370. . . . The belief on which it rests is not a belief about what men or women ought to be or do; it is a belief about what *all* people ought to be or do—to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex. That does not make workplace discrimination based on this belief better or worse than other kinds of discrimination, but it does make it something different from sex discrimination, and therefore something that is not prohibited by Title VII.

* * *

C

In the end, perhaps all of these arguments, on both sides, boil down to a disagreement about how discrimination on the basis of sexual orientation should be conceptualized. Whether based on linguistic arguments or associational theories or notions of stereotyping, the majority's arguments attempt to draw theoretical links between one kind of discrimination and another: to find ways to reconceptualize discrimination on the basis of sexual orientation as discrimination on the basis of sex. It is hard to believe that there would be much appetite for this kind of recharacterization if the law expressly prohibited sexual orientation discrimination, or that any opponent of sexual orientation discrimination would oppose the addition of sexual orientation to the list of protected characteristics in Title VII on the ground that to do so would be redundant or would express a misunderstanding of the nature of discrimination against men and women who are gay. I believe that the vast majority of people in our society—both those who are hostile to homosexuals and those who deplore such hostility—understand bias against or disapproval of those who are sexually attracted to persons of their own sex as a distinct type of prejudice, and not as merely a form of discrimination against either men or women on the basis of sex.

The majority asserts that discrimination against gay people is nothing more than a subspecies of discrimination against one or the other gender. Discrimination against gay men and lesbians is wrong, however, because it denies the dignity and equality of gay men and lesbians, and not because, in a purely formal sense, it can be said to treat men differently from women. It is understandable that those who seek to achieve legal protection for gay people victimized by discrimination search for innovative arguments to classify workplace bias against gays as a form of discrimination that is already prohibited by federal law. But the arguments advanced by the majority ignore the evident meaning of the language of Title VII, the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not, and the distinctive nature of anti-gay prejudice. Accordingly, much as I might wish it were otherwise, I must conclude that those arguments fail.

* * *

For these reasons, I respectfully, and regretfully, dissent.

[The dissenting opinions of DEBRA ANN LIVINGSTON, CIRCUIT JUDGE, and REENA RAGGI, CIRCUIT JUDGE, have been omitted.]

NOTES

1. **Understanding *Zarda*.** The *Zarda* case is the latest in a recent series of cases involving the question of whether discrimination based on sexual orientation constitutes sex discrimination under Title VII. The cases were sparked, at least in part, by the EEOC determination in *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015), discussed early in the *Zarda* case. To date, the EEOC, which as of July 2018 is operating with three of its five members while two individuals nominated by President Trump wait confirmation, has stood behind its decision and filed an amicus brief on behalf of the plaintiff in *Zarda*. The Trump Administration, however, filed an amicus brief on behalf of the employer in the case, and in *Zarda* the court generally refers to the positions in that brief as “the government’s.” The *Zarda* case explores the various arguments for and against defining Title VII to include sexual orientation discrimination, what do you think is the strongest argument in favor of such interpretation? The weakest? Given the existing circuit split, the Supreme Court is likely to address the issue in the next several years and, if it does, how do you think the Court is likely to rule? Why?

2. **Judge Posner’s opinion in *Hively*.** As discussed in the *Zarda* case, the Seventh Circuit also recently held that sexual orientation discrimination is covered by Title VII. See *Hively v. Ivy Tech. Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc). In a concurring opinion – which turned out to be one of his last judicial opinions – Judge Posner suggested that the court should adopt a different approach to the interpretive question by “updating” the statute to “give a fresh meaning to a statement found in a . . . statutory text.” *Id.* at 352 (Posner, J., concurring). He went on to explain:

The majority opinion states that Congress in 1964 “may not have realized or understood the full scope of the words it chose.” This could be understood to imply that the statute forbade discrimination against homosexuals but the framers and ratifiers of the statute were not smart enough to realize that. I would prefer to say that theirs was the then-current understanding of the key word—sex. “Sex” in 1964 meant gender, not sexual orientation. What the framers and ratifiers understandably didn’t understand was how attitudes toward homosexuals would change in the following half century. They shouldn’t be blamed for that failure of foresight. We understand the words of Title VII differently not because we’re smarter than the statute’s framers and ratifiers but because we live in a different era, a different culture. Congress in the 1960s did not foresee the sexual revolution of the 2000s. . . .

I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of “sex discrimination” that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.

Id. at 358. Does his argument seem more or less convincing than the majority’s opinion in *Zarda*? To support his argument, Judge Posner cited a number of other contexts where courts, including the Supreme Court, construe constitutional or statutory provisions with a focus on contemporary rather than historical approaches. For example, he noted that the Supreme Court does not interpret the “cruel and unusual” punishments clause of the Eighth Amendment based on what was permissible at the time the constitution was adopted but instead looks to contemporary mores, often reflected in current state practices. *Id.* at 354.

3. **Religious Objections.** It is not yet clear how, if at all, the Supreme Court’s recent decision in *Masterpiece Cakeshop v. Colorado Civil Rts. Comm’n*, 138 S.Ct. 1719 (2018), might affect employment claims. In that case, a baker, Jack Phillips, refused to make a wedding cake for Charlie Craig and Dave Mullins because he was opposed to same-sex marriage. The baker claimed that requiring him to make the cake would violate his religious and speech rights under the First Amendment. His claims failed under the Colorado public accommodations law, which explicitly protects against discrimination based on sexual orientation. The Supreme Court, however, reversed because it concluded that the state Civil Rights Commission expressed hostility to Phillips’ religious claim in a way that was “inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion.” *Id.* at 1732. The Court’s conclusion was based on statements made by Commissioners and differential treatment the Commission had provided to what the Supreme Court deemed were similar claims. The Court did not, however, rule on whether the baker’s religious or free speech claims provided what would amount to an exemption from the state law. The religious exemptions under Title VII are very narrow and the *Masterpiece Cakeshop* case did not address them and is not likely to affect those exemptions, at least at this point in time.

A recent Sixth Circuit case explored an employer’s religious objection made under the Religious Freedom Restoration Act (“RFRA”). The case involved a transgender plaintiff who worked at a Funeral Home and was immediately fired after she informed her employer that she was transitioning from a man to a woman. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). The court, after concluding that discrimination based on transgender status was prohibited under Title VII, went on to consider the employer’s religious objection. The employer raised an affirmative defense under RFRA arguing that being required to employ the plaintiff would substantially burden its religious practices but the employer was unable to articulate how its practices were affected. The court concluded, “RFRA provides the Funeral Home with no relief because continuing to employ Stephens [the plaintiff] would not, as a matter of law, substantially burden Rost’s [the defendant’s] religious exercise, and even if it did,

the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination.” *Id.* at 599. The Funeral Home also argued that customers might be offended by the presence of Ms. Stevens, a claim the court rejected because, even if true, would constitute impermissible customer discrimination. *Id.* at 587 (“we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA.”).

2. Employer Liability.

Insert new Note 8 on p. 658.

8. The #MeToo Movement. In October 2017, both the New York Times and the New Yorker published lengthy stories chronicling multiple allegations of sexual assault and harassment committed by movie producer Harvey Weinstein. The allegations extended over many years and shortly thereafter Actress Alyssa Milano tweeted, “If you’ve been sexually harassed or assaulted, write ‘me too’ as a reply to this tweet.” By the next morning there were 55,000 #MeToo tweets, which later grew into the millions prompting a social movement revolving around #MeToo, a phrase that was originally coined by Tarana Burke in 2006 but that gained popular attention only more recently.

Harvey Weinstein would later be indicted for sexual crimes and lose his movie studio. Soon other prominent men were exposed as serial workplace harassers including Matt Laurer, Mark Halperin, Judge Alex Kozinski, Charlie Rose, Louis C.K., Kevin Spacey, Mario Batali and countless others who suffered quick recriminations after allegations became public often leading to the loss of their business opportunities, whether in the entertainment or political world. Allegations of sexual misconduct have also affected the business world. Former Uber employee Susan Fowler wrote a blogpost detailing the sexual harassment she encountered while working at Uber and the company’s unwillingness to do anything about it. (<https://www.susanjefeller.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>) Her post went viral and led to the eventual removal of CEO Travis Kalanick, as well as the firing of dozens of Uber employees.

The #MeToo movement has created a wave of publicity regarding both the prevalence and severity of sexual harassment and assault, and it has likewise spurred a number of changes. Plaintiff attorneys report a surge of complaints regarding claims of sexual harassment and a greater willingness of employers to settle them, and often quickly. John Taylor the President of the Society for Human Resource recently told the New York Times, “For the first time I’m seeing a discussion about, ‘Even if this behavior doesn’t rise to the level of legal harassment, we won’t tolerate it.’” Jodi Kantor, *#MeToo Called for an Overhaul: Are Workplaces Really Changing?*, N. Y. TIMES, Mar. 23, 2018, available at <https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html>. A group of women, most of whom are tied to Hollywood and the entertainment industry, have established a group known as TimesUp that will help fund litigation with a particular focus on helping low-wage women fight against sexual harassment and assault.

The group has raised more than \$20 million to date and began distributing grants in Spring 2018. (<https://www.timesupnow.com/>)

There have also been a number of legislative initiatives since the #MeToo movement gained prominence, most of which focus on nondisclosure agreements (“NDAs”). These agreements, most commonly used in the settlement of claims but sometimes imposed as a condition of employment, can seriously limit the ability of an employee, or former employee, from reporting or discussing harassment allegations. Movie producer Harvey Weinstein apparently settled many claims regarding sexual harassment and assault with nondisclosure agreements and it is widely thought that the nondisclosure agreements facilitated his serial abuse. Several states have moved to regulate NDAs as they relate to sexual harassment – New York, for example, provides that any settlement, agreement or other resolution of a claim “the factual foundation for which involves sexual harassment” cannot include a confidentiality or non-disclosure provision, unless the complainant wants the provision. Arizona and Louisiana have passed similar laws and Vermont has passed a more comprehensive statute that regulates settlements of sexual harassment claims, including preserving a right for the individual to file a complaint with state and federal agencies. Other states have introduced legislation seeking to regulate NDAs in the context of settling sexual harassment claims. For a discussion of the use of NDAs to settle sexual harassment claims see Ian Ayres, *Targeting Repeat Offender NDAs*, STANFORD LAW REV. ONLINE, June 2018, available at <https://www.stanfordlawreview.org/online/targeting-repeat-offender-ndas/>; Susan Sholinsky, *#MeToo’s Impact on Sexual Harassment Law Just Beginning*, LAW360, July 22, 2018. As part of the 2017 tax reform bill, Congress prohibited employers from taking a tax deduction for any settlement paid for a sexual harassment claim that includes a non-disclosure agreement, and it also prohibits employers from deducting any expenses or attorneys’ fees related to the settlement. See Pub. L. No. 115-97, § 13307, 131 Stat. 2054, 2129 (to be codified at I.R.C. § 162 (q)).

Most of the legislation has focused on NDAs in connection with the settlement of sexual harassment claims but some legislatures are seeking to regulate the agreements in other ways. New York, Maryland, Vermont and Washington have recently banned mandatory arbitration of harassment claims. See Jonathan Hiles, *New York Prohibits Mandatory Arbitration of Sexual Harassment Claims*, Sanford Heisler Working for Justice, July 20, 2018, available at <https://sanfordheisler.com/new-york-prohibits-mandatory-arbitration-of-sexual-harassment-claims/> (discussing recent laws). These laws may turn out to be difficult to enforce in light of federal law relating to the permissibility of arbitration agreements, an issue that will be discussed in Chapter 14. However, a number of employers, and law firms, have recently agreed to abandon arbitration agreements for their employees, including summer associates. See Meghan Tribe, *Will Law Firms Bow to Pressure to End Mandatory Arbitration*, AMERICAN LAWYER, May 24, 2018, <https://www.law.com/americanlawyer/2018/05/24/will-law-firms-bow-to-pressure-to-end-mandatory-arbitration/>. Uber, Lyft and Microsoft have all abandoned mandatory arbitration but in those cases only for claims related to sexual harassment.

Although these developments are widely applauded as positive developments, there have been some concerns even among those who support aggressive enforcement of sexual harassment laws. A group of legal scholars have recently expressed concern that so many of the high-profile allegations involve sexual assault and explicit sexual behavior that it can obscure the many ways in which sexual harassment can infiltrate the workplace. See Vicki Schultz et al., *Open Statement*

on *Sexual Harassment for Employment Discrimination Law Scholars*, STANFORD Law Rev. Online, June 2018, available at <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/> (“In the popular imagination, sexual harassment refers to unwanted sexual advances, usually by powerful male bosses or benefactors against less powerful women . . . [but] the bottom line is that harassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality.”). How do you think the #MeToo movement has evolved and what lasting effect do you think it might have? There has also been some concern that the movement might have gone too far by condemning individuals through the media without appropriate due process. See Jacquelyn Martin, *Why the #MeToo Movement Should be Ready for a Backlash*, POLITICO MAGAZINE, Dec. 10, 2017, <https://www.politico.com/magazine/story/2017/12/10/yoffe-sexual-harassment-college-franken-216057>. In her article, Martin focuses on Democratic Senator Al Franken who reluctantly resigned from office after several allegations surfaced of unwanted touching or kissing, some of which occurred during his time on Saturday Night Live. So far the backlash has been relatively muted, do you think this should be an issue of greater significance? In the workplace, how would the status of the employee – at-will, vs. having a contract as most executives do – affect your analysis?

There is also an important question of the role of attorneys in the allegations of sexual harassment, particularly as they relate to confidential settlements of serial harassers. Should attorneys have a duty to inform corporate boards or other entities regarding the behavior of their employees, including executive level employees? Is there a point that an attorney should refuse to participate in a settlement if she believes the accused is likely to offend again? Relatedly, shareholders have taken notice of the effect sexual misconduct can have on stock prices and several shareholder suits have been filed in the last year. Allegations of serial misconduct against casino mogul Steve Wynn led to a drop in stock price of more than 15% or \$3 billion which in turn led to three shareholder lawsuits alleging, among other things, breach of fiduciary duty for failing to oversee the CEO. See David Garland, *Sex Harassment Meets Shareholder Lawsuit*, HR DRIVE, Feb. 22, 2018, <https://www.hrdive.com/news/sex-harassment-meets-shareholder-lawsuits/517544/>.

Chapter 11: The Regulation of Wages and Hours

B. Overview of the FLSA

1. Minimum wage provisions

Tipped Employees (p. 777-78)

Insert the following paragraph at the bottom of p. 778.

Tip-pooling became a political flashpoint in late 2017, after the Department of Labor proposed a new regulation to clarify the law. Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57395 (proposed Dec. 5, 2017) (to be codified at 29 C.F.R. pt. 531). The proposed rule would have allowed cooks, dishwashers and other lower-paid employees to share in tip pools, but worker advocates argued that it would also allow companies to divert tips to managers, supervisors, or even head chefs. In response, Congress amended FLSA Section 3(m) as part of an omnibus spending bill. Now tips can be shared with “back of the house” employees such as cooks and dishwashers, but not with supervisors, managers, or restaurant owners. Tim Carman, *With a new law in place, all sides are claiming victory in the tipping wars*, WASHINGTON POST (March 23, 2018). Due to this change, the statement at the bottom of page 777 that dishwashers and cooks cannot share in tip pools is no longer correct.

In April 2018, the DOL’s Wage and Hour Division announced that it was planning new rulemaking “to fully address the impact of the 2018 amendments.” Dept. of Labor Wage and Hour Division, Amendment to FLSA Section 3(m) Included in Consolidated Appropriations Act, 2018, Field Assistance Bulletin No. 2018-3, (April 6, 2018).

C. The FLSA’s Purposes: Wealth Redistribution and Work-Spreading

1. The Minimum Wage Provision

Insert the following new note on page 803.

5. New State and Local Efforts: The “Fight for \$15” and Wage Boards. Since 2012 worker advocates have pushed aggressively for states and localities to set higher minimum wages for all workers, as part of a campaign now known as the “Fight for \$15.” That effort began among fast food workers in various cities, and has involved both legislative advocacy and more traditional union tactics such as strikes and rallies. In response, three states (California, New York, and Massachusetts) and a number of major cities (including Los Angeles, San Francisco, Seattle, and Washington, D.C.) have raised or soon will raise their minimum wages to \$15 per hour. Various other states, including Arizona, Colorado, Maine, and Washington State, have raised their minimum wage significantly, though not to \$15 per hour. See National Employment Law Project, *Fight for \$15: Four Years, \$62 Billion*, (December 2016), available at <https://www.nelp.org/wp-content/uploads/Fight-for-15-Four-Years-62-Billion-in-Raises.pdf>

Those raises will affect a substantial number of workers. Around 29 percent of workers make less than \$15 per hour. Most of them are adults who work full-time, and a disproportionate number are women and people of color. DAVID COOPER, ECONOMIC POLICY INSTITUTE, *RAISING THE MINIMUM WAGE TO \$15 BY 2024 WOULD LIFT WAGES FOR 41 MILLION AMERICAN WORKERS*, 2-3 (April 26, 2017), *available at* <https://www.epi.org/files/pdf/125047.pdf>. Such workers are also concentrated in occupations that are expected to grow significantly in the near future, including in food service, personal care, building services, and nursing assistants. IRENE TUNG, YANNET LATHROP, & PAUL SONN, NATIONAL EMPLOYMENT LAW PROJECT, *THE GROWING MOVEMENT FOR \$15*, 2 (Nov. 2015), *available at* <https://www.nelp.org/wp-content/uploads/Growing-Movement-for-15-Dollars.pdf>.

Business interests and conservative groups have opposed such efforts. They have also encouraged states to preempt local minimum wage laws. For example, in 2016 Birmingham, Alabama raised its minimum wage to \$10.10 per hour—then two days later the state legislature passed Alabama’s first-ever minimum wage law, part of which barred cities and counties from setting a higher minimum than the state’s newly-mandated \$7.25 per hour. Zachary Roth, *Birmingham Raises Minimum Wage and Alabama Takes it Away*, NBC News, (Feb. 26, 2016). A group of plaintiffs led by the NAACP challenged the state law on equal protection grounds. The district court dismissed that suit on defendants’ 12(b)(6) motion. But in July 2018, the 11th Circuit allowed the claim to proceed, finding that the plaintiffs had sufficiently alleged a discriminatory motivation given “the disproportionate effect of the Minimum Wage Act on Birmingham’s poorest black residents; the rushed, reactionary, and racially polarized nature of the legislative process; and Alabama’s historical use of state power to deny local black majorities authority over economic decision-making.” *Marnika Lewis, et al v. Governor of Alabama, et al*, no. 2:16-cv-00690 (11th Cir., July 25, 2018).

As of July 2017, 25 states had minimum wage preemption laws on the books. National Employment Law Project, *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws* (July 2017), *available at* <https://www.nelp.org/wp-content/uploads/Fighting-Preemption-Local-Minimum-Wage-Laws.pdf>.

In a related development, worker advocates have used a long-dormant administrative process to raise wages in particular sector. A number of states allow their state Department of Labor to raise wages for particular occupations, often after empaneling a tripartite commission with representatives from business, labor, and the public. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 84-89 (2016) (discussing and assessing state-level “wage board” laws). New York State set up such a board for the fast food industry in 2015. The State Commissioner of Labor accepted the board’s recommendations, raising wages for most fast food workers to \$15 per hour over several years. Order of Acting Commissioner of Labor Mario J. Musolino on the Report and Recommendations of the 2015 Fast Food Wage Board (Sept. 10, 2015), *available at* <https://labor.ny.gov/workerprotection/laborstandards/pdfs/FastFood-Wage-Order.pdf>.

What do you see as the advantages and disadvantages of “wage boards,” compared to setting minimum wages through legislation? Some worker advocates feel that wage boards are promising because they encourage public debates around economic inequality and enable unions to mobilize non-union workers. But is there a risk that a union-backed Governor will push wages too high, or

will use a wage board process to reward politically-powerful unions? Similarly, could a Governor use that process to *reduce* worker protections?

D. Who is Covered?

3. Exemptions from Coverage

Add the following paragraph on page 815, before sub-heading 4:

On appeal, the D.C. Circuit reversed, applying the framework of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). It reasoned as follows:

The Supreme Court’s decision in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), confirms that the Act vests the Department with discretion to apply (or not to apply) the companionship-services and live-in exemptions to employees of third-party agencies. The Department’s decision to extend the FLSA’s protections to those employees is grounded in a reasonable interpretation of the statute and is neither arbitrary nor capricious.

Home Care Ass’n of America v. Weil, 799 F.3d 1084, 1087 (D.C. Cir, 2015), *cert. denied*, 136 S. Ct. 2506 (2016). In other words, under *Chevron*, the DOL acted within its discretion both when it applied the exemption to home care workers prior to 2007, and when it ceased doing so in 2015.

4. Applications

a. Independent Contractors

Add the following new Note on p. 823, just above sub-heading b:

3. Changing Approaches at the DOL. Under administrator David Weil, the DOL’s Wage and Hour division issued two guidance memoranda for employers and staff regarding the test for employment under FLSA. The first dealt with employee misclassification and emphasized that “the application of the economic realities factors should be guided by the FLSA’s statutory directive that the scope of the employment relationship is very broad.” U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2015-1 at 2 (July 15, 2015). The other discussed the scope of “joint employment” under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act, which borrows FLSA’s definition of employment, and also emphasized the broad scope of employment under those statutes. U.S. Dep’t of Labor, Wage & Hour Div., Administrator’s Interpretation No. 2016-1 at 3-4 (Jan 20, 2016).

While agency guidance of this sort is not binding on business or courts, it does reflect agencies’ enforcement priorities. Moreover, courts and parties may draw on such guidance in the course of litigation.

On June 7, 2017, Secretary of Labor Alexander Acosta rescinded the guidance in those two

memoranda. One reporter deemed this the “agency’s first major shift in labor policy under President Donald Trump.” Daniel Wiessner, *U.S. Labor Department rescinds Obama-era rule on ‘joint employment,’* REUTERS, (June 7, 2017).

b. Trainees and Interns

Page 825

In July 2015, the Second Circuit issued its decision resolving the split between the district courts on the question of the employment status of interns in the for-profit sector for FLSA purposes. Omit *Glatt v. Fox Searchlight Pictures, Inc.* and *Wang v. Hearst Corp.*, pages 825-835, and substitute the following case.

Glatt v. Fox Searchlight Pictures, Inc.

United States Court of Appeals for the Second Circuit

811 F.3d 528 (2015)

WALKER, JACOBS, and WESLEY, Circuit Judges.

John M. Walker, Jr., Circuit Judge:

Plaintiffs, who were hired as unpaid interns, claim compensation as employees under the Fair Labor Standards Act and New York Labor Law. Plaintiffs Eric Glatt and Alexander Footman moved for partial summary judgment on their employment status. Plaintiff Eden Antalik moved to certify a class of all New York interns working at certain of defendants' divisions between 2005 and 2010 and to conditionally certify a nationwide collective of all interns working at those same divisions between 2008 and 2010. The district court (William H. Pauley III, *J.*) granted Glatt and Footman's motion for partial summary judgment, certified Antalik's New York class, and conditionally certified Antalik's nationwide collective. On defendants' interlocutory appeal, we VACATE the district court's order granting partial summary judgment to Glatt and Footman, VACATE its order certifying Antalik's New York class, VACATE its order conditionally certifying Antalik's nationwide collective, and REMAND for further proceedings.

BACKGROUND

Plaintiffs worked as unpaid interns either on the Fox Searchlight-distributed film *Black Swan* or at the Fox corporate offices in New York City. They contend that the defendants, Fox Searchlight and Fox Entertainment Group, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 206-07, and New York Labor (NYLL), N.Y. Labor Law § 652, by failing to pay them as employees during their internships as required by the FLSA's and NYLL's minimum wage and overtime provisions. The following background facts are undisputed except where noted.

Eric Glatt

Eric Glatt graduated with a degree in multimedia instructional design from New York University. Glatt was enrolled in a non-matriculated (non-degree) graduate program at NYU's School of Education when he started working on *Black Swan*. His graduate program did not offer him credit for his internship.

From December 2, 2009, through the end of February 2010, Glatt interned in *Black Swan's* accounting department under the supervision of Production Accountant Theodore Au. He worked from approximately 9:00 a.m. to 7:00 p.m. five days a week. As an accounting intern, Glatt's responsibilities included copying, scanning, and filing documents; tracking purchase orders; transporting paperwork and items to and from the *Black Swan* set; maintaining employee personnel files; and answering questions about the accounting department.

Glatt interned a second time in *Black Swan's* post-production department from March 2010 to August 2010, under the supervision of Post Production Supervisor Jeff Robinson. Glatt worked two days a week from approximately 11:00 a.m. until 6:00 or 7:00 p.m. His post-production responsibilities included drafting cover letters for mailings; organizing filing cabinets; filing paperwork; making photocopies; keeping the takeout menus up-to-date and organized; bringing documents to the payroll company; and running errands, one of which required him to purchase a non-allergenic pillow for Director Darren Aronofsky.

Alexander Footman

Alexander Footman graduated from Wesleyan University with a degree in film studies. He was not enrolled in a degree program at the time of his *Black Swan* internship. From September 29, 2009, through late February or early March 2010, Footman interned in the production department under the supervision of Production Office Coordinator Lindsay Feldman and Assistant Production Office Coordinator Jodi Arneson. Footman worked approximately ten-hour days. At first, Footman worked five days a week, but, beginning in November 2009, he worked only three days a week. After this schedule change, *Black Swan* replaced Footman with another unpaid intern in the production department.

Footman's responsibilities included picking up and setting up office furniture; arranging lodging for cast and crew; taking out the trash; taking lunch orders; answering phone calls; watermarking scripts; drafting daily call sheets; photocopying; making coffee; making deliveries to and from the film production set, rental houses, and the payroll office; accepting deliveries; admitting guests to the office; compiling lists of local vendors; breaking down, removing, and selling office furniture and supplies at the end of production; internet research; sending invitations to the wrap party; and other similar tasks and errands, including bringing tea to Aronofsky and dropping off a DVD of *Black Swan* footage at Aronofsky's apartment.

Eden Antalík

Eden Antalik worked as an unpaid publicity intern in Fox Searchlight's corporate office in New York from the beginning of May 2009 until the second week of August 2009. During her internship, Antalik was enrolled in a degree program at Duquesne University that required her to have an internship in order to graduate. Antalik was supposed to receive credit for her internship at Fox Searchlight, but, for reasons that are unclear from the record, she never actually received the credit.

Antalik began work each morning around 8:00 a.m. by assembling a brief, referred to as "the breaks," summarizing mentions of various Fox Searchlight films in the media. She also made travel arrangements, organized catering, shipped documents, and set up rooms for press events.

Prior Proceedings

On October 19, 2012, plaintiffs filed their first amended class complaint seeking unpaid minimum wages and overtime for themselves and all others similarly situated. Thereafter, Glatt and Footman abandoned their class claims and proceeded as individuals. After discovery, Glatt and Footman moved for partial summary judgment, contending that they were employees under the FLSA and NYLL. The defendants cross-moved for summary judgment claiming that Glatt and Footman were not employees under either statute. At about the same time, Antalik moved to certify a class of New York State interns working at certain Fox divisions and a nationwide FLSA collective of interns working at those same divisions.

On June 11, 2013, the district court concluded that Glatt and Footman had been improperly classified as unpaid interns rather than employees and granted their partial motion for summary judgment. The district court also granted Antalik's motions to certify the class of New York interns and to conditionally certify the nationwide FLSA collective.

On September 17, 2013, the district court, acting on defendants' motion, certified its order for immediate appeal under 28 U.S.C. § 1292(b). On November 26, 2013, we granted defendants' petition for leave to file an interlocutory appeal from the district court's orders. For the reasons that follow, we vacate the district court's orders and remand.

DISCUSSION

At its core, this interlocutory appeal raises the broad question of under what circumstances an unpaid intern must be deemed an "employee" under the FLSA and therefore compensated for his work. That broad question underlies our answers to the three specific questions on appeal. First, did the district court apply the correct standard in evaluating whether Glatt and Footman were employees, and, if so, did it reach the correct result? Second, did the district court err by certifying Antalik's class of New York interns? Third, did the district court err by conditionally certifying Antalik's nationwide collective?

I. Glatt's and Footman's Employment Status

We review the district court's order granting partial summary judgment to Glatt and Footman de novo. *See Velez v. Sanchez*, 693 F.3d 308, 313-14 (2d Cir. 2012). Summary judgment is appropriate only if, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 314.

With certain exceptions not relevant here, the FLSA requires employers to pay all employees a specified minimum wage, and overtime of time and one-half for hours worked in excess of forty hours per week. 29 U.S.C. §§ 206-07. NYLL requires the same, except that it specifies a higher wage rate than the federal minimum. *See* N.Y. Labor Law § 652. An employee cannot waive his right to the minimum wage and overtime pay because waiver "would nullify the purposes of the [FLSA] and thwart the legislative policies it was designed to effectuate." *Barrentine v. Arkansas- Best Freight Sys., Inc.*, 450 U.S. 728, 740, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981) (internal quotation marks omitted); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985) (exceptions to coverage under the FLSA affect more people than those workers directly at issue because exceptions are "likely to exert a general downward pressure on wages in competing businesses").

The strictures of both the FLSA and NYLL apply only to employees. The FLSA unhelpfully defines "employee" as an "individual employed by an employer." 29 U.S.C. § 203(e)(1). "Employ" is defined as "to suffer or permit to work." *Id.* § 203(g). New York likewise defines "employee" as "any individual employed, suffered or permitted to work by an employer." 12 N.Y.C.R.R. § 142-2.14(a). Because the statutes define "employee" in nearly identical terms, we construe the NYLL definition as the same in substance as the definition in the FLSA. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 78 (2d Cir. 2003).

The Supreme Court has yet to address the difference between unpaid interns and paid employees under the FLSA. In 1947, however, the Court recognized that unpaid railroad brakemen trainees should not be treated as employees, and thus that they were beyond the reach of the FLSA's minimum wage provision. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947).

The Court adduced several facts. First, the brakemen-trainees at issue did not displace any regular employees, and their work did not expedite the employer's business. *Id.* at 149-50. Second, the brakemen-trainees did not expect to receive any compensation and would not necessarily be hired upon successful completion of the course. *See id.* at 150. Third, the training course was similar to one offered by a vocational school. *Id.* at 152. Finally, the employer received no immediate advantage from the work done by the trainees. *Id.* at 153.

In 1967, the Department of Labor ("DOL") issued informal guidance on trainees as part of its Field Operations Handbook. The guidance enumerated six criteria and stated that the trainee is not an employee only if all of the criteria were met. *See* DOL, Wage & Hour Div., Field Operations

Handbook, Ch. 10, ¶ 10b11 (Oct. 20, 1993), *available at* http://www.dol.gov/whd/FOH/FOH_Ch10.pdf. In 2010, the DOL published similar guidance for unpaid interns working in the for-profit private sector. This Intern Fact Sheet provides that an employment relationship does not exist if all of the following factors apply:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

DOL, Wage & Hour Div., Fact Sheet #71, Internship Programs Under The Fair Labor Standards Act (April 2010), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

The district court evaluated Glatt's and Footman's employment using a version of the DOL's six-factor test. However, the district court, unlike the DOL, did not explicitly require that all six factors be present to establish that the intern is not an employee and instead balanced the factors. The district court found that the first four factors weighed in favor of finding that Glatt and Footman were employees and the last two factors favored finding them to be trainees. As a result, the district court concluded that Glatt and Footman had been improperly classified as unpaid interns and granted their motion for partial summary judgment.

The specific issue we face—when is an unpaid intern entitled to compensation as an employee under the FLSA?—is a matter of first impression in this Circuit. When properly designed, unpaid internship programs can greatly benefit interns. For this reason, internships are widely supported by educators and by employers looking to hire well-trained recent graduates.¹ However, employers can also exploit unpaid interns by using their free labor without providing them with an appreciable benefit in education or experience. Recognizing this concern, all parties agree that there are circumstances in which someone who is labeled an unpaid intern is actually an employee entitled to compensation under the FLSA. All parties also agree that there are circumstances in which unpaid interns are not employees under the FLSA. They do not agree on what those circumstances are or what standard we should use to identify them.

¹ See, e.g., Nat'l Ass'n of Colleges & Emp'rs, Position Statement: U.S. Internships (July 2011), *available at* <http://www.nacweb.org/advocacy/position-statements/united-states-internships.aspx> ("NACE, Position Statement").

The plaintiffs urge us to adopt a test whereby interns will be considered employees whenever the employer receives an immediate advantage from the interns' work. Plaintiffs argue that focusing on any immediate advantage that accrues to the employer is appropriate because, in their view, the Supreme Court in *Portland Terminal* rested its holding on the finding that the brakemen trainees provided no immediate advantage to the employer.

The defendants urge us to adopt a more nuanced primary beneficiary test. Under this standard, an employment relationship is not created when the tangible and intangible benefits provided to the intern are greater than the intern's contribution to the employer's operation. They argue that the primary beneficiary test best reflects the economic realities of the relationship between intern and employer. They further contend that a primary beneficiary test that considers the totality of the circumstances is in accordance with how we decide whether individuals are employees in other circumstances.

DOL, appearing as amicus curiae in support of the plaintiffs, defends the six factors enumerated in its Intern Fact Sheet and its requirement that every factor be present before the employer can escape its obligation to pay the worker. DOL argues (1) that its views on employee status are entitled to deference because it is the agency charged with administering the FLSA and (2) that we should use the six factors because they come directly from *Portland Terminal*.

We decline DOL's invitation to defer to the test laid out in the Intern Fact Sheet. As DOL makes clear in its brief, its six-part test is essentially a distillation of the facts discussed in *Portland Terminal*. DOL Br. at 11-12, 21. Unlike an agency's interpretation of ambiguous statutory terms or its own regulations, "an agency has no special competence or role in interpreting a judicial decision." *New York v. Shalala*, 119 F.3d 175, 180 (2d Cir. 1997). And as DOL concedes, DOL Br. at 21, this interpretation is entitled, at most, to *Skidmore* deference to the extent we find it persuasive. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944) (the weight given to the Administrator's judgment depends on "all those factors which give it power to persuade"). Because the DOL test attempts to fit *Portland Terminal's* particular facts to all workplaces, and because the test is too rigid for our precedent to withstand, see, e.g., *Velez*, 693 F.3d at 326, we do not find it persuasive, and we will not defer to it.

Instead, we agree with defendants that the proper question is whether the intern or the employer is the primary beneficiary of the relationship. The primary beneficiary test has three salient features. First, it focuses on what the intern receives in exchange for his work. See *Portland Terminal*, 330 U.S. at 152 (focusing on the trainee's interests). Second, it also accords courts the flexibility to examine the economic reality as it exists between the intern and the employer. See *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 141-42 (2d Cir. 2008) (employment for FLSA purposes is "a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances"). Third, it acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits

that are not necessarily expected with all forms of employment (though such benefits may be a product of experience on the job).

Although the flexibility of the primary beneficiary test is primarily a virtue, this virtue is not unalloyed. The defendants' conception of the primary beneficiary test requires courts to weigh a diverse set of benefits to the intern against an equally diverse set of benefits received by the employer without specifying the relevance of particular facts. *Cf. Brown v. N.Y. City Dep't of Educ.*, 755 F.3d 154, 163 (2d Cir. 2014) ("While our ultimate determination [of employment status] is based on the totality of circumstances, our discussion necessarily focuses on discrete facts relevant to particular statutory and regulatory criteria." (internal citation omitted)).

In somewhat analogous contexts, we have articulated a set of non-exhaustive factors to aid courts in determining whether a worker is an employee for purposes of the FLSA. *See, e.g., Velez*, 693 F.3d at 330 (domestic workers); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988) (independent contractors). In the context of unpaid internships,² we think a non-exhaustive set of considerations should include:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Applying these considerations requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee entitled to the minimum wage. In addition, the factors we specify are non-exhaustive—courts may consider relevant evidence beyond the specified factors in appropriate cases. And because the touchstone of this analysis is the “economic reality” of the

² Like the parties and amici, we limit our discussion to internships at forprofit employers.

relationship, *Barfield*, 537 F.3d at 141, a court may elect in certain cases, including cases that can proceed as collective actions, to consider evidence about an internship program as a whole rather than the experience of a specific intern.

This flexible approach is faithful to *Portland Terminal*. Nothing in the Supreme Court's decision suggests that any particular fact was essential to its conclusion or that the facts on which it relied would have the same relevance in every workplace. See *Portland Terminal*, 330 U.S. at 150-53; see also *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 526 n.2 (6th Cir. 2011) ("While the Court's recitation of the facts [in *Portland Terminal*] included those that resemble the Secretary's six factors, the Court gave no indication that such facts must be present in future cases to foreclose an employment relationship." (internal citation omitted)).

The approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education—and is confined to internships and does not apply to training programs in other contexts. The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting,³ and, unlike the brakemen at issue in *Portland Terminal*, all of the plaintiffs were enrolled in or had recently completed a formal course of post-secondary education. By focusing on the educational aspects of the internship, our approach better reflects the role of internships in today's economy than the DOL factors, which were derived from a 68-year old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen.

In sum, we agree with the defendants that the proper question is whether the intern or the employer is the primary beneficiary of the relationship, and we propose the above list of non-exhaustive factors to aid courts in answering that question. The district court limited its review to the six factors in DOL's Intern Fact Sheet. Therefore, we vacate the district court's order granting partial summary judgment to Glatt and Footman and remand for further proceedings. On remand, the district court may, in its discretion, permit the parties to submit additional evidence relevant to the plaintiffs' employment status, such as evidence on Glatt's and Footman's formal education. Of course, we express no opinion with respect to the outcome of any renewed motions for summary judgment the parties might make based on the primary beneficiary test we have set forth.

II. Antalík's Motion to Certify the New York Class

We turn now to the defendants' appeal of the district court's order certifying Antalík's proposed class. We review the district court's class certification ruling for abuse of discretion and the conclusions of law that informed its decision to grant certification de novo. See *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir. 2003).

Antalík moved to certify the following class:

³ See, e.g., NACE, Position Statement (defining the internship as "form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting").

All individuals who had unpaid internships between September 28, 2005 and September 1, 2010 with one or more of the following divisions of FEG [Fox Entertainment Group]: Fox Filmed Entertainment, Fox Group, Fox Networks Group, and Fox Interactive Media (renamed News Corp. Digital Media).

Pls.' Mot. For Class Cert. 19, Doc. No. 104.

Antalik bore the burden of showing that her proposed class satisfied Rule 23's requirements of: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a)(1-4). Because Antalik moved to certify the class pursuant to Rule 23(b)(3), she was also required to show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3). "The predominance requirement is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) (internal quotation marks omitted).

The district court found that common questions pertaining to liability could be answered by evidence tending to show that interns were recruited to help with busy periods, that they displaced paid employees, and that Fox employees overseeing internships did not believe they complied with the law. Because "common questions of liability predominate over individual calculations of damages," the district court concluded that Antalik had satisfied her burden to establish predominance. S.A. 33-34.

On appeal, the defendants argue the district court erred by concluding that Antalik demonstrated predominance because it misconstrued our standards for determining when common questions predominate over individual ones. We agree and therefore vacate the district court's order certifying Antalik's class.⁴

Antalik points to evidence, relied on by the district court, suggesting that the defendants sometimes used unpaid interns in place of paid employees. Such evidence is relevant but not sufficient to answer the question of whether each intern was an employee entitled to compensation under the FLSA. As our previous discussion of the proper test indicates, the question of an intern's employment status is a highly context-specific inquiry. Antalik's evidence that the defendants received an immediate advantage from the internship program will not help to answer whether the internship program could be tied to an education program, whether and what type of training the internship program provided, whether the internship program continued beyond the primary period of learning, or the many other questions that are relevant in this case. Moreover, defendants'

⁴ In light of this disposition, we need not consider defendants' arguments related to commonality. *See Myers v. Hertz Corp.*, 624 F.3d 537, 548 (2d Cir. 2010).

undisputed evidence demonstrated that the various internship programs it offered differed substantially across the many departments and four Fox divisions included in the proposed class.

In sum, even if Antalík established that Fox had a policy of replacing paid employees with unpaid interns, it would not necessarily suffice to show that Fox's internship program created employment relationships, the most important issue in each case. Thus, assuming some questions may be answered with generalized proof, they are not more substantial than the questions requiring individualized proof. *See, e.g., Myers v. Hertz Corp.*, 624 F.3d 537, 548 (2d Cir. 2010) (district court did not abuse its discretion by denying certification of a class of store managers where determination of whether managers were exempt under the FLSA would be resolved only "by examining the employees' actual job characteristics and duties"); *In re Wells Fargo Home Mortgage*, 571 F.3d 953, 958-59 (9th Cir. 2009) (district court abused its discretion by certifying a class of mortgage consultants because employer's centralized policy of exempting consultants did not predominate over individual variation in job responsibilities).

Because the most important question in this litigation cannot be answered with generalized proof on this record in light of the new legal standard, we vacate the district court's order certifying Antalík's proposed class and remand for further proceedings consistent with this opinion.⁵

III. Antalík's Motion to Conditionally Certify the Nationwide FLSA Collective

Finally, we turn to the defendants' appeal of the district court's order conditionally certifying Antalík's proposed nationwide FLSA collective. Like the district court's certification determination pursuant to Rule 23, we review its decision to conditionally certify an FLSA collective for abuse of discretion. *See Myers*, 624 F.3d at 554; *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008).

The FLSA permits employees to create a collective by opting-in to a backpay claim brought by a similarly situated employee. 29 U.S.C. § 216(b). The unique FLSA collective differs from a Rule 23 class because plaintiffs become members of the collective only after they affirmatively consent to join it. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530, 185 L. Ed. 2d 636 (2013). As a result, unlike a Rule 23 class, a conditionally certified FLSA collective does not acquire an independent legal status. *Id.*

In *Myers*, we endorsed a two-step process for certifying FLSA collective actions. At step one, the district court permits a notice to be sent to potential opt-in plaintiffs if the named plaintiffs make a modest factual showing that they and others together were victims of a common policy or plan that violated the law. 624 F.3d at 555. At step two, with the benefit of additional factual development, the district court determines whether the collective action may go forward by determining whether the opt-in plaintiffs are in fact similarly situated to the named plaintiffs. *Id.*

⁵ Nevertheless, although the district court's certification order was erroneous in light of the new legal standard we have announced today, we cannot foreclose the possibility that a renewed motion for class certification might succeed on remand under our revised standard.

Antalik moved, at step one, to conditionally certify the following nationwide collective:

All individuals who had unpaid internships between September 28, 2008 and September 1, 2010 with one or more of the following divisions of FEG: Fox Filmed Entertainment, Fox Group, Fox Networks Group, and Fox Interactive Media (renamed News Corp. Digital Media).

Pls.' Mot. For Class Cert. 28, Doc. No. 104.

After some discovery had been completed, the district court, relying primarily on its analysis of commonality with respect to Antalik's Rule 23 motion, authorized plaintiffs to send the opt-in notice because Antalik put forth generalized proof that interns were victims of a common policy to replace paid workers with unpaid interns. On defendants' motion for reconsideration, the district court narrowed the opt-in notice to include only those individuals who held unpaid internships between January 18, 2010, and September 1, 2010, because the statute of limitations precluded claims by earlier Fox interns.

We certified for immediate review the question of whether a higher standard, urged by defendants, applies to motions to conditionally certify an FLSA collective made after discovery. We do not need to decide that question, however, because in light of the new test for when an internship program creates an employment relationship, we cannot, on the record before us, conclude that the plaintiffs in Antalik's proposed collective are similarly situated, even under the minimal pre-discovery standard.⁶ The common proof identified by Antalik, and relied on by the district court, addresses only some of the relevant factors outlined above. If anything, Antalik's proposed collective presents an even wider range of experience than her proposed class because it is nationwide in scope, rather than limited to just New York interns.

Accordingly, for substantially the same reasons as with respect to Antalik's Rule 23 motion, we vacate the district court's order conditionally certifying Antalik's proposed nationwide collective action and remand for further proceedings.⁷

CONCLUSION

For the foregoing reasons, the district court's orders are VACATED and the case REMANDED for further proceedings consistent with this opinion.

⁶ "We are not necessarily limited to the certified issue, as we have the discretion to consider any aspect of the order from which the appeal is taken." *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 115 (2d Cir. 2004); accord *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996) (same applied to order conditionally certifying a collective).

⁷ Again, we do not foreclose the possibility that a renewed motion for conditional collective certification might succeed on remand under the revised standard. *See supra* n.5.

NOTES

Omit Notes 1-5 pages 835-36 and substitute the following.

1. Comparing *Glatt* and the (now superceded) DOL Test. The *Glatt* court suggests a new test to determine the status of interns for FLSA coverage purposes. What exactly is that test? How does the *Glatt* test differ from the DOL test? In what ways is it similar? Why did the *Glatt* court refuse to defer to the DOL's interpretation?

Glatt has become the leading opinion on this question. The Ninth Circuit and the Eleventh Circuit followed it, rejecting the DOL's six-factor test, and adopting the "primary beneficiary" test. *Benjamin v. B&H Educ. Inc.*, 877 F.3d 1139 (9th Cir. 2017) (students who worked in clinical program sponsored by for-profit cosmetology school were not employees since at the end of their training they would qualify to practice cosmetology); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015) (student registered nurse anesthetists who "participated in a clinical curriculum which, under Florida law, was a prerequisite to obtaining their master's degrees" were not employees since they were the primary beneficiaries of the work).

The DOL then announced that it would begin using the same "primary beneficiary" test, rather than its six-factor test. News Release: U.S. Department of Labor clarifies when interns working at for-profit employers are subject to the Fair Labor Standards Act, (Jan 5, 2018). *See also* Wage and Hour Division Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (Updated Jan. 2018) (adopting "primary beneficiary" test).

2. The Primary Benefit. Do most internships primarily benefit the intern, or the employer? What do interns hope to gain from an internship? Who benefits most from an internship—a relatively class-privileged student, or a student from a less-economically privileged background? What do employers gain from the arrangement? If both intern and employer benefit, does the *Glatt* court's test assist in making the determination of which gains the primary benefit? Is it more useful than the DOL's now-superceded six-factor test?

3. The Purpose of an Internship. The *Glatt* court describes the function of a bona fide internship as the opportunity "to integrate classroom learning with practical skill developed in a real-world setting." Three elements of the court's test reference formal education, mirroring this premise. Does this description of the function of an internship fully capture their purpose? Aren't internships valuable to interns in part because they are very different from the training one receives in a formal context, even taking into consideration the inclusion of "clinical and hands-on training"?

Relatedly, what is the relevance of receiving academic credit to the FLSA status of the interns? Should the receipt of academic credit help to shield an internship arrangement from scrutiny under the FLSA? *See, e.g., Kaplan v. Code Blue Billing & Coding, Inc.*, 2013 U.S. App. LEXIS 1433 (11th Cir. Jan. 22, 2013) (unpublished), *cert. denied*, 134 S. Ct. 618 (students who worked as unpaid externs as a required part of their studies and received academic credit for their work were not employees covered by the FLSA). If so, should colleges and universities be obligated to exercise oversight to ensure that unpaid internships are meaningful educational experiences? Should they be held jointly liable for compensation along with the putative employer if they fail to assume this oversight role? *See* Hunter Swain, *Sinking the Unpaid Externship: How Many Externships Violate the Fair Labor Standards Act and Yield Exceptionally Broad Joint Liability* (2013), Louis Jackson

National Student Writing Competition, Paper 4, available at http://scholarship.kentlaw.iit.edu/louis_jackson/4; Gayle Cinquegrani, *Private Sector Firms Generally Should Pay Interns at Least Minimum Wage, Lawyers Say*, DAILY LAB. REP. (BNA) No. 96, May 19, 2014. Suppose that the unpaid internship occurs during the summer months and students must pay additional tuition to receive credit for working without compensation. Is this justifiable? See Ross Perlin, *Unpaid Interns, Complicit Colleges*, N.Y. TIMES, Apr. 2, 2011. Should universities' career centers be held liable for simply listing unpaid internships and looking the other way to avoid acknowledging what might be FLSA violations?

4. The Intern's Choice to Work Without Pay. The last factor in the DOL's old test and the first factor in the *Glatt* court's test concern whether the intern and the employer understood that the intern would not be entitled to wages. This factor tends to cut in favor of the employer, as interns agree at the outset that they will not be paid. Why are interns nevertheless permitted to sue the employer for minimum wages and overtime pay? Shouldn't they be held to the deal they made to work without pay? Would anyone be harmed if they were?

5. The Practical Consequences of the Class Certification Question. Although the *Glatt* plaintiffs did not prevail on appeal, it is conceivable that they could have won on remand on the question of employee status for purposes of FLSA coverage. A second blow, however, was dealt by the Second Circuit's refusal to uphold the district court's certification of a class under the New York state labor laws or a collective action under the FLSA. On remand, the case settled, with the defendants giving \$495 to each of the class members except the lead plaintiffs, who received between \$3,500 and \$7,500. Daniel Miller, *Fox unpaid intern case is drawing to a close with proposed settlement*, L.A. Times (Jul 12, 2016), available at <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-fox-interns-legal-case-20160712-snap-story.html> Given that outcome, do you expect law firms to bring many future cases on behalf of interns?

F. The Overtime Exemptions

Page 865: add the following text just above sub-heading F.1.

In addition to the white-collar exemptions, FLSA's overtime provisions are subject to a number of other exemptions, often focused on a particular industry or type of worker. In a FLSA exemption case that went to the Supreme Court twice, the Court first refused to defer to the DOL's interpretation of the FLSA, and then signaled that it plans to read those exemptions broadly. *Encino Motorcars, LLC v. Navarro* 136 S. Ct. 2117 (2016) (*Encino I*); *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018) (*Encino II*). The cases involved automotive service advisors, or dealership employees who dealt with customers regarding their needs and sold them service packages. A provision of the FLSA exempts from the overtime pay requirement "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. §213(b)(10)(A). The DOL had long interpreted that text to exempt service advisors from overtime, but in 2011 it changed course and issued a rule that the exemption for salesman did not include service advisors. 76 Fed. Reg. 18832, 18859 (2011) (codified at 29 CFR §779.372(c)).

Encino I held that the DOL's interpretation of the statute was "procedurally defective"

under *Chevron* because it “was issued without the reasoned explanation that was required in light of the Department’s change in position and the significant reliance interests involved.” *Encino I*, 136 S.Ct. at 2126. But *Encino I* did not address whether the exemption would cover the service advisors regardless of administrative deference. On remand, the Ninth Circuit held that the service advisors were not exempt, based in part on a plain reading of the statute, and in part on “the longstanding rule that the exemptions in § 213 of the FLSA ‘are to be narrowly construed against the employers seeking to assert them.’” *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925, 935 (9th Cir. 2017) (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, (1960)).

In *Encino II*, the Supreme Court reversed. Regarding the principle of narrow construction of FLSA exemptions, the Court was more definitive than it had been in *Christopher*. “We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no ‘textual indication’ that its exemptions should be construed narrowly, ‘there is no reason to give [them] anything other than a fair (rather than a ‘narrow’) interpretation.’” *Encino II*, 138 S. Ct. at 1142 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 363 (2012)). The Court then held that the service advisors were exempt from the overtime requirement, reasoning that they are “salesm[e]n...primarily engaged in... servicing automobiles.” *Encino II*, 138 S. Ct. at 1143. Does that seem like the most natural reading of the statute?

Page 865-866: replace the text under sub-heading F.1. with the following text

1. Traditional White-Collar Employees: Executives, Administrative Employees, Professionals and Outside Salespersons

Employees who fall within the traditional white collar exemptions have historically been defined as possessing three types of characteristics: (1) they are compensated on a salary basis, rather than hourly; (2) they exceed a specified pay threshold; and (3) they meet certain duties tests. The FLSA does not itself define the boundaries of the exemptions; instead, the Secretary of Labor issues regulations defining the exemptions pursuant to her authority to administer and enforce the Act. When this supplement went to press the 2004 regulations were still the governing law.

The Salary Basis Test

The simplest of the three tests that a worker must meet in order to qualify as an exempt white collar employee is compensation on a salary basis: the worker must receive a “predetermined amount” of compensation each week, regardless of hours worked. The salary generally cannot be subject to reduction because of variance in the quality or quantity of the work performed, although there are some exceptions. 29 C.F.R. § 541.2(e)(2); see *Auer v. Robbins*, 519 U.S. 452 (1997) (upholding the Secretary’s interpretation of the salary basis test as requiring that any adjustments made to salaried employees’ compensation be pursuant to an employer policy that clearly communicates that deductions will be made in certain circumstances). Thus, where an employer deducted monies from managers’ base compensation to “reclaim” bonuses paid before their performance dropped, the jobs were no longer exempt from the overtime requirements because they failed the “salary basis” test. See *Baden-Winterwood v. Life Time Fitness, Inc.*, 566 F.3d 618, 631-32 (6th Cir. 2009).

The Pay Threshold Test

The pay threshold test effective since 2004 requires that an exempt employee's salary be at least \$455 per week (\$23,660 annually) exclusive of board, lodging, or other facilities. 29 C.F.R. § 541.600(a). The regulations divide employees into three categories by pay level: Salaried employees who earn less than \$23,660 per year are guaranteed overtime. Those earning between \$23,660 and \$100,000 are still eligible for overtime if they do not satisfy the "standard duties" test described below. Those earning \$100,000 or more are subject to a new "highly-compensated" duties test, under which an employee is exempt from the FLSA minimum wage and overtime provisions if the employee "customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee." 29 C.F.R. § 541.601(a).

Finally, the regulations completely exempt from the salary level test "employees engaged as teachers (*see* § 541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (*see* § 541.304); or . . . employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession." 29 C.F.R. § 541.600(e).

The Duties Test

The duties test varies according to whether an employee is classified as an executive, an administrative, or a professional employee. The duties test for each exemption is discussed further in subsections (a-d), below. The regulations also explicitly exclude certain types of employees from the white-collar exemptions (meaning that they are entitled to overtime). For example, the white-collar exemptions "do not apply to manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy," *see* 29 C.F.R. § 541.3(a), or to "police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level," *see* 29 C.F.R. § 541.3(b)(1). Finally, the regulations include within the exempt category of professional employees "any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment." 29 C.F.R. § 541.303(a).

As we shall see, the white-collar exemptions are not finely drawn, and employees who fall into these classifications are often relatively highly paid and frequently work in excess of 40 hours per week. Thus, an error in classifying them as exempt can produce significant liability for unpaid overtime. The following cases illustrate the application of the duties tests developed for each of the traditional white-collar exemptions.

The Status of the 2004 Regulations

In March 2014 President Obama instructed the Department of Labor to engage in

rulemaking to narrow and simplify the FLSA's traditional white collar exemptions and to make more workers eligible for overtime pay. After following standard administrative rulemaking procedures, the DOL adopted a final rule which it published in May of 2016. The most important changes would have raised the pay threshold for the exemption to \$913 a week, or \$47,476 annually. The DOL estimated that this would have made 4.2 million additional workers automatically eligible for overtime pay. *Defining and Delimiting the Exemption for Executive, Administrative, Professional and Computer Employees*, 81 Fed. Reg. 32391 (May 23, 2016) (to have been codified at 29 C.F.R. pt. 541).

Before the new rule went into effect, however, a federal court held that the DOL lacked the statutory authority to raise the pay threshold so high that it would "effectively eliminate the duties test," since the FLSA itself prescribes the duties test. That court first preliminarily enjoined the DOL from implementing the rule, *Nevada v. United States DOL*, 218 F. Supp. 3d 520 (E.D. Tex. 2016), and then held the rule invalid, *Nevada v. United States DOL*, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

This left the DOL in a tricky position. On the one hand, the Trump administration likely didn't want to keep the Obama-era rule, and by the time of the final injunction it had already restarted the rulemaking process. Request for Information; *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 82 Fed. Reg. 34616 (July 26, 2017). On the other hand, the DOL was worried that the district court opinion left the scope of its statutory authority rather vague. So it appealed the final injunction to the Fifth Circuit, then asked that court to stay the appeal pending the outcome of rulemaking. Paul DeCamp, *Department of Labor Appeals Ruling Striking the 2016 Overtime Rule, Then Obtains Stay Halting Its Appeal*, Wage and Hour Defense Blog, (Nov. 13, 2017), *available at* <https://www.wagehourblog.com/2017/11/articles/dol-enforcement/departments-of-labor-appeals-ruling-striking-the-2016-overtime-rule-then-obtains-stay-halting-its-appeal>.

Chapter 14: Arbitration of Workplace Disputes

D. The Uses and Limits of Predispute Arbitration Agreements

Omit Part 3, pages 1024-41, and substitute the following:

3. Provisions Barring Class Claims

When predispute arbitration agreements bar class claims, they may undermine workers' statutory rights in two distinct ways. First, where individual recoveries are small, the waiver of class claims may make individual suits not viable, given the costs of litigation. Second, the waiver of class claims itself arguably interferes with workers' right to join together to seek redress, a right protected by the NLRA.

The first issue was raised in a series of cases involving FLSA claims. The FLSA explicitly provides for collective litigation. Plaintiffs argued that the right to proceed via collective action is a substantive right critical to the enforcement of the wage and hour provisions of the statute. Waivers of the right to bring class claims effectively prevent them from vindicating their statutory rights, particularly where individual claim amounts are small—as in the context of low wage workers bringing wage and hour claims under the Fair Labor Standards Act and parallel state wage and hour statutes. An individual pressing such claims in arbitration would incur prohibitive costs, they argued, thus removing the financial incentive to proceed. For example, the plaintiff in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) argued that the costs and fees associated with prosecuting her claims for overtime pay under the FLSA and New York labor laws on an individual basis would dwarf her potential recovery of less than \$2,000. She presented an estimate that her costs would include \$160,000 for attorneys' fees in arbitration, \$6,000 in costs, and at least \$25,000 in expert testimony fees. Courts facing these claims nevertheless typically concluded that class claims are waivable in the employment context, either because the right to proceed collectively is a procedural rather than substantive right, or because the FAA's pro-arbitration policy trumped the FLSA absent any contrary congressional command in the FLSA. *See, e.g., Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

Meanwhile, the question whether class action waivers in arbitration agreements violate the NLRA by interfering with protected concerted activities came before the NLRB. As we saw in Chapter 8, employee rights to engage in concerted activity protected under § 7 of the NLRA encompass a number of activities besides union organizing and collective bargaining. The Board had consistently ruled that section 7 also protected the right to proceed collectively to enforce statutory or contractual employment rights in court, usually in the context of situations where employees were discharged in retaliation for bringing class claims. It is well-established that employers cannot require employees to waive their rights to engage in concerted activity. Accordingly, in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), the Board ruled that a predispute agreement that required arbitration of claims on an individual basis and simultaneously blocked employees from filing a lawsuit or other civil proceeding relating to employment violated § 8(a)(1) of the NLRA because the contractual language would lead employees reasonably to believe that

they were prohibited from exercising their associational rights under § 7 of the NLRA. The Board reasoned that just as the processing of a workplace grievance under the arbitration machinery in a collective bargaining agreement is concerted activity (citing *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984)), so, too is a grievance pursued under a unilaterally-created arbitration procedure so long as its pursuit is concerted (involves two or more employees). 357 N.L.R.B. at 2278-79. According to the Board, the right to proceed concertedly was the core substantive right protected by the NLRA, regardless of the statutory basis for the underlying claim:

Here, although the underlying claim the Charging Party sought to arbitrate was based on the FLSA . . . the right allegedly violated by [the arbitration agreement] is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA. Thus, the question presented is not whether employees can effectively vindicate their rights under the FLSA in arbitration despite a prohibition against class or collective proceedings, but whether employees can be required, as a condition of employment, to enter into an agreement waiving their rights under the NLRA.

Any contention that the Section 7 right to bring a class or collective action is merely “procedural” must fail. The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. . . .

Id. at 2285-86.

The Fifth Circuit refused to enforce this part of the Board’s order, finding that the NLRB had failed to give sufficient weight to the FAA and that the right to bring class claims is not a substantive right. *D.R Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013). A circuit split developed, and the Supreme Court granted certiorari. The Court’s decision in *Lewis v. Epic Systems Corp.*, 138 S. Ct. 1612 (2018) is excerpted below.

EPIC SYS. CORP. v. LEWIS
United States Supreme Court
138 S. Ct. 1612 (2018)

JUSTICE GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees’ suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court’s duty to interpret Congress’s statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain

collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties’ agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP v. Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could “grant any relief that could be granted by . . . a court” in the relevant jurisdiction. The agreement also specified individualized arbitration, with claims “pertaining to different [e]mployees [to] be heard in separate proceedings.”

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA’s collective action provision, 29 U.S.C. §216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. 834 F.3d 975 (2016). The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute’s “saving clause,” see 9 U.S.C. §2, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the “concerted activit[y],” 29 U.S.C. §157, of pursuing claims as a class or collective action.

. . . .

Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms.

The National Labor Relations Board’s general counsel expressed much the same view in 2010. Remarking that employees and employers “can benefit from the relative simplicity and informality of resolving claims before arbitrators,” the general counsel opined that the validity of such agreements “does not involve consideration of the policies of the National Labor Relations Act.” Memorandum GC 10-06, pp. 2, 5 (June 16, 2010).

But recently things have shifted. In 2012, the Board—for the first time in the 77 years since the NLRA’s adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. *D. R. Horton, Inc.*, 357 N. L. R. B. 2277. Initially, this agency decision received a cool reception in court. See *D. R. Horton*, 737 F. 3d, at 355-362. In the last two years, though, some circuits have either agreed with the Board’s conclusion or thought themselves obliged to defer to it under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) . . . We granted certiorari to clear the confusion. 580 U.S. ____ (2017).

II

[The Court first explained that the Federal Arbitration Act requires that arbitration agreements be enforced like any other contract, subject to a “saving clause” that permits challenges to the validity of arbitration agreements on the same grounds available to avoid any other contract. The Court next observed that the FAA “requires courts ‘rigorously’ to ‘enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted,’” citing *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 233 (2013). 138 S. Ct. at 1621. The Court rejected the employees’ argument that class waivers were illegal under the NLRA and thus the NLRA provided grounds to challenge their validity under the savings clause, reasoning that a requirement that claimants be entitled to bring class claims in arbitration would fundamentally alter the nature of traditional arbitration. The Court explained:

[T]he saving clause recognizes only defenses that apply to “any” contract. In this way the clause establishes a sort of “equal-treatment” rule for arbitration contracts. *Kindred Nursing Centers L.P. v. Clark*, 581 U. S. ___, ___ (2017)(slip op., at 4). The clause “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” [*AT & T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011)]. At the same time, the clause offers no refuge for “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by “interfer[ing] with fundamental attributes of arbitration.” *Id.*, at 344; see *Kindred Nursing*, *supra*, at ___ (slip op., at 5).

This is where the employees’ argument stumbles. They don’t suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render any contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees’ argument seeks to interfere with one of arbitration’s fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited as unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. 563 U. S., at 338, 341. But, the Court held, the defense failed to qualify

for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This “fundamental” change to the traditional arbitration process, the Court said, would “sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.*, at 347, 348. Not least, *Concepcion* noted, arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. *Ibid.* All of which would take much time and effort, and introduce new risks and costs for both sides. *Ibid.* In the Court’s judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

. . . . *Concepcion*’s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent. *Id.*, at 344-351; see also *Stolt-Nielsen S. A. v. AnimalFeeds Int’l*, 559 U.S. 662, 684-687 (2010). Just as judicial antagonism toward arbitration before the Arbitration Act’s enactment “manifested itself in a great variety of devices and formulas declaring arbitration against public policy,” *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. 563 U. S., at 342 (internal quotation marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.]

138 S. Ct. at 1622-23.

III

But that’s not the end of it. Even if the Arbitration Act normally requires us to enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at “liberty to pick and choose among congressional enactments” and must instead strive “to give effect to both.” *Morton v. Mancari*, 417 U. S. 535 (1974). . . .

. . . .

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

“the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. §157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. Cf. *14 Penn Plaza LLC v. Pyett*, 556 U. S. 247, 256-260 (2009). But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn’t create the modern class action until 1966; class arbitration didn’t emerge until later still; and even the Fair Labor Standards Act’s collective action provision postdated Section 7 by years. See Rule 23-Class Actions, 28 U.S.C. App., p. 1258 (1964 ed., Supp. II); 52 Stat. 1069. . . . And while some forms of group litigation existed even in 1935, Section 7’s failure to mention them only reinforces that the statute doesn’t speak to such procedures.

A close look at the employees’ best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term “other concerted activities for the purpose of . . . other mutual aid or protection.” This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of “self-organization,” “form[ing], join[ing], or assist[ing] labor organizations,” and “bargain[ing] collectively.” 29 U.S.C. §157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to “embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 115 (2001) (discussing *ejusdem generis* canon); *National Assn. of Mfrs. v. Department of Defense*, 583 U. S. ___, ___, (2018) (slip op., at 10). All of which suggests that the term “other concerted activities” should, like the terms that precede it, serve to protect things employees “just do” for themselves in the course of exercising their right to free association in the workplace, rather than “the highly regulated, courtroom-bound ‘activities’ of class and joint litigation.” *Alternative Entertainment*, 858 F. 3d, at 414-415 (Sutton, J., concurring in part and dissenting in part) (emphasis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA’s broader structure underscores the point. After speaking of various “concerted activities” in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for the recognition of exclusive bargaining representatives, 29

U.S.C. §159, explains employees’ and employers’ obligation to bargain collectively, §158(d), and conscribes certain labor organization practices, §§158(a)(3), (b). The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as picketing, §158(b)(7), and strikes, §163. It even sets rules for adjudicatory proceedings under the NLRA itself, §§160, 161. Many of these provisions were part of the original NLRA in 1935, see 49 Stat. 449, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it’s not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn’t speak to class and collective action procedures in the first place.

Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving “actions,” “claims,” “charges,” and “cases” in statute after statute. *E.g.*, 29 U.S.C. §§216(b), 626; 42 U.S.C. §§2000e-5(b), (f)(3)-(5). Congress has likewise shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, “[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if” certain conditions are met, 15 U.S.C. §1226(a)(2); or that “[n]o predispute arbitration agreement shall be valid or enforceable” in other circumstances, 7 U.S.C. §26(n)(2); 12 U. S. C. §5567(d)(2); or that requiring a party to arbitrate is “unlawful” in other circumstances yet, 10 U. S. C. §987(e)(3). The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the NLRA doesn’t discuss any particular class and collective action procedures because it merely confers a right to use existing procedures provided by statute or rule, “on the same terms as [they are] made available to everyone else.” But of course the NLRA doesn’t say even that much. And, besides, if the parties really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures of their own design.

Still another contextual clue yields the same message. The employees’ underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act. The FLSA allows employees to sue on behalf of “themselves and other employees similarly situated,” 29 U.S.C. §216(b), and it’s precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the FLSA overcomes the Arbitration Act to permit their class and collective actions. Why not? Presumably because this Court held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does not displace the Arbitration Act or prohibit individualized arbitration proceedings. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 32 (1991) (discussing Age Discrimination in Employment Act). In fact, it turns out that

“[e]very circuit to consider the question” has held that the FLSA allows agreements for individualized arbitration. *Alternative Entertainment*, 858 F. 3d, at 413 (opinion of Sutton, J.) (collecting cases). Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the NLRA) steps in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrides the commands of yet a third statute (the Arbitration Act). It’s a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.

Perhaps worse still, the employees’ theory runs afoul of the usual rule that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. It’s more than a little doubtful that Congress would have tucked into the mousehole of Section 7’s catchall term an elephant that tramples the work done by these other laws; flattens the parties’ contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn’t even administer.

. . . .

[The Court then reviewed its precedents addressing conflicts between the FAA and other federal statutory schemes and concluded that its precedents confirm the textual analysis above].

The employees rejoin that our precedential story is complicated by some of this Court’s cases interpreting Section 7 itself. But, as it turns out, this Court’s Section 7 cases have usually involved just what you would expect from the statute’s plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)(walkout to protest workplace conditions); *NLRB v. Granite State Joint Board*, 409 U.S. 213 (1972)(resignation from union and refusal to strike); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975)(request for union representation at disciplinary interview). Neither do the two cases the employee cite prove otherwise. In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), we simply addressed the question whether a union’s distribution of a newsletter in the workplace qualified as a protected concerted activity. We held that it did, noting it was “undisputed that the union undertook the distribution in order to boost its support and improve its bargaining position in upcoming contract negotiations,” all part of the union’s “continuing organizational efforts.” *Id.* at 575, and n. 24. In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831-32 (1984), we held only that an employer’s assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining “process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity.” Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that “it has been held” by other courts and the Board “that the ‘mutual aid or protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.” [437 U. S., at 565-566](#); see also Brief for National Labor Relations Board in No. 16-307, p. 15 (citing similar Board decisions). But even on its own terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in litigation or arbitration. Instead this passage at most suggests only that “resort to administrative and judicial forums” isn’t “entirely unprotected.” *Id.*, [at 566](#). Indeed, the Court proceeded to explain that it did not intend to “address . . . the question of what may constitute ‘concerted’ activities in this [litigation] context.” *Ibid.*, [n. 15](#). So even the employees’ dicta, when viewed fairly and fully, doesn’t suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. . . .

[The Court then discussed and rejected the employees’ argument that it should defer to the NLRB’s interpretation of the NLRA under *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), reasoning that the question before it did not involve an interpretation of the NLRA in isolation, but instead how to harmonize it with a distinct statutory regime, the FAA, over which the NLRB has no administrative expertise or power. Further, the Court observed that no deference is due an agency’s statutory interpretation unless there is ambiguity in the statute that cannot be resolved by application of traditional canons of statutory construction, which the Court did not see in this case.]

IV

The dissent sees things a little bit differently. In its view, today’s decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead “yellow dog” contract. *Post*, at 3-17, 30 (opinion of GINSBURG, J.). But like most apocalyptic warnings, this one proves a false alarm. Cf. L. Tribe, *American Constitutional Law* 435 (1978) (“‘*Lochnerizing*’ has become so much an epithet that the very use of the label may obscure attempts at understanding”).

Our decision does nothing to override Congress’s policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at “safeguard[ing], first and foremost, workers’ rights to join unions and to engage in collective bargaining.” *Post*, at 8. Those rights stand every bit as strong today as they did yesterday. And rather than revive “yellow dog” contracts against union organizing that the NLRA outlawed back in 1935, today’s decision merely declines to read into the NLRA a novel right to class action procedures that the Board’s own general counsel disclaimed as recently as 2010.

Instead of overriding Congress’s policy judgments, today’s decision seeks to honor them. This much the dissent surely knows. Shortly after invoking the specter of *Lochner*, it turns around and criticizes the Court for trying *too hard* to abide the Arbitration Act’s “‘liberal federal policy favoring arbitration agreements,’” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002), saying we “‘ski’” too far down the “‘slippery slope’” of this Court’s arbitration precedent, *post*, at 23. But the dissent’s real complaint lies with the mountain of precedent itself. . . .

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably so. Our precedent clearly teaches that a contract defense “conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures” is inconsistent with the Arbitration Act and its saving clause. *Concepcion*, *supra*, at 336 (opinion of the Court). And that, of course, is exactly what the employees’ proffered defense seeks to do. . . .

. . . .

Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. *Post*, at 26-30. But it’s altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. 29 U.S.C. §216(b); *Gilmer*, *supra*, at 32. While the dissent is no doubt right that class actions can enhance enforcement by “spread[ing] the costs of litigation,” *post*, at 9, it’s also well known that they can unfairly “plac[e] pressure on the defendant to settle even unmeritorious claims,” *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.*, 559 U. S. 393, 445, n. 3 (2010) (GINSBURG, J., dissenting). The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agreements it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed. Reg. 33210 (2017) (cited *post*, at 28, n. 15); Pub. L. 115-74, 131 Stat. 1243. This Court is not free to substitute its preferred economic policies for those chosen by the people’s representatives. *That*, we had always understood, was *Lochner’s* sin.

*

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress’s statutes to work in harmony, that is where our duty lies. . . .

So ordered.

[JUSTICE THOMAS concurred on the basis of his view that the only grounds for revocation of an arbitration contract are those that concern the formation of the agreement.]

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §201 *et seq.*, and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. See Ruan, What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers, 2012 Mich. St. L. Rev. 1103, 1118-1119 (Ruan). But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See *id.*, at 1108-1111. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA), 9 U.S.C. §1 *et seq.*, permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA), 29 U.S.C. §151 *et seq.*, “to engage in . . . concerted activities” for their “mutual aid or protection”? §157. The answer should be a resounding “No.”

In the NLRA and its forerunner, the Norris-LaGuardia Act (NLGA), 29 U.S.C. §101 *et seq.*, Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34 (1937). The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees “to band together in confronting an employer.” *NLRB v. City Disposal Systems, Inc.*, 465 U. S. 822, 835 (1984). Congressional correction of the Court’s elevation of the FAA over workers’ rights to act in concert is urgently in order.

To explain why the Court’s decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation’s workplaces, and Congress’ aim in the NLGA and the NLRA to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does not shrink the NLRA’s protective sphere.

I

It was once the dominant view of this Court that “[t]he right of a person to sell his labor upon such terms as he deems proper is . . . the same as the right of the purchaser of labor to prescribe [working] conditions.” *Adair v. United States*, 208 U. S. 161, 174 (1908) (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the NLRA operate on a different premise, that employees must have the capacity to act collectively in order to match their employers’ clout in setting terms and conditions

of employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin Steel*, 301 U. S. 1 (upholding the NLRA against employer assault); cf. *United States v. Darby*, 312 U. S. 100 (1941) (upholding the FLSA).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. See 75 Cong. Rec. 4502 (1932). Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. See *ibid.*; H. Millis & E. Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* 7-8 (1950). Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, *The Yellow Dog Contract* 11 (1932). Notable among such devices was the "yellow-dog contract." Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. See *id.*, at 11, 56. Many of the employer-designed agreements cast an even wider net, "proscrib[ing] all manner of concerted activities." Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6, 16 (2014); see Seidman, *supra*, at 59-60, 65-66. As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the "laboring man . . . absolutely helpless" by "waiv[ing] his right . . . to free association" and by requiring that he "singly present any grievance he has." 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' rights to band together were unavailing. See, e.g., *Coppage*, 236 U. S., at 26; Frankfurter & Greene, *Legislation Affecting Labor Injunctions*, 38 Yale L. J. 879, 889-890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to "liberty of contract." See *Coppage*, 236 U. S., at 26; Frankfurter & Greene, *supra*, at 890-891. While stating that legislatures could curtail contractual "liberty" in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See *Coppage*, 236 U. S., at 16-19.

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great Depression shifted political winds further in favor of worker-protective laws, Congress passed [the NLGA and the NLRA,] two statutes aimed at protecting employees' associational rights. . . .

. . . .

Unlike earlier legislative efforts, the NLGA and the NLRA had staying power. When a case challenging the NLRA's constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-"liberty" decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel*, 301 U. S., at 33-34. The Court recognized that employees have a "fundamental right" to join together to advance their common interests and that Congress, in lieu of "ignor[ing]" that right, had elected to "safeguard" it. *Ibid.*

B

Despite the NLRA's prohibitions, the employers in the cases now before the Court required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one.⁸ When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure, the employers moved to compel individual arbitration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge that they must have access to a judicial forum. They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. In addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in *other* concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §157 (emphasis added); see, e.g., *NLRB v. Washington Aluminum Co.*, 370 U. S. 9, 14-15 (1962) (§7 protected unorganized employees when they walked off the job to protest cold working conditions).

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §157. "Concerted" means "[p]lanned or accomplished together; combined." American Heritage Dictionary 381 (5th ed. 2011). "Mutual" means "reciprocal." *Id.*, at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See *infra*, at 27-28.

⁸ [note 2] The Court's opinion opens with the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" *Ante*, at 1. Were the "agreements" genuinely bilateral? Petitioner Epic Systems Corporation e-mailed its employees an arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The agreement provided that if the employees "continue[d] to work at Epic," they would "be deemed to accepted th[e] Agreement." App. to Pet. for Cert. in No. 16-285, p. 30a. Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees' continued employment would indicate their assent to the agreement's terms. See App. In No. 16-300, p. 37. Epic's and Ernst & Young's employees thus faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs.

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design. Congress expressed its intent, when it enacted the NLRA, to "protec[t] the exercise by workers of full freedom of association," thereby remedying "[t]he inequality of bargaining power" workers faced. 29 U.S.C. §151; see, e.g., *Eastex, Inc. v. NLRB*, 437 U. S. 556, 567 (1978) (the Act's policy is "to protect the right of workers to act together to better their working conditions" (internal quotation marks omitted)); *City Disposal*, 465 U. S., at 835 ("[I]n enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting There can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act's earliest days, the Board and federal courts have understood §7's "concerted activities" clause to protect myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they participate in concerted appeals to the media, e.g., *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505-506 (CA2 1942), legislative bodies, e.g., *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F. 2d 930, 937 (CA1 1940), and government agencies, e.g., *Moss Planing Mill Co.*, 103 N.L.R.B. 414, 418-419, *enf'd*, 206 F. 2d 557 (CA4 1953). "The 74th Congress," this Court has noted, "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex*, 437 U. S., at 565.

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, e.g., *Spandsco Oil and Royalty Co.*, 42 N.L.R.B. 942, 948-949 (1942) (three employees' joint filing of FLSA suit ranked as concerted activity protected by the NLRA); *Poultrymen's Service Corp.*, 41 N.L.R.B. 444, 460-463, and n. 28 (1942) (same with respect to employee's filing of FLSA suit on behalf of himself and others similarly situated), *enf'd*, 138 F. 2d 204 (CA3 1943); *Sarkes Tarzian, Inc.*, 149 N.L.R.B. 147, 149, 153 (1964) (same with respect to employees' filing class libel suit); *United Parcel Service, Inc.*, 252 N.L.R.B. 1015, 1018 (1980) (same with respect to employee's filing class action regarding break times), *enf'd*, 677 F. 2d 421 (CA6 1982); *Harco Trucking, LLC*, 344 N.L.R.B. 478, 478-479 (2005) (same with respect to employee's maintaining class action regarding wages). For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by §7." *Leviton Mfg. Co. v. NLRB*, 486 F. 2d 686, 689 (CA1 1973); see, e.g., *Brady v. NFL*, 644 F.3d 661, 673 (CA8 2011) (similar). The Court pays scant heed to this longstanding line of decisions.

D

In [the] face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of §7. None of the Court's reasons for diminishing §7 should carry the day.

The Court relies principally on the *ejusdem generis* canon. See *ante*, at 12. Observing that §7’s “other concerted activities” clause “appears at the end of a detailed list of activities,” the Court says the clause should be read to “embrace” only activities “similar in nature” to those set forth first in the list, *ibid.* (internal quotation marks omitted), *i.e.*, “‘self-organization,’ ‘form[ing], join[ing], or assist[ing] labor organizations,’ and ‘bargain[ing] collectively,’” *ibid.* The Court concludes that §7 should, therefore, be read to protect “things employees ‘just do’ for themselves.” *Ibid.* (quoting *NLRB v. Alternative Entertainment, Inc.*, 858 F. 3d 393, 415 (CA6 2017) (Sutton, J., concurring in part and dissenting in part); emphasis deleted). It is far from apparent why joining hands in litigation would not qualify as “things employees just do for themselves.” In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow §7’s protections in the manner the Court suggests.

The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. See *Russell Motor Car Co. v. United States*, 261 U. S. 514, 519 (1923). Courts must take care, however, not to deploy the canon to undermine Congress’ efforts to draft encompassing legislation. See *United States v. Powell*, 423 U. S. 87, 90 (1975) (“[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute.”). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embrative purpose in enacting the legislation, *i.e.*, to “protec[t] the exercise by workers of full freedom of association.” 29 U.S.C. §151.2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA’s “structure.” *Ante*, at 12. Citing a handful of provisions that touch upon unionization, collective bargaining, picketing, and strikes, the Court asserts that the NLRA “establish[es] a regulatory regime” governing each of the activities protected by §7. *Ante*, at 12-13. That regime, the Court says, offers “specific guidance” and “rules” regulating each protected activity. *Ante*, at 13. Observing that none of the NLRA’s provisions explicitly regulates employees’ resort to collective litigation, the Court insists that “it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in [§7] yet remain mute about this matter alone—unless, of course, [§7] doesn’t speak to class and collective action procedures in the first place.” *Ibid.*

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only §7 activity Congress addressed with any specificity was employees’ selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer “specific guidance” about employees’ rights to “form, join, or assist labor organizations.” Nor did it set forth “specific guidance” for any activity falling within §7’s “other concerted activities” clause. . . .

. . . .

In a related argument, the Court maintains that the NLRA does not “even whispe[r]” about the “rules [that] should govern the adjudication of class or collective actions in court or arbitration.” *Ante*, at 13. The employees here involved, of course, do not look to the NLRA for the procedures enabling them to vindicate their employment rights in arbitral or judicial forums. They assert that the Act establishes their right to act in concert using existing, generally available procedures, see *supra*, at 7, n. 3, and to do so free from employer interference. The FLSA and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. Their employers cannot lawfully cut off their access to those procedures, they urge, without according them access to similar procedures in arbitral forums. See, *e.g.*, American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

To the employees’ argument, the Court replies: If the employees “really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures.” *Ante*, at 14. The freedom to depart asserted by the Court, as already underscored, is entirely one sided. See *supra*, at 2-5. Once again, the Court ignores the reality that sparked the NLRA’s passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees’ right to act in concert for their “mutual aid or protection.” 29 U.S.C. §§151, 157, 158.

4

Further attempting to sow doubt about §7’s scope, the Court asserts that class and collective procedures were “hardly known when the NLRA was adopted in 1935.” *Ante*, at 11. In particular, the Court notes, the FLSA’s collective-litigation procedure postdated §7 “by years” and Rule 23 “didn’t create the modern class action until 1966.” *Ibid*.

First, one may ask, is there any reason to suppose that Congress intended to protect employees’ right to act in concert using only those procedures and forums available in 1935? Congress framed §7 in broad terms, “entrust[ing]” the Board with “responsibility to adapt the Act to changing patterns of industrial life.” *NLRB v. J. Weingarten, Inc.*, 420 U. S. 251, 266 (1975). With fidelity to Congress’ aim, the Board and federal courts have recognized that the NLRA shields employees from employer interference when they, *e.g.*, join together to file complaints with administrative agencies, even if those agencies did not exist in 1935. See, *e.g.*, *Wray Electric Contracting, Inc.*, 210 N.L.R.B. 757, 762 (1974) (the NLRA protects concerted filing of complaint with the Occupational Safety and Health Administration).

. . . It takes no imagination, then, to comprehend that Congress, when it enacted the NLRA, likely meant to protect employees’ joining together to engage in collective litigation.⁹

⁹ [note 7] The Court additionally suggests that something must be amiss because the employees turn to the NLRA, rather than the FLSA, to resist enforcement of the collective-action waivers. See *ante*, at 14-15. But the employees’ reliance on the NLRA is hardly a reason to “raise a judicial

E

Because I would hold that employees' §7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, i.e., "waivers," are unlawful. As earlier recounted, §8(a)(1) makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" employees in the exercise of their §7 rights. 29 U. S. C. §158(a)(1). Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their §7 rights by mandating that they prospectively renounce those rights in individual employment agreements. The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940). Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court. See *Kaiser Steel Corp. v. Mullins*, 455 U. S. 72, 77 (1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.")

II

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. *Ante*, at 6. Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections. . . .

A

1

[The dissent reviewed the historical impetus for enactment of the FAA, concluding that Congress' goal was to "enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes," which arose primarily over questions of fact—such as quantity or quality of products, time of delivery, and so on—or simple questions of law—such as the existence of warranties. 138 S. Ct. at 1643-44. Arguing that the FAA was not intended to apply to employment contracts, the dissent critiqued the Court for departing from Congressional intent and developing a powerful judge-made pro-arbitration doctrine that encouraged employers to condition employment on employees' agreement to arbitrate employment disputes.]

2

. . . .

Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act. Few employers imposed arbitration agreements on their employees in the early 1990's. After *Gilmer* and *Circuit City*, however, employers' exaction

eyebrow." *Ante*, at 15. The NLRA's guiding purpose is to protect employees' rights to work together when addressing shared workplace grievances of whatever kind.

of arbitration clauses in employment contracts grew steadily. See, e.g., Economic Policy Institute (EPI), A. Colvin, *The Growing Use of Mandatory Arbitration* 1-2, 4 (Sept. 27, 2017), available at <https://www.epi.org/files/pdf/135056.pdf> (All Internet materials as visited May 18, 2018) (data indicate only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today). Moreover, in response to subsequent decisions addressing class arbitration, employers have increasingly included in their arbitration agreements express group-action waivers. See Ruan 1129; Colvin, *supra*, at 6 (estimating that 23.1% of nonunionized employees are now subject to express class-action waivers in mandatory arbitration agreements). It is, therefore, this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront, for the first time in 2012, the precise question whether employers can use arbitration agreements to insulate themselves from collective employment litigation. See *D. R. Horton*, 357 N. L. R. B. 2277 (2012), *enf. denied in relevant part*, 737 F. 3d 344 (CA5 2013). Compare *ante*, at 3-4 (suggesting the Board broke new ground in 2012 when it concluded that the NLRA prohibits employer-imposed arbitration agreements that mandate individual arbitration) with *supra*, at 10-11 (NLRB decisions recognizing a §7 right to engage in collective employment litigation), and *supra*, at 17, n. 8 (NLRB decisions finding employer-dictated waivers of §7 rights unlawful).

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today. Cf. R. Bork, *The Tempting of America* 169 (1990) ("Judges . . . live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").

B

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U. S., at 404, n. 12. Congress thus provided in §2 of the FAA that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. §2 (emphasis added). Pursuant to this "saving clause," arbitration agreements and terms may be invalidated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); see *ante*, at 7.

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, *Williston on Contracts* §12.1 (4th ed. 2009).. For the reasons stated *supra*, at 8-17, I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

. . . .

III

The inevitable result of today’s decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections*, 80 Brooklyn L. Rev. 1309 (2015).

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See Ruan 1109-1111; A. Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities* 11-16, 21-22 (2009). One study estimated that in Chicago, Los Angeles, and New York City alone, low-wage workers lose nearly \$3 billion in legally owed wages each year. *Id.*, at 6. The U. S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year* 2 (2014), available at <https://www.epi.org/files/2014/wage-theft.pdf>. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing wage and hours laws. See Brief for State of Maryland et al. as *Amici Curiae* 29-33; Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1150-1151 (2012) (Department of Labor investigates fewer than 1% of FLSA-covered employers each year).

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries. See *id.*, at 1184-1185 (because “the FLSA systematically tends to generate low-value claims,” “mechanisms that facilitate the economics of claiming are required”); *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (SDNY 2011) (finding that an employee utilizing Ernst & Young’s arbitration program would likely have to spend \$200,000 to recover only \$1,867.02 in overtime pay and an equivalent amount in liquidated damages); cf. Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L. J. 2804, 2904 (2015) (analyzing available data from the consumer context to conclude that “private enforcement of small-value claims depends on collective, rather than individual, action”); *Amchem Products, Inc. v. Windsor*, 521 U. S. 591, 617 (1997) (class actions help “overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights” (internal quotation marks omitted)).

Fear of retaliation may also deter potential claimants from seeking redress alone. See, e.g., Ruan 1119-1121; Bernhardt, *supra*, at 3, 24-25. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. See *Califano v. Yamasaki*, 442 U. S. 682, 702 (1979) (“[T]he scope of injunctive relief is dictated by the extent of the violation established.”). The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations.

....

I note, finally, that individual arbitration of employee complaints can give rise to

anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. See, e.g., App. to Pet. for Cert. in No. 16-285, p. 34a (Epic’s agreement); App. in No. 16-300, p. 46 (Ernst & Young’s agreement). As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. Cf. *Encino Motor Cars, LLC v. Navarro*, ante, p. ____ (Court divides on whether “service advisors” are exempt from overtime-pay requirements). With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

* * *

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called “yellow dog,” and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their “mutual aid or protection.” Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16-307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16-285 and 16-300.

NOTES

1. A Liberal Federal Policy Favoring Arbitration Agreements. The Court’s opinion in *Epic Systems* makes it clear that the federal policy favoring arbitration advanced by the FAA will permit waivers of rights to class claims unless the statute authorizing the claims contains a congressional command to the contrary—i.e., explicitly prohibits such waivers. The dissent points out that such clear congressional commands are likely to be found only in statutes of recent vintage, enacted subsequent to the Court’s pro-arbitration doctrine as applied to employment law, which dates from the 1990s. What implications does this have for the enforcement of rights created by the New Deal labor and employment statutes?

2. The FAA’s Saving Clause. Aside from a statutory ban signaling a clear Congressional intent to displace the FAA’s pro-arbitration policy, the only bases remaining open to parties seeking to challenge class waivers in arbitration agreements would be those fitting within the FAA’s saving clause – “such grounds as exist at law or in equity for the revocation of any contract.” FAA, 9 U.S.C. §2. In the eyes of the majority and concurring justices, what grounds might qualify?

3. Judicial Law-Making. The majority criticizes the dissent for retreating to policy arguments and seeking to substitute “its preferred economic policies for those chosen by the people’s representatives,” by urging the Court to “read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws.” 138 S. Ct. at 1632. The dissent criticizes the majority for its “exorbitant application of the FAA” to unbargained-for “yellow dog” employment contracts, abrogating rights created by the federal labor and employment statutes and usurping legislative prerogative. 138 S. Ct. 1644, 1648-49. Is it possible for the Court to take a

completely neutral stance on these questions that respects both the FAA and the NLRA? If so, what would that look like?

4. NLRA versus FLSA. The substantive rights at issue in *Epic Systems* were NLRA rights, not FLSA rights, although the employees ultimately sought to bring FLSA claims. The Court characterizes the NLRA-frame for the case as “an interpretive triple bank shot” that “is enough to raise a judicial eyebrow.” 138 S. Ct. at 1626. What does the Court mean by this? [Note: a triple bank shot in pool or billiards involves aiming the cue at a ball that then bounces off the edges of the table or other balls, ultimately resulting in a different ball-- which the first ball never directly contacts--going into a pocket] Why does the plaintiffs’ framing “raise a judicial eyebrow”? How does the dissent respond to this characterization?

5. The Scope of Section 7 Protection Under the NLRA. The Court holds that § 7 does not encompass a right to collective litigation, relying on the plain language of the statute, the statute’s structure, and the fact that the NLRA’s drafters would not have been thinking about modern forms of legal action such as the class action or class arbitration, which were “hardly known” at the time. 138 S. Ct. at 1624-26. The Court applies the canon of *esjudem generis* to limit the Act’s protection in § 7 of “other concerted activities for the purpose of . . . other mutual aid or protection” to those that are similar in nature to or fit within the ambit of “‘self-organization,’ ‘form[ing], join[ing] or assist[ing] labor organizations,’ and ‘bargain[ing] collectively.’” The Court finds that the structure of the NLRA regime reinforces this interpretation because it addresses specific concerted activities, including union organizing, collective bargaining, strikes, picketing and other forms of economic pressure. The Court concludes that “[u]nion organization and collective bargaining in the workplace are the bread and butter of the NLRA.” *Id.* at 1627.

What are the implications of the Court’s reasoning for the Section 7 protection accorded to nonunion employees not seeking unionization or collective bargaining? Recall the materials we covered in chapter 8.E. regarding the scope of section 7 protection for collective voice, particularly in the nonunion sector. Is the majority’s reasoning in *Epic Systems* consistent with the Court’s earlier decision in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)(holding that section 7 protects nonunion employees who walk off the job to protest cold conditions in their workplace, even though employees presented no specific demand to remedy the objectionable condition) and the Board’s decision in *Timekeeping Systems, Inc.*, 323 N.L.R.B. 244 (1997)(finding that employee who sent emails critical of a proposed change in vacation policy was protected under section 7)? Is the Court articulating a different view of the scope of Section 7 than its earlier precedent and the Board’s might suggest? Finally, what are the implications of the Court’s reasoning for the protection of modern forms of collective action, such as the use of social media, to air complaints?

6. Employer Responses. How should counsel for management advise clients to respond to *Epic Systems*? As the dissent explains, employers seeking to avoid costly class and collective action litigation are likely to insert an explicit waiver of class and collective actions in arbitration agreements. 138 S. Ct. at 1644 (citing study by Alexander Colvin, *The Growing Use of Mandatory Arbitration*, Sept. 27, 2017, available at <https://www.epi.org/files/pdf/135056.pdf>). Indeed, some have suggested that “it would be virtually malpractice for employer attorneys not to recommend the adoption of class waivers” now that they have been approved by the Court. See Lawrence E. Dube, *Could Justices Cause Employer Stampede to Mandatory Arbitration?*, Daily

Lab. Rep. (BNA) No. 70, Apr. 11, 2018, at 4.

Although this may seem prudent at first blush, could a class action waiver in an arbitration agreement backfire? Consider a scenario in which the same law firm files separate but identical wage and hour claims on behalf of 40 different employees (as could easily happen if the employer has misclassified an entire occupational group as exempt from the FLSA's overtime pay requirements, for example). If the arbitration provision bars class arbitration, the employer will be required to bear the costs of 40 arbitration proceedings with different arbitrators assigned to each proceeding, including the lost time entailed in 40 separate depositions of the same managers and 40 hearings in which the company is represented by its lawyers or human resources personnel. In addition, the company may be required to deposit the estimated fee for each arbitrator up front, as for example the AAA rules require, necessitating significant out-of-pocket costs (one arbitrator estimated that the total deposit for 40 arbitrations might be as high as \$500,000 to \$1,000,000). See Martin H. Malin, *The Employment Decisions of the Supreme Court's 2012-13 Term*, 29 ABA J. LAB. & EMP. L. 203, 213-14 (2014). As a case in point, the ABA Journal reported that AT&T Mobility's win in the *Concepcion* case was ultimately a "Pyrrhic victory." The company subsequently faced over 700 individual notices of dispute and arbitration demands from consumers complaining that its merger with T-Mobile violated the antitrust laws. The same law firm represented all the consumers. Martha Neil, *Law Firm Makes Lemonade After Supremes Nix AT&T Class Action, Now Pursues Individual Arbitrations*, ABA Journal, July 2011. More recently, Buffalo Wild Wings faced hundreds of individual arbitration proceedings claiming that it violated minimum wage requirements for tipped employees after it sought to enforce arbitration agreements containing a class action waiver. Jon Steingart, *Class Actions Waived? Workers File Hundreds of Solo Arbitrations*, Daily Lab. Rep. (BNA), No. 209, Oct. 31, 2017, at 10.

As discussed in the supplement to Chapter 9, the #MeToo movement has placed pressure on businesses to exclude claims of sexual harassment from arbitration agreements, and some states have banned arbitration agreements that include claims related to sexual harassment. See Jonathan Hiles, *New York Prohibits Mandatory Arbitration of Sexual Harassment Claims*, Sanford Heisler Working for Justice, July 20, 2018, available at <https://sanfordheisler.com/new-york-prohibits-mandatory-arbitration-of-sexual-harassment-claims/> (discussing laws in New York, Maryland, Vermont and Washington state). Further, some employers – particularly law firms—have responded by agreeing to abandon mandatory arbitration altogether. See Meghan Tribe, *Will Law Firms Bow to Pressure to End Mandatory Arbitration*, AMERICAN LAWYER, May 24, 2018, <https://www.law.com/americanylwyer/2018/05/24/will-law-firms-bow-to-pressure-to-end-mandatory-arbitration/>. So far, the movement away from mandatory arbitration agreements has occurred primarily in workplaces impacting white collar and professional employees.

7. State Law Unconscionability Doctrine. The FAA's saving clause permits challenges to arbitration agreements on the same grounds available to challenge other contracts, including presumably unconscionability. Nevertheless, specific applications of a state's unconscionability doctrine (such as a ban on class waivers) may be preempted by the FAA. The following case predates *Epic Systems* but addresses the question in light of the Court's decisions in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) and *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), upon which the Court relied in *Epic Systems*.

***Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916 (9th Cir. 2013).** The plaintiff, a deli clerk at Ralph's Grocery, filed an action on behalf of herself and all similarly situated employees alleging that Ralph's had failed to pay her and other employees for rest and meal breaks in violation of the California Labor Code and the California Business and Professions Code. Ralph's moved to compel arbitration of her individual claim under its predispute arbitration agreement, which was incorporated into the employment application and presented on a take-it-or-leave-it basis to all applicants. The agreement precluded the use of institutional arbitration administrators affiliated with a list of organizations (such as the AAA), all of which adhered to rules designed to produce a neutral arbitration. It also gave an advantage in arbitrator selection to the party who did not initiate arbitration, effectively guaranteeing that Ralph's would determine the arbitrator in the vast majority of cases. Further, the agreement prohibited the arbitrator from awarding attorneys' fees to the employee unless a Supreme Court decision expressly required the award, required the arbitrator to determine at the outset of arbitration how the fee (ranging from \$7,000 to \$14,000 per day) would be apportioned between the parties without regard to the claim's merits, and allowed the employer to amend the agreement unilaterally without notice to the employee, with continued employment serving as assent to the new terms.

The Ninth Circuit found the agreement both procedurally and substantively unconscionable. It found procedural unconscionability because submission of an application for employment bound applicants to the policy's terms, and Ralph's did not provide the terms of the policy until three weeks after the applicant had consented to be bound. *Id.* at 923-24. It also found substantive unconscionability because the arbitrator selection procedure would nearly always produce an arbitrator chosen by Ralph's, the exclusion of arbitrators provided by AAA or JAMS avoided their neutral arbitrator selection processes and due process protocols, and the fee apportionment provision was designed to price employees out of the arbitration dispute resolution process. *Id.* at 924-27.

The court then discussed the employer's argument that the FAA preempted California state law-based unconscionability doctrine:

Federal law preempts state laws that stand as an obstacle to the accomplishment of Congress's objectives. *Concepcion*, 131 S. Ct. at 1753. Accordingly, the FAA preempts state laws that in theory apply to contracts generally but in practice impact arbitration agreements disproportionately. *Id.* at 1747.

California's unconscionability doctrine applies to all contracts generally and therefore constitutes "such grounds at law or in equity for the revocation of [a] contract." 9 U.S.C. § 2. But specific application of rules within that doctrine may be problematic. *See Concepcion*, 131 S. Ct. at 1753 (holding that California's rule making class waivers unconscionable was preempted by the FAA).

In this case, California's procedural unconscionability rules do not disproportionately affect arbitration agreements, for they focus on the parties and the circumstances of the agreement and apply equally to the formation of all contracts. The application of California's general substantive unconscionability rules to Ralph's arbitration policy, however, warrants more discussion.

The Supreme Court's recent decision in *American Express Corp. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), does not preclude us from considering the cost that Ralphs' arbitration agreement imposes on employees in order for them to bring a claim. In that case, plaintiffs argued that the class waiver term of the arbitration agreement at issue effectively foreclosed vindication of the plaintiffs' federal rights: specifically, their rights under the Sherman Antitrust Act. *Id.* at 2310. Plaintiffs could not pursue their antitrust claims, they argued, because the experts required to prove an antitrust claim would cost hundreds of thousands of dollars, while the individual recovery would not exceed \$40,000. *Id.* The class waiver provision did not foreclose effective vindication of that right, the Court reasoned, because "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute an elimination of the *right to pursue* that remedy." *Id.* at 2311. The Court explicitly noted that the result might be different if an arbitration provision required a plaintiff to pay "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310-11.

Ralphs' arbitration policy presents exactly that situation. In this case, administrative and filing costs, even disregarding the cost to prove the merits, effectively foreclose pursuit of the claim. Ralphs has constructed an arbitration system that imposes non-recoverable costs on employees just to get in the door.

The Supreme Court's holding that the FAA preempts state laws having a "disproportionate impact" on arbitration cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration. Our court has recently explained the nuance: "*Concepcion* outlaws discrimination in state policy that is *unfavorable* to arbitration." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013) (emphasis added). We think this is a sensible reading of *Concepcion*.

This case illustrates the distinction. In addition to the problematic cost provision, Ralphs' arbitration policy contains a provision that unilaterally assigns one party (almost always Ralphs, in our view, as explained above) the power to select the arbitrator whenever an employee brings a claim. Of course, any state law that invalidated this provision would have a disproportionate impact on arbitration because the term is arbitration specific. But viewed another way, invalidation of this term is agnostic towards arbitration. It does not disfavor arbitration; it provides that the arbitration process must be fair.

If state law could not require some level of fairness in an arbitration agreement, there would be nothing to stop an employer from imposing an arbitration clause that, for example, made its own president the arbitrator of all claims brought by its employees. Federal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power. California law regarding unconscionable contracts, as applied in this case, is not unfavorable towards arbitration, but instead reflects a generally applicable policy against abuses of bargaining power. The FAA does not preempt its invalidation of Ralphs' arbitration policy.

Does the *Chavarria* court's analysis survive *Epic Systems, supra*? If not, are there any judicial limits on employer power to tilt the arbitration process in its favor?
