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

Second Edition

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Seth D. Harris
Joseph E. Slater
Anne Marie Lofaso
Charlotte Garden
Richard F. Griffin, Jr.

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

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Introduction

The materials that follow update the second edition of the casebook through mid-summer 2018. In the private sector, the Trump NLRB has begun taking positions more favorable to employers and less favorable to unions on a variety of issues detailed herein, and this path will likely continue. These changes may occur through overturning Obama Board decisions (as well as the decisions of previous Boards), but may also occur through regulations.

In the public sector, the *Janus v. AFSCME* has barred agency-fee clauses, effectively implementing "right to work" policies as a matter of constitutional law. This is likely to embolden union opponents to push against other aspects of public sector labor relations arrangements in federal court, while union-friendly states may experiment with new approaches, such as limiting the duty of fair representation in discrete contexts, or possibly by creating a mechanism for state itself to pay for parts of unions' bargaining costs. On the other hand, the past year saw an unexpected and largely successful wave of teachers' strikes in several states in which not only were such strikes illegal, but also in which teachers lacked the right to bargain collectively.

CHAPTER 1

THE HISTORY OF PUBLIC- AND PRIVATE-SECTOR LABOR LAW

Page 76, near the end of the second full paragraph. *Toth v. Callaghan*, 995 F.Supp.2d 774 (E.D.Mich. 2014), *appeal dismissed*, No. 14-1351 (6th Cir. July 8, 2014) struck down Michigan P.A 45, which had removed collective bargaining rights from graduate student unions. *Toth* held that the law violated the Article IV, § 24 of the Michigan Constitution, which bars changing the original purpose of bills during the enactment process.

Page 77, end of the penultimate paragraph. In 2017, Iowa enacted House File 291, which is largely modeled after Wisconsin Act 10. Among other things, HF 291's severe restrictions apply to most public-sector unions, specifically all bargaining units that consist of less than 30 percent public safety employees. For the employees it covers, this amendment limits contract negotiations to "base wages and other matters mutually agreed upon." Further, affected unions must undergo mandatory recertification elections and will only be recertified if a majority of the entire bargaining unit votes to do so; automatic dues-deduction is barred; and interest arbitrators cannot grant wage increases in excess of whichever is lower, 3 percent or the increase in the cost of living. In 2018, Missouri enacted H.B. 1413, which, among other things, requires public-sector unions to undergo a mandatory recertification election every three years and requires unions to obtain annual permission from members before having dues or fees deducted from their paychecks.

Page 77, end of the last paragraph. Also in 2017, Nevada, thorough Senate Bill 493, extended collective bargaining rights to school administrators, including school principals. California, in Senate Bill 201 amended its Higher Education Employer-Employee Relations Act to include student employees whose employment is contingent upon their status as students. In 2018, Florida enacted CS/HB 7055. Among other things, this requires unions to seek recertification if a majority of bargaining unit members are not dues-paying members. After the decision in *Janus v. AFSCME* (discussed in Chapter 14), this rule has added significance.

CHAPTER 2

LABOR LAW'S SUBJECTS: "EMPLOYEES" AND "EMPLOYERS"

Page 95, add a new note 5:

The Board and reviewing courts continue to struggle with whether certain workers are statutory employees, who have rights under the NLRA, or independent contractors, who do not have such rights. To clarify this area, the Obama-era NLRB's Division of Advice issued an Advice memo in *Pacific 9 Transportation., Inc.*, Case 21-CA-150875 (Dec. 18, 2015), describing a theory of a Section 8(a)(1) violation based on misclassification of employees as independent contractors. However, since this book's publication, the courts have reviewed the following three Board decisions, whose analyses tend to continue to confuse: *FedEx Home Delivery v. NLRB*, (D.C. Cir. 2017) (*FedEx II*); *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016); and *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305 (11th Cir. 2016). Significantly, *FedEx II* expressly relied on *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (*FedEx I*), which had held that FedEx delivery drivers are independent contractors and not FedEx employees. In both cases, the D.C. Circuit reversed the Board's legal conclusion that the FedEx drivers were employees. The *FedEx II* court further noted that the records of the two cases were "materially indistinguishable." *FedEx II*, 849 F.3d at 1124.

Although FedEx drivers across the country generally have the same job duties, and although Board law and state law governing independent contractor status are based on the Restatement 2d (Agency) § 220(2) and therefore ostensibly the same throughout the sundry U.S. jurisdictions, the conclusions differ. Compare the courts' analyses of the Board cases in *FedEx I* and *FedEx II* with that of the Ninth Circuit interpreting California law in *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 987 (9th Cir. 2014). These different analyses beg the question – Why? In thinking about this question, consider whether the following makes a difference: The D.C. Circuit focused on entrepreneurial opportunity and the Ninth Circuit focused on right of control.

This issue is once again being tested in the D.C. Circuit. *Pennsylvania Interscholastic Athletic Association, Inc.*, 366 N.L.R.B. No. 10 (2018), Docket Nos. 18-1037, 18-1043 (D.C. Cir. pet. for review filed Feb. 2, 2018) presents the question whether the Board's finding – that lacrosse referees are statutory employees – is consistent with the D.C. Circuit's construction of independent contractor as explicated in *FedEx II*.

Relatedly, on February 18, 2018, the Trump Board – perhaps in an effort to reject the theory described in the *Pacific 9 Transportation* Advice memo – issued a Notice and Invitation To File Briefs in *Velox Express*, Case 15-CA-184006, addressing the question: "Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?"

Page 122, insert the following paragraph immediately after the paragraph that begins: "Equally interesting . . . ."

Indeed, in 2016, the Board once again reversed course when it overturned *Brown University*. In *The Trustees of Columbia University in the City of New York*, 364 N.L.R.B. No. 90, the Board revisited the question "whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3)." In answering that question, the *Columbia University* Board, noting that both the broad language of Section 2(3)'s definition of employee and that the NLRA "does not speak directly to the issue posed here," decided to return to its interpretation of Section 2(3) as clarified in *New York University*, 332 N.L.R.B. 1205 (2000), on grounds that the NYU Board's construction of Section 2(3) better reflected both the breadth of that definition and the policies of the Act. The Board explained:

The unequivocal policy of the Act . . . is to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." Given this policy, coupled with the very broad statutory definitions of both "employee" and "employer," it is appropriate to extend statutory coverage to students working for universities covered by the Act unless there are strong reasons not to do so. We are not persuaded by the Brown University Board's self-described "fundamental belief that the imposition [sic] of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act. This ""fundamental belief" is unsupported by legal authority, by empirical evidence, or by the Board's actual experience.

In rejecting *Brown University*'s assertion that graduate assistants cannot be statutory employees because they "are primarily students and have a primarily educational, not economic, relationship with their university," the Board observed that it had "the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated. Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach."

With the new Trump Board, we suspect that *Columbia University* does not have a long shelf-life.

Page 131, insert the following sentence at the end of the full paragraph: The question whether the Board may lawfully assert jurisdiction over Indian casinos that employ mostly non-Indians is once again being challenged in court. *See Casino Pauma*, 363 N.L.R.B. No. 60, Docket Nos. 16-70397 & 16-70756 (D.C. Cir. petition for review filed Apr. 26, 2018).

Page 140, insert the following paragraph immediately before the paragraph starting: "The third limitation is comity with foreign governments and sovereign Indian tribes within the United States."

The Obama Board's *Pacific Lutheran* test is currently being testing in the U.S. courts of appeal with various university with religious affiliations arguing that the *Pacific Lutheran* test is inconsistent with *Catholic Bishop* and *Great Falls*, inconsistent with the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4, and constitutes an unconstitutional intrusion

into the university's religious liberty. *See, e.g., Duquesne University of the Holy Spirit*, 366 N.L.R.B. No. 27 (2018), Docket Nos. 18-1063 & 18-1078 (D.C. Cir. petition for review filed Feb. 28, 2018, cross-application for enforcement filed Mar. 15, 2018).

Page 131, insert the following sentence at the end of the full paragraph: The question whether the Board may lawfully assert jurisdiction over Indian casinos that employ mostly non-Indians is once again being challenged in court. *See Casino Pauma*, 363 N.L.R.B. No. 60, Docket Nos. 16-70397 & 16-70756 (D.C. Cir. petition for review filed Apr. 26, 2018).

Page 145, insert the following paragraph as note 4:

In *Hy-Brand I*, the newly minted Trump Board overruled *Browning-Ferris*, thereby returning to its prior legal standard for determining whether two employers are joint employers under the NLRA. See *Hy-Brand I*, 365 N.L.R.B. No. 156 (Dec. 14, 2017). Shortly thereafter, the Board issued an Order Vacating Decision and Order and Granting Motion for Reconsideration in Part in this proceeding. *Hy-Brand II*, 366 NLRB No. 26 (Feb. 26, 2018). The Trump Board's willingness to reconsider its decision does not, however, bode well for the new joint-employer status because the Board did not vacate *Hy-Brand I* because the newly constituted Board had a change of heart. Rather, the Trump Board vacated that decision based on the Board's Designated Agency Ethics Official determination that "Member Emanuel [whose former law firm represented Leadpoint, the joint-employer of Browning-Ferris] is, and should have been, disqualified from participating in this proceeding." Accordingly, "[a]fter careful consideration, and exercising the Board's authority under Section 102.48(c) of the Board's Rules and Regulations and Section 10(d) of the Act, [the Board] . . . decided to grant the Charging Parties' motion in part and to vacate and set aside the Board's December 14, 2017 Decision and Order." Thereafter, the Board unanimously denied the employer's motion of reconsideration of *Hy-Brand II*. *See Hy-Brand III*, 366 NLRB No. 93 (Jun. 6, 2018).

But the fight over defining joint-employer status does not end there. By letter dated May 29, 2018, from U.S. Senators Elizabeth Warren (D-MA), Kirsten Gillibrand (D-NY), and Bernard Sanders (I-VT) to NLRB Chairman John F. Ring, the Senators expressed grave concerns over the possibility that the Board would attempt to overturn *Browning-Ferris* using the rulemaking process. The Senators essentially viewed this potential move as an attempt to do an end-run around the following problem: given that Member Emanuel may not ethically participate in any decision to reverse *Browning-Ferris*, the Republican Board members do not have the votes to overturn that precedent.

The Board's Chairman disagrees. By letter dated June 5, 2018, Board Chairman Ring responded to the May 29 letter, notifying the Senators that a "majority of the Board is committed to engage in rulemaking" on this issue and that it will shortly issue a Notice of Proposed Rulernaking. The Chairman further assured that "any notice-and-comment rulemaking undertaken by the NLRB will never be for the purpose of evading ethical restriction."

Page 158, insert the following at the end of note 3. For recent examples of the NLRB taking jurisdiction over charter schools, see Pennsylvania Virtual Charter School, 364 NLRB No. 87 (2016) and Hyde Leadership Charter School – Brooklyn, 364 NLRB No. 68 (2016) (rejecting objections by, respectively, the employer and the union).

CHAPTER 3

UNION ORGANIZING AND EMPLOYER SPEECH

Page 171, add the following to the end of note 6. However, the Eighth Circuit recently limited this presumption to employees, rejecting the NLRB's position that it should apply equally to outside union organizers who were otherwise entitled to enter the employer's premises. *North Mem'l Health Care v. NLRB*, 860 F.3d 639 (8th Cir. 2017).

Page 171, add the following to the end of note 7. In a recent decision, the Fifth Circuit affirmed the Board's conclusion that a fast-food chain violated the NLRA by maintaining a rule prohibiting employees from wearing "any type of pin or sticker" on their uniform. The case arose after employees of In-N-Out were told that they could not wear "Fight for $15" pins during work time. The Board emphasized that the "special circumstances" defense is narrow, and that employers cannot qualify for it simply by pointing to the fact that employees are required to wear a uniform. Further, the fact that In-N-Out occasionally required employees to wear specific promotional pins undermined its argument that the "no buttons" rule was necessary to maintain In-N-Out's public image. *In-N-Out Burger v. NLRB*, No. 17-60241 (5th Cir. July 6, 2018).

Page 185, add note 12.e. As discussed in notes 8-9 following *Republic Aviation*, an employer's otherwise-lawful decision to bar a non-employee from a property may violate the NLRA if it discriminates against protected concerted activity. Thus, the NLRB held that an employer violated Section 8(a)(1) when it barred an ex-employee from its premises because she had filed a collective action alleging wage-and-hour violations, where ex-employees were typically allowed access to the property on the same basis as the general public. *MEI-GSR Holdings, LLC*, 365 N.L.R.B. No. 76 (May 16, 2017).

Page 188. Add the following sentence before the excerpt from Martin Luther Memorial Home, Inc.: As you read this, keep in mind that that *Martin Luther Memorial Home, Inc.* was overruled in part by *The Boeing Co.*, which is excerpted below.

Page 192, add a new note between notes 4 and 5. The Obama Board was quite active in cases involving work rules, but the Trump Board has already reversed course. In *The Boeing Co.*, 365 N.L.R.B. No. 154 (Dec. 14, 2017), the Board overruled *Martin Luther Memorial Home*, also known as *Lutheran Heritage*, in part. Specifically, the Board rejected *MLMH* to the extent it held that rules that "employees would reasonably construe . . . to prohibit Section 7 activity" violated the NLRA. (*The Boeing Co.* involved a challenge to a work rule that prohibited employees from using cameras or camera-enabled devices, such as cell phones, at work.)

The Board majority began by listing a set of "fundamental problems" with the *MLMH* standard:

> • The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases.

> • The *Lutheran Heritage* standard, especially as applied in recent years, reflects several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks. Employees are disadvantaged when they are denied general guidance regarding what standards of conduct are required and what type of treatment they can reasonably expect from coworkers. In this respect, *Lutheran Heritage* has required perfection that literally is the enemy of the good.
>
> • In many cases, *Lutheran Heritage* has been applied to invalidate facially neutral work rules *solely* because they were ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself.
>
> • The *Lutheran Heritage* "reasonably construe" test has improperly limited the Board's own discretion. It has rendered unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit *any* type of Section 7 activity. It has not permitted the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur. Nor has *Lutheran Heritage* permitted the Board to afford *greater* protection to Section 7 activities that are central to the Act.
>
> • *Lutheran Heritage* has not permitted the Board to differentiate, to a sufficient degree, between and among different industries and work settings, nor has it permitted the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.
>
> • Finally, the Board's *Lutheran Heritage* "reasonably construe" test has defied all reasonable efforts to make it yield predictable results. It has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

Instead, the Board adopted the following rubric:

> Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1). As the result of this

balancing, in this and future cases, the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as "rules"):

• *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.

• *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

• *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

The above three categories will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself. The Board will determine, in future cases, what types of additional rules fall into which category. Although the legality of some rules will turn on the particular facts in a given case, we believe the standard adopted today will provide far greater clarity and certainty to employees, employers and unions. The Board's cumulative experience with certain types of rules may prompt the Board to re-designate particular types of rules from one category to another, although one can expect such circumstances to be relatively rare.

We emphasize that Category 1 consists of two subparts: (a) rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted, and (b) rules that are lawful because, although they do have a reasonable tendency to interfere with Section 7 rights, the Board has determined that the risk of such interference is outweighed by the justifications associated with the rules. Of course, as reflected in Categories 2 and 3, if a particular type of rule is determined to have a potential adverse impact on NLRA activity, the Board may conclude that maintenance of the rule is *unlawful*, either because individualized scrutiny reveals that the rule's potential adverse impact outweighs any justifications (Category 2), or because the type of rule at issue predictably has an adverse impact on Section 7 rights that outweighs any justifications (Category 3). Again, even when a rule's *maintenance* is deemed lawful, the Board will examine circumstances where the rule is *applied* to discipline employees who

> have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act.

Members Pearce and McFerran each wrote a dissent. Member Pearce's dissent began as follows:

> Overruling 13-year-old precedent, the majority today institutes a new standard for determining whether the maintenance of a challenged work rule, policy, or employee handbook provision is unlawful. Although characterized by the majority as a balancing test, its new standard is essentially a how-to manual for employers intent on stifling protected concerted activity before it begins. Overly protective of employer interests and under protective of employee rights, the majority's standard gives employers the green light to maintain rules that chill employees in the exercise of rights guaranteed by the National Labor Relations Act. Because the new standard is fundamentally at odds with the underlying purpose of the Act, I dissent.

And Member McFerran's dissent called into question whether it was procedurally proper to overrule *MLMH*:

> No party and no participant in this case--which involves a single, no-photography rule--has asked the Board to overrule *Lutheran Heritage*. Nor has the Board asked anyone whether it should. Over the minority's objection, the Board majority has refused to notify the public that it was contemplating a break with established precedent. It has refused to invite amicus briefing from interested persons, even though this has become the Board's wise norm in the years following *Lutheran Heritage*. Without the benefit of briefs from the parties or the public, the majority invents a comprehensive new approach to work rules that goes far beyond any issue presented in this case and, indeed, beyond the scope of *Lutheran Heritage* itself. This is secret rulemaking in the guise of adjudication, an abuse of the administrative process that leaves Board law not better, but demonstrably worse

Page 192, renumber existing note 5 as note 6, and substitute the following text.

Following the *Boeing* decision, the Board's General Counsel issued a memo. Peter Robb, Mem. GC 18-04 (June 6, 2018), *available at* https://apps.nlrb.gov/link/document.aspx/09031d45827f38f1. (Remember that a General Counsel memo is not law, but it is still useful guidance.) The memo emphasizes that *Boeing Co.* represented a "significant[] alter[ation]" in the Board's "jurisprudence on the reasonable interpretation of handbook rules." The memo also discussed a large variety of different handbook rules.

Page 197, add the following to the beginning of note 3. One preliminary issue is whether an employee protest disparages a product – or would be understood by the public to disparage a product – at all. Thus, in *Micklin Enters., Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017), the Eighth Circuit, *en banc*, held that fast food employees lost NLRA protection when they created posters that suggested that – because workers did not receive paid sick days – sick workers might be preparing food for customers. The posters included the sentence, directed at customers, "we hope your immune system is ready because you're about to take the sandwich test." Although the protest was clearly connected to a labor dispute, it was unprotected because it "target[ed] the food product

itself." In contrast, in *Medco Health Solutions of Law Vegas, Inc.*, 364 N.L.R.B. No. 115 (Aug. 27, 2016), the Board applied the *Republic Aviation* and *Martin Luther* instead of *Jefferson Standard* when an employer disciplined an employee for wearing a shirt that disparaged an employee incentive system rather than a product.

Page 198, note 4. Note that the Board's decision in *MasTech Technologies* was upheld by the D.C. Circuit in a 2-1 decision. *DIRECTV*, Inc., v. NLRB, 837 F.3d 25 (2017).

Page 212, add the following to the end of note 2. See *Hogan Transps., Inc.*, 363 N.L.R.B. No. 196 (May 19, 2016) (holding that employer violated 8(a)(1) "by blaming the Union for attempting to take away [an] unlawful wage increase" after the union filed a ULP charge alleging an *Exchange Parts* violation, and observing that "the Board does not typically require a company to rescind a wage increase" offered in violation of *Exchange Parts*).

Page 212, add the following at the end of note 3. What if an employer grants a new benefit to its workers who are not eligible to unionize, but refuses to extend that benefit to union-eligible employees? At least where the employer cites the pendency of a union election as its reason, the Board has held (and the D.C. Circuit affirmed) that this too violates the Act. *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d 351 (D.C. Cir. 2016).

Page 222, add the following to the end of the section on "Inflammatory Appeals to Prejudice." A separate issue arises when strikers use racist, sexist, or otherwise prejudiced language on the picket line. Whether and when they lose NLRA protection (and therefore may be fired for their conduct) is discussed in Chapter 11.

CHAPTER 4

PROTECTION OF WORKERS' PROTEST AND "CONCERTED ACTIVITIES"

Page 277, add a new note 3. For a more recent example of the *Interboro* doctrine, *see S. Freedman & Sons, Inc. v. NLRB*, 713 Fed. App'x 152 (4th Cir. 2017) (employee's refusal to work overtime was protected when he "plainly referred to the CBA when refusing the additional driving assignment, and the record contains evidence that at least three junior drivers were available to take the truck to the repair facility," and employee did not lose NLRA protection by using during his exchange with his employer).

Page 289, add a new subsection c to Problem 4.2. Shortly after President Trump's inauguration, protests such as the Day Without Immigrants and Day Without Women called on employees to skip work to demonstrate support for issues ranging from civil rights, to immigration, to raising the minimum wage and preserving the Affordable Care Act. Would the NLRA cover participation in such a protest? How would you analyze whether an employer would be within its rights to fire an employee who missed work in order to participate? And, given that analysis, is there anything an employee could do to increase the likelihood that her participation would be protected by the NLRA? You may want to re-consider your answers to these questions after you read *Washington Aluminum* in the next section of this chapter. For more on this, you may want to refer to General Counsel Memo No. 08-10 (July 22, 2008), and Advice Memo No. 07-CA-193475 (Aug. 30, 2017).

Page 298, replace the section on *Concerted Litigation and Alternative Dispute Resolution* with the following:

Groups of employees bringing joint or class- or collective-action lawsuits against their employers under various employment laws, or collective grievances under employers' dispute resolution and arbitration policies, would seem to fit comfortably within the colloquial definition of "concerted." In *D. R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), *enforcement denied*, 737 F.3d 344 (5th Cir. 2013), the Board agreed and held that an employer commits a ULP if it requires its employees to sign clauses requiring the employees to resolve all employment disputes through individual arbitration – that is, agreements precluding employees from filing class actions or collective claims against the employer in any forum. According to the Board, § 7's protection of employees' right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" extends to employees filing class claims and pursuing class litigation to improve their working conditions in administrative, judicial, and arbitral forums.

The Board affirmed *D.R. Horton*'s rule – that employees must have at least one forum (either arbitral or judicial) in which they can bring joint or class or collective claims – in many other cases. But circuit courts split as to whether the Board's rule was permissible, and the Supreme Court agreed to hear a trio of cases presenting this issue. *Lewis v. Epic Systems*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); and *Murphy Oil USA, Inc., v. NLRB*, 808 F.3d 1013 (5th Cir. 2013). In *Epic Systems* and *Ernst & Young*, the courts held that the NLRA's language clearly supported the Board's rule. But in *Murphy Oil*, the Fifth Circuit relied on its earlier analysis rejecting the Board's *D.R. Horton* decision, which held that the Board's rule was inconsistent with the requirement of the Federal Arbitration Act (FAA) that arbitration agreements "shall be valid, irrevocable, and enforceable…" 9 U.S.C. § 2.

The Supreme Court granted *cert*. shortly before President Trump's inauguration and consolidated

the three cases for briefing and oral argument. While the Solicitor General had filed the *Murphy Oil cert*. petition on behalf of the Board, the Trump Administration Acting Solicitor General did an about-face, filing an amicus brief on behalf of the employers arguing that the NLRB's rule was inconsistent with the FAA. However, the Acting Solicitor General authorized the NLRB to represent itself before the Supreme Court, and the Board briefed and argued the case, defending the *Murphy Oil/D.R. Horton* rule.

In a 5-4 decision written by Justice Gorsuch, *Epic Systems Corp. v. Lewis*, No. 16-285 (May 21, 2018), the Supreme Court held that the individual arbitration agreements were enforceable under the FAA and neither the FAA's savings clause nor the provisions of the NLRA required a different result. Most troublingly, the Court harmonized the FAA and the NLRA by reading § 7's protection of employees' right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" narrowly, stating that: "where, as here, a 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'…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.'" *Id.* at 12, citations omitted.[1] Justice Ginsberg dissented, contending that "the Court's decision is egregiously wrong" and explaining "why the Arbitration Act, sensibly read, does not shrink the NLRA's protective sphere."

Page 294, add a new note 3. Do employees have *Weingarten* rights when voluntarily attending a meeting or hearing? The NLRB recently answered "yes," but the DC Circuit reversed. In *Midwest Div.—MMC*, the NLRB held that two nurses' Section 7 rights were violated when their employer refused their requests for a union representative to accompany them to a "peer review" meeting that they reasonably expected could result in discipline. However, the D.C. Circuit reversed because the nurses were not required to attend the peer review meeting at all, writing that "absent compulsory attendance, the right to union representation recognized in *Weingarten* does not arise." *Midwest Div.—MMC v. NLRB*, 867 F.3d 1288 (D.C. Cir. 2017).

Page 299, add the following to the end of the section on *Use of Social Media*. In a later case, the Board found, and the Second Circuit affirmed, that "liking" a post on Facebook could also constitute concerted activity. *Three D, LLC v. NLRB*, 629 Fed. App'x. 33 (2d Cir. 2015).

Page 325, add a new Note 5. Even where public employees are permitted to bargain collectively, other issues may complicate *Weingarten* rights. *Prince George's County Civilian Employee's Ass'n v. Prince George's County*, 447 Md. 180 (2016), held that a Maryland county did not have the authority to negotiate a contract clause with a union granting *Weingarten* rights in *criminal* investigations of employees.

[11] This interpretation of concerted activities for other mutual aid or protection would appear to contradict the *Eastex* Court's statement that Congress chose "to protect concerted activities for the somewhat **broader** purpose of 'mutual aid or protection' as well as for the **narrower** purposes of 'self-organization' and 'collective bargaining.' *Eastex* at 565. (emphasis supplied). Justice Gorsuch did not address, or even mention, this prior understanding of the language he was interpreting.

CHAPTER 5

PROTECTION AND PROHIBITION: OTHER EMPLOYER RESPONSES TO ORGANIZING

Page 380, insert note 4.

Articles XX and XXI of the AFL-CIO Constitution provides for an internal dispute resolution (mediation/arbitration) process for resolving fights between competing unions. One purpose of this process is to protect the collective-bargaining relationships that AFL-CIO affiliates have developed. *See* Art. XX, § 2. In particular, affiliates "actively engaged in organizing a group of employees and seeking to become their exclusive representative may invoke [the procedures in Article XX] to seek a determination affirming its ability to do so without being subject to ongoing competition by any other AFL-CIO affiliate." *See* Art. XXI, § 2. The Board has normally deferred to the AFL-CIO's internal dispute resolution proceedings where two or more affiliates are involved in a representation battle. *See Irvin H. Whitehouse & Sons Co., Inc. v. Local Union No. 118 of Intern. Broth. of Painters and Allied Trades, AFL-CIO*, 1992 WL 19472, at *5 (6th Cir. 1992) (citing NLRB Casehandling Manual Part II (Representation Proceedings) § 11052.1). These sections are now found at NLRB Casehandling Manual Part II (Representation Proceedings) §§ 11017-11019.

CHAPTER 6

REMEDIES

Page 435, add the following paragraph at the end of the page: For over 15 years, NLRB General Counsels Meisburg, Solomon, Griffin, and now Robb have issue a series of memos prioritizing first contract bad faith bargaining, nip-in-the-bud discipline in organizing, and successorship refusal to hire cases for 10(j) relief. See G.C. Memo 18-05 for the latest memo.

Pages 441–42, add to the end of note 7.

Notwithstanding the court's decision in *Latino Express*, 776 F.3d at 479 (awarding reasonable attorneys' fees to Board in civil litigation), the Board is without inherent authority to award attorneys' fees in an administrative proceeding. *See Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 804–06 (D.C.Cir.1997). Following that line of reasoning, the court in *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085 (D.C. Cir. 2016), refused to award attorney fees to pay the union's and the NLRB General Counsel's litigation costs incurred in the Board's *administrative* proceedings. The court nevertheless enforced the Board's award of the union's bargaining costs as a remedy for the Section 8(a)(5) violation. Specifically, it held that, in a bad-faith refusal to bargain case, "the Board may require an employer to reimburse a union's bargaining expenses pursuant to its remedial authority under section 10(c) of the Act." *Id.* at 1087.

Although the Board may not award attorneys' fees in an administrative proceeding as a punishment, it may award attorneys' fees where the litigation itself is the unlawful act. In *Road Sprinkler Fitters Local Union 669*, 365 NLRB No. 83 (2017), the union filed a grievance and lawsuit and enforce a CBA predicated on a reading of that agreement which would convert it into an unlawful agreement under Section 8(e). The Board therefore properly concluded that using "the grievance procedure and the court system in this manner constitute[d] unlawful means pursuant to Section 8(b)(4)(A)." As part of the remedy, the Board awarded attorneys' fees that the employer had to incur to fight the illegal lawsuit. The D.C. Circuit agreed and enforced the Board's order. See *Road Sprinkler Fitters Local Union 669 v. NLRB*, 2018 WL 3040513, at *4 (D.C. Cir. 2018) (explaining that "[t]he Local misconceives the reason for the award of attorney's fees. It is not because the Local's behavior is particularly egregious but rather because the litigation itself is the illegal act. Since, as the Board determined, the Local's [grievance and suit were] illegal ab initio, ... costs ... are therefore the logical measure of damages.") (citing *Local 32B-32J, Service Employees Intern. Union, AFL-CIO v. NLRB*, 68 F.3d 490, 496 (D.C. Cir. 1995).

CHAPTER 7

ELECTING A UNION REPRESENTATIVE

Page 457 delete the following paragraph:

Facial challenges to the NLRB's final representation procedures rule were raised in *Chamber of Commerce v. NLRB*, Case No. 1:15-cv-9 (Jan. 5, 2015) (complaint), and *Associated Builders and Contractors of Texas, Inc. v. NLRB*, Case No. 1:15-cv-00026 (Jan. 13, 2015). Both cases were unsuccessful at the district court level.

Replace with the following paragraph:

Facial challenges to the NLRB's final representation procedures rule were raised in *Chamber of Commerce v. NLRB*, and *Associated Builders and Contractors of Texas, Inc. v. NLRB*. Both cases were unsuccessful at the district court level. *See Chamber of Commerce v. NLRB*, 118 F.Supp.3d 171, 178 (D.D.C., 2015) (granting the Board's motion for summary judgment); *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 2015 WL 3609116, at *17 (W.D.Tex. 2015) (granting the NLRB's partial motion to dismiss and cross–motion for summary judgment), *aff'd*, 826 F.3d 215, 229 (5th Cir. 2016). On December 14, 2017, the Trump Board published a Request For Information, asking for public input regarding whether the Board should retain the 2014 Representation Election Rule without change, or with modifications, or should rescind the 2014 Rule. The RFI was approved by a three-member majority consisting of Chairman Miscimarra, and Members Kaplan and Emanuel. Members Pearce and McFerran dissented.

Page 457 Insert the following paragraph after the discussion of Specialty Healthcare:

In PCC Structurals, Inc., 365 NLRB No. 160 (Dec. 15, 2017), the Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. 934 (2011) (*Specialty Healthcare*), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) and "reinstate[d] the traditional community-of interest standard as articulated in . . . *United Operations, Inc.*, 338 N.L.R.B. 123 (2002). The Board further clarified that "the correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees" is not, as *Specialty Healthcare* held, whether the employer could show that the additional employees "share an overwhelming community of interest with the petitioned-for employees, such that there 'is no legitimate basis upon which to exclude certain employees from the petitioned-for unit because the traditional community-of-interest factors overlap almost completely." *Id.* at *1 (internal quotation marks and citations omitted). Instead, the Board reinstated its traditional community of interest test.

Pages 500-08, replace H.S. Care LLC (Oakwood Care Center), 343 N.L.R.B. 659 (2004), with the following:

Miller & Anderson

The National Labor Relations Board
Case 05-RC-079249
364 NLRB No. 39
July 11, 2016

Chairman Pearce and Members Hirozawa and McFerran; Member Miscimarra, dissenting

I. INTRODUCTION

The fundamental issue raised by the Petitioner's request for review is whether under [the Act] the employees who work for a user employer—both those employees the user alone employs and those employees it jointly employs (along with a supplier employer)—must obtain employer consent if they wish to be represented for purposes of collective bargaining in a single unit, even if both groups of employees share a community of interest with one another under the Board's traditional test for determining appropriate units.

Anyone familiar with the Act's history might well wonder why employees must obtain the consent of their employers in order to bargain collectively. After all, Congress passed the Act to compel employers to recognize and bargain with the designated representatives of appropriate units of employees, even if the employers would prefer not to do so. But most recently in *Oakwood Care Center*, 343 N.L.R.B. 659 (2004) ("Oakwood"), the Board held that bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by that same user employer and an employer supplying employees to the user employer constitute multi-employer units, which are appropriate only with the consent of the parties. . . . The *Oakwood* Board thereby overruled *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000) ("*Sturgis*"), which had held that the Act permits such units without the consent of the user and supplier employers, provided the employees share a community of interest. . . .

The Petitioner requests that the Board overturn *Oakwood* and return to the rule of *Sturgis* in its request for review of the Regional Director's administrative dismissal of its petition seeking to represent a unit of all sheet metal workers employed by Miller & Anderson, Inc. and/or Tradesmen International as either single employers or joint employers on all job sites in Franklin County, Pennsylvania.

We granted review to consider the important issue raised . . . . Following our grant of review, we issued a Notice and Invitation to File Briefs ("NIFB"). The NIFB invited the parties and interested amici to address one or more of the following questions:

1. How, if at all, have the Section 7 rights of employees in alternative work arrangements, including temporary employees, part-time employees and other contingent workers, been affected by the Board's decision in *Oakwood Care Center*, 343 N.L.R.B. 659 (2004), overruling *M.B. Sturgis*, 331 N.L.R.B. 1298 (2000)?

2. Should the Board continue to adhere to the holding of *Oakwood Care Center*, which disallows inclusion of solely employed employees and jointly employed employees in the same unit absent the consent of the employers?

3. If the Board decides not to adhere to *Oakwood Care Center*, should the Board return to the holding of *Sturgis*, which permits units including both solely employed employees and jointly employed employees without the consent of the employers? Alternatively, what principles, apart from those set forth in *Oakwood* and *Sturgis*, should govern this area?

* * *

After carefully considering the briefs of the parties and amici and the views of our dissenting colleague, we conclude that *Sturgis* is more consistent with our statutory charge. Accordingly, we overrule *Oakwood* and return to the holding of *Sturgi*s. Employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer. Instead, we will apply the traditional community of interest factors to decide if such units are appropriate. *Sturgis*, 331 N.L.R.B. at 1308. We also agree with the *Sturgis* Board's clarification that there is no statutory impediment to processing petitions that seek units composed only of the employees supplied to a single user, or that seek units of all the employees of a supplier employer and name only the supplier employer. . . .We remand the case to the Regional Director for further proceedings consistent with this Decision.

II. OVERVIEW OF PRECEDENT

A. Board Precedent Prior to Sturgis

A review of Board precedent demonstrates that units combining employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer are not novel. In the early years of the Act's administration and continuing for 4 decades, the Board routinely found units of the employees of a single employer appropriate, regardless of whether some of those employees were jointly employed by other employers. The Board used its traditional community of interest test to decide whether such units were appropriate. Significantly, the Board identified no statutory impediment to such units, and the issue of employer consent was neither raised nor discussed.

Thus, in the 1940's, the Board included employees who worked for concessionaires in a unit of the employees of the retail department store where the concessions were located. . . . Although these concessionaires operated whole departments, the Board included the employees in these departments in the unit with the solely employed department store employees where the evidence demonstrated that the department store possessed sufficient control over the former to be deemed their employer, and where those employees shared a community of interest with the store's solely employed employees. On the other hand, the Board excluded employees in the departments operated by the concessionaires pursuant to lease or similarly-styled arrangements if they were solely employed by the concessionaires. In these cases, the Board noted that they did not share """"sufficient interests" with the employees in the other departments to be joined for collective bargaining. . . . In the 1950s, the Board continued to include the employees in the leased departments in units with the store's employees. . . .

In the 1960s, the Board recognized that control over employees in leased departments may be shared between user and supplier employers and, hence, the employees may be jointly employed. . . . With this shared employment relationship, the Board continued to sanction units combining solely employed department store employees with jointly employed employees working in the leased departments, applying the community of interest test to decide whether jointly employed employees should be included in the unit. . . .

In 1969, the [Sixth Circuit] rejected an employer's challenge to a storewide unit that included jointly employed employees supplied by several employers in a unit with Kresge's employees. *S. S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969), *enfg. in relevant part*, *S. S. Kresge Co.*, 169 N.L.R.B. 442 (1968). The employer contended that "to compel unwilling employers to bargain as joint employers will disrupt the collective bargaining process because each licensee may have independent ideas about appropriate labor policy." . . . The court specifically rejected this contention, relying on a similar case from the [Ninth Circuit] which rejected an employer's contention that a userwide (storewide) unit would have a "highly disruptive effect upon the store's operation, [and] will prejudice the licensees and not produce sound and stable collective bargaining relationships." *See Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 531 (9th Cir. 1968). The *Gallenkamp* court also had rejected the employer's contention that the jointly employed employees of one the licensees "lack[ed] a sufficient community of interest" with the store employees to be included in the unit. . . .

In short, as of the end of the 1960s, no Board or court decision had barred, absent employer consent, units combining solely employed employees and jointly employed employees. To the contrary, the Board and the courts perceived no statutory impediments to units combining solely employed employees and jointly employed employees. Inclusion of the jointly employed employees was subject only to the Board's traditional community of interest standards.

During the next 2 decades, the Board continued to find appropriate collective bargaining units that combined employees solely employed by a single user employer and employees jointly employed by that same user employer and a supplier employer, provided the employees shared a community of interest under the Board's traditional test for determining unit appropriateness. . . .

Similarly, [one court] found no impediment to bargaining in units of these mixed groups of employees absent employer consent. Thus, in *NLRB v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1265 (7th Cir. 1987), the court found that a user employer, Classic, was not prejudiced by the inclusion—in a unit with Classic's solely employed employees—of the part-time employees supplied to it by Western Temporary Services ("Western") whom Classic jointly employed (along with Western).

However, the Board's treatment of units combining jointly employed and solely employed user employees abruptly changed in *Lee Hospital*, 300 N.L.R.B. 947 (1990), without any explanation or even so much as an acknowledgement from the Board that it was breaking with precedent. The issue arose there in a convoluted manner. The petitioner sought a unit limited to certified registered nurse anesthetists (CRNAs) who worked in a department operated by Anesthesiology Associates, Inc. (AAI) for the hospital. The Regional Director found that CRNAs did not constitute an appropriate unit separate from other hospital professionals, because under the then applicable "disparity of interest" test applied to health care institutions, the CRNAs possessed no sharper than

usual differences from the other professionals employed by the hospital. Accordingly, the Regional Director dismissed the petition. The petitioner sought review of this decision arguing, among other things, that the CRNAs were jointly employed by Lee Hospital and AAI, and that this joint employer relationship further evidenced a disparity of interest between the CRNAs and the other hospital professionals who were not jointly employed.

On review, the Board, unlike the Regional Director, concluded that the joint employer issue had to be resolved to determine whether a separate CRNA unit was appropriate. This was so because, according to the Board, "as a general rule, the Board does not include employees in the same unit if they do not have the same employer, absent employer consent[.] Thus, if AAI is a joint employer, the CRNAs could be included in the unit with other professionals employed by Lee Hospital only with the hospital's consent[,] and [i]t is clear that Lee Hospital does not consent to such an arrangement." . . .

In announcing this "general rule," however, *Lee Hospital* entirely ignored the Board's routine practice of finding appropriate units that combined employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer. *Lee Hospital* also failed to offer any rationale in support of its supposed general rule. Instead, it simply cited in a footnote . . . a single case--*Greenhoot, Inc.*, 205 NLRB 250 (1973)—in support of the supposed general rule.

The Board's decision in *Greenhoot*, however, had left undisturbed—indeed it had said nothing about—the Board's long-standing practice of finding appropriate units that combined employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer absent employer consent. Instead, *Greenhoot* addressed the entirely different situation where a union seeks to represent a unit of employees who perform work for, and who are employed by, different user employers.

Subsequently, the Board applied the "rule" of *Lee Hospital* to prohibit any unit that would combine jointly employed employees with solely employed employees of one of the joint employers, absent consent of both employers. . . . These cases applying *Lee Hospital* did not discuss, explain, or rationalize the "rule."

B. Sturgis

A decade later, the Board reexamined *Lee Hospital* in *Sturgis*. The Regional Director . . . had issued a Decision and Direction of Election in *M. B. Sturgis, Inc.*, Case 14-RC-11572, in which he found appropriate a petitioned-for unit consisting of all employees employed by M. B. Sturgis, with the exception of 10-15 "temporary" employees used by Sturgis and supplied by Interim, Inc. The Regional Director found that the temporary employees were jointly employed by Sturgis and Interim, but that under *Lee Hospital*, they could not be included in the same unit with employees employed solely by Sturgis absent the consent of both Sturgis and Interim. . . .

On review, the Board concluded that *Lee Hospital* had improperly extended the multi-employer analysis in *Greenhoot* to situations where a single user employer obtains employees from a supplier employer and a union is seeking to represent both those jointly employed employees and the user's solely employed employees in a single unit. The Board rejected the "faulty logic" of *Lee Hospital* that a user employer and a supplier employer—both of which employ employees who perform work

on behalf of the same user employer pursuant to the user's arrangement with the supplier—are equivalent to the completely independent user employers in multi-employer bargaining units. . . . The Board found that employer consent is not required for a unit combining the employees solely employed by a user employer and the employees jointly employed by that same user employer and a supplier employer, because such a unit is an "employer unit" given that all the employees in such a unit perform work for the user employer and all are employed by the user employer. . . . The Board held that it would apply traditional community of interest factors to decide if such units are appropriate. . . . Accordingly, the Board remanded the cases to the Regional Directors to decide the unit questions without regard to the restriction imposed by *Lee Hospital*. . . .

C. Oakwood

Four years later, however, the Board changed course. In *Oakwood*, the Regional Director . . . had issued a Decision and Direction of Election, in which he found appropriate a petitioned-for unit of nonprofessional employees at *Oakwood*'s residential care facility. . . . The petitioned-for unit included both the employees who were solely employed by *Oakwood* and the employees who were jointly employed by *Oakwood* and its supplier employer, a personnel staffing agency. The parties stipulated that under *Sturgis*, the petitioned-for unit of the employees solely employed by *Oakwood* and the jointly employed supplier employees (who wore identification tags that were issued by *Oakwood* and that identified them as employees of *Oakwood*'s facility) was appropriate. However, *Oakwood* urged the Board to reverse *Sturgis*, contending that it was wrongly decided. . . .

After granting review, the Board concluded that *Sturgis* was misguided both as a matter of statutory interpretation and sound national labor policy. . . . The Board concluded that Congress had not authorized the Board to direct elections in units encompassing the employees of more than one employer, and that the bargaining structure contemplated by *Sturgis* gives rise to significant conflicts among the various employers and groups of employees participating in the process. . . .

III. DISCUSSION

With the foregoing review of the Board's and the courts' historical treatment of combined units of jointly employed and solely employed employees in mind, we turn to our own analysis of the issue. We begin, as we must, with the statute itself. Section 1 of the Act sets forth the Congressional findings that the denial by some employers of the right of employees to organize and bargain collectively and the inequality of bargaining power between employers and employees, who do not possess full freedom of association, lead to industrial strife that adversely affects commerce. Congress therefore declared it to be the policy of the United States to mitigate or eliminate those adverse effects by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. In short, the central purpose of the Act is "to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations." *American Hospital Assn. v. NLRB*, 499 U.S. 606, 609 (1991). Thus, Section 7 . . . grants employees "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[.]" . . .

Section 9 . . . speaks to the implementation of employees' right to bargain collectively through representatives of their own choosing. Section 9(a) thus provides that representatives "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]" . . . And Section 9(b) relevantly provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof[.]" . . . But neither Section, nor any other portion of Section 9 or the Act itself, explicitly addresses whether the Board may find appropriate a unit that combines employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer.co_tablefootnoteblock_15_1

That circumstance establishes two important foundations for our consideration of the employer-consent issue. First, the Act does not compel *Oakwood*'s holding that bargaining units combining solely employed and jointly employed employees are appropriate only with the consent of the user and supplier employers. Second, precisely because the Act does not dictate a particular rule, we may find that another rule is not only a permissible interpretation of the statute, but also that it better serves the purposes of the Act. For the reasons explained below, we find that the *Sturgis* rule, not requiring employer consent to units combining jointly employed and solely employed employees of a single user employer, meets both of those criteria.

A. Sturgis Is Consistent With Section 9(b)

The "exact limits of the Board's powers" under Section 9 and "the precise meaning" of the term "employer unit" are not defined by the statute. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941). Notably, however, the statutory definition of the terms "employer" and "employee" . . . are very broad, and, as described, Congress's "statutory command" to the Board, in deciding whether a particular bargaining unit is appropriate, is "to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act[.]" [*Gallenkamp Stores Co. v. NLRB*]. In that context, we are persuaded that a unit combining employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer logically falls within the ambit of a 9(b) employer unit. All the employees in such a unit are performing work for the user employer and are employed within the meaning of the common law by the user employer. Thus, the user employer and the supplier employer are joint employers of the employees referred by the supplier to the user for the latter's use.[17] The employees solely employed by the user employer likewise plainly perform work for the user employer and are employed by the user within the meaning of the common law. In sum, a *Sturgis* unit comprises employees who, working side by side, are part of a common enterprise.

As *Sturgis* explained,

That a unit of all of the user's employees, both those solely employed by the user and those jointly employed by the user and the supplier, is an " "employer unit" within the meaning of Section 9(b), is logical and consistent with precedent. The scope of a bargaining unit is delineated by the work being performed for a particular employer. In a unit combining the user employer's solely employed employees with those jointly employed by it and a supplier employer, all of the work is

being performed for the user employer. Further, all of the employees in the unit are employed, either solely or jointly, by the user employer. Thus, it follows that a unit of employees performing work for one user employer is an "employer unit" for purposes of Section 9(b).

331 N.L.R.B. at 1304-1305.

The restrictive view that the *Oakwood* Board and our dissenting colleague place on Section 9(b) is based on the erroneous conception that bargaining in a *Sturgis* unit constitutes multi-employer bargaining, which requires the consent of all parties. However, in the traditional multi-employer bargaining situation, the employers are entirely independent businesses, with nothing in common except that they operate in the same industry. They are often in competition for work with each other, operate at separate locations on different work projects, and hire their own employees. Multi-employer bargaining units are created without regard for any preexisting community of interest among the employees of the various separate employers. In fact, the Board developed the consent requirement in such cases precisely because the employers at issue were physically and economically separate from each other, their operations were not intermingled, and their employees were not jointly controlled.

In multi-employer bargaining, the unrelated employers on their own initiative decide to join an employer association and bargain through a mutually selected agent to match union strength and to avoid the competitive disadvantages resulting from nonuniform contractual terms. As an agency relationship cannot be compelled, multi-employer bargaining is voluntary in nature; unions may not coerce employers into joining associations which negotiate labor contracts on behalf of their members. . . . Indeed, by conceding that employer consent is not required when a petition names two employers and seeks a unit composed of the employees jointly employed by the two employers, *Oakwood* itself recognized that a bargaining unit involving more than one employer is not ipso facto a "multi-employer bargaining unit."

There plainly is a distinction of substance between a *Sturgis* unit and a multi-employer bargaining unit. Put simply, as shown, in a *Sturgis* unit, all of the employees are employed by the user employer. . . . After all, the employees who are solely employed by the user employer share an employer (the user employer) with the contingent employees who are jointly employed by that same user employer and a supplier employer. Thus, a *Sturgis* unit fits comfortably within 9(b)'s sanctioning of an "employer unit." By contrast, although a multi-employer bargaining unit also involves more than one employer, there is no common user employer for all the employees in such a unit.

The legislative history relied on in *Oakwood*, which indicates that "Congress included the phrase 'or subdivision thereof' [in Section 9(b)] to authorize other units 'not as broad as 'employer unit,' yet not necessarily coincident with the phrases 'craft unit' or 'plant unit,"' does not persuade us that a single user employer unit is inappropriate. That Congress sought to authorize the Board to find appropriate employer subunits hardly establishes that Congress sought to disallow units of employees of a user employer combined with employees who the user jointly employs with a supplier. Indeed, our dissenting colleague, like the *Oakwood* majority, cites no legislative history expressing disapproval of such units. The only concern expressed by either the Wagner Act Congress or the Taft-Hartley Congress with respect to bargaining units that included more than one employer was focused on industrywide or anticompetitive bargaining units and on multiple-worksite situations.

Tradesmen, several amici, and our dissenting colleague nevertheless contend that the Board is precluded from returning to *Sturgis*, relying on the following single phrase from Section 9(b) of the Act to support their argument:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, *the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof*[.]

. . . Citing *Oakwood*, they reason that because the broadest permissible unit category listed in Section 9(b) is the ""employer unit," with each of the other delineated types of appropriate units representing subgroups of the work force of an employer, "the text of the Act reflects that Congress has not authorized the Board to direct elections in units encompassing the employees of more than one employer.". . .

However, the proponents of this argument put more weight on those few words than they can reasonably carry. As we have explained, given the broad definition of "employer" and "employee" in Sections 2(2) and 2(3) of the Act, along with our statutory charge to afford employees "the fullest freedom" in exercising their right to bargain collectively, a combined unit of employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer does not fall outside the ambit of a Section 9(b) "employer unit," because all work is performed for the user employer and all employees are employed, either solely, or jointly, by the user employer. And, as we explain below, finding such a unit to be appropriate is responsive to Section 9(b)'s statutory command and effectuates fundamental policies of the Act. Accordingly, we conclude that the Act does not preclude us from returning to *Sturgis*.

B. Sturgis Effectuates Fundamental Policies of the Act that Oakwood Frustrates

Sturgis is manifestly more responsive than *Oakwood* to Section 9(b)'s ""statutory command" to the Board, in deciding whether a petitioned-for bargaining unit is appropriate, "'to assure to employees the fullest freedom in exercising the rights guaranteed' by th[e] Act[.]" [*Gallenkamp Stores Co. v. NLRB*]. The Board has recognized that "[a] key aspect of the right to 'self-organization' is the right to draw the boundaries of that organization--to choose whom to include and whom to exclude." . . . The *Sturgis* approach honors that principle because it does not require employees to obtain employer permission before they may organize in their desired unit. Nor does *Sturgis* mandate any particular bargaining unit for the contingent employees (who are jointly employed by a user employer and a supplier employer) and the employees solely employed by that same user employer. Rather, *Sturgis* leaves the employees free to choose the unit they wish to organize, provided their desired unit is appropriate under the Board's traditional test for determining unit appropriateness. Thus, *Sturgis* permits the jointly employed contingent employees to organize in bargaining units with their coworkers who are solely employed by the user employer if they share the requisite community of interest, while also leaving both groups free to organize separately if they would prefer to do so.

In contrast, *Oakwood* denies employees in an otherwise appropriate unit full freedom of association. Thus, even if the jointly employed employees and their coworkers who are solely employed by the user employer wish to be represented for purposes of collective bargaining in the same unit, and even if both groups share a community of interest with one another, *Oakwood*

prevents them from so organizing unless the employers consent. Requiring employees to obtain employer permission to organize in such a unit is surely not what Congress envisioned when it instructed the Board, in deciding whether a particular bargaining unit is appropriate, "to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act." 29 U.S.C. §159(b). In fact, by requiring employer consent to an otherwise appropriate bargaining unit desired by employees, *Oakwood* has upended the Section 9(b) mandate and allowed employers to shape their ideal bargaining unit, which is precisely the opposite of what Congress intended.

Oakwood also potentially limits the contingent employees' opportunity for workplace representation. Under *Oakwood*, the contingent employees cannot organize in the same unit as the employees solely employed by the user employer unless the user and supplier employers consent. Some amici argue that *Oakwood* does not deprive the contingent employees of their Section 7 rights to organize because a union does not need employer consent if it files a petition that names just the supplier employer and seeks a unit of just the supplier employees or if it files a petition that names both the user and supplier employers and seeks a unit limited to the jointly employed employees. However, *Oakwood* would appear to deny employees and unions the first option in cases where the supplier employer establishes that the petitioned-for employees are jointly employed by a user employer. . . . Moreover, many supplier employers do not just serve one client; rather they serve many clients simultaneously, and accordingly, the supplier employees may be scattered among various locations. Given their isolation from one another, those employees may face near-insurmountable challenges in attempting to organize, and even if they do, it may prove extremely difficult for them to have their collective voice heard by their referring employer. As for the second option, there may be no union that wishes to name the user and supplier employers on a petition that seeks to represent a unit limited to the jointly employed contingent employees.

In any event, limiting the contingent employees to these options, by definition, deprives them of the full ability to associate for collective bargaining purposes with their coworkers who are solely employed by the user employer. It also deprives the solely employed employees of their full ability to associate with their contingent coworkers. And . . . it dilutes the bargaining power of both groups. In short, *Oakwood*'s interjection of a consent requirement in workplaces utilizing contingent workers creates an obstacle to workers' freedom to organize and bargain collectively as they see fit even when the contingent workers share a broad community of interest with the user's solely employed employees they work alongside.

Sturgis is also more consistent with the premise upon which national labor policy is based, because it permits employees in an otherwise appropriate unit to pool their economic strength and act through a union freely chosen by the majority so that they can effectively bargain for improvements in their wages, hours and working conditions. *See NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967) (our national labor policy "has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions."). . . . On the other hand, by requiring the two groups of employees to engage in parallel organizing drives and then parallel bargaining relationships, despite their shared community of interest and desire to bargain in a single unit, the *Oakwood* approach diminishes the bargaining power of both the employees solely employed by the user employer and the employees jointly employed by that same user employer and a supplier employer.

These deleterious effects of the *Oakwood* rule requiring employer consent are all the more troubling

because of changes in the American economy over the last several decades. [The Board describes the modern fragmented workforce, which it had previously described in *Browning Ferris (BFI)*, 362 N.L.R.B. No. 186 (2015), a case initially overruled by the now-vacated decision, *Hy-Brand Industrial Contractor's*, LTD., 365 N.L.R.B. No. 156 (Dec. 14, 2017), judgment vacated by *Hy-Brand Industrial Contractor's*, LTD., 366 N.L.R.B. No. 26 (Feb. 26, 2018).]

In *BFI*, we concluded that given our "responsibility to adapt the Act to the changing patterns of industrial life," this change in the nature of the workforce was reason enough to revisit the Board's then current joint-employer standard. . . . Just as was the case with respect to that standard, *Oakwood* imposes additional requirements that are disconnected from the reality of today's workforce and are not compelled by the Act. We correspondingly conclude that to fully protect employee rights, the Board should return to the standard articulated in *Sturgis*.

C. The Policy Arguments Advanced by Sturgis' Opponents Are Unpersuasive

Tradesmen, several amici, and our dissenting colleague also argue that returning to *Sturgis* would be unwise as a policy matter because it would hinder meaningful bargaining, threaten labor peace, and harm employee rights. They argue that this is so because *Sturgis* permits a bargaining structure that allegedly gives rise to significant conflicts both among the various employers and among the groups of employees participating in the process, thereby making agreement much less likely and increasing the chances for labor strife.

However, the specter of conflicts posited by *Sturgis*' opponents did not materialize during the many decades before *Sturgis* that the Board had "routinely found units of the employees of a single employer appropriate, regardless of whether some of those employees were jointly employed by other employers." . . . And *Sturgis*' opponents do not demonstrate that those problems materialized in the years between *Sturgis* and *Oakwood*.

Moreover, the amici and our dissenting colleague fail to show that collective bargaining involving a *Sturgis* unit is significantly more complicated than if the jointly and solely employed employees were in separate bargaining units, as envisioned by *Oakwood*. . . .

Accordingly, the claim that *Sturgis* gives rise to an unworkable bargaining structure—because there may be disputes on the employer side of the table over who has the responsibility to bargain over or pay for certain items—is unconvincing, because the potential for such disputes could be said to exist in every case involving joint employer bargaining, which has long been sanctioned by the Board and the courts. After all, in every joint employer bargaining case, more than one employer must sit at a bargaining table and bargain with the union that represents the unit employees.

Not surprisingly, the appellate courts have also rejected claims that inclusion of jointly employed employees in a unit of solely employed employees over the objections of one or more of the joint employers is inimical to effective collective bargaining. For example, as noted, in *S.S. Kresge Co. v. NLRB*, the Sixth Circuit rejected the claim that "to compel unwilling employers to bargain as joint-employers will disrupt the collective bargaining process" because each of the joint employers may have independent ideas about appropriate labor policy. . . . The court explained: "Whether [this] asserted practical difficult[y] will occur is speculative." The court also agreed with the Ninth Circuit that just as the different entities have managed to resolve any differences between them in agreeing to do business with one another, so too should they be able to resolve any differences between them

when it comes to bargaining. . . .

As for employee interests, to the extent that the user and supplier employers are unable or unwilling to give both the solely employed and the jointly employed employees everything they want, tradeoffs may have to be made. But the same would be true regardless of whether the bargaining takes place in two parallel units or one *Sturgis* combined unit. And, as *Sturgis* noted, "Even in units composed only of solely employed employees, it is common for groups of employees to have differing, even competing, interests. Unions and employers are routinely called upon to handle such differences, and do so successfully.". . . In *S.S. Kresge Co. v. NLRB*, the Sixth Circuit rejected a similar claim that the rights of the licensees' employees would be impaired if they were included in the same unit as the employees solely employed by Kresge because the solely employed employees would outnumber the others and therefore dominate union policy. . . . The court explained:

There is the possibility that the employees in the departments operated by Kresge will dominate union policy. This, however, is a problem which is germane to all units encompassing different departments with divergent interests. Indeed, the same problem could arise if the appropriate unit consisted solely of Kresge employees, because employees in larger Kresge departments could impose their decisions on employees in smaller departments. Such a result does not mean that the unit is inappropriate, particularly when, as in the present case, there is a sufficient community of interest among the employees in the unit to suggest the problem will not be serious if it does occur.

Contrary to amici, *Sturgis* does not encourage a tyranny of the majority over minority interests. Under [*Sturgis*], the Board will not find a combined unit appropriate for the purposes of collective bargaining unless the two groups share a community of interest; moreover, by virtue of the union's status as exclusive representative of the unit, the union has a duty to fairly and in good faith represent the interests of *all* the unit employees, including in collective bargaining. See generally *Emporium Capwell Co. v. NLRB*, 420 U.S. 50, 64 (1975); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

Nor are we persuaded by the other policy arguments opposing a return to *Sturgis*. For example, some amici argue that the Board would harm contingent workers and the economy as a whole if it were to return to *Sturgis*. They reason that if the Board were to overturn *Oakwood* and return to *Sturgis*, it would discourage employers from entering into, or maintaining, alternative staffing arrangements because user employers will wish to avoid the costs, uncertainty and inherent difficulties presented by the prospect of bargaining in *Sturgis* units. But this employer wish runs counter to the Act's stated policy of encouraging the practice of collective bargaining. In any event, *Sturgis* leaves employers free to enter into, or maintain, such arrangements. In other words, we have decided to return to *Sturgis*, not to prevent employers from entering into, or maintaining user-supplier arrangements, but rather to better effectuate the policies of the Act if the employees affected by such arrangements choose to exercise their Section 7 rights.

The Chamber of Commerce . . . cautions that overturning *Oakwood* and returning to *Sturgis* would be bad for unions seeking to organize just the employees solely employed by the user employer, because "employers may use *Sturgis* as a weapon to dilute a union's support" and to preclude employees solely employed by a user employer "from being represented at all." The Chamber adds, "If the temporary [supplier] employees outnumber the employees solely employed by the user, this possibility may well become likely." In our view, rather than undermining the case for returning to *Sturgis*, the suggestion that employers might choose which positions to take regarding the inclusion of the supplier employees based solely on tactical considerations relating to the election, contradicts

their claims that combined units hinder collective bargaining, foster labor strife, and undermine employee rights.

Nor, contrary to the claims of some amici and our dissenting colleague, can it fairly be said that returning to *Sturgis* would undermine Section 8(b)'s prohibitions. For example, nothing in *Sturgis* permits a union in any way to restrain or coerce an employer in the selection of his collective bargaining representative or grievance adjustor. Nothing in *Sturgis* permits a union to strike or to threaten, coerce, or restrain an employer to join an employer organization. Nothing in *Sturgis* forces an employer to bargain with a labor organization before it has been certified. And nothing in *Sturgis* eliminates the prohibition on secondary boycott activity. . . .

D. Response to the Dissent

Our dissenting colleague offers both policy arguments and statutory arguments against a return to *Sturgis*, but, for reasons already suggested, we are not persuaded.

We have explained that our interpretation of the Act is consistent with its text and supportive of its policies. Our dissenting colleague does not argue, nor could he, that Congress has spoken directly to the issue in this case. Instead, the dissent repeatedly--but mistakenly--characterizes the bargaining that takes place in a *Sturgis* unit as "multi-employer/non-employer bargaining." As discussed above, it is not "multi-employer" bargaining because all the employees in a *Sturgis* unit perform work for the user employer and all the employees are employed (either solely or jointly) by the user employer. By contrast, there is no common user employer for all the employees in a multi-employer bargaining unit.

The dissent's contention that under *Sturgis*, an employer is required to bargain with respect to non-employees—in contravention of Section 8(a)(5)—is likewise mistaken. As explained above, in a *Sturgis* unit, each employer is obligated to bargain only over the employees with whom it has an employment relationship (and only with respect to such terms and conditions which it possesses the authority to control). [*Sturgis*]. Accordingly, no employer bargains regarding employees it does not employ, and so our colleague's use of the term "non-employer" bargaining is inaccurate. To the extent that multiple employers will be required, as a practical matter, to cooperate or coordinate in bargaining, that is a function of the freely chosen business relationship between user and supplier employers that defines all joint-employer situations.

Contrary to our dissenting colleague's suggestion, we are not, by returning to *Sturgis*, abdicating our responsibility to carefully review and make an appropriate bargaining unit determination in each case. As the *Sturgis* Board explained, "By our decision today, we do not suggest that every unit sought by a petitioner, which combines jointly employed and solely employed employees of a single user employer, will necessarily be found appropriate. As in the Board's pre-*Greenhoot* cases, application of our community of interest test may not always result in jointly employed employees being included in units with solely employed employees." . . . . The Board continued to carefully examine the community of interest factors in determining the appropriateness of petitioned-for units while *Sturgis* was in effect. For example, as the Chamber of Commerce notes, in the *Sturgis* governed case of *Outokumpu Copper Franklin, Inc.*, the Board rejected the unit sought by the petitioning union on community-of-interest grounds. 334 NLRB 263, 263-264 (2001). And, as our order in this case makes clear, no election can be conducted in the combined unit sought by the petitioner here unless, among other things, it is established that the employees supplied by

Tradesmen to Miller & Anderson (who are allegedly jointly employed by both entities) share a community of interest with the employees solely employed by Miller & Anderson.

Our dissenting colleague is mistaken in asserting that the return to *Sturgis*, coupled with *BFI*'s restatement of the joint-employer standard, somehow creates an unprecedented situation. In *BFI*, the Board returned to its traditional test, endorsed by the Third Circuit. . . . *BFI* merely represents a return to the Board's "earlier reliance on reserved control and indirect control as indicia of joint-employer status." . . . Indeed, *Sturgis* itself cited several cases that relied on such factors. . . . Before the Board's restrictive joint-employer decisions of 1984 (overruled in *BFI*) and before 1990's *Lee Hospital* decision, the Board followed the same approach we endorse today: a broad definition of joint employment and a practice of including jointly-employed and solely-employed employees of a single user employer in the same bargaining unit, where they shared a community of interest. There is no evidence of destabilized collective bargaining during that long period. In any event, for the reasons explained here and in *BFI*, both rules are based on permissible constructions of the Act and effectuate the Act's policies.

IV. CONCLUSION

We hold today that *Sturgis* is more consistent with our statutory charge than *Oakwood*. Accordingly, we overrule *Oakwood* and return to the holding of *Sturgis*. Employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer. Instead, we will apply the traditional community of interest factors to decide if such units are appropriate. *Sturgis*, 331 N.L.R.B. at 1308. We likewise agree with the *Sturgis* Board's sanctioning of units of the employees employed by a supplier employer, provided the units are otherwise appropriate. Ibid.

Insert the following notes immediately after Miller & Anderson:

Page 508, delete notes 1 through 4 and add new note 1. In *Miller & Anderson*, the Obama Board overturned the Bush II Board's decision in *H.S. Care LLC (Oakwood Care Center)*, 343 N.L.R.B. 659 (2004), which itself had overturned the Clinton Board's decision in *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000) ("*Sturgis*"), which had overturn the Bush I Board's decision in *Lee Hospital*, 300 N.L.R.B. 947 (1990). The Board's decisions in *Miller & Anderson*, and *Sturgis*, stand for the proposition that the Board will certify bargaining units that contain both solely and jointly employed employees without the employer's consent. This is a return to the Board's normal rule that employer consent is not required for bargaining-unit certification. *See, e.g., S.S. Kresge Co.*, 169 N.L.R.B. 442 (1968), *enf'd*. 416 F.2d 1225 (6th Cir. 1969). Which is the better rule for deciding how and whether leased employees should be included in a bargaining unit? Do permanent and leased employees share a community of interest? Is there another circumstance under the NLRA in which the employer's permission is needed before a group of employees may be included in a bargaining unit?

Page 508, add new note 2. Why do pro-business Boards tend to favor employer consent in these circumstances and more union-friendly Boards tend to favor leaving the employer out of the decision? Could it be that the *Sturgis* rule facilitated organizing temporary and contingent workers?

Page 508, add new note 3. *Miller & Anderson* and *Oakwood* are examples of Board oscillation.

Given the composition of the new Trump Board (three Republicans and two Democrats), is this rule likely to flip-flop once again?

Page 529, add a new note 6. In public institutes of higher education, full-time, tenure-track faculty are usually not in the same bargaining unit as part-time, adjunct faculty, on the theory that the employees lack sufficient community of interest. *See, e.g.*, *Tompkins Cortland Community College Adjuncts Ass'n*, 50 PERB ¶4001 (NY PERB, Feb. 8, 2017). For a contrary example holding that over-fragmentation concerns require one unit for both types of employees, *see Employees of Beaver County Community College*, 47 Pennsylvania Pub. Employee Rep. ¶ 78 (Pa. Lab. Rel. Bd., Feb. 16, 2016).

Page 534, add a new note 3. On the other hand, it is easier than normal to decertify unions covered by Missouri's state Constitutional right to bargain collectively. *St. Louis Police Leadership Org. v. City of St. Louis*, 484 S.W.3d 882 (Mo.App. 2016), involved a decertification process an employer set up that, among other things, had no provisions for a union to challenge decertification and allowed decertification via petition without any actual voting. The court held this system did not violate the state Constitutional right to bargain collectively or any other legal rule.

Page 529, add a new note 6. Sometimes, small units are unavoidable. Indeed, the Ohio labor agency recently held that a bargaining unit could have literally just a single member (here, a city Records Clerk). *Ohio Labor Council Inc. v. City of Maple Heights*, 34 Ohio Pub. Employee Rep. ¶ 100 (SERB 2017). It rejected the employer's argument that the statute's use of the term "employees" necessarily required more than one employee in a bargaining unit.

CHAPTER 8

ORGANIZING WITHOUT AN ELECTION

Page 555, add an additional citation after *Traction Wholesale Center Co.*: *see also Novelis Corp. v. NLRB*, 885 F.3d 100 (2d Cir. 2018) (reversing bargaining order because Board did not account for effects of other Board-ordered remedies, including that the employer posed and publicly read to employees a notice that it had engaged in unfair labor practices, and two years had elapsed).

Page 579, add the following citation to the end of the Note that begins on the previous page. *See also Ohlendorf v. UFCW Local 876*, 883 F.3d 636 (6th Cir. 2018) (holding § 302 does not create a private right of action).

Page 600, add a new note between notes 1 and 2. The day before his NLRB term ended, Member Hirozawa issued a concurrence endorsing Professor Morris's position in *Children's Hospital & Research Center of Oakland*, 364 N.L.R.B. No. 114 (Aug. 26, 2016). The case was about whether the employer was required to arbitrate grievances with a union that had been replaced by another union, given that the grievance arose while the first union still enjoyed majority status. The Board answered "yes," reasoning that it was logical to require the employer to arbitrate with the first union because there was no other mechanism to redress violations of the contract between that union and the employer. However, Member Hirozawa would have gone farther, writing that:

> Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees, subject to the provisions of section 9(a)." Section 9(a), in turn, provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . ." The Board's decision in this case explains what the subject-to-Section-9(a) clause means and marshals powerful arguments in support of its interpretation of the statute. That holding alone fully justifies the result in this case.
>
> I think it is also useful, however, to consider what the subject-to-Section-9(a) clause does *not* mean. It does not mean that for an employer to have a duty to bargain with a union on behalf of its employees, the union must be a Section 9(a) exclusive representative. This reading finds ample support in the text of the Act.
>
> First, the Section 8(a)(5) clause at issue here simply says, "subject to the provisions of section 9(a)." It does not say, if such representative is "the representative of the employees as provided in section 9(a)." Clearly, the Wagner Act Congress, which drafted the language of Section 8(a)(5), knew how to impose such a requirement if it so intended. It imposed precisely that requirement, using precisely that language, in a parallel subsection of the same section of the Act, Section 8(a)(3). The absence of such a requirement from Section 8(a)(5) is a strong indication that no such requirement was intended by Congress.

> Second, the Act's statement of the right enforced by Section 8(a)(5) is unencumbered by any requirement of Section 9(a) status. That statement appears, of course, in Section 7: "Employees shall have the right . . . to bargain collectively through representatives of their own choosing . . . ." Again, there is no requirement that the representatives through which employees exercise their right to bargain have attained Section 9(a) status or otherwise demonstrated majority support. In my view, these provisions, in the light they shed on the intended scope of Section 8(a)(5), reinforce the Board's finding of a violation of that section for refusal to bargain with a superseded union, which by definition was no longer a Section 9(a) exclusive representative.

For a full-throated contrary view to that of Member Hirozawa, see the Advice Memo in *Dick's Sporting Goods*, Case 6-CA-34821 (June 22, 2006); *see also* Denial of Appeal in *SCA Tissue North America*, Case 03-CA-132930 (June 5, 2015).

Page 602, insert the following between the two full paragraphs on the page. Following these events, the UAW petitioned for – and won – a union election among the maintenance employees at the Chattanooga plant. Volkswagen opposed the union election on the grounds that more of the plant's employees should have been included in the unit. However, the Obama NLRB rejected Volkswagen's challenge in a decision applying the *Specialty Healthcare* standard discussed in Chapter 7. Volkswagen refused to bargain with the UAW in order to appeal the bargaining unit determination. However, the Trump NLRB then successfully moved the D.C. Circuit to remand the case in light of its decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), which overruled *Specialty Healthcare.*

Page 610, note 3, before the final sentence, add the following. In *Great Futures Charter High School for the Health Sciences and Great Futures Educ. Ass'n*, 43 N.J. Pub. Employee Rep. ¶ 45 (2016), the New Jersey agency, in rejecting the employer's claim that the union had used coercion to obtain representation cards, stated the following:

> Since the Legislature authorized petitions for card check certification as the majority representative in 2005, we have only once ordered an election in addressing a challenge to the validity of authorization cards. *North Bergen Tp*., 35 *NJPER* 244 (¶ 88 2009); aff' d at P.E.R.C. No. 2010-37, 35 NJPER 435 (¶ 143 2009). In *North Bergen Tp*., the Commission upheld a decision by the Director to order an election since the validity of a significant number of authorization cards were called into question by numerous letters from employees to the Director describing threats, promises of benefits, and misleading statements causing them to sign cards. Specifically, ten (10) employees of a unit of forty (40) employees expressed in writing their desire to revoke their authorization cards.

CHAPTER 9

THE DUTY TO BARGAIN COLLECTIVELY

Page 638, end of carryover paragraph. Compare also *Boling v. Public Employees Rel. Bd.*, S242034 (Cal., Aug. 2, 2018). In the case, the mayor of San Diego sponsored a citizens' initiative to eliminate pensions for new municipal employees, and then he rebuffed union demands to meet and confer over the measure. The relevant agency held that San Diego was obliged to bargain with a union of city employees before it could place this initiative on the ballot. The appellate court reversed, holding, among other things, that the initiative was not a *de facto* governing-body-sponsored ballot proposal, and that the mayor's support of the initiative could not be imputed to the city council. Reversing the appellate court, the California Supreme Court held that this matter had to be negotiated. The Court held that the appellate court had given insufficient deference to the state agency, and that it had read the statutory obligation to bargain too narrowly.

Page 654, new paragraph after the first full paragraph. *Worcester School Committee and Educ. Ass'n of Worcester* MUP-10-6005, *aff'd* 43 Mass. Labor Comm. 218 (2017) found that the employer had violated the union's right to information by denying access to an environmental expert the union had designated to conduct testing for polychlorinated biphenyl (PCB) in the schools' exterior calking. The agency affirmed the Hearing Officer's finding that the union's request was relevant and necessary to its bargaining obligations regarding health and safety, noting that an Environmental Protection Agency regulation required removing building materials with PCB levels greater than 50 parts per million. Also, some evidence suggested than in recent years, five teachers had been diagnosed with cancer and an additional two had died of cancer. The agency ordered the employer to allow access to the relevant buildings "at reasonable times, with reasonable notice, and in a reasonable manner."

Page 673, add a new note 5. *Raytheon Network Centric Systems*, 365 NLRB No. 161 (N.L.R.B. 2017) narrowed the definition of what counts as a "unilateral change" in the context of negotiating a new contract after an old one has expired. *Raytheon* overturned *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (N.L.R.B. 2016), which had held that employers could not rely on a past practice of making discretionary changes pursuant to a management rights clause to justify a failure to bargain over additional discretionary changes after a contract expired. *Raytheon* held that the employer did not violate 8(a)(5) by unilaterally modifying medical benefits after a contract expired because it had previously made similar unilateral modifications while previous contracts were in effect. Thus, the employer was not changing the status quo. The majority argued this reversal returned the law to a long-understood, commonsense understanding of what constitutes a "change." The dissent argued that allowing employers to unilaterally change terms of employment during successor contract negotiations over those very terms is impermissible as a policy choice and frustrates the process of collective bargaining. Both the majority and dissent insisted that their positions represented the correct interpretation of *Katz*.

Page 683, end of the first paragraph under Section C. This rule also applies to more mundane matters. The Washington Public Employment Relations Commission (WPERC) held that an employer committed a ULP when it unilaterally discontinued its practice of providing free coffee to correctional employees. This was a mandatory topic of negotiation because it involved working conditions. *King Cnty. Corr. Guild v. King Cnty*., WPERC Case No. 26573-U-14 (May 26, 2016).

Page 693, add a new note 5. New Jersey is unusual in that it uses both rules: the dynamic status quo rule for most public employees, but the static status quo rule for teachers. For an explanation of how this came about, and a court's rejection of the state labor agency's attempt to change from dynamic to static for non-teaching employees, *see In Re County of Atlantic and PBA Local 243*, 445 N.J. Super. 1 (N.J. App. 2016), *aff'd* 230 N.J. 237 (2017).

Page 703, add to the end of the last full paragraph. In Florida, the state Supreme Court interpreted a statute permitting modifying labor contracts in cases of "financial urgency" to require that the employer show that the funds were not available from any other possible reasonable source, and that the parties had completed impasse resolution proceedings and failed to ratify an agreement. The court added that a "financial urgency" is a dire financial condition requiring immediate attention and demanding prompt and decisive action, but not necessarily a financial emergency or bankruptcy. *Headley v. City of Miami*, 215 So.3d 1 (2017).

CHAPTER 10

SUBJECTS INCLUDED IN THE DUTY TO BARGAIN COLLECTIVELY

Page 758, end of the second paragraph. On the other hand, *Int'l B'hood of Teamsters Local 700 v. Illinois Labor Rel. Bd.*, 73 N.E.3d 108 (2017), held that a sheriff's department order stating that its employees may not associate with gang members was a mandatory subject of bargaining.

Page 759, end of the first full paragraph. In contrast, *City of Allentown v. IAFF Local 302*, 157 A.3d 899 (Pa. 2017) held that under Pennsylvania law, the number of firefighters on duty per shift was a mandatory subject of bargaining, not a matter of inherent management prerogative.

Page 759, end of the second full paragraph. *City of Everett v. Int'l Ass'n of Firefighters* (Wash. Pub. Empt' Rel. Comm'n Case No. 127504-U-5, Oct. 3, 2017) used a balancing test and determined that staffing for firefighters was a mandatory subject. The agency noted, however, that in this area, whether a proposal was mandatory or permissive would depend on the facts of individual cases. It explained that the balancing test "does not provide parties with certainty about what topics are mandatory. . . [but] it does effectuate the appropriate balance." If you find this troubling, or at least unclear, consider the alternative of specific statutory lists of negotiable and non-negotiable topics when you read subsection C, *infra*.

Page 762, end of the last full paragraph. Applying a standard "balancing test," the New Hampshire agency held that a school system moving from a "block" schedule to an "A/B" schedule for classes was a mandatory subject of bargaining, rejecting the employer's argument that this should be a matter of educational policy reserved to management. *Sugar River Educ. Ass'n v. Claremont School Dist.*, N.H. PERB, Dec. No. 2016-176 (Case No. E- 0188-2) (July 29, 2016).

Page 769, add to the end of Problem 10.5. *See Fraternal Order of Police, Lodge #7 and City of Chicago (Dept. of Police)*, 34 PERI ¶ 178 (Ill. Lab. Rel. Bd., June 5, 2018) (police body cams); *Matter of Belleville Educ. Ass'n*, 2018 WL 3421392 (N.J. App. July 16, 2018) (audio and video recording devices in schools to help respond to student shooting incidents).

Page 775, add the following as a new Note 1-A before Note 1. As described above in a note to page 77, Iowa amended its public-sector labor statute in 2017. For most public employees, including the employees in *Black Hawk County*, the scope of bargaining is now very severely limited. But the "laundry list" approach continues to apply to public safety employees in Iowa.

Page 820, add the following to note 4.

The Board has continued to adhere to its *Clear Pine Mouldings* standard, with some success in the courts of appeals, although the Board's decisions in this area have also met with harsh criticism. Thus, in *Consolidated Communications v. NLRB*, 837 F. 3d 1 (D.C. Cir. 2016), the D.C. Circuit held that a picketer who grabbed his crotch, said "f**k you," and gave the middle finger did not lose the protection of the Act. The Court stated that while the actions on the picket line were "totally uncalled for and very unpleasant," they could not objectively be perceived "as an implied

threat of the kind that would coerce or intimidate a reasonable [replacement] employee from continuing to report for work." Id. at 12. However, in concurrence, Judge Millett criticized what she viewed as the "too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes." Judge Millett called for the Board to distinguish "zealous expressions of frustration and discontent" from "conduct of a sexually or racially demeaning and degrading nature." She concluded her opinion as follows:

> To be sure, employees' exercise of their statutory rights to oppose employer practices must be vigorously protected, and ample room must be left for powerful and passionate expressions of views in the heated context of a strike. But Board decisions' repeated forbearance of sexually and racially degrading conduct in service of that admirable goal goes too far. After all, the Board is a component of the same United States Government that has fought for decades to root discrimination out of the workplace. Subjecting co-workers and others to abusive treatment that is targeted to their gender, race, or ethnicity is not and should not be a natural byproduct of contentious labor disputes, and it certainly should not be accepted by an arm of the federal government. It is 2016, and "boys will be boys" should be just as forbidden on the picket line as it is on the assembly line.

In *Cooper Tire & Rubber Company v. NLRB*, 866 F.3d 885 (8th Cir. 2017), the Eighth Circuit, while noting that "[t]his court agrees with the concurrence in *Consolidated Communications*" and quoting Judge Millet's opinion at length, upheld a Board ruling that the employer improperly discharged a locked-out employee who yelled several racially derogatory remarks at a van carrying replacement workers that had just crossed a picket line. The court observed that: "While yelling [the employee's] hands were in his pockets; he made no overt physical movements or gestures. There is no evidence that the replacement workers heard [the employee's] statements (though dozens in the crowd did)." The Court then deferred to the Board's conclusion that the picketer's "use of obscene language and gestures and a racial slur, standing alone, did not rise to the level where he forfeited the protection of the Act," citing *Clear Pine Mouldings*. The majority opinion elicited a strong dissent from Judge Beam. It begins: "No employer in America is or can be required to employ a racial bigot."

CHAPTER 11

ECONOMIC WEAPONS AND IMPASSE RESOLUTION

Page 862, end of note 4. Conversely, not all pickets in support of legal strikes are lawful. *See, e.g., Harrison Hills Teachers' Ass'n v. State Emp. Rel. Bd.*, 56 N.E.3d 986 (Oh. App. 2016) (rejecting a constitutional challenge to a provision making it a ULP for s union to induce or encourage any individual in connection with a labor dispute to picket any place of private employment of any public official).

Page 867, add to problem 11.1. Consider here that in the spring of 2018, teachers engaged in state-wide walkouts in West Virginia, Oklahoma, Tennessee, Arizona, and Colorado. These strikes were generally successful, despite the fact that all of these states not only made such strikes illegal but also did not even grant collective bargaining rights to teachers. Thus, the teachers all could have been fired, but they were not. *See* Noam Schreiber, "Can Weak Unions Get Teachers More Money?," May 5, 2018 https://www.nytimes.com/2018/05/05/sunday-review/unions-teachers-money-strike.html?login=smartlock&auth=login-smartlock; Linda Darling-Hammond, "What Teacher Strikes are Really About," April 27, 2018, https://www.cnn.com/2018/04/27/opinions/teacher-strikes-more-than-pay-darling-hammond-opinion/index.html; Cory Turner, "Teacher Walkouts: A State-by-State Guide," April 25, 2018, https://www.npr.org/sections/ed/2018/04/25/602859780/teacher-walkouts-a-state-by-state-guide.

Page 912, end of note 1. For example, *Snohomish County v. Snohomish County Corrections Officers Guild* (Arb. Cavanagh, Case No. 12771-1-15, 2017), an interest arbitration case from Washington state featured fifteen separate contract issues (the union mostly prevailed on wages and health insurance, the employer on the remaining thirteen). The interest arbitration in *Illinois Dept. of State Police and Illinois Troopers Lodge #41, F.O.P.* (Arb. Nielsen, Case No. S-MA-15-347, 2016) involved *twenty-five* issues.

Page 916, second full paragraph, after the cites. *Hennepin County of Paramedics and Hennepin County Medical Center* (Arb. Befort, BMS No. 17PNO203, 2017) (focusing on internal comparables and consistency in ruling for employer); *Capital City Labor Program Supervisory Division and Ingham County* (Arb. Stratton, MERC Case No. L15H0958, 2016) (rejecting internal comparables, because the relevant employees "are not responsible for what the County does with respect to other employee groups," and ruling for the employer).

Page 958, end of note one. The wave of teachers' strikes in the spring of 2018, discussed above in the note for page 867 arguably supports this thesis. Again, these strikes took place in states that not only make such strikes illegal but also do not grant collective bargaining rights to teachers. What lessons should unions, public employers, and policy-makers take from these strikes

Page 959, continuation of note 3, after the sentence ending "the state House did not." Unions backed essentially identical legislation in the summer of 2016, with events playing out the same way (the state House ultimately failed to override the Governor's veto).

Chapter 12

LEGAL CONSTRAINTS ON CONCERTED ACTIVITY: SECONDARY BOYCOTTS, PICKETING, AND HANDBILLING, AND RECOGNITIONAL PICKETING

Page 967, insert the following after the paragraph that ends with *Madsen* and *Hill*. Recently, a union attempted to argue that it was unconstitutional to apply § 8(b)(4) to secondary picketing of government offices, relying on the recent Supreme Court decision in *Reed v. Town of Gilbert*, 153 S.Ct. 2218 (2015) (holding that strict scrutiny applied to ordinance imposing different restrictions on signs intended for different purposes, and striking down sign ordinance). The Ninth Circuit rejected the challenge, writing that "a plain reading of § 8(b)(4)(ii)(B) reflects that the statute regulates conduct rather than content." *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433*, 891 F.3d 1182, 1187 (9th Cir. 2018).

Chapter 13

GRIEVANCE-ARBITRATION

Pages 1063–64, add the following discussion of Deflategate in note 6, immediately before the discussion of *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243 (1977):

In *NFL Mgmt. Council v. NFLPA*, 820 F.3d 527, 541 (2d Cir. 2016), the Second Circuit reversed the district court's decision and reinstated the arbitral award.

> The majority held that Goodell did not exceed his authority as an appellate arbitrator by upholding the suspension on new grounds, namely, Brady's destruction of his cell phone, because "[n]othing in Article 46 [of the Collective Bargaining Agreement (CBA)] limits the authority of the arbitrator to examine or reassess the factual basis for a suspension." The court added that although Commissioner Goodell upheld the suspension on new grounds, he "did not increase the punishment as a consequence of the destruction of the cell phone—the four game suspension was not increased. Rather, the cell phone destruction merely provided further support for the Commissioner's determination that Brady had failed to cooperate, and served as the basis for an adverse inference as to his participation in the scheme to deflate footballs." The court denied the Patriots' and Brady's petition for rehearing en banc.

Anne Marie Lofaso, *Deflategate: What's the Steelworkers Trilogy Got to Do with It?* 6 BERKELEY J. ENTERTAINMENT & SPORTS LAW 48, 56 (2017). Which court's analysis is more persuasive?

Page 1093, end of note 2. Of course, courts vacate some arbitral decisions in the public sector under the traditional, narrow *Steelworkers Trilogy* test. *See, e.g.*, *Lake City Fire & Rescue Ass'n, Local 2288 IAFF v. City of Lake City*, 240 S.3d 128 (Fla.App. 2018) (arbitrator exceeded his authority in reducing penalty where CBA specified that arbitrator couldn't rule on extent of discipline, only on whether employee did what he was accused of); *Civil Service Employees Local 1000 v. Bd. of Trs. of Mount Vernon Pub. Library*, 2018 L.R.R.M. (BNA) 142, 211 (N.Y. Sup. Ct., April 19, 2018) (arbitrator exceeded his authority by ordering a provision on pay parity removed from the CBA, when only issue before him was whether the employer had violated that provision).

Page 1096, end of first full paragraph, add the following. *Cuyahoga Metropolitan Housing Auth. v. Fraternal Order of Police, Ohio Labor Council*, 2018 LLRM (BNA) 100, 705 (Oh.App. March 22, 2018), rejected an argument that an arbitrator reducing a discharge to a suspension violated public policy. A City Housing Authority had fired a police officer for his improper conduct while investigating a suspected drug transaction (including use of excessive force) and for being dishonest during the employer's investigation of the incident. The court held that the arbitrator's award of a sixteen-month, unpaid suspension drew its essence from the contract, and the majority stated that no law barred reinstatement of a police officer who had made dishonest statements during an investigation. A dissent argued that Ohio had a well-defined and dominant public policy favoring an honest police force made up of officers who command the public trust, and reinstating a police officer who has committed acts of dishonesty in his official capacity violated that policy.

Page 1097. **At the end of the problem, delete the current citation and replace with the following:** *See Philadelphia Housing Auth. v. American Federation of State, County and Municipal Employees Council 33*, 16 Pa. 69 (2012); *New York Transit Auth. v. Phillips*, 2018 F.E.P.C (BNA) 125, 430 (April 10, 2018).

CHAPTER 14

INDIVIDUAL WORKERS AND THEIR UNIONS

Page 1143, replace the first paragraph (about local right to work laws) with the following.

You will note that the preceding list includes only states, and no municipalities. But municipalities have also begun to enact right-to-work ordinances, raising the question of whether those ordinances are preempted by the NLRA. The main textual argument in favor of preemption is that NLRA § 14(b) says that the Act does not preempt "State or Territorial" right-to-work laws. But municipalities are neither states nor territories, so their right-to-work laws are preempted by § 8(a)(3) of the Act, which permits the negotiation of union security agreements. Further, proponents of this view argue that Congress generally intended to preempt the entire field of regulation of union security clauses, and that as a result, it accords with probable congressional intent to read § 14(b) narrowly. A district court in Illinois accepted this view in *Int'l Union of Operating Eng'rs, Local 399 v. Village of Lincolnshire*, No. 16-c-2395, 2017 WL 75742 (N.D. Ill. Jan. 7, 2017). That case is currently on appeal.

Conversely, the Sixth Circuit held that local right-to-work laws are permitted under § 14(b) in *United Auto., Aerospace, & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.*, 842 F.3d 407 (6th Cir. 2016). In *Hardin County*, the Court reasoned that § 14(b)'s use of the word "state" includes political subdivisions of the state, relying in part on the text of the statute, and in part on cases suggesting that statutes should be construed in a manner that preserves the traditional ability of states to delegate lawmaking authority to their subdivisions.

If the Seventh Circuit affirms the district court in *Lincolnshire*, it will create a circuit split that will be likely to be resolved by the Supreme Court. If the outcome is that the NLRA does not preempt local right-to-work ordinances, remember that states will still be free to exercise their sovereignty over municipalities to decide whether or not to permit local variation in this area.

Another issue regarding the scope of § 14(b)'s authorization of state right-to-work laws is whether states may exempt workers from paying union hiring hall fees. In *Simms v. Local 1752, Int'l Longshoremen Ass'n*, 838 F.3d 613 (5th Cir. 2016), the Fifth Circuit answered "no."

Page 1143, add the following to the end of the middle paragraph. The Seventh Circuit declined to overrule *Sweeney* in *Int'l Union of Operating Eng'rs Local 139 v. Schimel*, No. 16-3736, 2017 WL 2962896 (7th Cir. July 12, 2017). In addition, a district court in Idaho rejected a similar set of arguments in *Int'l Union of Operating Eng'rs v. Wasden*, 217 F.Supp. 3d 1209 (D. Idaho 2016), and the union plaintiff has filed an appeal in the Ninth Circuit.

Page 1153, add the following sentence before *Abood*. In 2018, the Supreme Court overruled *Abood v. Detroit Board of Education*.

Page 1159, add the following to the end of note 1. For more on this point, see Joseph Slater, *Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?* 96 NEB. L. REV. 62 (2017).

Page 1159, make the material beginning with note 6 and ending after the first paragraph break on page 1162 a new subsection: The Court's Retreat From *Abood*. Delete the first two full paragraphs on page 1162. Then add the following paragraph & new principal case before the third full paragraph.

In 2015, the Supreme Court agreed to re-consider *Abood* in *Friedrichs v. California Teachers' Ass'n*. After oral argument, commentators widely predicted that the Court would vote to overturn *Abood*. However, after Justice Scalia died, the Court announced that was equally divided in *Friedrichs*, meaning that the lower court decision (which applied *Abood*) was affirmed. 136 S.Ct. 1083 (2016).

Mark Janus v. American Federation of State, County, and Municipal Employees, Council 31

138 S. Ct. 2448 (2018)

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

Justice ALITO delivered the opinion of the Court.

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood v. Detroit Bd. of Ed.*, and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). Janus refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." Under his unit's

collective-bargaining agreement, however, he was required to pay an agency fee of $44.58 per month, which would amount to about $535 per year.

In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before but in more recent cases we have recognized that this holding is "something of an anomaly," *Knox v. Service Employees*, and that *Abood* 's "analysis is questionable on several grounds," *Harris*. We have therefore refused to extend *Abood* to situations where it does not squarely control, while leaving for another day the question whether *Abood* should be overruled.

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*."

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth, see, *e.g., Thornhill v. Alabama*. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) We have therefore recognized that a " 'significant impingement on First Amendment rights' " occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences."

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to

be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees.

In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. Even though commercial speech has been thought to enjoy a lesser degree of protection, prior precedent in that area, specifically *United Foods*, had applied what we characterized as "exacting" scrutiny, *Knox*, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed "exacting scrutiny." But we questioned whether that test provides sufficient protection for free speech rights, since "it is apparent that the speech compelled" in agency-fee cases "is not commercial speech."

Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

In *Abood*, the main defense of the agency-fee arrangement was that it served the State's interest in "labor peace." By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.*, at 220–221, 97 S.Ct. 1782. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." And a settlement with one union would be "subject to attack from [a] rival labor organizatio[n]."

We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*'s fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true.

The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members. The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, and about 400,000 are union members. Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago

when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees.

In addition to the promotion of "labor peace," *Abood* cited "the risk of 'free riders'" as justification for agency fees. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs.

Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, "free-rider arguments ... are generally insufficient to overcome First Amendment objections." To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

Those supporting agency fees contend that the situation here is different because unions are statutorily required to "represen[t] the interests of all public employees in the unit," whether or not they are union members. Why might this matter?

We can think of two possible arguments. It might be argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought. Why is this so?

Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union.

In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, and having dues and fees deducted directly from employee wages, The collective-bargaining agreement in this case guarantees a long list of additional privileges.

These benefits greatly outweigh any extra burden imposed by the duty of providing fair

representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members."

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee ... to the collective interests of all employees in the bargaining unit."

In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. Individual nonmembers could be required to pay for that service or could be denied union representation altogether. Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were *not* subject to the duty to represent all employees fairly.

In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. We therefore hold that agency fees cannot be upheld on free-rider grounds.

Implicitly acknowledging the weakness of *Abood* 's own reasoning, proponents of agency fees have come forward with alternative justifications for the decision, and we now address these arguments.

The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees.

As an initial matter, we doubt that the Union—or its members—actually want us to hold that public employees have "*no* [free speech] rights."

It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*. Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* and its progeny would fall. Respondents presumably want none of this, desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. We will not engage in this halfway originalism.

Nor, in any event, does the First Amendment's original meaning support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its historical examples involved limitations on public officials' outside business dealings, not on their speech.

The Union has also failed to show that, even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here. We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees.

The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering*, which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, or if it involved a matter of only private concern. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless "'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.'

First, the *Pickering* framework was developed for use in a very different context—in cases that involve "one employee's speech and its impact on that employee's public responsibilities." This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights.

The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, the dissent denies the obvious.

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different.

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases'

categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood*, a public employer is flatly prohibited from permitting nonmembers to be charged for this speech, but under *Pickering*, the employees' free speech interests could be overcome if a court found that the employer's interests outweighed the employees'.

A similar problem arises with respect to speech that *is* germane to collective bargaining. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls squarely into that category. Under *Abood*, nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer's interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme.

For all these reasons, *Pickering* is a poor fit indeed.

Even if we were to apply some form of *Pickering*, Illinois' agency-fee arrangement would not survive.

Respondents begin by suggesting that union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti, i.e.*, as speech "pursuant to [an employee's] official duties." Many employees, in both the public and private sectors, are paid to write or speak for the purpose of furthering the interests of their employers. There are laws that protect public employees from being compelled to say things that they reasonably believe to be untrue or improper, but in general when public employees are performing their job duties, their speech may be controlled by their employer. Trying to fit union speech into this framework, respondents now suggest that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech.

This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

What is more, if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion. For these reasons, *Garcetti* is totally inapposite here.

Since the union speech paid for by agency fees is not controlled by *Garcetti*, we move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern.

Illinois, like some other States and a number of counties and cities around the country, suffers from severe budget problems.

The Governor, on one side, and public-sector unions, on the other, disagree sharply about what to do about these problems. [W]hen the State offered cost-saving proposals on these issues, the Union countered with very different suggestions. Among other things, it advocated wage and tax increases, cutting spending "to Wall Street financial institutions," and reforms to Illinois' pension and tax systems (such as closing "corporate tax loopholes," "[e]xpanding the base of the state sales tax," and "allowing an income tax that is adjusted in accordance with ability to pay"). To suggest that speech on such matters is not of great public concern—or that it is not directed at the "public square," *post,* at 2495 (KAGAN, J., dissenting)—is to deny reality.

In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. What unions have to say on these matters in the context of collective bargaining is of great public importance.

Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound " 'value and concern to the public.' " We have often recognized that such speech " 'occupies the highest rung of the hierarchy of First Amendment values' " and merits " 'special protection.' "

Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square." For instance, the Union respondent in this case recently filed a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. In short, the union speech at issue in this case is overwhelmingly of substantial public concern.

The only remaining question under *Pickering* is whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests. We have already addressed the state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders.

In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State's "interest in bargaining with an adequately funded exclusive bargaining agent." This was not "the interest *Abood* recognized and protected," and, in any event, it is insufficient.

Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, ample experience, as we have noted, shows that this is questionable.

Especially in light of the more rigorous form of *Pickering* analysis that would apply in this context, the balance tips decisively in favor of the employees' free speech rights.

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*. It does not.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and

consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." We will not overturn a past decision unless there are strong grounds for doing so. But as we have often recognized, *stare decisis* is "'not an inexorable command.'"

Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood* 's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

An important factor in determining whether a precedent should be overruled is the quality of its reasoning. We will summarize, but not repeat, *Harris*'s lengthy discussion of the issue.

Abood went wrong at the start when it concluded that two prior decisions, *Railway Employes v. Hanson*, and *Machinists v. Street*, "appear[ed] to require validation of the agency-shop agreement before [the Court]." Properly understood, those decisions did no such thing. Both cases involved Congress's "*bare authorization* " of *private-sector* union shops under the Railway Labor Act.[24] *Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees.

Abood's unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases. Rather, *Abood* followed *Hanson* and *Street,* which it interpreted as having deferred to "*the legislative assessment* of the important contribution of the union shop to the system of labor relations established by Congress." But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues.

Abood also did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political'" speech. The Court did not dispute that characterization, and in fact conceded that "decisionmaking by a public employer is above all a political process" driven more by policy concerns than economic ones. But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector."

In sum, as detailed in *Harris, Abood* was not well reasoned.

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[24] No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today. We reserved decision on this question in *Communications Workers v. Beck*, and do not resolve it here.

Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question.

Abood's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision. We tried to give the line some definition in *Lehnert*. There, a majority of the Court adopted a three-part test requiring that chargeable expenses (1) be " 'germane' " to collective bargaining, (2) be "justified" by the government's labor-peace and free-rider interests, and (3) not add "significantly" to the burden on free speech, but the Court splintered over the application of this test. That division was not surprising. As the *Lehnert* dissenters aptly observed, each part of the majority's test "involves a substantial judgment call," rendering the test "altogether malleable" and "no[t] principled."

Objecting employees also face a daunting and expensive task if they wish to challenge union chargeability determinations. While *Hudson* requires a union to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," the *Hudson* notice in the present case and in others that have come before us do not begin to permit a nonmember to make such a determination.

In this case, the notice lists categories of expenses and sets out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses. Here are some examples regarding the Union respondent's expenditures:

Category	**Total Expense**	**Chargeable Expense**
Salary and Benefits	$14,718,708	$11,830,230
Office Printing, Supplies, and Advertising	$148,272	$127,959
Postage and Freight	$373,509	$268,107
Telephone	$214,820	$192,721
Convention Expense	$268,855	$268,855

How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures.

The Union respondent argues that challenging its chargeability determinations is not burdensome because the Union pays for the costs of arbitration, but objectors must still pay for the attorneys and experts needed to mount a serious challenge.

Developments since *Abood*, both factual and legal, have also "eroded" the decision's "underpinnings" and left it an outlier among our First Amendment cases.

Abood pinned its result on the "unsupported empirical assumption" that "the principle of exclusive representation in the public sector is dependent on a union or agency shop." But, as already noted, experience has shown otherwise.

It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977.

This ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in 2014 dollars. By 2014, that figure had ballooned to approximately $10,238 per capita. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role.

Abood is also an "anomaly" in our First Amendment jurisprudence, as we recognized in *Harris* and *Knox*. This is not an altogether new observation.

Abood particularly sticks out when viewed against our cases holding that public employees generally may not be required to support a political party. The Court reached that conclusion despite a "long tradition" of political patronage in government. It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted.

In some cases, reliance provides a strong reason for adhering to established law, and this is the factor that is stressed most strongly by respondents, their *amici*, and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provisions granting them such fees.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time. "The fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected."

This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood* 's many weaknesses. During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.

We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how

many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. No form of employee consent is required.

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

It is so ordered.

Justice SOTOMAYOR, dissenting.

I join Justice Kagan's dissent in full. Although I joined the majority in *Sorrell v. IMS Health Inc.*, I disagree with the way that this Court has since interpreted and applied that opinion. Having seen the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with Justice KAGAN that *Sorrell*—in the way it has been read by this Court—has allowed courts to "wiel[d] the First Amendment in ... an aggressive way" just as the majority does today.

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

For over 40 years, *Abood v. Detroit Bd. of Ed.*, struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions havet long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that.

Not any longer. Today, the Court succeeds in its 6–year campaign to reverse *Abood*. Its decision will have large-scale consequences. Public employee unions will lose a secure source of financial

support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood.* It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

I begin with *Abood*, the 41–year–old precedent the majority overrules. In considering [*Abood*], the Court canvassed the purposes of the "agency shop" clause. It was rooted, the Court understood, in the "principle of exclusive union representation"—a "central element" in "industrial relations" since the New Deal. Significant benefits, the Court explained, could derive from the "designation of a single [union] representative" for all similarly situated employees in a workplace. In particular, such arrangements: "avoid[ ] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"; "prevent[ ] inter-union rivalries from creating dissension within the work force"; "free[ ] the employer from the possibility of facing conflicting demands from different unions"; and "permit [ ] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." As proof, the Court pointed to the example of exclusive-representation arrangements in the private-employment sphere: There, Congress had long thought that such schemes would promote "peaceful labor relations" and "labor stability." A public employer like Detroit, the Court believed, could reasonably make the same calculation.

But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. Because the "designation of a union as exclusive representative carries with it great responsibilities," the Court reasoned, it inevitably also entails substantial costs. "The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." Those activities, the Court noted, require the "expenditure of much time and money"—for example, payment for the "services of lawyers, expert negotiators, economists, and a research staff." And there is no way to confine the union's services to union members alone (and thus to trim costs) because unions must by law fairly represent all employees in a given bargaining unit—union members and non-members alike. See *ibid.*

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause. Those fees, the Court reasoned, "distribute fairly the cost" of collective bargaining "among those who benefit"—that is, *all* employees in the work unit. And they "counteract[ ] the incentive that employees might otherwise have to become 'free riders.'" In other words, an agency-fee provision prevents employees from reaping all the "benefits of union representation"—higher pay, a better retirement plan, and so forth—while leaving it to others to bear the costs. *Ibid.* To the Court, the upshot was clear: A government entity could reasonably conclude that such a clause was needed to maintain the kind of exclusive bargaining arrangement that would facilitate peaceful and stable labor relations.

But the Court acknowledged as well the "First Amendment interests" of dissenting employees. It recognized that some workers might oppose positions the union takes in collective bargaining, or even "unionism itself." And still more, it understood that unions often advance "political and ideological" views outside the collective-bargaining context—as when they "contribute to political candidates." Employees might well object to the use of their money to support such "ideological causes."

So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in "collective bargaining, contract administration, and grievance adjustment." There, the Court held, the "important government interests" in having a stably funded bargaining partner justify "the impingement upon" public employees' expression. But on the other hand, employees could not be compelled to fund the union's political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee's First Amendment rights defeated any conflicting government interest.

Abood's reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an effective employee representative and bargaining partner. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others.

The majority does not take issue with the first point. The majority claims that the second point never appears in *Abood,* but is willing to assume it for the sake of argument. So the majority stakes everything on the third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood* 's rule allowing fair-share agreements: That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.

The majority's initial response to this reasoning is simply to dismiss it. "[F]ree rider arguments," the majority pronounces, "are generally insufficient to overcome First Amendment objections." But that disregards the defining characteristic of *this* free-rider argument—that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for

"senior citizens or veterans" (to use the majority's examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are—by law—in a different position, as this Court has long recognized.

The majority's fallback argument purports to respond to the distinctive position of unions, but still misses *Abood*'s economic insight. Here, the majority delivers a four-page exegesis on why unions will seek to serve as an exclusive bargaining representative even "if they are not given agency fees." But that response avoids the key question, which is whether unions without agency fees will be *able to* (not whether they will *want to*) carry on as an effective exclusive representative. And as to that question, the majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces.

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers' speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees' speech.

"Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with "citizens at large." The government, we have stated, needs to run "as effectively and efficiently as possible." That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to "certain limitations on his or her freedom." Government workers, of course, do not wholly "lose their constitutional rights when they accept their positions." But under our precedent, their rights often yield when weighed "against the realities of the employment context." If it were otherwise—if every employment decision were to "bec[o]me a constitutional matter"—"the Government could not function."

In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty*. As we later described the *Pickering* inquiry, the Court first asks whether the employee "spoke as a citizen on a matter of public concern." If she did not—but rather spoke as an employee on a workplace matter—she has no "possibility of a First Amendment claim": A public employer can curtail her speech just as a private one could. But if she did speak as a citizen on a public matter, the public employer must demonstrate "an adequate justification for treating the employee differently from any other member of the general public." The government, that is, needs to show that legitimate workplace interests lay behind the speech regulation.

Abood coheres with that framework. *Abood* and *Pickering* raised variants of the same basic issue: the extent of the government's authority to make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests. Consider the parallels:

Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court first discussed the

use of agency fees to subsidize the speech involved in "collective bargaining, contract administration, and grievance adjustment." It understood that expression (really, who would not?) as intimately tied to the workplace and employment relationship. The speech was about "working conditions, pay, discipline, promotions, leave, vacations, and terminations," the speech occurred (almost always) in the workplace; and the speech was directed (at least mainly) to the employer. As noted earlier, *Abood* described the managerial interests of employers in channeling all that speech through a single union. And so *Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees' speech on similar workplace matters. But still, *Abood* realized that compulsion could go too far. The Court barred the use of fees for union speech supporting political candidates or "ideological causes." That speech, it understood, was "unrelated to [the union's] duties as exclusive bargaining representative," but instead was directed at the broader public sphere. And for that reason, the Court saw no legitimate managerial interests in compelling its subsidization. The employees' First Amendment claims would thus prevail—as, again, they would have under *Pickering*.

The majority claims it is not making a special and unjustified exception. It offers two main reasons for declining to apply here our usual deferential approach, as exemplified in *Pickering*, to the regulation of public employee speech. First, the majority says, this case involves a "blanket" policy rather than an individualized employment decision, so *Pickering* is a "painful fit." Second, the majority asserts, the regulation here involves compelling rather than restricting speech, so the pain gets sharper still. And finally, the majority claims that even under the solicitous *Pickering* standard, the government should lose, because the speech here involves a matter of public concern and the government's managerial interests do not justify its regulation. The majority goes wrong at every turn.

First, this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision. Nothing in *Treasury Employees* suggests that the Court defers only to ad hoc actions, and not to general rules, about public employee speech. That would be a perverse regime, given the greater regularity of rulemaking and the lesser danger of its abuse. So I would wager a small fortune that the next time a general rule governing public employee speech comes before us, we will dust off *Pickering*.

Second, the majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. Regulations challenged as compelling expression do not usually look anything like that—and for that reason, the standard First Amendment rule is that the "difference between compelled speech and compelled silence" is "without constitutional significance." And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression. So when a government mandates a speech subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech.

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. But to start, the majority misunderstands the threshold inquiry set out in *Pickering* and later cases. The question is not, as the majority seems to think, whether the

public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square.

Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering* 's first step. This Court has rejected all attempts by employees to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations."

Consider an analogy, not involving union fees: Suppose a government entity disciplines a group of (non-unionized) employees for agitating for a better health plan at various inopportune times and places. The better health plan will of course drive up public spending; so according to the majority's analysis, the employees' speech satisfies *Pickering*'s "public concern" test. But in fact, this Court has always understood such cases to end at *Pickering* 's *first* step: If an employee's speech is about, in, and directed to the workplace, she has no "possibility of a First Amendment claim." So take your pick. Either the majority is exposing government entities across the country to increased First Amendment litigation and liability—and thus preventing them from regulating their workforces as private employers could. Or else, when actual cases of this kind come around, we will discover that today's majority has crafted a "unions only" carve-out to our employee-speech law.

What's more, the government should prevail even if the speech involved in collective bargaining satisfies *Pickering*'s first part. Recall that the next question is whether the government has shown "an adequate justification for treating the employee differently from any other member of the general public." That inquiry is itself famously respectful of government interests. This Court has reversed the government only when it has tried to "leverage the employment relationship" to achieve an outcome unrelated to the workplace's "effective functioning."

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech—and will almost surely remain so.

But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong. But even if that were true (which it is not), it is not enough. "Respecting *stare decisis* means sticking to some wrong decisions."

Consider first why these principles about precedent are so important. *Stare decisis*—"the idea that today's Court should stand by yesterday's decisions"—is "a foundation stone of the rule of law." It "promotes the evenhanded, predictable, and consistent development" of legal doctrine. It fosters respect for and reliance on judicial decisions. And it "contributes to the actual and perceived integrity of the judicial process," by ensuring that decisions are "founded in the law rather than in the proclivities of individuals."

And *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot).

Ignoring our repeated validation of *Abood,* the majority claims it has become "an outlier among our First Amendment cases." That claim fails most spectacularly for reasons already discussed: *Abood* coheres with the *Pickering* approach to reviewing regulation of public employees' speech. So all that the majority has left is *Knox* and *Harris*. Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."

The majority is likewise wrong to invoke "workability" as a reason for overruling *Abood*. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely "precis[e]," as the majority demands? Well, not quite that—but as exercises of constitutional linedrawing go, *Abood* stands well above average. In the 40 years since *Abood,* this Court has had to resolve only a handful of cases raising questions about the distinction.

And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis,* this Court has held, "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision."

Over 20 States have by now enacted statutes authorizing fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions. Many of those States have multiple statutory provisions, with variations for different categories of public employees. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers.

Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." Not today. The majority undoes bargains reached all over the country.[5]

The majority, though, offers another reason for not worrying about reliance: The parties, it says, "have been on notice for years regarding this Court's misgivings about *Abood.*" Here, the majority proudly lays claim to its 6–year crusade to ban agency fees.

"[R]eliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." *Abood* 's holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and governments, were thus justified in relying on it.

[5] Indeed, some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses.

There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, "can follow the model of the federal government and 28 other States."

And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

Page 1162, add the following new notes in place of the third full paragraph.

1. Note that Janus contains two holdings. First, that union-represented public sector workers cannot be required to pay dues or fees associated with collective bargaining. Second, that unions must obtain affirmative consent, manifested by "clear and convincing evidence," before they can have fees deducted from non-members' paychecks.

2. Anticipating *Janus*'s holding, a number of "blue" states passed or proposed legislation designed to mitigate the case's impact. For example, consider the following two amendments to New York's Taylor Law:

> (a) Within thirty days of a public employee first being employed or reemployed by a public employer, or within thirty days of being promoted or transferred to a new bargaining unit, the public employer shall notify the employee organization, if any, that represents that bargaining unit of the employee's name, address, job title, employing agency, department or other operating unit, and work location; and (b) Within thirty days of providing the notice in paragraph a of this subdivision, a public employer shall allow a duly appointed representative of the employee organization that represents that bargaining unit to meet with such employee for a reasonable amount of time during his or her work time without charge to leave credits, unless

> otherwise specified within an agreement bargained collectively under article fourteen of the civil service law, provided however that arrangements for such meeting must be scheduled in consultation with a designated representative of the public employer.
>
> ***
>
> Notwithstanding any law, rule or regulation to the contrary, an employee organization's duty of fair representation to a public employee it represents but who is not a member of the employee organization shall be limited to the negotiation or enforcement of the terms of an agreement with the public employer. No provision of this article shall be construed to require an employee organization to provide representation to a non-member (i) during questioning by the employer, (ii) in statutory or administrative proceedings or to enforce statutory regulatory rights, or (iii) in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate. Nor shall any provision of this article prohibit an employee organization from providing legal, economic or job related services or benefits beyond those provided in the agreement with a public employer only to its members.

2018 N.Y. S07509C. Consider why New York adopted these amendments in light of Janus. What are the amendments' benefits and drawbacks? And, considering the *Janus* opinion, do you think there are grounds for a legal challenge against any part of these amendments?

Other states have taken other approaches. For example, New Jersey adopted a bill designed to facilitate opportunities for public unions to communicate with represented workers, which also included this provision: "a. A public employer shall not encourage negotiations unit members to resign or relinquish membership in an exclusive representative employee organization and shall not encourage negotiations unit members to revoke authorization of the deduction of fees to an exclusive representative employee organization.; b. A public employer shall not encourage or discourage an employee from joining, forming or assisting an employee organization." 2018 N.J. A3686.

As you can tell from the New York and New Jersey bills, the dominant state response to Janus involves facilitating union access to public employees. *See also* 2017 Cal. AB-119. But consider whether states could or should respond in other ways. For example, one law professor has called for states and unions to require that represented workers who decide not to pay an agency instead contribute the equivalent amount to a charity. Samuel Estreicher, *How Unions Can Survive a Supreme Court Defeat*, BLOOMBERG OPINION, (March 2, 2018), https://www.bloomberg.com/view/articles/2018-03-02/how-unions-can-survive-a-supreme-court-defeat. Another has suggested that states should reimburse states directly for their bargaining costs. Aaron Tang, *Life After Janus* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3189186; see also 2017 HI HB 923 (legislative proposal to establish a state-funded "public employees' bargaining fund"). Consider the pros and cons of these approaches.

3. Following *Janus*, a major issue will be whether objectors are entitled to recover past dues or fees

(up to the relevant statute of limitations), or whether the decision applies prospectively only. Does *Janus* itself say anything about this? One question is whether the union will be able to invoke a "good faith" defense, which is similar to qualified immunity. For two views on this question, see Aaron Tang, *The Doomed – and Dangerous – Demand for Refunds From Public Sector Unions*, TAKE CARE BLOG https://takecareblog.com/blog/the-doomed-and-dangerous-demand-for-refunds-from-public-sector-unions; Will Baude, *Can Unions Be Sued for Janus Claims?*, REASON (Jul. 19, 2018), https://reason.com/volokh/2018/07/19/can-unions-be-sued-for-janus-claims.

4. In light of the Court's opinion in Janus, what other aspects of public sector collective bargaining might face First Amendment challenges? The same group that litigated *Janus* has already filed lawsuits claiming that exclusive representation in the public sector is unconstitutional. *See, e.g.*, Complaint, *Uradnik v. Inter Faculty Organization*, Case No. 18-cv-01895 (D. Minn. July 6, 2018); *Parrish v. Dayton*, 761 F.3d 873 (8th Cir. 2014) (denying preliminary injunction); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016) (affirming dismissal of case).

Page 1178, add the following under heading F. Note that in light of *Janus*, the issue of what activities are chargeable in the public sector is now moot. However, as the following cases show, it is difficult to separate the development of this issue in the private sector from the public sector.

Page 1189, substitute the following for the last paragraph on the page. In *Janus*, the Supreme Court extended *Knox*'s holding so that unions must now obtain affirmative consent before charging any fees of non-members. Go back and review this part of *Janus*. Was it well-supported and well-reasoned? Based on your knowledge of other areas of constitutional law, can you think of other situations where waivers of rights must be "clear and convincing"? For a critique of the Court's approach in *Knox*, *see* Charlotte Garden, *Meta Rights*, 83 Fordham L. Rev. 855, 901-05 (2014).

Page 1190, add the following new note between notes 1 and 2. There are many recent cases featuring union objectors who argue that they should be entitled to more robust procedural protections and/or unions challenging the validity of state statutes that provide more protections to objectors. *See, e.g.*, *Int'l Ass'n of Machinists Dist. 10 v. Scott*, No. 16- cv-77, 2016 WL 7475720 (W.D. Wisc. Dec. 28, 2016) (holding that Wisconsin statute prohibiting dues check off authorizations unless revocable upon 30 days' notice was preempted by § 302 of the LMRA); *Sands v. NLRB*, 825 F.3d 778 (D.C. Cir. 2016) (holding that union did not commit ULP by failing to tell employee how much she would save if she became an agency fee payer). Public sector workers have brought similar cases, but *Janus* effectively resolved them by holding that represented non-members cannot be charged union dues or fees unless they have provided affirmative consent. But other cases persist in the private sector, where the First Amendment is (presumably) not implicated.

Page 1191, regarding the paragraph on *Davenport*. Note that this case has been superceded (though not necessarily overruled) by *Janus*, because unions must now obtain affirmative consent before collecting fees from non-members for any purpose.

CHAPTER 15

BARGAINING RELATIONSHIPS IN TRANSITION

Page 1202, add the following paragraph to the end of note 2. In *Creative Vision Resources, L.L.C. v. NLRB*, 882 F.3d 510, 526 (5th Cir. 2018), the court, in agreement with the Board, held that a union bargaining demand is not necessary to trigger bargaining in the case of perfectly clear successors. The employer has petitioned for certiorari on that question. *See Creative Vision Resources, L.L.C. v. NLRB*, Docket No. 17-1667, petition for certiorari filed Jun. 14, 2018. The NLRB waived its right to file a response. The case is conferenced for September 24, 2018.

Page 1203, add this paragraph to the end of note 8: But how does the Board's General Counsel prove union animus in refusal-to-hire cases? In *Adams and Associates, Inc. v. NLRB*, 871 F.3d 358, 371 n. 3 (5th Cir. 2017), the Board relied on the CEO's own statements, written in an email, that he intended to avoid hiring the predecessor's employees to avoid bargaining, which evinced a corporate strategy to avoid successorship. The court rejected the employer's argument that these statements were attorney-client privileged, and therefore inadmissible evidence, even though several people on the email correspondence were attorneys.

Page 1212, add the following paragraph to the end of note 5. In *NLRB v. Lily Transportation Corp.*, 853 F.3d 31 (1st Cir. 2017), Associate Justice David Souter, writing for the court, upheld the Board's rule in *UGL*.

Page 1219 end of section B, add this paragraph:

In *In re Trump Entertainment Resorts*, 810 F.3d 161, 164 (3rd Cir. 2016), *cert. denied*, ___ U.S. ___, 136 S. Ct. 2396 (May 31, 2016) – a case of first impression among the courts of appeal – the Third Circuit held that a bankruptcy court, under Section 1113(c) of the Bankruptcy Code, can authorize trustees or debtors in possession to reject terms and conditions of employment maintained, post-contract expiration. The court explained that in resolving the question presented, it was required to resolve a potential conflict between the NLRA, which does not permit employers to unilaterally change terms and conditions of employment without first bargaining with the union, and Bankruptcy Code Section 1113(c), which allows Chapter 11 debtors to reject collective-bargaining agreements in certain circumstances. Under the court's decision, those circumstances include situations where the collective-bargaining agreement has expired. The court based its conclusion on its finding that "§ 1113 does not distinguish between the terms of an unexpired CBA and the terms and conditions that continue to govern after the CBA expires." *Id.*

CHAPTER 16

MODERN AUTHORITY OVER LABOR RELATIONS

Page 1233, add the following to the end of note 4. In *Airline Service Providers Ass'n v. Los Angeles World Airports*, 873 F.3d 1074 (9th Cir. 2017), the Ninth Circuit upheld a city law requiring companies engaged in refueling planes, handling baggage, taking tickets, and similar services at LAX airport to enter a "labor peace agreement" with "any employee organization that requests one." (The law also required companies to enter mediation and then arbitration to settle the terms of the agreement in the event that bargaining with the employee organization failed.) The Court held that the city, which operates LAX, was acting as a market participant because "the challenged governmental action [was] undertaken in pursuit of the 'efficient procurement of needed goods and services,' as one might expect of a private business in the same situation," and "the narrow scope of the challenge action defeat[ed] an inference that its primary goal was to encourage a general policy rather than [to] address a specific proprietary problem." *See also Southeast La. Bldg. & Constr. Trades Council v. Jindal*, 107 F.Supp. 3d 584 (E.D. La. 2015) (state law prohibiting public entities from entering into project labor agreements or funding projects that include project labor agreements fell under the market participant exception.)

Page 1235, add the following to the end of note 5e. Recently, the UFCW-linked group OURWalmart engaged in a series of protests inside and around Wal-Mart stores, and Wal-Mart responded by filing trespass lawsuits in a number of state courts. With one exception, these state courts have concluded that Wal-Mart's claims are not preempted. *See UFCW v. Wal-Mart Stores, Inc.*, No. 02-C-13-181974, 2017 WL 2691235 (Md. 2017) (holding trespass and nuisance suit fell under *Garmon*'s "local feeling" exception and therefore was not preempted by NLRA); *UFCS v. Wal-Mart Stores, Inc.*, No. 02-15-00374-cv, 2016 WL 6277370 (Tex. App. Oct. 27, 2016) (holding trespass and nuisance actions not preempted, and discussing similar conclusions by state courts in California, Colorado, Florida, and Maryland); *but see Wal-Mart Stores, Inc. v. UFCW*, 354 P.3d 31 (Wash. Ct. App. 2015) (Wal-Mart's trespass action did not implicate "'deeply rooted' local interest because the UFCW's activities were not violent, intentional torts, or threaten violence").

Page 1236, add the following to the end of note 7. See also *Figueroa v. Foster*, 864 F.3d 222 (2d Cir. 2017) (holding that NLRA duty of fair representation did not preempt discrimination claims filed by union members against their union representative under the New York State Human Rights Law).

Page 1243, add the following to the end of note 1a. A related issue involves minimum standards laws that contain an exemption for employees who are covered by a collective bargaining agreement. For example, in 2014, Los Angeles adopted a minimum wage ordinance for hotel workers that contained an exemption for hotels covered by a collective bargaining agreement. Non-union hotels sued to invalidate the law, arguing that either the law in general or the waiver for union hotels was preempted by *Machinists*. However, the Ninth Circuit disagreed, because the law did not interfere with labor dispute resolution. *Am. Hotel & Lodging Ass'n v. Los Angeles*, 834 F.3d 958 (9th Cir. 2016) (citing *Livadas v. Bradshaw*). In contrast, a federal district court in New York held that the NLRA preempted a city ordinance that required non-union car wash companies to post a $150,000 surety bond, but required only a $30,000 bond from car washes that entered into a

collective bargaining agreement or an "active monitoring" agreement that would ensure timely and accurate wage payments. *Ass'n of Car Wash Owners, Inc. v. City of NY*, 15-cv-08157 (S.D.N.Y. May 26, 2017).

Page 1243, add a new note 1d. Workers excluded from NLRA coverage: States may provide their own labor relations schemes governing workers who are excluded from the NLRA, including agricultural and domestic workers, and public employees. *See, e.g.*, *United Farm Workers of Am. v. AZ Agric. Emp't Relations Bd.*, 669 F.2d 1249 (9th Cir. 1982). The Ninth Circuit recently held that the same rule applied to independent contractors, rejecting the argument that Congress's decision to exclude independent contractors from NLRA coverage in the Taft-Hartley Act indicated a desire that these workers should not be able to bargain collectively at all. *Chamber of Commerce v. Seattle*, 890 F.3d 769 (9th Cir. 2018).