

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

Second Edition

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Introduction

The materials that follow update the second edition of the casebook through mid-summer 2019. In the private sector, the Trump Board has continued to take positions more favorable to employers and less favorable to unions on a variety of issues detailed herein, both through decided cases and through rulemaking.

The public sector is still dealing with the repercussions of *Janus v. AFSCME*. For example, union opponents have pushed for extended damages going back many years, so far with no success in lower courts. Other suits seek to end time limits on when objecting employees can withdraw from unions, or to challenge the very principle of exclusive representation. Meanwhile, some union-friendly states have adopted limited countermeasures, such as increasing union access to employees and limiting the duty of fair representation in discrete contexts. The legacy of the surprisingly successful teachers' strikes of 2018 still looms large.

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. In 2018, Florida enacted CS/HB 7055. Among other things, this requires unions of public-school employees to seek recertification if a majority of bargaining unit members are not dues-paying members. After the decision in *Janus v. AFSCME* (discussed in Chapter 16), this rule has added significance.

Page 77, end of the last paragraph. In 2019, Nevada, in Senate Bill 135, extended collective bargaining rights to employees of the state's government (local government employees already had such rights). This law, which covers approximately 20,000 employees, was hailed as the largest expansion of collective bargaining rights in the United States in sixteen years. See Jake Johnson, "Massive Win for Working People": Nevada Governor Signs Bill Giving Over 20,000 State Employees Collective Bargaining Rights, COMMON DREAMS, (Jun. 13, 2019) at <https://www.commondreams.org/news/2019/06/13/massive-win-working-people-nevada-governor-signs-bill-giving-over-20000-state> (last accessed July 20, 2019). In 2017, Nevada, in 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.

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 the question 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 issued the following decisions reviewing Board decisions: *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (denying enforcement to *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014)) (*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.

The Trump Board recently switched directions in *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (Jan. 25, 2019). There, in the context of franchisees who operate shared-ride vans for SuperShuttle Dallas-Fort Worth, the Board brought the test for differentiating employees from independent contractors into line with the D.C. Circuit's view, and overturned the Board's decision in *FedEx II*, 361 N.L.R.B. 610 (2014), *enf. denied*, 849 F.3d 1123 (D.C. Cir. 2017).

FedEx drivers across the country generally have the same job duties, and state law governing independent contractor status is often based on the Restatement 2d (Agency) § 220(2), as is Board law. You might expect that tribunals throughout the sundry U.S. jurisdictions would reach the same conclusion about drivers' status, but this has not been the case. 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 (and now the Board) focuses on entrepreneurial opportunity and the Ninth Circuit has focused on right of control.

This issue was once again tested in the D.C. Circuit. *Pennsylvania Interscholastic Athletic Association, Inc.*, 366 N.L.R.B. No. 10 (2018), enforcement denied, 926 F.3d 837 (D.C. Cir. Jun. 14, 2019), which presented 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*. The court acknowledged, in agreement with the Board's factual findings, that the referees had little entrepreneurial opportunity and that the employer PIAA controls significant aspects of the referee's jobs. The court, however, refused to enforce the Board's order on the well-established principle that reviewing courts do not owe *Chevron* deference to the Board on this particular question of law. The court therefore drew its own

conclusion based on its own balancing of the independent contractor factors.

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?” That case remains open with no Board decision issued as of publication of this supplement.

Page 119, note 1, after the second sentence. *See, e.g. Metropolitan Alliance of Police, Chapter 294 v. Illinois Labor Relations Board*, No. 1-17-1322 (Sept. 28, 2018) (investigators at the Illinois Central Management Services and Department of Corrections properly excluded as confidential employees, because, among other things, investigators had access to emails that might contain confidential collective bargaining information).

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: Indeed, on May 22, 2019, the NLRB's rulemaking priorities were released by the Office of Management and Budget's Office of Information and Regulatory Affairs; included on the Board's agenda was "rulemaking to establish the standard for determining whether students who perform services at a private college or university in connection with their studies are 'employees' within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. 153(3))," scheduled to commence in September 2019.

Page 131, insert the following sentence at the end of the full paragraph: The Ninth Circuit recently enforced the Board's assertion of jurisdiction over a tribal enterprise in *Casino Pauma v. NLRB*, 888 F.3d 1066 (9th Cir. 2018) (enforcing *Casino Pauma*, 363 N.L.R.B. No. 60), *cert. denied*, 587 U.S. ___, 139 S.Ct. 2614 (May 20, 2019).

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 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 N.L.R.B. 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 the newly constituted Board did not vacate *Hy-Brand I* out of 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 N.L.R.B. 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 Rulemaking. The Chairman further assured that "any notice-and-comment rulemaking undertaken by the NLRB will never be for the purpose of evading ethical restriction."

The Board followed through on Chairman Ring's statement, and, on September 14, 2018, issued a Notice of Proposed Rulemaking and Request for Comments on "The Standard for Determining Joint-Employer Status." The proposed rule would require that, to be deemed a joint employer, an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine.

The D.C. Circuit put a potential wrench in the works of the rulemaking, however, when it issued, on December 28, 2018, its decision in *Browning-Ferris industries of California Inc.*, 911 F.3d 1195 (D.C. Cir. 2018). The court first held that: "to the extent that the Board's joint-employer standard is predicated on interpreting the common law...The content and meaning of the common law is a pure question of law that we review de novo without deference to the Board." Regarding the pending rulemaking, the court opined: "The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary."

Turning to the merits, the court stated that the question in the case was: "whether the common-law analysis of joint-employer status can factor in both (i) an employer's authorized but unexercised forms of control, and (ii) an employer's indirect control over employees' terms and conditions of employment." On that question, the court held: "We conclude that the Board's right-to-control standard is an established aspect of the common law of agency. The Board also correctly determined that the common-law inquiry is not woodenly confined to indicia of direct and immediate control; an employer's indirect control over employees can be a relevant consideration." However, the court determined that, in addressing an employer's exercise of indirect control, the Board had failed "to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting" and remanded the case for the Board to address that issue.

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 N.L.R.B. No. 87 (2016) and *Hyde Leadership Charter School – Brooklyn*, 364 N.L.R.B. No. 68 (2016) (rejecting objections by, respectively, the employer and the union). In *Voices for International Business v. NLRB*, 905 F.3d 770 (5th Cir. 2018), the Fifth Circuit upheld the NLRB taking jurisdiction over an "independent public school" (a type of charter school) in Louisiana, as the school was not a "political subdivision" of Louisiana, it was not controlled by political actors, and there was no public control over any charter school policies.

On February 4, 2019, the NLRB invited parties and interested amici to file briefs in *KIPP Academy Charter School*, 02-RD-191760, to address the question whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under NLRA Section 14(c)(1), and, therefore, to modify or overrule the Obama Board’s 2016 decisions in *Hyde Leadership Charter School—Brooklyn*, and *Pennsylvania Virtual Charter School*. This case, which involves an employee-filed decertification petition, presents an awkward vehicle for answering the question presented. United Federation of Teachers, Local 2, AFT, the current collective bargaining representative, took the position that the Board should decline jurisdiction over the specific type of school involved—a “conversion” charter school where, under New York law, a pre-existing public school was “converted” to a charter school, with the same public school students and public school teachers continuing to attend school and work in the same public school building. If the Board does decide to decline jurisdiction over charter schools, states will be able to step in and regulate charter school labor relations.

CHAPTER 3

UNION ORGANIZING AND EMPLOYER SPEECH

Page 171, add the following to the end of note 5. Under labor law, picketing is sometimes subject to special restrictions. (For more on this, see Chapter 12.) But in *Capital Medical Center v. NLRB*, the D.C. Circuit upheld the Board’s decision applying *Republic Aviation* presumptions to picketing in which “a small number of off-duty hospital employees . . . peacefully distributed leaflets and held picket signs on hospital property next to an entrance.” 909 F.3d 427 (2018).

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*, 894 F.3d 707 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1259 (Feb. 25, 2019).

Page 175, add the following to the end of the first paragraph. In 2018, the NLRB called for amicus briefs about whether *Purple Communications* should be overruled. Notice and Invitation to File Briefs, *Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel and Casino*, No. 28-CA-060841 (Aug. 1, 2018). As of the time this Supplement went to print, the Board had not decided *Rio All-Suites*.

Page 184, add the following to the end of note 8. In a recent case, the Trump Board held that a hospital could bar union organizers even if it was open to the public, taking a more restrictive approach to access rights than some earlier boards. In *UPMC*, 368 N.L.R.B. No. 2 (June 14, 2019), the Board considered whether a hospital had violated the NLRA when it expelled two union organizers from its cafeteria, which was open to the public. The organizers were sitting at a table and talking with employees; union flyers and pins were displayed on the table. A guard then ordered the organizers to leave because they lacked “hospital business.” Later, the hospital maintained that its policy did not bar everyone who lacked “hospital business,” but instead barred only “nonemployees who are engaged in promotional activity, including soliciting or distributing, in or near the cafeteria.” As examples of previous occasions on which it had enforced this policy, the hospital cited a panhandler and a group of religious proselytizers who had also been told to leave the cafeteria.

The Board held that the employer could enforce its policy: “Absent discrimination between nonemployee union representatives and other nonemployees . . . the employer may decide what

types of activities, if any, it will allow by nonemployees on its property.” Then, responding to the argument that the employer had discriminated because it generally allowed non-employees to eat and converse with others in the cafeteria, the Board added that “there is a difference between admitting friends or relatives of employees for meals and permitting outside entities to seek money or memberships.” The Board’s decision in *UPMC* suggests that employers now have more leeway to enforce policies that turn on the content of union organizers’ conversations with employees.

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 Board held that an employer violated § 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 185, add note 13. Most of the cases in this section involve non-union workplaces. But union organizers will want access to unionized workplaces as well, to speak with represented employees. To facilitate this, unions will often negotiate the conditions under which they can access employer property in a CBA. “When employees and/or their exclusive collective-bargaining representative exercise rights embodied in their collective-bargaining agreement, the exercise of those rights is protected.” *Fred Meyer Stores, Inc.*, 368 N.L.R.B. No. 6 (June 18, 2019). In *Fred Meyer Stores*, the NLRB found that union organizers exceeded the scope of the access rights granted in the CBA. Accordingly, the employer did not commit a ULP when a supervisor ordered the organizers to leave the premises and called the police when they did not.

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

Page 191, replace note 1 with the following. The Obama Board was quite active in cases involving work rules, but the Trump Board has reversed course. In *The Boeing Co.*, 365 N.L.R.B. No. 154 (Dec. 14, 2017), the Board overruled *Martin Luther Memorial Home* (“*MLH*,” 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, replace note 5 as follows. 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.nlr.gov/link/document.aspx/09031d45827f38f1> (last accessed July 20, 2019). (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, add the following to the end of note 4. 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 208, add the following to the end of note 4. A recent high-profile case before the Board, *Tesla, Inc.*, No. 32-CA-220777 (filed May 23, 2018), asks whether Tesla CEO Elon Musk violated labor law when he tweeted the following: “Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare.” Given the other cases in this section, how should the Board decide this case?

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 has affirmed) that this too violates the Act. *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d 351 (D.C. Cir. 2016).

Page 221, add the following to the end of note 3. How should one reconcile *Midland National* with the cases in the earlier part of this chapter? On one hand, the Board will not police statements that are merely misleading. On the other, coercive statements are a ULP and/or a violation of laboratory conditions. In *Didlake, Inc.*, the Board attempted to parse the line between these two categories. 367 N.L.R.B. No. 125 (May 10, 2019). The employer told employees in part that if a union drive was successful, “[f]irst thing they will require you to do is join the Union . . . And if you don’t, you will not be able to work here. . . . If they win, you will have to join as a condition of your employment to be here, and you will be paying union dues . . . All the other things will become negotiation.”

The employer’s statement was wrong as a matter of law – as discussed in Chapter 14, union security clauses must be negotiated, and are not imposed automatically when a union wins an election – but was it also coercive? The Board majority concluded that the best way to read the statement was as a non-coercive prediction based on the employer’s experience with the union at another location. The dissent disagreed and would have read the statement as a threat of job loss if the union was elected.

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.

Page 234, add a new note 7 at the top of the page. Surveillance techniques that are available to employers are becoming much more sophisticated. For example, companies have long had the

capacity to log employees' keystrokes, meaning employers can easily track which websites their employees are visiting from their work computers. But the rise of big data analysis means that companies can now use the information gleaned from keystroke loggers in a much more nuanced (and arguably intrusive) way. For example, one company offers to scan and analyze employees' email to develop a portrait of how employee "sentiment changes over time." Other companies promise similar analyses based on employees' movements throughout the day, or even their conversations, recorded via microphones that employees wear or that are placed throughout the workplace.

Routine employer surveillance typically does not violate the NLRA. Thus, the fact that an employer happens to monitor the workplace with closed-circuit cameras to deter theft does not give rise to an ULP charge, even if the presence of those cameras also deters union organizing. In contrast, if a workplace is already unionized, the employer would be obligated to bargain over the installation of new surveillance technology.) Is this rule – which dates from the earliest days of the NLRA – adequate to the challenges of modern employer surveillance techniques? For an argument that it is not, see Charlotte Garden, *Labor Organizing in the Age of Surveillance*, 63 ST. LOUIS U. L.J. 55 (2018).

CHAPTER 4

PROTECTION OF WORKERS' PROTEST AND "CONCERTED ACTIVITIES"

Page 277, add the following to the end of note 2. In *Alstate Maintenance, LLC & Trevor Greenidge*, the Board considered the line between concerted activity and griping, 367 N.L.R.B. No. 68 (Jan. 11, 2019). Employee Trevor Greenidge was working as a skycap at JFK Airport in New York, when he was asked by Lufthansa Airlines to assist with a soccer team's equipment. Greenidge responded that "[w]e did a similar job a year prior and we didn't receive a tip for it." (The Board noted that "[t]he bulk of skycaps' compensation comes from passengers' tips.") When the van containing the team's equipment arrived, four skycaps walked away. Later, all four skycaps were fired, and Greenidge's letter stated that he was fired for his comments about the (lack of) tip the previous year.

The Board concluded that Greenidge's comment did not qualify as concerted activity. It found that Greenidge was neither "bringing a truly group complaint to the attention or management," nor did "the statement in and of itself . . . demonstrate that Greenidge was seeking to initiate or induce group action." (Unhelpfully to his cause, Greenidge "testified that his remark was 'just a comment' and was not aimed at changing the Respondent's policies or practices.")

In the course of reaching this conclusion, the NLRB also overruled *WorldMark by Wyndham*, 356 NLRB 765 (2011), which held that "an employee who protests publicly in a group meeting is engaged in initiating group action." Instead, the *Alstate* Board emphasized that whether a complaint is voiced on behalf of multiple employees or aimed at initiating collective action is a fact-bound inquiry.

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 profanity during his exchange with his employer). See also *St. Paul Park Refining Co., LLC v. NLRB*, ___ F.3d ___, 2019 WL 2909329 (8th Cir. 2019) (affirming Board's finding that employer committed ULP when it suspended an employee who invoked safety procedures described in CBA, which included stopping work to call for a safety review).

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 could lawfully fire an employee who missed work 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 have read *Washington Aluminum* in the next section of this chapter. For more on this, see General Counsel Memo No. 08-10 (July 22, 2008), and Advice Memo No. 07-CA-193475 (Aug. 30, 2017).

Page 294, add a new note 3. Do employees have *Weingarten* rights when voluntarily attending a meeting or hearing? The Board recently answered "yes," but the D.C. Circuit reversed. In *Midwest*

Div.—MMC, the Board held that two nurses’ § 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 294, add a new note 4. When do *Weingarten* rights attach? In *Ozburn-Hessey Logistics, LLC*, the Board held that they attach as soon as the union wins a representation election, rather than when the union is certified by the Board. 366 N.L.R.B. No. 177 (Aug. 27, 2018). Thus, an employer that denies employees their *Weingarten* rights while it contests the results of a union election will have committed a ULP if its challenge ultimately fails.

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

Groups of employees bringing joint, 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 repeatedly 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. 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 Sys.*, 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 lower 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 *certiorari* shortly before President Trump’s inauguration and consolidated the three cases for briefing and oral argument. Although the Board and the Solicitor General jointly filed the *Murphy Oil cert.* petition on behalf of the Board, the Trump Administration’s 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. The NLRB represented itself before the Supreme Court, defending the *Murphy Oil/D.R. Horton* rule.

In a 5–4 decision written by Justice Gorsuch, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (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). 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.”

The majority’s 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 **broad**er purpose of ‘mutual aid or protection’ as well as for the **narrow**er purposes of ‘self-organization’ and ‘collective bargaining.’” *Eastex* at 565. (emphasis added). Justice Gorsuch did not address, or even mention, this prior understanding of the language he was interpreting.

Epic Systems may have consequences beyond the enforcement of individual arbitration clauses. In *Cordua Restaurants, Inc.*, 366 N.L.R.B. No. 72 (Apr. 26, 2018), the Board held that an employer committed a ULP when it fired an employee for filing a collective action lawsuit alleging wage and hour violations. However, after the Supreme Court’s decision in *Epic Systems*, the Board vacated its decision; it has not yet issued a replacement opinion. How should the Board rule in this case?

A different issue is presented when an employer demands that an employee waive their right to make an administrative complaint, such as by filing an NLRB charge – this is a ULP. In a recent case, the Board confronted the intersection of this rule and *Boeing Corp.*, which was discussed in Chapter 3. The Board found that a clause requiring that “all claims or controversies for which a federal or state court would be authorized to grant relief” be resolved by arbitration would reasonably be interpreted by employees in a way that would interfere with their right to file Board charges. The Board then held that the employer lacked a sufficient justification for the rule because “as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees’ access to the Board or its processes.” *Prime Healthcare Paradise Valley, LLC*, 368 N.L.R.B. No. 10 (June 18, 2019).

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 may 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.

CHAPTER 5

PROTECTION AND PROHIBITION: OTHER EMPLOYER RESPONSES TO ORGANIZING

Page 380, insert note 4.

Articles XX and XXI of the AFL-CIO Constitution provide 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.

Page 395, insert the following sentence after note 4, paragraph c, but before note 5. For a recent example of the Board’s discussion of affirmative defenses to Section 8(a)(3) charges, *see Preferred Building Services*, 366 N.L.R.B. No. 159 (Aug. 28, 2018) (holding that an employer may justifiably discharge employees engaged in unprotected picketing).

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 issued 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.

Along these lines, the Board has stated: “In cases involving the maintenance of an unlawful lawsuit, the Board has, with court approval, usually exercised its remedial discretion to require the respondent to reimburse opposing parties for the legal fees and expenses incurred in defending themselves.” *J.A. Croson Company*, 359 NLRB 19, 27–28 (2012) (citing cases where attorney’s fees were awarded but declining to award attorney’s fees in the instant case).

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 N.L.R.B. 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. “The Board’s current representation-case procedures” and its “current standards for blocking charges” on the list of matters on which the Board is considering rulemaking, released on May 22, 2019 by the Office of Management and Budget’s Office of information and Regulatory Affairs.

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

In *PCC Structural, Inc.*, 365 N.L.R.B. 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
National Labor Relations Board
Case 05-RC-079249
364 N.L.R.B. 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 *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 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.

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*[, 331 N.L.R.B. at 1304–05] 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). . . .

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-worksites 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), *enfd.* 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 508, add new note 4. In *Hy-Brand I*, 365 N.L.R.B. No. 156 (Dec. 14, 2017), discussed in Chapter 2 of this supplement, the Trump Board criticized the *Miller & Anderson* majority for “unnecessarily overrul[ing] existing law to find a petitioned-for bargaining unit appropriate despite unrebutted evidence that the bargaining unit had ceased to exist more than 3 years before the Board issued its decision.” *Id.* at 2017 WL 6403496, at *52. Although the Trump Board vacated that decision in *Hy-Brand II*, 333 N.L.R.B. 717 (2001), *supra*, this critique of *Miller & Anderson* suggests that the Trump Board may be willing to revert position once again.

Page 509, replace the final sentence with the following paragraph: After *Allentown Mack*, the Board reconsidered its rules in *Levitz Furniture Co.*, 333 N.L.R.B. 717 (2001), where it held that “an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule *Celanese* and its progeny insofar as they permit withdrawal on the basis of good-faith doubt. Under our new standard, an employer can defeat a postwithdrawal refusal to bargain allegation if it shows, as a defense, the union’s actual loss of majority status.” The Board further explained that “employers [may] obtain RM elections by demonstrating good-faith reasonable uncertainty (rather than disbelief) as to unions’ continuing majority status. We adopt this standard to enable employers who seek to test a union’s majority status to use the Board’s election procedures — in our view the most reliable measure of union support — rather than the more disruptive process of unilateral withdrawal of recognition.”

Although *Levitz* followed Justice Scalia’s opinion in *Allentown Mack* and was issued during the George W. Bush years, that Board was still chaired by the moderate John Truesdale, a career NLRB employee with a reputation for impartiality. *Levitz* was never popular with the ever-more conservative leaning management bar, which finally had a chance to overrule *Levitz* in the following case.

Pages 510-16, replace *Levitz Furniture Co.*, 333 N.L.R.B. 717 (2001), with the following:

**JOHNSON CONTROLS, INC.
National Labor Relations Board
Case 10–CA–151843
368 N.L.R.B. No. 20
July 3, 2019**

Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting

This case involves what happens when employees—with no improper influence or assistance from management—provide their employer with evidence that at least 50 percent of the bargaining unit no longer wishes to be represented by their union, the employer tells the union that it will withdraw recognition when the parties’ labor contract expires, and the union subsequently claims that it has reacquired majority status before the employer actually withdraws recognition. Under extant precedent, the Board determines the union’s representative status and the legality of the employer’s action by applying a ““last in time” rule, under which the union’s evidence controls the outcome because it postdates the employer’s evidence. As we shall explain, this framework has proven unworkable and does not advance the purposes of the Act. Today, we adopt a new framework that

is fairer, promotes greater labor relations stability, and better protects § 7 rights by creating a new opportunity to determine employees' wishes concerning representation through the preferred means of a secret ballot, Board-conducted election.

Under well-established precedent, an employer that receives evidence, within a reasonable period of time before its existing CBA expires, that the union representing its employees no longer enjoys majority support may give notice that it will withdraw recognition from the union when the CBA expires, and the employer may also suspend bargaining or refuse to bargain for a successor contract.¹ This is called an “anticipatory” withdrawal of recognition.

When the contract expires, however, an employer that has made a lawful anticipatory withdrawal of recognition still withdraws recognition at its peril. [Under *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001), i]f the union challenges the withdrawal of recognition in a ULP case, the employer will have violated § 8(a)(5) if it fails to establish that the union lacked majority status at the time recognition was actually withdrawn. In making this determination, the Board will rely on evidence that the union reacquired majority status in the interim between anticipatory and actual withdrawal, regardless of whether the employer *knew* that the union had reacquired majority status. As a result, an employer that properly withdraws recognition anticipatorily, based on evidence in its possession showing that the union has lost majority status, can unexpectedly find itself on the losing end of an 8(a)(5) charge when it withdraws recognition at contract expiration. Moreover, [under *Lee Lumber & Building Material Corp.*, 334 N.L.R.B. 399 (2001), *enforced*, 310 F.3d 209 (D.C. Cir. 2002)], the remedy for that violation will typically include an affirmative bargaining order, which precludes any challenge to the union's majority status for a reasonable period of time—at least 6 months, as long as 1 year. And if, within this insulated period, the parties reach agreement on a successor contract, the union's majority status will again be irrebuttably presumed for the duration of that contract, up to another 3 years [see *General Cable Corp.*, 139 N.L.R.B. 1123 (1962)].

The facts of this case and others like it highlight the crux of the problem. Where the union possesses evidence that it has reacquired majority status notwithstanding prior disaffection evidence showing that it had lost that status, some unit employees necessarily must be “dual signers.” That is, some employees must have signed both the anti-union petition and, subsequently, a union authorization card or pro-union counter-petition. And where this happens, unions and employers are generally unwilling to disclose the identities of signers on their respective sides, for fear that the other party may retaliate against them. Although one may wish it were otherwise, we cannot say this mutual concern of retaliation is wholly groundless.

Further, we believe there are better ways to settle disputes over a union's postcontract majority status than by relying on the “last in time” rule. In what often may be a contentious and confusing time for employees who are being repeatedly asked to express their representational preference, the “last in time” rule strikes us as ill-suited for making such an important determination. Moreover, we are concerned that the union's ability to gather its counter-evidence secretly, together with the “peril” rule of *Levitz*, creates an opportunity, if not an actual incentive, for incumbent unions to take advantage of the “last in time” rule to extend the bar against challenges to its representative status for years to come, to the detriment of employees' § 7 right to choose a different bargaining representative or to refrain from union representation altogether.

¹ [fn.2] The employer, however, must comply with the existing contract in the interim.

The framework we announce today addresses all these concerns and creates a mechanism that settles questions concerning employees' representational preference in the anticipatory withdrawal context through a Board-conducted, secret-ballot election, the preferred means of resolving such questions. In doing so, we overrule *Levitz* and its progeny insofar as they permit an incumbent union to defeat an employer's withdrawal of recognition in a ULP proceeding with evidence that it reacquired majority status in the interim between anticipatory and actual withdrawal. Instead, we hold that proof of an incumbent union's actual loss of majority support, if received by an employer within 90 days prior to contract expiration, conclusively rebuts the union's presumptive continuing majority status when the contract expires. However, the union may attempt to reestablish that status by filing a petition for a Board election within 45 days from the date the employer gives notice of an anticipatory withdrawal of recognition. Consistent with the Board's usual practice, we shall apply our new holding retroactively in this case and in other pending cases. Accordingly, we will adopt the judge's recommended Order and dismiss the complaint.

FACTS

Johnson Controls manufactures, distributes, and sells interior automobile components from its facility in Florence, South Carolina. Since August 18, 2010, the Union has represented a unit of production and maintenance employees employed at the Florence facility. The parties' most recent CBA was effective from May 7, 2012, through May 7, 2015. Negotiations for a successor agreement began on April 20. However, on April 21, Johnson Controls was presented with a union-disaffection petition circulated by employees Brenda Lynch and Anna Marie Grant. The petition, titled "Union Decertification Petition," was signed by 83 of the 160 bargaining-unit employees and stated, in pertinent part:

WE, THE UNDERSIGNED, EMPLOYEES OF Johnson Controls, Florence facility, DO NOT WISH TO CONTINUE TO BE REPRESENTED BY THE United Auto Workers, LOCAL UNION NO. 3066 (Local 3066) FOR PURPOSES OF COLLECTIVE BARGAINING OR ANY OTHER PURPOSE ALLOWED BY LAW. WE UNDERSTAND THIS PETITION MAY BE USED TO OBTAIN AN ELECTION SUPERVISED BY THE NATIONAL LABOR RELATIONS BOARD OR TO SUPPORT WITHDRAWAL OF RECOGNITION OF THE UNION.

There is no allegation that any of the disaffection signatures were tainted by supervisory involvement.

Later that same day (April 21), Johnson Controls notified the Union that it had received the petition and would no longer recognize the Union as the employees' bargaining representative when the parties' CBA expired on May 7. Johnson Controls also stated that it was cancelling the previously scheduled bargaining sessions for a successor agreement. In its April 22 response, the Union stated that it had not received a petition or any verifiable evidence that it no longer enjoyed majority support, and it demanded that Johnson Controls return to the bargaining table. On April 24, Johnson Controls refused to provide the petition or to continue bargaining.

The Union thereafter began soliciting authorization cards from bargaining-unit employees. The authorization cards stated:

UAW AUTHORIZATION CARD

Date:

It's Time!

I, _____ authorize the United Auto Workers to represent me in collective-bargaining.

The cards included signature lines for the employee and a witness. Between April 27 and May 7, the Union collected 69 signed authorization cards, six of which were signed by employees who had also signed the disaffection petition (“dual signers”).

On May 5, Johnson Controls informed the Union that it had not received any evidence from the Union that the Union continued to enjoy majority support among the bargaining-unit employees and that, in the absence of such evidence, it would withdraw recognition upon expiration of the parties’ current contract. Although not mentioned by the judge, the Union responded by letter the following day, advising Johnson Controls that it “ha[d] credible evidence” that it retained majority support and was “happy to meet” to compare evidence. By letter dated May 7, Johnson Controls acknowledged the Union’s request to meet but stated that it was “not willing ... to share the names of the employees who signed the [disaffection] petition.” Johnson Controls further stated:

You indicate that despite the evidence the [Johnson Controls] has received from our employees, the [U]nion has evidence it has not lost majority support. However, while the employees provided the [Johnson Controls] with their evidence, to date the [U]nion has not provided any substantiated evidence supporting its position. Absent contrary evidence, we must rely upon the evidence in our possession and proceed as previously indicated.

Johnson Controls withdrew recognition from the Union on May 8. Immediately thereafter, Johnson Controls announced improvements to the employees’ terms and conditions of employment, including a 3-percent wage increase and a match to employees’ 401(k) retirement contributions.

On August 28, Lynch filed a petition for a decertification election in Case 10-RD-158949. Processing of that petition has been blocked, however, by the ULP charge the Union filed in this case.

At the ULP hearing, four of the six dual signers testified that on May 8—the day Johnson Controls withdrew recognition from the Union—they did not want the Union to represent them, and the judge credited their testimony. Based on the disaffection petition and the credited testimony of the four dual signers, the judge concluded that at the time Johnson Controls withdrew recognition, the Union had actually lost majority support. That is, adding these four dual signers to the 77 bargaining-unit employees who signed only the disaffection petition, 81 employees out of the 160-employee unit no longer wished to be represented by the Union. On this basis, the judge found the withdrawal of recognition lawful and dismissed the complaint.

DISCUSSION

The issue presented here is whether Johnson Controls demonstrated that the Union had lost its majority status as of May 8, the date Johnson Controls withdrew recognition. Under current law, and declining to rely on dual-signer testimony (unlike the judge), all six dual signers would be counted as supporting the Union because they signed union authorization cards after having signed the disaffection petition. In other words, their prior signatures on the disaffection petition would be disregarded. We believe there is a better way to resolve anticipatory withdrawal cases such as this one. Before we explain our new framework, however, we will first review the legal context within which this case and others like it arise.

I. THE LEGAL CONTEXT

Under § 9(a), the bargaining representative of an appropriate unit of employees is the representative “designated or selected for the purposes of collective bargaining by the majority of the employees in [such] unit,” and § 8(a)(5) requires the employer of the unit employees to recognize and bargain with their 9(a) representative.² Under longstanding precedent, once a union has been designated or selected as the § 9(a) representative of a bargaining unit, it enjoys a presumption of continuing majority status, which under certain conditions is irrebuttable. Specifically, a union “usually is entitled to a conclusive presumption of majority status for one year following Board certification as [the exclusive bargaining] representative” of a bargaining unit.³ In addition, under the “contract bar” doctrine, a union is entitled to a conclusive presumption of majority status during the term of a CBA, up to 3 years.⁴ As the Supreme Court has observed [in *Auciello*], “[t]hese presumptions are based not so much on an absolute certainty that the union’s majority status will not erode as on the need to achieve stability in collective-bargaining relationships.” At the end of the certification year or upon expiration of the CBA, the policy-based presumption of majority status becomes factually rebuttable.

Prior to *Levitz*, an employer could rebut the incumbent union’s presumption of majority status by establishing either that the union did not enjoy majority status at the time the employer refused to bargain, or the refusal to bargain was based on a good-faith reasonable doubt, supported by objective considerations, of the union’s majority status. [See *Celanese Corp. of America*, 95 N.L.R.B. 664, 671–675 (1951).] In addition, under the “anticipatory withdrawal of recognition” doctrine, while an existing contract would bar a *present* withdrawal of recognition, an employer that established good-faith doubt of the union’s majority status within a reasonable time prior to the expiration of a CBA could announce that it did not intend to negotiate a successor agreement, and it could then lawfully withdraw recognition and implement unilateral changes when the existing

² [fn.12]. . . [A]n employer violates § 8(a)(2) by recognizing or continuing to recognize a union that lacks majority support. See *International Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altmann) v. NLRB*, 366 U.S. 731, 738–739 (1961). In *Levitz*, however, the Board created a safe harbor from 8(a)(2) liability for employers with evidence of actual loss of majority status that elect to file an RM petition for an election rather than withdraw recognition. . . .

³ [fn.14] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996). Certain “unusual circumstances” are recognized as exceptions to the otherwise irrebuttable presumption of majority status during the certification year: defunctness of the union, schism within the certified representative, and radical fluctuation of the size of the bargaining unit. . . .

⁴ [fn.15] . . . Additionally, an affirmative bargaining order precludes any challenge to a union’s majority status for a reasonable period of time. See *Lee Lumber*, 334 N.L.R.B. at 399. And under the “successor bar” and “recognition bar” doctrines, majority status is similarly irrebuttable for a reasonable period of time. See *UGLUNICCO Service Co.*, 357 N.L.R.B. 801 (2011) (successor bar); *Lamons Gasket Co.*, 357 N.L.R.B. 739 (2011) (recognition bar). We express no view as to whether *UGL-UNICCO* and *Lamons Gasket* were correctly decided.

contract expired.

The “good-faith reasonable doubt” standard came under scrutiny in the Supreme Court’s decision in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998). . . . [T]he Board had found that the employer failed to demonstrate that it harbored a reasonable doubt of the union’s majority status. Before the Supreme Court, Allentown Mack contended that the Board had effectively abandoned the “reasonable doubt” standard and would recognize an employer’s reasonable doubt “only if a majority of the unit employees renounce[d] the union.” At oral argument, the Board maintained that “the word ‘doubt’ may mean either ‘uncertainty’ or ‘disbelief’” and that its reasonable-doubt standard “use[d] the word only in the latter sense.” The Court rejected the Board’s position and held that *doubt* means “uncertainty.” Accordingly, it held that under the Board’s reasonable-doubt standard, properly construed, the question was whether Allentown Mack had “a genuine, reasonable uncertainty” about the union’s continued majority status. The Court also held that the Board could permissibly maintain a unitary standard for withdrawal of recognition, filing an RM petition, and polling, but it could also rationally adopt different standards, including more stringent requirements for withdrawal of recognition.

Thereafter, in *Levitz*, the Board abandoned the “good-faith doubt” standard for withdrawal of recognition and held that, at times when an incumbent union’s majority support is rebuttably presumed, an employer may withdraw recognition only “where the union has actually lost the support of the majority of the bargaining unit employees.” *Id.* at 717; *see id.* at 725 (“[A]n employer may rebut the continuing presumption of an incumbent union’s majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.”). At the same time, the Board stressed “that an employer with objective evidence that the union has lost majority support . . . withdraws recognition at its peril.” *Id.* at 725. This means that if the union challenges the withdrawal of recognition in a ULP proceeding, the employer will have violated § 8(a)(5) if it fails to establish actual loss of majority status at the time recognition was withdrawn. *Id.*

. . . Subsequent to *Levitz*, . . . the Board incorporated the “actual loss of majority status” standard into its statement of the anticipatory withdrawal doctrine. Thus, an employer that receives evidence, within a reasonable period of time before its existing CBA expires, that the union representing its employees no longer enjoys majority support may lawfully refuse to negotiate a successor agreement and announce that it will not recognize the union after the contract expires. It must, of course, continue to recognize the union and adhere to the terms of the existing contract in the interim, since until the contract expires the union enjoys an irrebuttable presumption of majority status under the “contract bar” doctrine. *Levitz*, 333 N.L.R.B. at 730 n. 70. But, under *Levitz*, when an employer follows its anticipatory withdrawal of recognition with actual withdrawal when the contract expires, it does so at its peril: if the union challenges the employer’s claim of loss of majority status in a ULP case, the employer will be found to have violated § 8(a)(5) if it fails to establish loss of majority status at the time it withdrew recognition. *Id.* at 725.

In combination, the change from the *Celanese* “good-faith doubt” standard to the “actual loss of majority status” requirement, plus the *Levitz* “peril” rule, created an opportunity that unions reasonably seized. An employer’s anticipatory withdrawal of recognition became a signal to the union to mount a counter-offensive. If, in the interim between anticipatory and actual withdrawal, a union were able to reacquire majority status, the employer’s withdrawal of recognition would violate § 8(a)(5). The remedy for that violation would most likely include an affirmative bargaining

order, which would insulate the union's majority status from challenge for up to one year. And if a successor contract could be concluded within that insulated period, a new contract bar would take effect, giving the union up to 3 more years during which its majority status would be irrebuttably presumed. Moreover, an incumbent union need not show the employer its evidence of reacquired majority status prior to contract expiration. From one perspective, this rule is justified by concern that an employer might retaliate against employees should their identities and preferences be revealed. But it is also true that the union's ability to *covertly* reacquire majority status increases the odds that the employer's withdrawal of recognition will unwittingly violate § 8(a)(5), potentially resulting in an affirmative bargaining order, concomitant decertification bar, successor contract, and another contract bar.

II. NEED FOR A NEW FRAMEWORK

The issue presented in this case and in prior similar cases is how best to determine the wishes of employees concerning representation where the employer has evidence that at least fifty percent of unit employees no longer desire to be represented by the union, and the union possesses evidence that it has reacquired majority status. In these situations, as in this case, some unit employees are necessarily "dual signers." In resolving this issue, the Board is required to "balance the statutory goal of promoting labor relations stability against its statutory responsibility to give effect to employees' wishes concerning representation." After careful consideration, we do not believe the existing framework effectively serves either goal.

First, existing precedent does not properly safeguard employee free choice. In determining the dual signers' wishes, extant precedent follows a "last in time" principle, giving controlling effect to the later signature. Thus, an employee's disaffection signature is automatically invalidated by his or her subsequent reauthorization signature. Such a rule ignores the fact that dual signers have expressed both support for *and* opposition to union representation within a brief period of time. Moreover, it is quite possible that some dual signers may fail to understand that when they sign a union card or counter-petition after having signed a union-disaffection petition, they are effectively revoking their prior signature on the disaffection petition.⁵

Parties have sometimes sought to ascertain dual signers' representational wishes by asking them, at ULP hearings, what their sentiments were on the date recognition was withdrawn. Here, for example, the judge allowed such questions and relied on the testimony of four dual signers to find actual loss of majority status notwithstanding the Union's documentary evidence to the contrary. We cannot endorse this practice. Employees' testimony about their representational wishes, given in the presence of the parties' representatives and bound to displease one of them, is an unreliable substitute for a secret ballot, cast within the safeguards of a Board-conducted election.⁶

⁵ [fn.31] For example, in the instant case, employee Jefferson testified that he "didn't really know what [the union authorization card] meant." And employee McFadden testified that "they had already told us that the Union was out, so I felt like signing [the union authorization card], you know, wouldn't make a difference. So I just signed it anyway." In noting this evidence, we do not rely on after-the-fact testimony to ascertain these employees' representational sentiments. We merely observe that this testimony illustrates the fallibility of the "last in time" rule.

⁶ [fn. 32] The question of how to resolve dual-signer situations has plagued the Board. Two past Board members proposed addressing this issue by requiring the union to present its evidence of reacquired majority status. . . . In addition to removing the risk of unfair surprise, such a requirement would also (as former Member Johnson noted) discourage gamesmanship and eliminate unwitting violations of Section 8(a)(5), which disrupt bargaining relationships and typically result in the decertification-barring issuance of an affirmative bargaining order.

Second, existing precedent does not effectively promote labor relations stability, either. A union is under no obligation to disclose to an employer that it has reacquired majority status prior to the employer's actual withdrawal of recognition. Thus, an employer possessed of numerically sufficient disaffection signatures, and unaware of the union's counter signatures, will likely withdraw recognition at contract expiration and make unilateral changes, only to discover that it has violated § 8(a)(5). This results in an unwarranted disruption of the bargaining relationship, which could have been avoided had the employer known that its disaffection evidence had been superseded. The union may obtain a decertification-barring affirmative bargaining order as a result, but the bargaining relationship has still been unlawfully and unnecessarily disrupted. In contrast, if the union were permitted to re-establish its majority status through an election, there would be no unlawful disruption of the bargaining relationship, and the union would receive a new certification year if it won the election.

Third, the treatment of dual signers under current precedent is analytically unsound. . . . *Levitz* establishes an unjustified asymmetry: the Board only allows an employer to prove the dispositive fact—a union's loss of majority support—with evidence the employer actually possessed and relied on, but it permits the union, through the General Counsel, to challenge that evidence with after-acquired evidence the employer did not possess. There is the following asymmetry as well. An employee's union authorization card "cannot be effectively revoked in the absence of notification to the Union prior to the demand of recognition." But an employee's signature on a disaffection petition *is* effectively revoked by a pro-union countersignature in the absence of notification to the employer prior to its withdrawal of recognition. Nowhere in *Levitz* or its progeny is there any explanation why an employee's signature on a disaffection petition, presented to an employer for the purpose of securing an end to union representation, should be treated differently than his or her signature on a union authorization card.

Finally, the Board's current treatment of dual signers under current precedent was questioned in *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017). There, unbeknownst to the employer, the union reacquired majority status by obtaining signed union authorization cards from dual signers 3 days before recognition was withdrawn. Although the majority affirmed the Board's finding that the employer unlawfully withdrew recognition, Judge Henderson questioned whether an employer violates the Act at all "when, in good faith, it withdraws recognition from a union as a result of the union's intentional nondisclosure of its restored majority status." Moreover, the court unanimously refused to enforce the Board's affirmative bargaining order, citing the unintentional nature of the employer's violation and the union's having withheld the evidence of its restored majority status. Instead, the court indicated that in these circumstances, the question concerning representation should be resolved through an election.

Although this proposal has merit, we believe a Board-conducted, secret-ballot election provided under our new framework is the better solution. First, as this case illustrates, both employers and unions may be reluctant to disclose their evidence to each other, or they may dispute which side should "go first." In this regard, we note that the Union's offer to compare its evidence with Johnson Controls's evidence contemplated an exchange of evidence, as the dissent acknowledges. Unlike the dissent, we read the Union's offer to disclose its evidence as conditioned on reciprocity. Had the Union intended an unconditional offer, it would have provided its evidence even though Johnson Controls did not do likewise. Second, the mandated disclosure proposal of past Board members accepts the "last in time" rule, provided the union timely discloses its evidence to the employer. We would not apply the "last in time" rule. When, as here, a majority of employees have validly withdrawn support from the union, evidence that some of them may have subsequently recanted gives rise to a situation that is best resolved through an election.

We agree. The determination of union majority status through ULP litigation in cases like these has proven to be unsatisfactory. A Board-conducted secret ballot election, in contrast, is the preferred means of resolving questions concerning representation. Under current representation law, both employers and employees can obtain a Board-conducted secret ballot election when, as here, a sufficient number of unit employees have indicated that they no longer wish to be represented by an incumbent union.⁷ We conclude that unions, too, should have an electoral mechanism to determine the will of the majority following an anticipatory withdrawal of recognition, and we believe that such a mechanism is preferable to the current *Levitz* regime.

III. THE NEW STANDARD

a. Anticipatory Withdrawal and the 45-Day Window Period

We reaffirm the settled doctrine that if, within a reasonable time before an existing CBA expires, an employer receives evidence that the union has lost majority status, the employer may inform the union that it will withdraw recognition when the contract expires, and it may refuse to bargain or suspend bargaining for a successor contract. A union that receives such notice of anticipatory withdrawal has a variety of options. Assuming it has grounds to do so, it may file a ULP charge alleging that the employer initiated the union-disaffection petition or unlawfully assisted it, that the petition fails to make the employees' representational wishes sufficiently clear,⁸ that the petition is tainted by serious unremedied ULPs,⁹ or that the number of valid signatures on the disaffection petition fails to establish loss of majority status.¹⁰ However, the Board will no longer consider, in a ULP case, whether a union has reacquired majority status as of the time recognition was actually withdrawn. Instead, if the union wishes to reestablish its majority status, it must file an election petition. The Board will process the petition without regard to whether the parties' contract is still in force at the time the petition is filed.¹¹

⁷ [fn.38] Section 9(c)(1)(A) provides for elections petitioned for by employees seeking to decertify an incumbent union ("RD" elections). Section 9(c)(1)(B) provides for employer-petitioned elections to determine majority support ("RM" elections).

⁸ [fn.40] *Compare Highlands Regional Medical Center*, 347 N.L.R.B. at 1406 (finding that petition denominated "a showing of interest for decertification" did not establish that employees no longer wanted union representation), *with Wurtland Nursing & Rehabilitation Center*, 351 N.L.R.B. 817, 817–18 (2007) (finding that petition evidenced loss of majority status given that it expressly referenced removal of union).

In overruling *Highlands Regional Medical Center* to the extent it is inconsistent with today's decision, we do not reach the question of whether a petition that describes itself as a showing of interest for decertification may be relied upon to evidence nonsupport of the union as well as support for a decertification election. *Id.* at 1406 fn. 15. Such a question may be considered in the context of a future representation proceeding.

⁹ [fn.41] *See, e.g., Mesker Door, Inc.*, 357 N.L.R.B. 591, 596–98 (2011) (concluding that unlawful threats by employer's attorney and plant manager were causally related to employees' disaffection petition and thus the employer's withdrawal of recognition based on the petition was unlawful) (citing cases).

¹⁰ [fn.42] Under current law, an employer is not obligated to provide the union with a copy of its disaffection evidence at the time it withdraws recognition anticipatorily. We do not change that precedent. We believe that a union on the receiving end of an anticipatory withdrawal may readily acquire sufficient relevant information from its stewards and/or other pro-union employees to determine whether an unfair labor practice charge would be warranted. The sufficiency of the employer's disaffection evidence will, of course, be evaluated by the Board's regional office in its investigation of any unfair labor practice charge that may be filed regarding the employer's anticipatory withdrawal and refusal to bargain for a successor contract.

¹¹ [fn.43] Consistent with existing law, a union satisfies the requirement for a showing of interest to support its petition if it is the certified or currently recognized bargaining agent of the employees involved or a party to a current or recently expired collective-bargaining agreement covering the employees in whole or in part. *See* CASEHANDLING MANUAL (Part II) Representation Cases §11022.1.

We recognize that so long as the contract remains in effect, the union's majority status is irrebuttably presumed. The election, however, is to determine whether a majority of unit employees wish the union to continue to represent them *after* the contract expires. Although a union typically enjoys a rebuttable presumption of majority support post-contract, the fact that at least fifty percent of the unit has signaled its nonsupport of the union rebuts the presumption.

Accordingly, we modify the “anticipatory withdrawal of recognition” doctrine in two respects. First, the “reasonable time” before contract expiration within which anticipatory withdrawal may be effected is defined as no more than 90 days before the contract expires. This change removes any uncertainty as to what constitutes a “reasonable time” before contract expiration, and it aligns the start of the “anticipatory withdrawal” period with the usual start of the 30-day open period during which decertification and rival union petitions may be filed. Second, if an incumbent union wishes to attempt to re-establish its majority status following an anticipatory withdrawal of recognition, it must file an election petition within 45 days from the date the employer announces its anticipatory withdrawal. The union has 45 days to file this petition regardless of whether the employer gives notice of anticipatory withdrawal more than or fewer than 45 days before the contract expires. . . .

If *no* post-anticipatory withdrawal election petition is timely filed, the employer, at contract expiration, may rely on the disaffection evidence upon which it relied to effect anticipatory withdrawal; that evidence—assuming it does, in fact, establish loss of majority status at the time of anticipatory withdrawal—will be dispositive of the union's loss of majority status at the time of actual withdrawal at contract expiration; and the withdrawal of recognition will be lawful if no other grounds exist to render it unlawful.¹² If a post-anticipatory withdrawal election petition *is* timely filed, the employer may still withdraw recognition at contract expiration since the union's post-contract presumption of continuing majority status has been rebutted by the employer's disaffection evidence, and the employer may withhold recognition unless and until the union's majority status is reestablished electorally. Under certain circumstances, however, such an employer may permissibly continue to recognize the union, as explained below.

Thus, an employer's numerically sufficient and untainted evidence that an incumbent 9(a) representative has lost its majority status, upon which the employer relies to withdraw recognition

¹² [fn. 46] Following anticipatory withdrawal, the union will now have an electoral means to re-establish its majority status. If it chooses not to employ that means, the employer's disaffection evidence will be dispositive because it will be the only cognizable evidence of the unit employees' representational desires.

[I]f the union believes the employer is bluffing and does not, in fact, have evidence that the union has lost majority status, it can call the employer's bluff by filing a charge alleging that the employer's refusal to bargain for a successor contract violated § 8(a)(5). It can also file a petition for an election and an 8(a)(5) charge, and the block example, if a union receives notice of anticipatory withdrawal and has sufficient information to believe that the employer solicited disaffection evidence, it may file an election petition and an 8(a)(5) charge with a simultaneous offer of proof, thereby blocking the election. *See* § 103.20 of the Board's Rules & Regulations. We clarify, however, that if a union opts to file a ULP charge rather than an election petition first, or at all, we will not toll the 45-day period. Thus, a union must file an election petition within 45 days of receiving notice of anticipatory withdrawal. If the union chooses to first pursue a ULP charge, it will have no election recourse if it does not file an election petition within the 45-day window period.

Under the blocking-charge policy, the pendency of a ULP—regardless of whether it is meritorious—may prevent an election from occurring for an extended period of time. For this reason, among others, the Board plans to revisit the blocking charge policy in a future rulemaking proceeding. As of the issuance of this decision, however, the Board has not yet revisited the policy. Thus, for institutional reasons, we continue to maintain extant law pertaining to blocking charges. . . .

anticipatorily, will be dispositive of the union's loss of majority status at contract expiration. Accordingly, an employer possessing such evidence *may* withdraw recognition when the contract expires: the union's irrebuttable presumption of majority status disappears when the contract expires; its postcontract presumptive majority status has been rebutted by evidence that at least fifty percent of the unit employees no longer support the union; and its majority status may only be re-established through an election that has yet to be held. In recognizing the right of an employer, thus situated, to withdraw recognition at contract expiration, we protect the § 7 right of employees to refrain from union representation and collective bargaining. In the interest of promoting labor relations stability, however, we do not *require* such an employer to withdraw recognition at contract expiration if the 45-day window period remains open or a union election petition has been timely filed and the election remains pending.

We recognize . . . that where an incumbent union has lost majority status, permitting an employer to refrain from withdrawing recognition as described above implicates § 8(a)(2). Therefore, just as the Board in *Levitz* created a safe harbor from 8(a)(2) liability for employers with evidence of actual loss of majority status that choose to file an RM petition rather than withdraw recognition, . . . so also we create a safe harbor from 8(a)(2) (and 8(b)(1)(A)) liability to the extent necessary to accommodate the legal structure we adopt today. No employer that permissibly refrains from withdrawing recognition from a minority union in conformity with this decision will violate § 8(a)(2) . . . , and no union that accepts such recognition will violate § 8(b)(1)(A).

There is, however, one exception to the foregoing "safe harbor" rule. That exception is when a rival union has filed an election petition or intervenes in the incumbent union's representation case. In that situation, the employer must withdraw recognition from the incumbent, since continued recognition of the incumbent union would give it an unfair advantage over its rival. The employer may lawfully express its *preference* for one of the competing unions, but it may not continue to recognize the incumbent union to the disadvantage of its rival.

b. Impact of the New Standard on Unilateral Changes

Whether an employer may or should take unilateral action following a lawful withdrawal of recognition depends on the situation. As noted, except in limited circumstances, unilateral action by the employer would entail substantial risk. . . .

1. Gap period between contract termination and union election

If there is a gap between the date the contract terminates and the date of the election, an employer that makes unilateral changes in unit employees' terms and conditions of employment during that intervening period would not violate § 8(a)(5), since the unit employees' showing of disaffection will have rebutted the union's post-contract presumption of continuing majority status. However, unilateral changes made after the election petition has been filed—during the pre-election "critical period"—could constitute objectionable conduct where the changes would reasonably interfere with employee free choice (for example, a wage increase or grant of benefits), warranting a second election if the union were to lose the first one.

2. Unchallenged election loss by the Union

If the union loses a post-anticipatory withdrawal election, has not challenged a potentially outcome-

determinative number of ballots, and does not file election objections, the employer must withdraw recognition (if it has not done so already), and it may proceed to act unilaterally.

3. Challenged election loss by the union

Assuming the employer refrains from making changes pre-election, if the union *loses* the election and either had challenged a potentially determinative number of ballots or files election objections, or both, the employer would make unilateral changes after the election at its peril. If the disposition of the union's ballot challenges were to change the outcome of the election and result in a union victory, the union's representative status would be established as of the date of the election, and the employer's unilateral changes made after that date would violate § 8(a)(5). Assuming no outcome-changing ballot challenges, if the union were to prevail on its objections, a second election would be directed, and the employer's unilateral changes prior to that election could furnish grounds for the union—if it loses the second election—to file objections yet again and obtain a third election. Of course, if the union's outcome-determinative ballot challenges and/or objections are overruled, the employer must withdraw recognition (if it has not done so already), and it may proceed to act unilaterally.

4. Employer challenges union election win

Similar considerations are brought to bear if the union *wins* the post-anticipatory withdrawal election, and the employer either challenged a potentially determinative number of ballots or files election objections, or both. Again, the employer would make unilateral changes at its peril. If the disposition of the determinative challenged ballots results in the union preserving its election win, the union's representative status would be established as of the date of the election, and the employer's unilateral changes made after that date would violate § 8(a)(5). If the employer's objections are sustained and a second election directed, its unilateral changes in unit employees' terms and conditions of employment would furnish the union grounds to file objections to the second election and obtain a third election in the event it loses the second election. In other words, if an employer wants to avoid interfering with its own efforts to secure an efficacious rerun election, it should refrain from making unilateral changes until post-election proceedings have run their course.

Accordingly, as a practical matter, whereas withdrawing recognition after the contract expires following a lawful anticipatory withdrawal will generally be a risk-free act, making unilateral changes poses considerable risks. An employer should take these risks into consideration in its decision making, although we are well aware that the exigencies of running a business may exert other pressures. . . .

IV. RETROACTIVE APPLICATION

[In this section, the Board holds that it will not apply the new rule retroactively.]

V. RULING ON THE MERITS

. . . . On April 21, Johnson Controls was presented with a disaffection petition signed by 83 of the 160 bargaining-unit employees, over 50 percent of the unit. Later on April 21, Johnson Controls

notified the Union that it had received the petition and would no longer recognize the Union as the employees' bargaining representative when the parties' CBA expired on May 7. Consistent with this announcement, Johnson Controls withdrew recognition on May 8, and the Union did not file an election petition. Because a majority of unit employees no longer wished to be represented by the Union at the time Johnson Controls withdrew recognition, Johnson Controls acted lawfully. Although the Union had solicited authorization cards from 69 bargaining-unit employees, six of whom were "dual signers," we do not consider this evidence for the purpose of determining whether Johnson Controls's withdrawal of recognition was lawful for the reasons fully explained in this decision. We also do not consider the dual signers' testimony about their true sentiments concerning representation on the date recognition was withdrawn, or testimony concerning the sentiments of other employees who did not sign the disaffection petition.

VI. RESPONSE TO DISSENT

Our dissenting colleague contends that our decision is contrary to the foundational principle that an incumbent union is entitled to a continuing presumption of majority support, which must be measured solely as of the time the employer withdraws recognition. Our colleague also contends that the Board should consider prohibiting employers from ever withdrawing recognition unilaterally and should instead require them to seek a Board election. We respectfully disagree.

Our colleague's single-minded focus on the irrebuttable presumption of majority status during the first 3 years of a contract term turns a blind eye to a salient aspect of anticipatory-withdrawal precedent. Under well-settled law, both before and after *Levitz*, an employer that receives evidence, within a reasonable period of time (now defined as 90 days) before a CBA expires, may lawfully do two things. First, it may lawfully announce that it will withdraw recognition when the contract expires (and with it, the union's conclusive presumption of majority status under the contract-bar doctrine). Second—and this is the salient point—it may *immediately* refuse to bargain or suspend bargaining for a successor CBA, at a time when the union's majority status is otherwise irrebuttable. That such a refusal is lawful can only mean one thing: the Board recognizes, and has long recognized, that the irrebuttable presumption of majority status is a policy-based presumption of law, not a presumption of fact, and that there are policy-based circumstances warranting an exception to this presumption when an incumbent union has actually lost majority status within a reasonable period of time before the contract expires. The presumption—the legal fiction—of the union's continuing post-contract majority status has been rebutted in fact, and it's pointless to pretend otherwise. Our framework accepts this reality and furnishes an electoral mechanism for the union to seek to regain majority status even before the contract expires, or shortly thereafter, with a consequent renewal of the certification-year bar. The dissent disregards this reality and prefers legal fictions instead.

The dissent compounds her error by faulting Johnson Controls for following through on its anticipatory withdrawal of recognition announcement without post-expiration affirmation of the union's continued loss of majority status. In this respect, she relies on unsupported presumptions of fact to buttress her unsupported presumption of law. For our colleague, the only thing that matters is whether Johnson Controls could prove loss of majority status on the date it withdrew recognition, shackled by restrictive evidentiary rules that (1) conclusively presume dual signers were union supporters; (2) count pro-union evidence in the union's possession whether or not the employer knew of it; and (3) exclude all evidence detracting from the union's support not in the employer's possession. § 7 . . . creates a right for employees to be represented by a union of their own

choosing, and it also creates a right for employees to refrain from such representation. The dissent's restrictive evidentiary rules effectively privilege the former right over the latter. . . .

We also reject the dissent's advocacy for a rule under which all withdrawals of recognition would be unlawful absent an election. . . . [T]hat position was fully considered and rejected in *Levitz* by a unanimous Board. . . . We adhere to the views there expressed. In addition, it would be anomalous to hold that an election is the only means by which a union's representative status under § 9(a) may be ended when unions may achieve 9(a) status through voluntary recognition as well as by an election. Moreover, unilateral withdrawal of recognition has been a lawful means of terminating a union's 9(a) status for many decades—and although, since *Levitz*, such withdrawal requires a showing that the incumbent union has lost its majority status, for most of the Board's history recognition could be lawfully withdrawn based on a lesser showing of good-faith doubt of the union's continuing majority status. See *Celanese Corp.*, 95 N.L.R.B. 664 (1951). Although we do not here propose returning to the good-faith doubt standard, the dissent establishes no valid basis for running to the opposite extreme and abolishing withdrawal of recognition altogether.

ORDER

The [ALJ's] recommended Order . . . is adopted and the complaint is dismissed.

MEMBER MCFERRAN, dissenting.

In the name of promoting employee free choice and preserving stability in collective bargaining, the majority does the opposite: It permits an employer unilaterally to withdraw recognition from an incumbent labor union, in the face of objective evidence that the union has *not* lost majority support among the employees it represents. It then requires the union to petition for and win an election to regain its representative status, which should never have been stripped from it. This result—reached by reversing precedent unasked and without briefing—violates two foundational principles under the National Labor Relations Act: first, that a recognized union is entitled to a continuing presumption of majority support, and, second, that a Board-conducted election—not empowering unilateral employer action—is the preferred way to determine whether an incumbent union continues to enjoy majority support. Indeed, the majority has invented an entirely new scheme that flips these longstanding principles on their head. . . .

Today, the majority imposes a contrived solution on a nonexistent problem. Employers in cases like this one face no real dilemma. The situation is this: Presented with objective evidence that the union has lost majority support—but precluded (under the Board's "contract bar" doctrine) from withdrawing recognition because a collective-bargaining remains in effect the employer announces that it *will* withdraw recognition *when the contract expires* (under the "anticipatory withdrawal" doctrine). But before the contract expires, and so before withdrawal can be effectuated, the union gathers evidence showing that it has *not* lost majority support, and, though not required to do so, even offers to share that evidence with the employer. What is the employer to do? The answer under *Levitz* is obvious: petition for a Board election.

Instead of following sound precedent, the majority constructs an entirely new scheme for addressing cases like this one. Disregarding the union's continuing presumption of majority support and dismissing the union's rebuttal evidence as immaterial, the employer is now permitted to oust the union as the employees' bargaining representative the second the contract expires—and the

union remains ousted, unless and until it seeks and wins a Board election.

The Supreme Court has observed that when it comes to employers who unilaterally withdraw recognition from incumbent unions, “[t]here is nothing unreasonable in giving a short leash to the employer as vindicator of its employees’ organizational freedom.” That is precisely what *Levitz* and the Board’s “anticipatory withdrawal” cases have done, with the approval of the federal courts. In contrast, the majority’s apparent aim is to let employers off the leash completely, even in cases like this one, where it is clear that the employer is vindicating not “employees’ organizational freedom,” but rather its own interest in ousting a Board-certified union without an election. Here, letting employers off the leash means that unions and the workers that support them will get bit. That result may not trouble the majority, but it is inimical to the NLRA. Accordingly, I dissent.

* * *

Page 529, add a new note 3-A. Alaska’s labor agency may be more willing to combine different types of employees into one bargaining unit than most. *Public Safety Employees Ass’n, AFSCME Local 803 v. City of Whittier*, 2018 WL 2561079 (Alaska Labor Relations Agency, May 7, 2018) approved a unit composed of all police, fire, and EMS service employees in the city. The agency rejected the city’s objections (among others) that the unit combined law enforcement and non-law enforcement personnel and both temporary and permanent employees.

Page 529, add a new note 6a. 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 faculty, *see Employees of Beaver County Community College*, 47 Pennsylvania Pub. Employee Rep. ¶ 78 (Pa. Lab. Rel. Bd., Feb. 16, 2016).

Page 529, add a new note 6b. 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.

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.

CHAPTER 8

ORGANIZING WITHOUT AN ELECTION

Page 555, add this 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 employer posted and publicly read to employees a notice that it had engaged in unfair labor practices, and two years had elapsed).

Page 556, add the following at the end of note 14. In a recent case, the Board observed that, while it “would normally consider issuing a remedial bargaining order,” the fact that four years had elapsed since the employer’s ULPs and approximately thirty percent of the workforce had turned over meant that “a bargaining order would likely be unenforceable.” “Accordingly, rather than engender further litigation and delay over the propriety of a bargaining order, [the Board decided] that employees’ rights would be better served by proceeding directly to a second election.” *Sysco Grand Rapids, LLC*, 367 N.L.R.B. No. 111 (Apr. 4, 2019).

Page 568, add the following at the end of note 3. One difference between a regular CBA—that is, one governed by § 9(a)—and a pre-hire agreement is that when the latter expires, the employer is no longer obligated to bargain with the union. This difference is key to understanding *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (DC Cir. 2018). There, the company negotiated a series of pre-hire agreements with a union. When the last of those agreements expired, the company refused to continue bargaining. The union, backed by the Board, asserted that it had become the exclusive representative under § 9(a), and the pre-hire agreements had been converted to regular CBAs. The basis for that assertion was that the union had previously offered to demonstrate to the employer that it had the support of a majority of employees, and several of the earlier agreements acknowledged the union’s status as exclusive representative under § 9(a).

This was sufficient under NLRB precedent, *Staunton Fuel & Material, Inc.*, 335 N.L.R.B. No. 59 (2001), but the D.C. Circuit held that a union’s offer to show proof of majority support was not sufficient to establish that the union was an exclusive representative of a group of employees under *Bernhard-Altmann*. Instead, the D.C. Circuit held that a § 8(f) agreement could be converted into a § 9(a) agreement only if there the union had at some time produced proof of its majority status.

Based in part on *Colorado Fire Sprinkler*, the Board later issued a call for amicus briefs in a case presenting the question of whether *Staunton Fuel* should be overturned. However, the union later withdrew its charge, and the case ended.

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 that § 302 does not create a private right of action), *cert. denied*, 139 S. Ct. 198 (2018).

Page 600, add a new note between notes 1 and 2. The day before his NLRB term ended, Member Hirozawa issued a concurrence in *Children’s Hospital & Research Center of Oakland*, 364 N.L.R.B. No. 114 (Aug. 26, 2016), endorsing Professor Morris’s position. The case concerned 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. The Obama Board 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 Board then successfully moved the D.C. Circuit to remand the case in light of its decision in *PCC Structural, Inc.*, 365 N.L.R.B. No. 160 (Dec. 15, 2017), which overruled *Specialty Healthcare*.

Months passed without a decision from the Board. Evidently tired of waiting for what would almost certainly be a loss, on April 9, 2019 the UAW filed a new petition seeking a plant-wide election. On April 17, 2019, it moved to withdraw its petition to represent the maintenance employees and dismiss the related ULP charge; the Board granted that motion on May 3. But the Board found that this sequence of events was impermissible because of the certification bar. Recall that the Board bars new union election petitions from being filed for one year following a Board order certifying a union; that period is tolled if there is a challenge to the certification. Therefore, the Board majority concluded, the certification bar was still in effect when the UAW filed its new election petition, and further, that problem that was not cured by the UAW later disclaiming interest in representing the unit of maintenance workers. *See Volkswagen Group of America Chattanooga Operations, LLC*, 367 N.L.R.B. No. 138 (May 22, 2019).

Board Member McFerran dissented in a scathing opinion stating that, faced with VW's tactical invocation of the certification bar rule, the Board had "abandon[ed] our duty" to protect workers' § 7 rights: "When the Union effectively conceded victory to the Employer by petitioning for the unit that the Employer had demanded, the Employer sought to block the new petition. And the employer now prevails. 'Heads the employer wins; tails the union loses' cannot be the Board's new motto."

Following the Board's decision, the UAW filed a new union election petition, which meant the election was further delayed. After employees voted over the course of three days in June 2019, the union lost, 833–776.

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.*, 5 Cal.5th 898 (2018). In this case, the mayor of San Diego sponsored a citizens’ initiative to eliminate pensions for new municipal employees, then 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. An 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 645, end of note 1. *Ledbetter* explicitly held, however, that the “good faith” required in bargaining would be defined by Missouri state law, not federal labor law. 387 S.W.3d 360, 367-68.

Also, lower courts in Missouri have allowed employers to create “collective” bargaining rules that are relatively employer-friendly. *St. Louis Police Leadership Org. v. City of St. Louis*, 484 S.W.3d 882 (Mo.App. 2016) approved a decertification process that had no provisions for unions to challenge decertification and allowed decertification via petition without any formal voting. Another court upheld a system which required secret ballot votes to certify a union, barred a city from paying officers for time spent in collective bargaining, restricted economic terms of labor agreements to one-year terms, and allowed the city to modify the economic terms of agreement in the event of a budget shortfall. *West Central Missouri Region Lodge #50, FOP v. City of Grandview*, 460 S.W.3d 425 (Mo. App. 2015).

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 that 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*, Case No. 127504-U-5 (Wash. Pub. Empt' Rel. Comm'n, 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.*, Dec. No. 2016-176, Case No. E- 0188-2 (N.H. PERB, July 29, 2016).

Page 769, add to the end of Problem 10.5. See *Nebraska Association of Public Employees Local 61, AFSCME v. State of Nebraska, Dept. of Correctional Services*, Case No. 1448 (Oct. 26, 2018) (requiring police body cams is a mandatory topic given that footage could be used in disciplinary hearings); *Matter of Belleville Educ. Ass'n*, 455 N.J.Super. 387 (N.J. App. July 16, 2018) (using audio and video recording devices in schools to help respond to student shooting incidents was mandatory due to potential use in discipline and privacy issues).

Page 770, add the end of the carryover paragraph. Among other things, under the revised § 423.15, school employees may not negotiate over decisions regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit; personnel decisions involving a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or the impact of those decisions on an individual employee or the bargaining unit; a school's performance evaluation system, including classroom observations, or the impact of those decisions on an individual employee or the bargaining unit; and decisions concerning the performance-based compensation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

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.

CHAPTER 11

ECONOMIC WEAPONS AND IMPASSE RESOLUTION

Page 820, insert new note 5. General Counsel Robb has placed the issue of “[f]inding racist comments by picketers protected under *Clear Pine Mouldings* because they were not direct threats (Cooper Tire & Rubber Co., 363 NLRB No. 194 (2016))” under the “conflicts with other statutory requirements” section of his Mandatory Submissions to Advice memo, Memorandum GC 18-02, December 1, 2017.

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 a 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 897, add a new note 5. How much deference should interest arbitrators give to the facts and recommendations in fact-finders’ reports? Most arbitrators give great deference. *City of Painesville, Ohio v. IAFF Local 434*, 2017-MED-1346 (Conciliator Bernardini). *But cf. City of Broadview Heights, Ohio v. IAFF Local 3646*, 2017-MED-09-1139 (Conciliator Klein) (arbitrators are not required to “rubber stamp” a fact-finder’s conclusions because positions and facts can change between the fact-finding hearing and the arbitration). Consider this issue when reading the next section.

Page 912, end of note 1. For example, *Snohomish County v. Snohomish County Corrections Officers Guild*, Case No. 12771-1-15 (Arb. Cavanagh, 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.*, Case No. S-MA-15-347 (Arb. Nielsen, 2016) involved *twenty-five* issues.

Page 916, second full paragraph, after the cites. *Hennepin County of Paramedics and Hennepin County Medical Center*, BMS No. 17PNO203 (Arb. Befort, 2017) (focusing on internal comparables and consistency in ruling for employer); *Capital City Labor Program Supervisory*

Division and Ingham County, MERC Case No. L15H0958, (Arb. Stratton, 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 916, after the second paragraph. What if interest arbitrators traditionally relied heavily on internal comparables for a certain issue between the parties, but then the collective bargaining rights of the comparable employees, but not the employees in the union at issue, were revoked by a statutory amendment? In *City of Dubuque and Dubuque Policeman’s Protective Association* (Arb. Perry, June 21, 2018), the city argued that internal comparables – other city employees – had recently increased their payments toward health insurance premiums to 15%, while payments for the police employees at issue in the arbitration remained at 10%. While granting that these numbers were correct and that arbitrators had traditionally given great weight to internal comparables on this issue with these parties, the arbitrator also noted that most of the other city employees had recently lost their collective bargaining rights when the Iowa Public Employment Relations Act was amended. The arbitrator awarded the union’s position of remaining at 10%.

Page 927, add a new note 12. A few states have specified that some different rules should apply in interest arbitration for cities that are “financially distressed.” It is unclear how much of a difference such rules have made so far. *See Walker v. Read*, 91 N.Y.S.3d 807 (N.Y. Sup.Ct. App.Div., 2019) (interest arbitration award granting a 2% wage increase to firefighters upheld over employer challenge, despite the fact that the employer (Plattsburgh, NY) was a “fiscally eligible municipality” under a state law that required arbitrators to give a weight of 70% to such an employer’s ability to pay, because the arbitration panel complied with that mandate); *Fraternal Order of Police Fort Pitt Lodge No. 1. v. City of Pittsburgh*, 203 A.3d 965 (Pa. 2019) (interest arbitration award involving a city under a recovery plan pursuant to the state Municipal Financial Recovery Act upheld over a union challenge, as award did not deviate from the plan).

Page 929, add a new Problem 11.2-B. In response to a police department ordering the use of body cams, a police union made the following bargaining proposal about the effects of this order: officers and their union should have unlimited access to their video footage to assist officers in writing reports, and in preparing for testimony in legal proceedings. The employer’s proposal was to give the Chief of Police discretion to determine whether officers should have access to video footage in instances of officer-involved shootings, in-custody deaths, or incidents where officers are alleged to have engaged in criminal activity or serious misconduct. At the interest arbitration, assuming the statutory criteria do not weigh heavily on one side or the other on this issue, what do you think the best arguments for each side are, and had you been the arbitrator, how would you have ruled? *See City of Ithaca, NY v. Ithaca Police Benevolent Association*, PERB Case No. 1A 2016-024 (Arbitrator Gorman) (adopting the union’s proposal on this issue).

Page 958, end of note 1. 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 argued 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).

Page 980, add the following to the end of note 1. In recent months, the office of NLRB’s General Counsel has argued in several cases that the Board should reverse its recent precedent holding that the use of large banners or inflatable rats is neither equivalent to picketing nor coercive. So far, these arguments have not met with success, either before Administrative Law Judges (who are bound by the Board’s precedent in *Eliason & Knuth* and *Sheet Metal Workers*), or district courts. See *King v. Construction & General Building Laborers’ Local 79*, Case No. 1:19-cv-03496, 2019 WL 2743839 (E.D.N.Y. July 1, 2019); *IUOE Local 150*, Case 25-CC-228342, 2019 WL 30739999 (NLRB Div. of Judges, July 15, 2019); *IBEW, Local 98 (Shree Sai Siddhi Spruce)*, Case 04-CC-223346, 2019 WL 2296952 (NLRB Div. of Judges, May 28, 2019). See also NLRB Office of the General Counsel, Advice Memorandum, Case 13-CC-225655 (Dec. 20, 2018).

Page 991, add a new note 3. Early evidence suggests that the Trump Board plans to apply the *Moore Dry Dock* guidelines strictly. In *Preferred Building Services, Inc.*, 366 N.L.R.B. No. 159 (Aug. 28, 2018), the Board held that union picketing outside an office building constituted unlawful secondary conduct, and that therefore the employer’s decision to fire the employees in retaliation for their participation in the picketing did not violate the NLRA. The picketing involved janitorial employees whose employer was hired by the office building’s management company. While the picket signs themselves named the picketers’ employer, the Board held that picketers’ conduct did not meet the *Moore Dry Dock* criteria because their leaflets requested that a building tenant “ensure that ‘their’ janitors obtain better working conditions.” In the Board’s view, “the picketers led the public to believe that [the tenant] – who was not involved in the dispute – was their employer.” Then, the Board added that even if the pickets satisfied *Moore Dry Dock*, their conduct was unlawful because “the picketing was intended to ‘seriously disrupt’ the business relationship between” the janitors’ employer and the building management company.

Page 991, add a new note 4. In *IBEW Local Union 357*, 367 N.L.R.B. No. 61 (Dec. 27, 2018), the NLRB held that “if a union notifies neutral employers at a common situs that it intends to picket the primary employer, the union ‘has an affirmative obligation to qualify its threat by clearly indicating that the picketing would conform to *Moore Dry Dock* standards or otherwise be in uniformity with Board law.’”

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 1083, add at the end of the first full paragraph. Shortly after *Babcock* issued, then-General Counsel (and current co-author of this casebook) Richard F. Griffin, Jr., issued a memo discussing how the Regional Offices should apply the new precedent. See Memorandum GC 15-02, *Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in Section 8(a)(1) and (3) Cases* (Feb. 10, 2015). That memo noted the following: “Although the *Babcock* decision only discussed this new requirement in the context of *Collyer* deferral, we assume that it would also apply to cases where *Dubo* deferral is raised, i.e., where the unfair labor practice issue is being processed through the grievance-arbitration machinery and there is a reasonable chance that use of that machinery will resolve the dispute or put it to rest. See *Dubo Manufacturing Corp.*, 142 N.L.R.B. 431 (1963); Memorandum GC 79-36, *Procedures for Application of the Dubo Policy to Pending Charges*, dated May 14, 1979, at 1.” *Id.* at 11, n.47 (explaining that under *Dubo*, deferral is warranted “where the matter in dispute . . . is being processed through the grievance-arbitration machinery and there is a reasonable chance that the use of that machinery will resolve the dispute or set it at rest”).

General Counsel Robb, who disagrees with that policy, recently issued a memo instructing the Regions on when to apply the *Dubo* policy:

Memorandum GC 15-02 was incorrect in . . . that, by its own terms, the *Babcock* decision does not apply to *Dubo* deferrals. Because *Babcock* did not modify *Dubo* deferral, which is supported by different rationales than those supporting *Collyer* deferral, the General

Counsel wishes to reaffirm the role of *Dubo* in the administration of the Act, and to clarify the circumstances and procedures applicable to *Dubo* deferrals. Accordingly, contrary to the instruction set forth in Memorandum GC 15-02, Regions should continue to defer under *Dubo* Section 8(a)(1) and (3) cases meeting the standards for deferral set forth herein, and should otherwise consider *Dubo* deferral in any Section 8(a)(1), (3) and (5) and Section 8(b)1(A) and (3) case where the allegations of the charge fall within its scope and the Charging Party or individual grievant has previously filed a grievance in a contractual process leading to binding arbitration.

Memorandum GC 19-03, *Deferral under Dubo Manufacturing Company*, dated Dec. 28, 2018.

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 Trustees of Mount Vernon Pub. Library*, 75 N.Y.S.3d 840 (N.Y. Sup. Ct., 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*, 108 N.E.3d 1220 (Oh.App. 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 that reinstating a police officer who committed acts of dishonesty in his official capacity violated that policy.

In contrast, *City of Chicago v. Fraternal Order of Police*, 2019 IL App. (1st) 172907, (Ill.App., 2019) held that an arbitrator erred in ordering the City of Chicago to destroy records of alleged police misconduct that were more than five years old, even though the relevant CBA required the destruction of such records. Using the private-sector test, the court held that state and local law established a well-defined public policy favoring the proper retention of important public records for access by the public. Further, the U.S. Department of Justice (which had opened an investigation into the department’s use of force policies in 2015) had concluded that this CBA provision could deprive the Department of important information needed to monitor historical patterns of police misconduct.

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*, 617 Pa. 69 (2012); *New York Transit Auth. v. Phillips*, 75 N.Y.S.3d 133 (N.Y. Sup. Ct. App. Div., 2018).

CHAPTER 14

INDIVIDUAL WORKERS AND THEIR UNIONS

Page 1128, add the following to the end of note 4. In 2018, the NLRB’s General Counsel issued a memo giving his view of the line between arbitrary conduct by unions and “mere negligence.” The memo stated that “[i]n cases where a union asserts a mere negligence defense based on its having lost track, misplaced or otherwise forgotten about a grievance . . . the union should be required to show the existence of established, reasonable procedures or systems in place to track grievances.” The memo went on to state that “a union’s failure to communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party . . . constitutes more than mere negligence . . . unless there is a reasonable excuse or meaningful explanation.” Office of the General Counsel, Memorandum GC 19-01(Oct. 24, 2018), <https://apps.nlr.gov/link/document.aspx/09031d4582992b84>.

This memorandum illustrates a broader dynamic: Republican General Counsels and Boards tend to take a stricter view of what is required by the DFR than Democratic General Counsels and Boards. Is it apparent to you why this is?

Page 1142, add the following to the list of right-to-work states in the last paragraph.

Kentucky (2017). In 2016, West Virginia enacted a right-to-work law. However, a state court recently held that it violated the state constitution. *West Virginia AFL-CIO v. Justice*, Case No. 16-C-959 (Kanawha Cty. Circuit Court, Feb. 27, 2019).

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

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 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), 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, 228 F. Supp. 3d (N.D. Ill.2017). The Seventh Circuit affirmed, and the defendants filed a cert. petition. While that petition was pending, Illinois passed a law barring municipal right-to-work laws. As a result, the Supreme Court vacated the Seventh Circuit’s judgment and directed that that case be dismissed as moot.

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.

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 1153, delete the heading, and substitute the following:

D. Union Security in the Public Sector

1. Phase 1: *Abood v. Detroit Board of Education* and the Chargeable/Non-Chargeable Distinction

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 NEBRASKA L. REV. 62 (2017).

Page 1159, move the material beginning with note 6 and ending after the first paragraph break on page 1162 into a new subsection, as follows:

2. Phase 2: The Court's Retreat From *Abood*.

Beginning in 2007, several Supreme Court justices began signaling that they viewed *Abood* as insufficiently protective of objecting workers' interests. These signals came in cases about what procedures were required or permitted to enforce *Abood*'s chargeable/non-chargeable distinction. (These procedures are discussed further in Part II.F of this section.) First, in *Davenport v. Wash. Educ. Ass'n*, Justice Scalia wrote that “it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees.” 551 U.S. 177, 184 (2007) (holding state could require public-sector labor unions to obtain affirmative consent before spending represented nonmembers' fees for election-related purposes).

Next, in *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012), Justice Alito wrote that the *Abood* rule was “something of an anomaly.” *Knox* was another case about procedures to protect union objectors. Specifically, the Court held that objectors could not be required to “opt out” of a mid-year dues assessment; instead, the union had to obtain affirmative consent from non-member represented workers before charging them. (*Knox* did not apply to regular dues assessments – only mid-year increases.) This holding was remarkable less for its substance – mid-year dues increases are relatively rare – than because it went beyond the relief requested by the plaintiff-objectors. They had asked the Court to hold only that the union was required to send them notice of the assessment and then give them opportunity to opt out; the opt-in requirement was the Court's own innovation, arrived at without benefit of briefing.

The Court reached its decision in part because it assumed that represented workers who had neither joined the union nor opted out of paying the non-germane portion of dues probably would have preferred on some level to have become non-member objectors. But can you think of any reasons that this might not be the case? See Charlotte Garden, *Meta Rights*, 83 Fordham L. Rev. 855, 901-05 (2014) (arguing that (1) concept of “sticky defaults” could explain why workers would neither join their union nor opt out of the non-germane portion of union dues; and (2) some workers may

prefer not to join the union for rational reasons, such as avoiding union discipline, that are irrelevant to the worker's decision to pay for non-germane union expenses).

Some *dicta* in the majority opinion, written by Justice Alito for five justices, indicated a willingness to explore a much more radical approach to the law in this area generally. Most worrying for unions and their advocates, the majority opinion seemed to toy with the idea of making “opt in” the default rule for *all* employees for *all* “nonchargeable” expenses.

Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly — one that we have found to be justified by the interest in furthering “labor peace.” . . . But it is an anomaly nevertheless. . . .

Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction. Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles. . . .

By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.

Justice Sotomayor, joined by Justice Ginsburg, concurring, objected to this *dicta*.

I cannot agree with the majority's decision to address unnecessarily significant constitutional issues well outside the scope of the questions presented and briefing. By doing so, the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court's proper role in our system of separated powers.

Two years later, the Court decided *Harris v. Quinn*, 573 U.S. 616 (2014). Unlike *Davenport* and *Knox*, *Harris* involved the constitutionality of agency fees, rather than procedures that accompany their collection. *Harris* involved a special set of quasi-public sector employees: home health aides (also called “personal assistants”), whom Illinois law deemed state employees for the sole purpose of collective bargaining. The Court's decision turned on the particular facts regarding their employment—specifically, that the personal assistants were jointly employed by the state and individual private clients. Thus, while the *Harris* Court harshly criticized *Abood*, it did not overrule it.

Illinois was among a list of several states that created a collective bargaining mechanism for home health aides who worked for individual clients, but who were paid by the state; the aides could elect a union that would represent them in bargaining with the state over only those terms and conditions of employment that the state set. (This mechanism would not affect the relationship between aides and the individual customers who hired them and directed their day-to-day tasks.) A group of aides elected the SEIU to represent them in bargaining with Illinois, and the resulting CBA contained an agency fee clause.

The plaintiffs in *Harris* argued that the requirement that they pay fair share fees violated their First Amendment rights. In a 5-4 decision, the Supreme Court agreed. Justice Alito, writing for the majority, also questioned *Abood*'s continuing viability on several grounds.

The majority began by hinting that it was not satisfied with the First Amendment analysis of private-sector agency fee cases. "The First Amendment analysis in *Hanson* was thin." The Court in *Street* "recognized that the case presented constitutional questions 'of the utmost gravity.'" The majority then criticized *Abood* for failing to appreciate the differences between the union security agreements in the private sector and those in the public sector, stating that 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." Also, *Abood* did not anticipate the "magnitude of the practical administrative problems" created by the need to distinguish chargeable and nonchargeable activities.

In the end, however, the majority chose to distinguish *Abood* rather than overturn it, or even significantly alter relevant law. *Abood* did not cover the employees here, the majority reasoned, because they were not "full-fledged public employees"; rather, they were "partial-public employees," because private customers primarily controlled their work. Further, these "employees" did not enjoy most of the rights other state employees had. Notably, the scope of bargaining for these employees was extremely narrow, and thus the state's interest in collective bargaining (that is balanced against the First Amendment rights of employees) was atypically weak. "*Abood*'s rationale, whatever its strengths and weaknesses, is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law."

The majority also rejected the union's argument, based on *Garcetti v. Ceballos*, 547 U.S. 410 (2009), and related precedent, that the government has significantly more power to restrict the First Amendment rights of its employees than those of citizens in general. *Garcetti* set out the most recent test in cases involving the free speech rights of individual public employees. *Garcetti* held that restrictions by public employers on the speech of their employees only violate the First Amendment if the speech was not pursuant to the employee's job duties; the speech involved a matter of public concern; and the employee's interest in speaking as a citizen outweighed the employer's interest in effectively managing its workplace. In *Harris*, the majority reasoned that collective bargaining generally is a matter of public concern and that union security clauses heavily burden First Amendment rights.

In dissent, Justice Kagan defended *Abood* both on the grounds of *stare decisis* and on the merits, and she insisted that *Abood* covered the employees in this case. First, the dissent argued that *Abood* "is deeply entrenched, and is the foundation for . . . thousands of contracts between unions and governments across the Nation." Second, the case involved joint employers (the state and the individuals receiving care), and there was "no warrant for holding that joint public employees are not real ones." Joint employers are employers under labor law, and here, "Illinois kept authority over all work-force-wide terms of employment — the very issues most likely to be the subject of collective bargaining." Third, the dissent found the majority opinion to be inconsistent with *Garcetti* and related cases. "This Court has long acknowledged that the government has wider constitutional latitude when it is acting as employer than as sovereign." Public employers should have the same discretion to use union security clauses as private employers. Further, "'the prosaic stuff of collective bargaining' does not become speech of 'public concern' just because those employment terms may have broader consequence. To the contrary, we have made clear that except

in narrow circumstances we will not allow an employee to make a ‘federal constitutional issue’ out of basic ‘employment matters. . . .’” Fourth, the dissent described as “radical” any attempt to overturn *Abood* such that union security clauses would be unconstitutional in all public sector jurisdictions across the nation. This would improperly remove the issue from the political branches of government. Finally, the dissent criticized the majority for not allowing governments to structure their employment relationships in a manner they saw fit, “robb[ing] Illinois” of the tools it felt were best designed to manage this somewhat unusual public-sector workplace.

This decision affects unionized workers in “partial public employment” situations similar to those in *Harris*. Home health care workers have successfully organized as public employees in a number of states. See Pegg R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390 (2008). Likewise, some states have permitted publicly funded child-care workers to bargain collectively on a similar basis. After *Harris*, none of these represented “partial” or “quasi” public employees can be required to contribute financially to their union representatives.

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).

In 2017, Justice Neil Gorsuch was confirmed to the Supreme Court. A few months later, the Supreme Court granted cert. in another case challenging *Abood*’s constitutionality.

Mark Janus
v.
American Federation of State, County, and Municipal Employees, Council 31
United States Supreme Court
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 Employees 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.¹³ *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

¹³[fn.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.

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.

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 have 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.¹⁴

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

¹⁴ [fn. 5] Indeed, some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses.

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.

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.

Notes

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. **Post-*Janus* Legislation.** 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.

NY Civ. Serv. Law § 208(4) & 209-a(2). 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* Cal. Gov. Code § 1556 (giving elected unions access to new-employee orientations); Oregon HB 2016 (allowing union representatives to attend to certain union business during work time; providing opportunities for unions to speak with represented employees; providing unions with access to employee contact information; allowing telephonic or email consent to dues deductions; making it an unfair labor practice for an employer to encourage an employee to resign union membership); Martin H. Malin & Catherine Fisk, *After Janus*, _____ 107 CAL. L. REV. _____ (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3245522.

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”). The leadership of the four biggest public-sector unions (AFSCME, SEIU, NEA, and AFT) have publicly rejected the idea of having governments pay unions’ representation costs. Why do you think that might be?

3. Post-Janus Litigation. In light of the Court’s opinion in *Janus*, what other aspects of public sector collective bargaining might face First Amendment challenges? While *Janus* was pending in the Supreme Court, the National Right to Work Legal Defense Foundation and similar-minded groups and lawyers filed a number of lawsuits seeking back fees for nonmembers, anticipating that *Janus* would overturn *Abood*. After *Janus* was decided, the number of these lawsuits increased dramatically—there are more than 80 of them pending in federal courts around the country—and they also began to include suits asserting claims for back dues for members and attacking checkoff authorization provisions. Other cases from both before and after *Janus* challenge the concept of exclusive representation for both “partial” and traditional public employees. These cases are brought under 42 U.S.C. § 1983, and many of them are class actions.

In the litigation on behalf of fee payers seeking the return of fees collected prior to *Janus*, the plaintiffs’ theory is that *Janus*’ declaration that agency fees are unconstitutional is retroactive, so that making nonmembers pay agency fees violated their First Amendment rights even while *Abood* was in effect. Plaintiffs contend that the unions were acting under color of state law in collecting agency fees, and that § 1983 provides a cause of action to redress violations of constitutional rights by a union acting under color of state law. While the unions have advanced a variety of defenses in these cases, courts have been uniformly hospitable to the defense that the unions were acting in good faith pursuant to state laws that had yet to be ruled invalid and had been approved by a directly on point Supreme Court decision. Thus, to date, 14 courts have dismissed plaintiffs’ claims relying largely on the good faith defense. See *Danielson v. AFSCME Council 28*, 340 F. Supp. 3d 1083 (W.D. Wash. 2018), *appeal pending*, No. 18-36087 (9th Cir.); *Cook v. Brown*, 364 F. Supp. 3d 1184 (D. Or. 2019), *appeal pending*, No. 19-35191 (9th Cir.); *Carey v. Inslee*, 364 F. Supp. 3d 1220 (W.D. Wash. 2019), *appeal pending*, No. 19-35290 (9th Cir.); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019), *appeal pending*, No. 19-35299 (9th Cir.); *Janus v. AFSCME Council 31*, 2019 WL 1239780 (N.D. Ill. Mar. 18, 2019); *Hough v. SEIU Local 521*, 2019 WL 1274528 (N.D. Cal. Mar. 20, 2019), *amended*, 2019 WL 1785414 (N.D. Cal. Apr. 16, 2019), *appeal pending*, No. 19-15792 (9th Cir.); *Lee v. Ohio Educ. Ass’n*, 366 F. Supp. 3d 980 (N.D. Ohio 2019), *appeal pending*, No. 19-3250 (6th Cir.); *Mooney v. Illinois Educ. Ass’n*, 372 F. Supp. 3d 690 (C.D. Ill. Apr. 11, 2019), *appeal pending*, No. 19-1774 (7th Cir.); *Bermudez v. SEIU Local 521*, 2019 WL 1615414 (N.D. Cal. Apr. 16, 2019); *Akers v. Maryland Educ. Ass’n*, ---F. Supp. 3d---, 2019 WL 1745980 (D. Md. Apr. 18, 2019), *appeal pending*, No. 19-1524 (4th Cir.); *Wholean v. CSEA SEIU Local 2001*, 2019 WL 1873021 (D. Conn. Apr. 26, 2019), *appeal pending*, No. 19-1563 (2d Cir.); *Babb v. California Teachers Ass’n*, ---F. Supp. 3d---, 2019 WL 2022222 (C.D. Cal.

May 8, 2019); *Doughty v. State Employee's Ass'n*, No. 1:19-cv-00053-PB (D.N.H. May 30, 2019) *Hernandez v. AFSCME California*, ___ F. Supp. 3d ___, 2019 WL 2546195 (E.D. Cal. June 20, 2019); *Diamond v. Pennsylvania State Education Association*, No. 3:18-cv-128-KG (W.D. Pa. July 8, 2019).

The attacks on exclusive representation have fared no better. Plaintiffs have focused on a particular passage in *Janus* stating: “It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itsself a significant impingement on associational freedoms that would not be tolerated in other context.” *Janus*, 138 S.Ct. at 2478. Relying on this *dicta*, plaintiffs have asserted that the mere concept of exclusive representation, even divorced from any obligation to pay the fair share of such representation, violates non-members’ First Amendment rights. So far, the courts considering these claims have dismissed them relying on the Supreme Court’s decision in *Minn. St. Bd. For Community Colleges v. Knight*, 465 U.S. 271 (1984), in which the Court upheld Minnesota’s exclusive meet-and-negotiate statute in the face of a First Amendment challenge. See, e.g., *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019); *Jarvis v. Cuomo*, 660 Fed. Appx. 72 (2d Cir. 2016); *Branch v. Commonwealth Employment Relations Board*, 481 Mass. 810 (2019).

Finally, some plaintiffs are relying on *Janus* to broadly challenge post-resignation continued deduction of union dues even where the employee has signed a checkoff authorization agreement that limits revocation of the checkoff authorization to certain specified times. These cases tend to turn on the particular facts of the resignation, the language of the checkoff authorization agreement and any collective bargaining language addressing the subject, and the specifics of how the union reacted to the member’s attempt to revoke authorization. However, a few generalizations with respect to the legal issues these cases raise are possible.

First, these cases are also brought pursuant to 42 U.S.C. § 1983, thus raising a question of whether there is state action involved in a union’s decision to enforce a dues-deduction authorization contained in a membership contract between the union and a public employee. One court that considered the question held that state action was not present. *Belgau v. Inslee*, 2019 WL 652362 (W.D. Wash. Feb. 15, 2019) (appeal pending).

Second, there is a question of whether the language in particular checkoff authorizations constitutes consent by the members to waive whatever First Amendment rights they may have. In this regard, the Supreme Court’s decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) is instructive. In that case, the Supreme Court rejected a claim that the First Amendment prohibited enforcement of a newspaper’s promise to keep the identity of a source confidential. The Court concluded: “the First Amendment does not confer...a constitutional right to disregard promises that would otherwise be enforced under state law.” *Id.* at 672. A number of courts have relied on *Cohen* to reject *Janus*-based claims. See *Smith v. Superior Court, County of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Ca, Nov. 16, 2018); *Cooley v. Calif. Statewide Law Enforcement Ass’n*, 2019 WL 331170, at *2-*3 (E.D. Cal. Jan. 25, 2019); *Belgau v. Inslee*, 2018 WL 4931602, at *4-*5 (W.D. Wash. Oct. 11, 2018).

Page 1174, add the following to the end of note 3. (Of course, *Janus* changed this.)

Page 1174, add the following to the end of note 4. The Massachusetts Supreme Court reached the same conclusion in *Branch v. Commonwealth Employment Relations Board*, 481 Mass. 810 (2019).

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 1184, add the following to the paragraph about *United Nurses and Allied Professionals*. In 2019, the Trump Board reversed course, holding in a 2-1 decision that unions cannot charge non-members for any lobbying expenses. *United Nurses and Allied Professionals (Kent Hospital)*, 367 N.L.R.B. No. 94 (Mar. 1, 2019). *Kent Hospital* also held that unions must provide objectors with audit verification letters to support their agency fee calculations.

Following the Board's decision in *Kent Hospital*, the Board's General Counsel issued a memorandum making it easier for represented workers to file complaints with the NLRB about unions' chargeability calculations. Memorandum GC 19-06 (Apr. 29, 2019). The General Counsel wrote "we will no longer require agency fee objectors to explain why a particular expenditure is nonchargeable and to provide evidence or promising leads to support that contention." The GC also emphasized that "the Region should bear in mind that it is the union's burden to establish that the expenses it has charged to nonmember objectors are germane to collective bargaining, contract administration, and grievance handling."

Page 1188, delete the material on *Knox*, which is now included in this Supplement in the material on the Court's path from *Abood* to *Janus*.

Page 1191, add a new note 5. In 2019, the NLRB's General Counsel issued a memorandum stating his view that of the obligations that unions owe to represented workers under *General Motors* and *Beck*. In particular, the memo stated that "[t]he General Counsel agrees with the D.C. Circuit that an initial *Beck* notice must apprise potential objectors of the percentage of union dues chargeable to them in order for potential objectors to gauge the propriety of a union's fee." Additionally, it stated the General Counsel's view that unions cannot require workers to revoke dues checkoff authorizations during a certain window before a CBA expires, rather than upon contract expiration. Memorandum GC 19-04 (Feb. 22, 2019).

Page 1191, regarding the paragraph on *Davenport*. Note that this case has been superceded 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.), *cert. denied*, 139 S. Ct. 152 (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 the following sentence to the end of note 6: Finally, although an “employer that relinquishes and later reacquires ownership of an operation for legitimate business reasons may be free to negotiate a new CBA with the inherited employees,” an employer may not “design[] the transactions . . . to evade its obligations under those CBAs.” In such cases, reviewing courts will hold that “the [putative] successor is in reality the same employer and is subject to all the legal and contractual obligations of the [putative] predecessor.” *HealthBridge Management, LLC v. NLRB*, 902 F.3d 37, 45–46 (2018) (citing *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 259 n.5 (1974))

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 1204, add the following to the end of note 9: In *Ridgewood Health Care Center*, 367 N.L.R.B. No. 110 (April 2, 2019), the Board reversed *Galloway School Lines*, 321 N.L.R.B. 1422 (1996), and its progeny to the extent that line of cases held that the *Love’s Barbeque* remedy should apply in a case in which “a successor employer discriminatorily failed to hire some, but not ‘all,’ predecessor employees in order to avoid a bargaining obligation, i.e., when some of the predecessor employees who applied but were not hired by the successor were not unlawfully denied employment by the successor.” The Board returned to *Love’s Barbeque*’s original holding, that a successor, who discriminatorily fails to hire predecessor employees to avoid its bargaining obligation, may not set initial terms and conditions of employment prior to bargaining with a union only where that successor discriminatorily refused to hire all or substantially all of the predecessor’s employees.

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 sub nom. Unite Here Local 54 v. Trump Entertainment Resorts, Inc.*, ___ 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), *cert. denied*, 2019 WL 2570657 (Jun. 24, 2019), 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.)

Note that cert was sought in the *Airline Service Provider* case and, after the Supreme Court sought and received the views of the Solicitor General on the matter, it denied cert on June 24, 2019.

Page 1233, add the following to the end of note 5a. One important case concerns a New York City law requiring fast food restaurants to allow workers to pay money to “alt-labor” and other qualifying non-profit groups via payroll deduction. The statute specifically bars “labor organizations” as defined in the NLRA from qualifying to receive contributions under this system.

The National Restaurant Association sued, arguing in part that the law was preempted under *Garmon*. The NRA’s argument turned on the fact that the ordinance put a New York agency in charge of deciding what groups were “labor organizations.” Specifically, the NRA argued that the NLRB was the only body permitted to decide what groups were labor organizations, and relatedly, that the statute inevitably placed the NY agency in the position of having to make close calls involving groups that were “arguably” labor organizations. However, a district court rejected these arguments, at least insofar as the NRA argued that they provided a basis to strike down the statute on its face. The district court held that many situations covered by the statute would not present close calls; where that was not the case, the court signaled that an as-applied preemption challenge might succeed. *Restaurant Law Center v. City of New York*, 360 F. Supp.3d 192 (S.D.N.Y. 2019). (This case is currently on appeal.)

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); *UFCW 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 CBA. 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 CBA 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).

Page 1253, add the following to the end of note 2. For a recent example of a claim that is preempted under Section 301, consider *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146 (9th Cir. 2019). Curtis was employed on an oil platform off the coast of California. His typical schedule called for him to stay on the platform for seven days at a time, during which he would work for 12 hours, then rest for 12 hours. Curtis filed a lawsuit, alleging that under California law, he was entitled to compensation for all hours that he was required to be on the platform.

The Court held that Curtis’s claim was preempted because California’s wage and hour law contains a carve-out for employees “working pursuant to . . . [a]n alternative workweek schedule adopted pursuant to a [qualifying] collective bargaining agreement.” Curtis argued that he should not fall under the carve-out because his CBA defined overtime differently than California law. But the Court rejected that argument, because it would make the carve-out nearly meaningless. Accordingly, the Court held that “[b]ecause Curtis’s right to overtime ‘exists solely as a result of the CBA,’ . . . his claim that Irwin violated overtime requirements . . . is preempted under § 301. Thus, his claim fails at step one of the preemption analysis.”