2021 Supreme Court Commentary: Employment Law

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This article is dedicated to my friend and law partner Mike Okun upon his retirement as General Counsel of the North Carolina State AFL-CIO. Perhaps more formally known as Michael G. Okun to the bench, bar and fortunate law students in his labor law classes, Mike's matchless 40-year tenure in the North Carolina labor movement will endure as an inspiration to all who are interested in workplace justice.

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I offer special thanks to Nahomi Harkavy - tireless copyreader, muse and devoted partner in life and lawyering - for her helpful insights, sharp editor's pencil and ever-bemused patience with her husband, the author of this article. I am, of course, solely responsible for its content and tone.

The October 2020 Term of the Supreme Court of the United States presents a stark contrast with the 2019 Term's busy docket of employment-related cases that broke new ground and generated considerable media attention. Put more bluntly, with the 2020 Term's merits docket highlighted by a cursing high school cheerleader and otherwise notable only for a few decisions outside the employment area (*e.g.*, safeguarding Obamacare, upholding Arizona's voting restrictions and protecting religious expression), most observers have regarded this year's term as a placid and pedestrian one in the labor and employment sector.

My take on the 2020 Term's employment decisions, however, differs somewhat from the common regard. I see in this year's opinions some disquieting rationales that could bode ill for employee rights, just as they may auger well for employer prerogatives. Moreover, a comprehensive look at all of the 2020 Term's employment-related opinions, as well as several decisions appearing on what has come to be known as the "shadow docket," confirms a worry I expressed in last year's Commentary about "an unsettling thread of religious and moral liberty . . . that would excuse compliance with generally applicable laws" governing the workplace and beyond. Whether Congress' attempt to foster workplace justice through landmark civil rights and employment legislation over the last eight decades can survive a new and energetic plurality of *laissez-faire* enthusiasts is a question that permeates the 2020 Term's opinions. Indeed, from my vantage point, our current employment jurisprudence seems a slow-moving target for these Justices, especially when they can cloak anti-union or other business-friendly sentiments in the garb of religious liberty or economic freedom. But, my worry may be your glee, so as you read what follows, make your own judgment about what the Court did during this supposedly "slow" term and what, if anything, it may be signaling for

the future. No matter how quiescent the 2020 Term may seem to others, reviewing its work remains - at least for me - as fascinating and rewarding as ever! I hope that will be the case for you, too.

Section I of this article summarizes each of the employment-related cases of the 2020 Term, as well as a number of non-employment decisions likely to affect the shape of workplace jurisprudence or litigation within it. The cases are arranged by broad substantive topics, with some brief commentary at the beginning of each topical subsection. Additionally, my abbreviated personal take on each principal decision is offered in the italicized paragraphs immediately following the individual case summaries. That personal commentary ranges from the political to the practical to the philosophical. The aim is to assess the likely impact of these decisions on all stakeholders in the employment relationship, including working people, business owners, labor organizations and benefit providers.

Excluded from coverage in this article are a few of the several decisions during the 2020 Term that involved appointment and removal power over certain federal office-holders. *E. g., Collins v. Yellin*, 594 U.S. ---, 141 S. Ct. 1761, 208 L. Ed. 2d --- (2021) (Restriction on Presidential power to remove Director of Federal Housing Finance Agency violates the Constitution's separation of powers); *United States v. Arthrex, Inc.*, 594 U.S. ---, 141 S. Ct. 1970, 208 L. Ed. 2d 305 (2021) (Appointment by the Secretary of Commerce of Administrative Patent Judges who exercise unreviewable authority as members of the Patent Trial and Appeal Board violates the Appointments Clause); *Cf. also, Carney v. Adams*, 592 U.S. ---,141 S. Ct. 493, 208 L. Ed. 2d --- (2020) (Lawyer lacks standing to challenge regulation of appointments to Delaware Supreme Court). These decisions are singular in nature and, while they may be intriguing prospects for an article about the Appointments Clause, they do nothing of consequence to shape the relationship between working people and employers.

Section II offers comments on a number of opinions appearing on the Court's Orders Lists, including several dissents from denials of certiorari and a number of filings emerging from what has come to be known as the Court's "shadow docket." (That exquisitely apt moniker was coined by a former law clerk to the Chief Justice. *See*, William Baude, "The Supreme Court's Secret Decisions" (*The New York Times*, February 3, 2015.)) Taken together with one high-profile non-employment religious liberty case, also briefly summarized in this section, these opinions offer what I regard as a disquieting peek at how the Court could stymie enforcement of our employment laws and thus accelerate the growing inequities between workers and their employers.

Section III is a descriptive listing, current as of the date of this article, of grants of certiorari presenting employment-related issues to be decided in the upcoming October 2021 Term scheduled to begin on Monday, October 5, 2021.

The article concludes in Section IV with a few additional observations about the 2020 Term's opinions rendered in the midst of the COVID-19 pandemic and during a transition of Presidential administrations. This section is also sprinkled with a bit of personal speculation about what to expect in the 2021 Term - just as foreign entanglements dominate daily headlines, union density shows little sign of increasing, the political branches try to re-invigorate an uncertain economy, the demographics of our country evolve, and the nature of work itself develops in uncharted ways.

I. Decisions of the 2020 Term

In spite of an unusually small docket of employment-related decisions, what appears below are not only cases that arise strictly under employment laws, but also a number of non-employment cases that either bear in some way on our workplace jurisprudence or deal with standing, remedies and other adjective issues. The decisions not directly involving employment law are, for the most part, summarized in abbreviated fashion.

A. Labor Relations.

While the banner news in labor relations is how the Biden administration is reconfiguring the NLRB and other federal offices overseeing labor relations, the Court managed to capture some attention when it blocked union access to unorganized farm workers in its first substantive labor-related decision in several terms. And while some observers have downplayed the importance of the Court's decision because it involves "only" a discrete segment of workers not covered by federal labor law, that observation misses the point that a Court majority managed to deal a serious blow to workers' collective rights throughout an entire agricultural workforce estimated to number more than 800,000 individuals.

Although no labor relations cases yet appear on the 2021 Term's docket, keep your eyes peeled for Board rulings and Court of Appeals decisions, as we are about to witness a monumental change from Chamber of Commerce deference to a more solicitous regard for collective rights.

Cedar Point Nursery v. Hassid, 594 U.S. ---, 141 S. Ct. 2063, 209 L. Ed. 2d --- (2021)

The Court held that California's regulation granting labor organizations a "right to take access" to an employer's property in order to solicit support for unionization constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments.

In 2015, the United Farm Workers ("UFW") sought to organize workers at Cedar Point Nursery, a California strawberry grower. The National Labor Relations Act ("NLRA") expressly exempts agricultural laborers from its coverage. 29 U.S.C. 152(3). California law,

however, grants agricultural employees a right to self-organization and, by regulation, permits a "right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." California Agricultural Labor Relations Act of 1975 ("State Act"). Thus, a union may, upon prior notice, "take access" to an employer's property for up to four 30-day periods per calendar year. To "take access" means to permit a limited number of organizers to enter the employer's property for up to an hour before work, an hour during lunch break and an hour after work to meet workers in a non-disruptive manner. Interference with this right of access may constitute an unfair labor practice under the State Act.

The UFW's campaign began when its organizers attempted to enter the property of Fowler Packing Company, a table grapes and citrus grower, in July of 2015. They were, however, blocked from doing so by the employer. UFW filed an unfair labor practice charge under the State Act with the California Agricultural Labor Relations Board ("Board"), but subsequently withdrew the charge. About three months later and without prior notice to the employer, representatives of the UFW entered Cedar Point's property and used bullhorns to address hundreds of workers who were engaged in preparing strawberry plants at a nursery shed. A number of workers joined the organizers in a protest, while others left the worksite altogether. Cedar Point filed a charge with the Board based on the union's lack of notice, and the UFW filed an unfair labor practice charge against Cedar Point.

The growers, believing that the UFW would try to enter their property again soon, filed suit in federal court against several Board members, arguing that the access regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property. The district court denied the growers' motion for summary judgment and granted the Board's motion to dismiss, reasoning that the access regulation was not a *per se* physical taking because it "did not allow the public to access the property in a permanent and continuous manner for whatever reason." The court concluded that the growers had made no attempt to evaluate, much less satisfy, the multi-factor balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The Ninth Circuit affirmed, essentially on the reasoning of the district court. Judge Leavy dissented, noting that in NLRA cases labor organizers had never been allowed to enter an employer's premises for substantial periods of time when its employees lived off premises (as all the growers' employees did here.) In his view, therefore, the regulation did effect a *per se* taking. Upon denial of rehearing *en banc*, Judge Ikuta, joined by seven other judges, dissented because the access regulation effectively transferred to the union an "easement in gross," thereby constituting a *per se* physical taking subject to Constitutional restraint. The Supreme Court granted the growers' petition for certiorari.

The Supreme Court, in a 6-to-3 decision written by Chief Justice Roberts, reversed the Ninth Circuit and held that California's access regulation constitutes a *per se* physical taking of the growers' property. The Chief Justice, noting first that the Takings Clause imposes an obligation to provide the owner with just compensation when the state physically takes private

property for a public purpose, concludes that these physical takings are assessed using a simple *per se* rule, namely that the government must pay for what it takes. The opinion takes pains to differentiate regulations that restrict an owner's use, explaining that the Court uses the flexible *Penn Central* test that balances factors such as economic impact, interference with economic expectations and the character of government action. The majority's bottom line is that "whenever a regulation results in a physical appropriation of property, a per se taking has occurred, and *Penn Central* has no place." And, that is exactly what the majority concludes is the effect of California's regulation as applied to the growers.

The Court stresses the central importance of an owner's right to exclude others from its property and notes prior cases where the Court has held that military flights over a farm or firing coastal defense guns across private property constitute takings. Similarly, the Chief Justice pointed to state laws requiring public access to a private marina on a newly dredged pond that had become "navigable water." Likewise, the opinion cited as a taking a state law requiring landlords to allow cable companies to install cable boxes and cables on the roofs of their buildings. Also adverting to several other precedents, the majority said that the regulations in those situations, like the California labor regulation here, appropriate a right of access to private property and constitute *per se* physical takings, thus supporting the growers' statement of a claim for an uncompensated taking in violation of the Constitution.

The majority rejects the distinction drawn by the Ninth Circuit and the dissent that this regulation only permits temporary access and not continuous and permanent access. The Chief Justice pointedly remarks that the duration of an appropriation bears only on the amount of compensation. And, the intermittent (as opposed to continuous) nature of the taking does not make the appropriation of property any less a physical taking, according to the Court. The opinion also rejects the Board's argument based on the notion that the access right acquired by the union is not a true easement under California law. Whether taking access amounts to a particular form of easement (or other property interest) under state law does not determine whether a taking is actionable. Under the Court's *per se* rubric, if the state appropriates a right to invade property, compensation is due.

Characterizing the dissenting opinion as a "thoughtful" and "considered" one, the Chief Justice nonetheless expresses disagreement with the dissent's "plain English" premise that "regulation" is not "appropriation" and that regulatory invasions on a temporary basis are practical necessities in a complex modern world. Accordingly, the majority dismisses what it views as the dissent's "permissive approach" to property rights, stressing that the Court has consistently safeguarded property rights in order to preserve individual liberty.

Finally, the majority finds "unfounded" the fear expressed by the State Board and the dissenting opinion that treating California's labor regulation as a *per se* physical taking will endanger a number of governmental activities involving entry onto private property. The Chief Justice first explains that the Court's holding does nothing to affect the distinction between isolated invasions that are treated as trespass torts and the type of regulatory appropriation

countenanced here by the State Act. Second, the majority posits that many governmental invasions are not "takings" because they are consistent with "longstanding background restrictions" on property rights, citing common law privileges to access private property to enforce the criminal law, avert imminent public disaster or avoid serious personal harm. Likewise, the Chief Justice also distinguishes the requirement to abate nuisances because the property owner never had a right to engage in the nuisance in the first place.

Justice Kavanaugh wrote a concurring opinion expressing his view that *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), involving non-agricultural workers covered by the NLRA, strongly supports the Court's decision because California's union access regulation intrudes on the growers' property rights "far more" than what the Court disallowed under the NLRA. As support for his view, Justice Kavanaugh cites a dissent from the California Supreme Court's approval of the State Act's union access regulation in 1976.

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. In their view the State Act's union access regulation simply "regulates," but does not "physically appropriate" the growers' property. So long as the regulatory temporary invasions do not go "too far," they cannot be regarded as a "taking" requiring just compensation. The dissent also addressed the issue of remedies on remand. (The majority did not do so, as it simply remanded the case "for further proceedings consistent with this opinion.") Because the growers sought only equitable relief and alleged no damages, Justice Breyer asserts that California should have the choice on remand of foreclosing any equitable relief by providing "just compensation."

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Many commentators, noting that this case involves only agricultural workers who are excluded from NLRA coverage, proclaim that the decision has limited impact on labor relations generally. As noted above, that suggestion misapprehends what an activist majority of the Court is really trying to do. In particular, these observers fail to appreciate that the majority's open embrace of private property rights conveniently obscures an underlying mission of long-standing to frustrate the ability of labor unions to organize workers. In this case, that mission not only impairs the right of workers to seek collective power, but it also treats a partly immigrant workforce with little regard for the few rights they enjoy, leaving at least a faint whiff of bias in its wake. But, if it turns out that state labor laws provide minimal compensation for union access to an employer's private property, those laws may yet remain effective, and this decision will not matter much to anyone. Time will tell.

As a matter of Constitutional application, the Chief Justice's opinion veers pretty far away from the common sense notion that California's access regulation does not physically appropriate the growers' property in ways that are any different from what property owners must tolerate in today's world. After all, if property can be invaded for public health and safety reasons without risk of "taking" liability, the strictly limited right of organizers to speak with workers when they are on the employer's property does not easily justify characterization

as a per se physical taking. On this central question, Justice Breyer's "thoughtful" and "considered" opinion (as the Chief Justice characterized it) has the better of it as a matter of Constitutional meaning.

In another "taking" case from the Ninth Circuit that adverts to Cedar Point in a footnote, the Court granted relief to the non-occupant owners of portions of a multi-unit residential building in San Francisco. Pakdel v. City and County of San Francisco, California, 594 U.S. ---, 141 S. Ct. 2226, 208 L. Ed. 2d --- (2021). The owners had sought to challenge a city requirement that they offer tenants lifetime leases as a condition of obtaining conversion of their tenancy-in-common with other owners into a condo-ownership type of arrangement. The owners claimed that the lifetime lease requirement was a "regulatory taking" of their property by the city requiring compensation. Reversing the lower courts' refusal to address the merits because the owners had not properly and timely exhausted their local remedies to seek compensation, the Court held - in a per curiam decision without briefing or oral argument - that further exhaustion of state remedies is not a prerequisite to the owners' claim under Section 1983.

Bear in mind, finally, that the Court's broadening of what is a compensable "taking" effectively "Constitutionalizes" how employers can resist union access to their employees. What that means for both federal and state bills intended to guarantee labor organizing access is that passing such legislation may become more difficult, and sustaining any such enactments in court may likewise involve a greater struggle. In short, what the Court did in this case surely must be an unwelcome development for labor organizations.

B. Employment Discrimination.

The most notable feature of the 2020 Term's employment discrimination docket is the absence, for the first time in many years, of any decision directly presenting an employment discrimination issue. To be sure, there is certainly no let-up in employment discrimination claims generally. Witness the EEOC's most recent statistics indicating that while the number of new charges has dropped when compared to a decade ago, there were more than 57,000 new charges of discrimination filed with the EEOC, according to its most recent report in 2020. *See*, www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data (last accessed August 5, 2021). And, there are a number of significant employment discrimination issues that are continuing to percolate in the circuits. Nevertheless, in the wake of last term's blockbuster decision involving coverage of gay and trans-gender individuals, the absence of an employment discrimination issue on the Court's opinion docket stands out all the more.

Looking critically at the 2020 Term's opinions, it appears that the Court handed employers a minor setback that garnered little attention. The summary of the case that follows, while truncated because it does not directly involve employment law, effectively forecloses an

employer from defending discharge or discipline on the ground that a worker who obtains access to restricted information using acknowledged computer access has committed a crime under the Computer Fraud and Abuse Act of 1986 ("CFAA"). Bear in mind that the Court's decision does not stop employers from relying on violations of their own policies about computer use in taking action against employees. But, what the Court did here is significant, as it robs employers of the more striking defense that a discharged or disciplined worker actually committed a crime under the CFAA.

Van Buren v. United States, 593 U.S. ---, 141 S. Ct. 1648, 208 L. Ed. 2d --- (2021)

The Court held that an employee "exceeds authorized access" to his employer's computer only when he accesses it with authorization but then obtains information from an area of the computer's database that is off-limits to him.

Nathan Van Buren, a police sergeant in the Cumming, Georgia, police department, became acquainted in the course of his patrol duties with Andrew Albo, a man whom the police chief had warned officers to deal with carefully because he was "volatile." Van Buren, who thought Albo was his friend, asked Albo for a personal loan. Albo secretly recorded that request and went to the local sheriff with the tape, complaining that Van Buren had sought to "shake him down" for cash. The Sheriff's office shared the recording with the Police Department which in turn referred the matter to the FBI. When the FBI obtained the tape it devised a "sting" to see how far Van Buren would go for money. Albo was to ask Van Buren to search the state law enforcement database for a license plate purporting to belong to a woman whom Albo had met at a local strip club, telling Van Buren he wanted to be sure before pursuing her further that she was not an undercover officer. In return for the search, Albo would pay Van Buren about $5000.

Van Buren used his patrol car computer to access the state database and found the license-plate entry created by the FBI. Van Buren told Albo he had information to share. The federal government then charged Van Buren with a CFAA felony violation on the premise that running the plate for Albo violated the "exceeds authorized access" clause of 18 U.S.C. 1030 (a)(2). The trial evidence showed that Van Buren knowingly violated department policy and his training not to use the computer for an improper purpose, such as personal use. The jury convicted Van Buren, and the district court sentenced him to 18 months in prison. The Eleventh Circuit affirmed the conviction, concluding that misuse of the access granted to Van Buren fits within the CFAA's "exceeds authorized access" prohibition. The court of appeals declined to join other circuits' rule that the CFAA clause applies only to those who obtain information to which their computer access does not extend. The Supreme Court granted certiorari to resolve the circuit conflict.

The Supreme Court, in a 6 to 3 decision, reversed the Eleventh Circuit's judgment in an opinion by Justice Barrett holding that Van Buren did not violate the CFAA's prohibition on exceeding authorized access simply because he had an improper motive for using that access.

In the Court's view, Van Buren's running a license plate did not require him to go into an area of the computer that was off-limits to him. Accordingly, the Court concludes that Van Buren's authorized use for an improper purpose does not make him a criminal. Justice Thomas, joined by the Chief Justice and Justice Alito, dissented because, in their more confined view of the "exceeding access" provision, Van Buren committed a crime when he exceeded the scope of the police department's permission to use its computer and information in it.

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So, how does this decision bear on employer-employee relations? Read on for a moment, please.

Justice Barrett's majority opinion explains that the CFAA defines the "exceeds authorized access" provision to mean "to access a computer with authorization and to use such access to obtain. . . information in the computer that the accessor is not entitled so to obtain. . . ." 18 U.S.C. 1030(e)(6). The majority concludes that while this provision does cover those who obtain information from areas of the computer (e.g., files, folders or databases) to which their computer access does not extend, the statute does not cover those who, like Van Buren, simply have an improper motive for obtaining information that is otherwise available to them. The lengthy majority opinion scrupulously anchors its holding on the CFAA's text, context and structure. Most pertinently, the majority opinion refers specifically to the workplace in rejecting the Government's policy arguments. The majority points out with obvious concern that because employers commonly state that computers and electronic devices can be used only for business purposes, employees who read a news report or send a personal email would violate the CFAA in the Government's view. This reference makes clear that because of how the Court decided this case employers may not readily use the CFAA as a defensive shield against an employment discrimination claim. Instead, employers will have to establish and enforce their own computer use policies for that purpose. That, indeed, is the most significant takeaway from this decision for lawyers who advise management and owners.

One further politically-tinged note: Check out the lineup of Justices in this split decision. The three Justices appointed during the prior administration joined with the three Justices appointed by Democratic presidents to defeat the views of the Chief Justice and Justices Thomas and Alito. That singular array has probably sparked considerable speculation among Court gossipers, none of which I shall comment on here except to note its oddity.
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C. Employee Wages and Benefits.

Continuing to demonstrate an interest in employee wage and benefit issues in both the private and public sectors, the Court dealt with esoteric groups of "employees" this term, ranging from a railroad carpenter to pharmacy benefit managers and, in a case gaining the most notoriety, college athletes. The Court sided with working people for the most part in these

cases. But, as the reader will see, much is left unsettled and unpredictable, especially when it comes to transfiguring the college-student relationship into an employer-employee one for the purpose of sharing more fairly the enormous wealth created by the student-athletes' "labor."

Plenty more employee benefits issues are making their way through the lower courts, and, as the grants of certiorari summarized in Section III indicate, the 2021 Term promises yet another take on ERISA's duty of prudence, as well as whether Puerto Rico can be carved out of Social Security disability coverage.

Rutledge v. Pharmaceutical Care Management Ass'n, 592 U.S. ---
141 S. Ct. 474, 208 L. Ed. 2d 327 (2020)

The Court held that ERISA does not pre-empt Arkansas' law regulating the price at which pharmacy benefit managers reimburse pharmacies for the cost of drugs covered by prescription-drug plans.

Pharmacy benefit managers (PBMs) act as intermediaries between prescription-drug plans and the pharmacies that beneficiaries use to obtain their drugs. When a beneficiary goes to a pharmacy to fill a prescription, the pharmacy checks with a PBM to obtain the customer's coverage and co-pay information. The PBM reimburses the pharmacy for the prescription (less the co-pay amount), and the prescription-drug plan then reimburses the PBM. Instead of tying the amount of reimbursement to what the pharmacy paid a drug wholesaler for the drug, the PBMs' contracts with the pharmacies specify a maximum allowable cost ("MAC") for each listed drug. Each PBM develops and administers her own MAC list as well as her own contract with the prescription-drug plans for repayment. PBM's profit when what they pay the pharmacies is less than what they receive from the plans.

Arkansas adopted Act 900 in 2015 to address reimbursement rates from PBM's that were often too low to cover the pharmacies' costs, thus jeopardizing especially the rural and independent pharmacies. The statute requires PBMs to reimburse Arkansas pharmacies at a price equal to or higher than what the pharmacy paid a wholesaler for the drugs. To do so, the law requires PBMs (i) to update their MAC lists when wholesale prices increase, (ii) to provide an appeal procedure for pharmacies to challenge reimbursement rates that are below the pharmacies' cost for purchasing the drugs; and (iii) to permit a pharmacy to decline sale of a drug to a plan beneficiary if the PBM will reimburse at less than the pharmacy's acquisition cost.

After Act 900 was enacted into law, Pharmaceutical Care Management Association ("PCMA"), a national trade association representing the 11 largest PBMs in the country, sued in Arkansas federal court, claiming that the Employee Retirement Income Security Act of 1974 ("ERISA") pre-empts the Act because it "relates" to an "employee benefit plan." 29 U.S.C. 1144(a). Upon the parties' cross-motions for summary judgment, the district court held that ERISA pre-empts the Act in light of the Eighth Circuit's ruling on Iowa's PBM statute

containing similar features. The Eighth Circuit affirmed, and the Supreme Court granted certiorari.

The Court, with Justice Barrett recused, unanimously reversed the judgment of the Eighth Circuit in an opinion by Justice Sotomayor holding that the Act is not pre-empted. The Court concluded that the Act has neither an impermissible connection with nor reference to an ERISA plan. Because the Act is merely a form of cost regulation that does not dictate plan choices, its connection with ERISA does not require pre-emption. Likewise, the Act regulates plans serviced by PBMs whether they are ERISA plans or not and affects the latter only to the extent that PBMs pass along higher pharmacy rates. Because ERISA plans are not essential to the Act's operation, the state law affords no basis for federal pre-emption.

Finally, Justice Sotomayor rejects the PCMA's contention that the Act's enforcement mechanisms directly affect plan administration and interfere with national uniformity of the same. Whatever operational inefficiencies are caused by the Act (such as allowing pharmacies to decline dispensing prescriptions based on PBM reimbursement rates) are not matters that involve a central aspect of plan administration. Moreover, in the Court's view, PCMA's argument goes too far, as it would require pre-emption of any state law claim that could affect the price or provision of benefits. Accordingly, the Court characterizes the Act simply as a "cost regulation" that does not bear an impermissible connection with or reference to ERISA. Upon reversal of the Eighth Circuit's judgment, the case is remanded for further proceedings consistent with the Court's opinion.

Justice Thomas, while joining the Court's opinion in full, wrote a separate concurrence expressing his continuing doubt about an ERISA preemption jurisprudence he regards as "amorphous" and unsupported by ERISA itself. In his view, the Court has veered from ERISA's plain text, offering little guidance or predictability. 29 U.S.C. 1144. Arguing that the pre-emption provision should be applied as written, Justice Thomas concludes that because the parties in this case point to no provision of ERISA that governs "the same matter" as the Act, that alone should resolve the case. Finally, Justice Thomas explains that *stare decisis* does not stand in the way of returning to a text-based pre-emption rule because the outcomes of recent cases - if not their reasoning - have been consistent with a text-based approach.

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Most pertinent about this case is Justice Thomas' solo plea to abandon the Court's crafting of its own pre-emption jurisprudence for ERISA cases and return simply to the text of 29 U.S.C. 1144 to determine when federal pre-emption must apply. The issue Justice Thomas spots is an intriguing one that may, at some point, attract the attention of enough Justices to examine anew how the Court strikes a balance between state and federal regulation affecting employee benefit plans under ERISA. The fact that no other Justice joined this concurrence does not indicate to me that any of them would reject an opportunity to do something close to what Justice Thomas seeks to do.

Turning to the decision itself, Justice Sotomayor's opinion is straightforward and leaves little to debate. The Act's regulation does not really go to the center of what ERISA was intended to do for plan beneficiaries in terms of fiduciary conduct. By avoiding federalization of yet another area of economic regulation, it is no wonder that the Chief Justice assigned this opinion to Justice Sotomayor to craft an argument that all the participating Justices could join.

Salinas v. U.S. Railroad Retirement Board, 592 U.S. ---, 141 S. Ct 691. 208 L. Ed. 2d 608 (2021)

The Court held that the Railroad Retirement Board's refusal to reopen a prior disability benefits determination was a final decision of the Board under the Railroad Retirement Act and is therefore subject to judicial review.

Manfredo Salinas, a former carpenter and assistant foreman for the Union Pacific Railroad, suffered two serious head injuries on the job in 1989 and 1993 requiring two spinal surgeries. He began seeking disability benefits under the Railroad Retirement Act ("RRA") in 1992. His first two applications were denied, and Salinas did not seek reconsideration either time. In 2006 Salinas filed a third application that was likewise denied. After missing the deadline for seeking reconsideration, he requested the Railroad Retirement Board ("Board") to reconsider his request for reconsideration. The Board denied the request, finding that Salinas had failed to demonstrate good cause for late filing. Seven years later, in December of 2013, Salinas filed his fourth application for benefits. That application was granted, and he was deemed disabled as of October 9, 2010, with benefits to begin as of December 1, 2012, twelve months prior to his successful application date. Salinas sought reconsideration of the amount and start date, but that relief was denied by the Reconsideration Section.

On appeal to the Bureau of Hearings and Appeals, Salinas argued that his 2006 application should be reopened because the Board had not considered medical records then available. The Bureau denied the request to reopen because Salinas had failed to seek reopening within four years of the disputed decision, as required by regulation. On appeal to the Board, the decision of the Bureau was affirmed. Salinas filed a timely *pro se* petition seeking judicial review by the Fifth Circuit. In accord with a prior Fifth Circuit decision, the Court of Appeals dismissed the petition on the ground that federal courts cannot review a Board refusal to reopen a prior benefits determination. The lower court did, however, note a circuit split on that issue. The Supreme Court granted certiorari.

The Court, in a 5-to-4 decision, reversed the Fifth Circuit's judgment. Justice Sotomayor's majority opinion holds that the Board's refusal to reopen the prior denial of Salinas' 2006 application for benefits is subject to judicial review under section 231g of the RRA (which makes review available to the same extent that the Railroad Unemployment Insurance Act ["RUIA"] does for "any final decision of the Board" in its section 355(f).) The

Court relied on the statutory text denoting some kind of terminal event or consummation of the agency's process in concluding that the Board's refusal to reopen justified judicial review. The majority opinion also relies secondarily on a presumption favoring judicial review and the Board's failure to carry a "heavy burden" to show that the RRA's language forecloses that review. Finally, the majority distinguishes precedent cited by the Board and rejects the further arguments that the reconsideration decision was akin to a new determination and that the Court should affirm based on the doctrine of administrative grace.

Justice Thomas, joined by Justices Alito, Gorsuch and Barrett, dissented on the ground that the RRA itself governs, not the imported language from the RUIA. And, based on the RRA alone, the dissenters conclude that because the Board did not determine any right or liability as to Salinas, there can be no judicial review of its reconsideration decision.

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While the Court's decision in this case is not likely to cut a wide swath through our employment jurisprudence or even capture a headline in the railroad industry, one noteworthy feature of the case is the lineup of Justices. Taking a more activist view of judicial review in this case is the Chief Justice and Justice Kavanaugh. More often than not, they align with the dissenters in decisions favoring employers and cabining workers' rights. But in this case, one that may not evoke much sympathy because of Salinas' initial lethargy about pursuing his disability claim, the fracture of what is ordinarily a solid bloc of Justices is noteworthy.

On the merits of the Court's decision, Justice Sotomayor's carefully documented construction of the RRA and the companion RUIA carried the day for a majority of the Court. And, going forward, this decision will make smoother the way for claimants like Manfredo Salinas to seek judicial review of agency decisions that frustrate plausible claims for benefits. On the other hand, for employees this case is a gift with strings. Justice Sotomayor stressed at the end of her opinion that judicial review of reopening decisions "will be limited," emphasizing that those decisions are discretionary and subject to reversal only for abuse of discretion. Indeed, the majority opinion openly predicts that most reopening decisions will be upheld under this deferential standard, explaining that judicial review plays only a "modest" role in guarding against arbitrary or otherwise indefensible agency rulings.

Carr v. Saul, 593 U.S. ---, 141 S. Ct. 1352, 209 L. Ed. 2d 376 (2021)

The Court held that applicants for Social Security disability benefits did not forfeit their Appointments Clause challenges to the administrative law judges who heard their cases by failing to make those challenges first to those judges.

Willie Earl Carr and five other individuals who claimed Social Security disability benefits sought administrative review when their claims were initially denied by the Social Security Administration ("SSA"). After the SSA's initial determinations denying relief, claimants

sought reconsideration and were granted a hearing before an Administrative Law Judge ("ALJ") and review by the SSA's Appeals Council. The applicants lost at every stage, and then sought review in federal court.

In the meantime, the Supreme Court in *Lucia v. SEC*, 585 U.S. --- (2018), noting that ALJs within the Securities and Exchange Commission were "Officers" of the United States because they exercised significant discretion in carrying out important agency functions, held that their appointments by lower level officials violated the Appointments Clause of the Constitution. Shortly thereafter, the SSA's acting Commissioner took note of the *Lucia* decision and ratified the appointments of all Social Security ALJs by approving those appointments as her own. The SSA thereafter issued a ruling that when timely requests for Appeals Council review is made, the Council should vacate pre-ratification decisions and provide fresh review by a properly appointed ALJ. Willie Earl Carl and the other five claimants here had not raised the appointments argument during their prior administrative proceedings. And, by the time the SSA issued its new appointments ruling, the claimants were already in federal court seeking judicial review of their benefits denials.

Each claimant, following Lucia's holding, asked the federal district court for a new hearing before a constitutionally appointed judge. The SSA Commissioner contended that the claimants had forfeited their Appointments Clause challenges by failing to raise them before the agency. The Eighth and Tenth Circuits, handling all six cases, adopted the Commissioner's argument and, contrary to rulings in three other circuits, denied the request for new ALJs. The Supreme Court granted certiorari.

The Court unanimously concluded that the claimants had not forfeited their Appointments Clause claims by failing to raise them and that the lower courts' judgments to the contrary should be reversed. Justice Sotomayor's opinion, joined fully by the Chief Justice and Justices Alito, Kagan and Kavanaugh, and joined in part by the other Justices, held that the lower courts' imposition of an issue-exhaustion requirement was reversible error. Justice Thomas, joined by Justices Gorsuch and Barrett, filed an opinion concurring in the judgment and concurring in part with the Court's opinion. Justice Breyer likewise filed an opinion expressing the view that ordinarily a reviewing court should not consider arguments a party failed to raise before that agency, but that in this case claimants' Appointment Clause challenge fell within an exception for futile claims. Accordingly, Justice Breyer concurred in part with the Court's opinion and concurred in the judgment.

* * * *

There is little to say about the Court's unanimous view that these six disability claimants did what they could under the law as it stood and that they should not be denied the opportunity of administrative review by a constitutionally appointed ALJ. For present purposes, whether any of the six claimants ultimately receive disability benefits is, of course, secondary to the administrative law principle that an exhaustion requirement is inappropriate

for this type of situation. Again, note that the Chief Justice turned to Justice Sotomayor to craft an opinion that all the Justices could join, at least in pertinent part. Finally, for those readers who advise employees about Social Security benefits and for others of you who wish to relive the Administrative Law experience of your law school years, this decision is for you.

National Collegiate Athletic Association v. Alston, 594 U.S. ---, 141 S. Ct. 2141, 209 L. Ed. 2d --- (2021)

The Court held that an injunction against enforcement of NCAA rules limiting education-related benefits that schools make available for student-athletes is consistent with established antitrust principles in the Sherman Act.

A group of current and former student athletes in men's Division I football and men's and women's Division I basketball filed a class action suit against the National Collegiate Athletic Association ("NCAA") and eleven Division I athletic conferences. The plaintiffs challenged as as violative of section 1 of the Sherman Act, 15 U.S.C. 1, the NCAA rules limiting compensation they may receive in exchange for athletic services. Following extended pretrial proceedings and a 10-day bench trial, the district court concluded that the NCAA dominates the market for Division 1 athletic services by exercising its monopsony (i.e., buyer's monopoly) power to restrain compensation. The court rejected the NCAA's pro-competitive justifications. While it found reasonable the NCAA rules restricting compensation and benefits unrelated to education, it agreed with plaintiffs that caps on education-related benefits (e.g., payments for tutoring, post-grad internships or graduate school scholarships) are unreasonable under the Sherman Act. Both sides appealed, and the Ninth Circuit affirmed in full, explaining that the district court "struck the right balance" in crafting a remedy that prevents anticompetitive harm to student athletes while serving the pro-competitive purpose of preserving the popularity of college sports.

The Supreme Court unanimously affirmed the judgment of the Ninth Circuit in an opinion by Justice Gorsuch. His opinion reviews in pinpoint detail the history of college athletics from the first intercollegiate contest - a boat race between students from Harvard and Yale on Lake Winnipesaukee, New Hampshire, in 1852 where the race's sponsor, a railroad executive seeking to promote train travel to the lake, offered the competitors unlimited alcohol and an all-expenses paid vacation with lavish prizes. Ultimately, the Court concluded that the district court had acted "within the . . . bounds" of the Sherman Act in its compromise decision that did not please either side.

Justice Kavanaugh, while enthusiastically joining in full the Court's opinion, filed a concurring opinion expressing his view that "[t]he NCAA is not above the law" and that antitrust scrutiny of its compensation rules is long overdue. Going further, Justice Kavanaugh emphasizes that the NCAA's remaining enforceable rules restricting payments by colleges for playing sports and prohibiting student athletes from receiving money from endorsement deals "raise serious questions under the antitrust laws" and should now receive "rule of reason"

scrutiny. Indeed, Justice Kavanaugh expresses doubt that those rules can pass muster under such scrutiny, characterizing them as "price-fixing labor" in a multi-billion dollar college sports market where the athletes do most of the work and get little or nothing while their colleges reap virtually all the benefits (from which they pay huge salaries to the officials who run these programs.)

* * * *

Let's begin with a salute to the plain-spoken concurrence by Justice Kavanaugh. Agree with it or not, the opinion wins points for clarity and forthrightness. Indeed, witness his amazing suggestion toward the end of the opinion: He remarks that litigation is not the only way to resolve the antitrust problems with the NCAA's rules. He suggests that "colleges and student athletes could potentially engage in collective bargaining. . .to provide student athletes a fairer share of the revenues that they generate for their colleges." Concurring Slip Opin., p. 5. The likelihood that this quoted suggestion will pop up in other labor relations cases seems pretty high.

This decision's appearance as a wage and benefit employment case underscores a reality - punctuated passionately in Justice Kavanaugh's concurrence - that student-athletes at Division I schools are effectively employees while the schools and the NCAA are effectively their employers. The employment sector in which these participants operate, college sports, is a multi-billion dollar business whose popularity and growth is fueled by a fan base of untold millions. The Court's unanimous embrace of this reality puts to rest any romantic notion that the schools and the NCAA regard their athletes simply as students who like to participate in competitive sporting events. And, lest one think that commercialized college athletics is something new, Justice Gorsuch's opinion stresses that starting with the 1852 intercollegiate boat race on Lake Winnipesaukee, student athletes have effectively served as workers generating funds for their schools and the schools' affiliates. The point here is that by taking this small step toward employment equity, the Court is signaling a change in its traditional view of "work" and "workers."

D. Adjective Law.

These cases, described in abbreviated fashion here, flesh out adjective issues ranging from standing to seek relief to the kind of relief that Congress has authorized under certain statutes. Tying these disparate threads together, the Court appears to have removed a number of obstacles from the paths plaintiffs follow. Whether that result will obtain when applied to employment litigation remains to be seen.

TransUnion LLC v. Ramirez, 594 U.S. ---, 141 S. Ct. ---
208 L. Ed. 2d --- (2021)

The Court held that only plaintiff class members concretely harmed by a

defendant's violations of the Fair Credit Reporting Act have Article III standing to seek damages against that defendant in federal court.

Sergio Ramirez tried to buy a Nissan Maxima from a dealership in California, but could not do so because the salesman said his name was on a "terrorist list" based on a credit report by TransUnion LLC, a credit reporting agency that sells its credit reports on individuals to banks, landlords, car dealerships and other businesses who request creditworthiness information. Ramirez and a class of individuals sued TransUnion, alleging that it failed to "follow reasonable procedures to assure maximum possible accuracy" of its credit reports in violation of the Fair Credit Reporting Act ("Act"). The parties stipulated that the class consisted of 8185 persons to whom TransUnion had sent mailings during the class period and that 1853 of those members had their credit reports sent by TransUnion to potential creditors during that time.

The district court ruled that all members of the class had Article III standing and entered judgment on the jury's verdict that each class member was to receive $984.22 in statutory damages and $6353.08 in punitive damages for a total award of more than $60 million. The Ninth Circuit affirmed, but reduced the punitive award to $3936.88 per member, thus reducing the total award to about $40 million. The Supreme Court granted TransUnion's petition for certiorari.

The Court, in a 5-to-4 decision, reversed the Ninth Circuit's judgment and ruled, in a majority opinion by Justice Kavanaugh, that only plaintiffs concretely harmed by a defendant's statutory violation have Article III standing to seek damages against that private defendant in federal court. Justice Kavanaugh's opinion for the Court was joined by the Chief Justice and Justices Alito, Gorsuch and Barrett. Justice Thomas dissented in an opinion that Justices Breyer, Sotomayor and Kagan joined. Justice Kagan filed a separate dissenting opinion that Justices Breyer and Sotomayor joined.

The majority opinion concludes that the 1853 class members who suffered repetitional harm when Trans-Union provided misleading credit reports about them to creditors have shown the necessary concrete harm to sue. But, because the internal credit files for 6332 class members were not provided to third parties during the class period, those class members failed to demonstrate concrete harm and thus lack Article III standing to sue Trans-Union. After reviewing how the Trans-Union credit check process works, Justice Kavanaugh explains the Constitutional basis for standing, as well as what makes a harm sufficient for purposes of Article III standing. Tangible harms, such as physical or monetary ones, pose no difficulty. Whether an intangible harm is actionable is the question here. The Court holds that only where a plaintiff has suffered a harm bearing a "close relationship" to those harms "traditionally recognized" as the basis for a lawsuit has that plaintiff suffered a concrete harm and not just a violation of rights - can that plaintiff have Article III standing to sue.

Applying its holding to the class, the Court concludes that only those 1853 members

whose credit reports were actually sent to third parties suffered reputational harm traditionally associated with the tort of defamation. That concrete harm qualifies as an injury in fact under Article III. The remaining class members, however, whose credit reports were not sent suffered no such harm, have no standing to sue, and cannot recover the damages awarded by the lower courts. In remanding the case, the Court instructed that the Ninth Circuit "may consider in the first instance whether class certification is appropriate in light of our conclusion about standing." Slip opin., p. 27.

Justice Thomas' dissent examines the history of Article III standing and concludes that because each class member established a violation of his or her private rights by virtue of Trans-Union's inaccurate and mishandled credit checks, they have a sufficient injury to sue in federal court. Justice Kagan's separate dissent expresses her disagreement with Justice Thomas' view that violation of an individual right gives rise to standing. In her view Article III requires a concrete injury even in the context of a statutory violation. As Justice Kagan points out, however, this divergence of views will not make much difference in practice except in highly unusual cases.

* * * *

Putting to one side an unexpected lineup of Justices in this case, the importance of the Court's decision in the employment arena should not go unnoticed. In many workplace retaliation and discrimination cases, the real harm is not often physical. And, many times the harm has no economic consequences. Indeed, the harm to an individual worker is often a besmirching of their reputation. That is why the Court's decision here is notable. The rationale of this case draws into question the ability of an employee whose injury is reputational harm to sue her employer. At least that may be the tack defense lawyers take at the motion and discovery stages of a discrimination or retaliation case.

But there is another possible consequence of this case that could have an impact on employment litigation generally. The Court's less-than-generous view of personal harm perhaps portends stricter scrutiny of cases where relief is sought on a class or collective basis to redress a single employer's policy or practice. In practical terms, workers' lawyers should be prepared for more probing depositions that dig deeper into the nature, scope and consequence of the precise harm that an employer is alleged to have caused to a deponent. Both initial interviews and preparation of parties and witnesses by employees' lawyers may thus become all the more important in order to obtain appropriate relief. For these reasons, study of Justice Kavanaugh's majority opinion would be prudent for employment litigators on both sides.

Uzuegbunam v. Preczewski, 592 U.S. ---, 141 S. Ct. 792, 209 L. Ed. 2d 94 (2021)

The Court decided that a request for nominal damages satisfies the repressibility

element necessary for Article III standing where a plaintiff's claim is based on a completed violation of a legal right.

Chike Uzuegbunam, an evangelical Christian student at Gwinnett College, a public institution in Georgia, believes that an important part of exercising his religion includes sharing his faith by engaging in conversations with interested students and handing out religious literature. When Uzuegbunam did just that at an outdoor gathering place near the library, a campus police officer told him to stop, informing him that campus policy prohibited distribution of written religious materials. Uzuegbunam obeyed and later visited the school's Director of the Office of Student Integrity to learn more about campus policy. When he asked whether he could continue speaking about religion at that plaza without handing out materials, the official said no, explaining that there were two designated "free speech expression areas" on campus where he could do so only after securing a permit - which he then did. When he started speaking in the free speech zone on the permitted day, campus police again told him to stop, saying that people had complained about his speech. Uzuegbunam complied with the order after being threatened with disciplinary action if he continued. Another student who shared the same faith decided not to speak about religion because of what happened to Uzuegbunam.

Both evangelical Christian students then sued a number of college officials for injunctive relief and nominal damages, alleging that the campus policies violated the First Amendment. The officials got rid of the challenged policies and moved to dismiss for mootness in light of the policy change. The students agreed that injunctive relief was no longer available, but that their case was not moot because they had also sought nominal damages. The district court dismissed the case, holding that a claim for nominal damages by itself was insufficient to establish standing. The Eleventh Circuit affirmed, concluding that because the students had not sought compensatory relief, their nominal damages claim could not, standing alone, establish their standing.

The Supreme Court granted certiorari and reversed in an 8-to-1 decision. Justice Thomas' majority opinion holds that nominal damages can by itself redress a completed injury and thus establishes standing for Uzuegbunam, who indisputably suffered an injury in fact that is fairly traceable to the conduct he challenged. Parsing the common law rule permitting nominal damages without "evidence of actual damage," Justice Thomas demonstrates that even a single dollar can provide a partial remedy for a past injury and thus satisfy the redressibility requirement for standing for Uzuegbunam. As for the other student who sued, the district court on remand must first determine whether his rights were violated by enforcement of the campus policies against Uzuegbunam.

Justice Kavanaugh concurred in a one paragraph opinion noting that, while a request for nominal damages can keep an otherwise moot case alive, a defendant should be able to accept entry of a judgment for nominal damages and thereby end the suit without resolution of the merits.

Chief Justice Roberts dissented, noting first that the plaintiffs are no longer students, the challenged restrictions no longer exist, and the plaintiffs have not alleged any actual damages. Accordingly, the case is moot because no federal court can grant any effectual relief whatever. In the Chief Justice's view, nominal damages do not alleviate harms, and if they can preserve a live controversy, then federal courts will be required to act as "advice columnists". . . "whenever plaintiff tacks on a request for a dollar." Dissenting Slip. Opin., p. 1.

* * * *

Put aside yet another oddity - this time seeing Chief Justice Roberts as a solo dissenter from an opinion by Justice Thomas, one that was joined fully by every other member of the Court! The pertinence of this decision for the labor and employment bar is the ability to keep litigation alive despite an abandonment or other decisive favorable change in a challenged employment policy. Left unsaid in all three opinions is the fact that litigation is often exploited by both sides for ulterior purposes, even if it was not instigated, defended or pursued on that basis. Exemplifying lawsuits as a way to stand up to employers, or rallying employee sentiment by touting lawyers and lawsuits as a "cure" for wrongdoing, or forestalling adoption of other workplace policies that could hurt employees are but a few prime examples of why continuing litigation is seen as a virtue. The Court's decision here insures that a "standing" issue may no longer serve to dismiss suits where policy changes have been achieved, but nominal damages remain unresolved.

On the other hand, however, the Chief Justice makes a powerful point that the Court's sweeping new rule that a request for nominal damages can avoid mootness itself embodies a sweeping exception: A defendant should be able to moot a case by agreeing to pay the requested nominal damages - namely one dollar. And, although the Court recently reserved the question whether a defendant can moot a case by depositing the full amount of damages requested by a plaintiff, Campbell-Ewald Co., v. Gomez, 577 U.S. 153, 166 (2016), a defendant can call a bluff in a nominal damage case by filing a one dollar offer of judgment under F.R. Civ. P. 68(d). What conclusion can we ultimately draw from the opposing opinions in this case? Gamesmanship may emerge as the dominant result of the Court's decision here, and that may particularly be the case in employment disputes where the continuation of lawsuits can be especially hurtful to employers.

Tanzin v. Tanvir, 592 U.S. ---, 141 S. Ct. 486, 208 L. Ed. 2d 295 (2020)

The Court held that claims by practicing Muslims for money damages against Government officials in their individual capacities who unlawfully burdened claimants' Free Exercise rights is "appropriate relief" under the Religious Freedom Restoration Act.

Muhammed Tanvir, Jameel Algibhah and Naveed Shinwari, each a practicing Muslim

born abroad into the faith and each a lawful resident or citizen of the United States, sued FBI agents who allegedly placed them on the Government's No Fly List ("List") in retaliation for their refusal - based on sincerely held religious beliefs - to act as informants against Muslim groups. Their complaint alleged that, because of the FBI agents' importuning and threats in order to secure their cooperation as informants, their religious exercise was substantially burdened and that they were thus entitled to "appropriate relief" under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. 2000bb(1)-(2). The complaint against the defendants in their official capacities sought removal from the List in addition to money damages from the agents in their individual capacities for plaintiffs' lost job opportunities and wasted airline tickets they were not permitted to use.

The official capacity injunctive relief claims were mooted when the Department of Homeland Security advised plaintiffs more than a year after they sued that they could now fly again. As to the individual capacity money damages claims, the district court dismissed them, ruling that RFRA does not permit monetary relief. The Second Circuit reversed, concluding that "appropriate relief" under the statute encompasses money damages against Government officials.

The Supreme Court, in a unanimous decision written by Justice Thomas, affirmed, holding that "appropriate relief" under RFRA includes claims for money damages against Government officials in their individual capacities. Justice Barrett did not take part in the case.

Starting with the statutory text, the Court first determined that injured parties can sue Government officials in their personal capacities because obtaining relief "against a government" under RFRA is defined in 42 U.S.C. 2000bb-2(1) to include an "official (or other person acting under color of law) of the United States." Accordingly, the plaintiffs' individual capacity claims for money damages because of retaliation for refusing to act as informants against their co-religionists were properly brought against the FBI agents who importuned and threatened them.

Next, Justice Thomas, confronting what is "appropriate relief" in the absence of a statutory definition, first notes that this open-ended phrase is "inherently context dependent." Looking to the context of suits against Government officials in both common law and more recent statutory cases, the Court finds money damages to be a commonly available form of appropriate relief against Government officials who violate federal law. Indeed, Justice Thomas found particularly salient that money damages have always been available under Section 1983 for clearly established violations of the First Amendment. And, in this case monetary relief is the only way to remedy some of plaintiffs' losses, such as the wasted plane tickets. Finally, the Court rejects the Government's policy argument, based partially on separation-of-powers concerns, that the Court should recognize a presumption against money damages against individual officials. Justice Thomas points out that Congress is best suited for such a policy argument and that the Court is not at liberty to manufacture a new presumption and it is likewise not free to retroactively impose it on a 1993 Congress that enacted RFRA.

Accordingly, the Court affirmed the Second Circuit's judgment, concluding that "RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities." Slip Opin., p. 9.

* * * *

Justice Thomas' opinion, while admirably straightforward, concise and virtually unimpeachable as to rationale, is opaque when it comes to the egregious facts giving rise to plaintiffs' claims. To give the reader a flavor of what the FBI agents did to these three individuals, here is a barebones sketch of what happened: None of the three plaintiffs or their friends or families were ever suspected of criminal activities, and plaintiffs had flown many times without ever posing or being accused of posing any threat to aviation security. Nonetheless, the FBI agents sought to force plaintiffs to serve as "community spies" simply because they were Muslims with access to a faith community that had been under suspicion since the 9/11 terror of 2001. When plaintiffs told the agents that, because of their religious beliefs, they did not want to serve as informants on their Muslim community, the agents threatened them with deportation and arrest. When that did not work, the agents tried to bribe the plaintiffs with financial incentives and assistance with family members' immigration to the United States. Ultimately, the agents assumed that plaintiffs could not resist them if they were placed on the No Fly List. Being on the list caused plaintiffs to lose money on plane tickets they had paid for, hampered their ability to travel for work, and prevented them from visiting family abroad. Two of the agents told plaintiff Algibhah that it was futile for him to seek Congressional assistance to secure removal from the list because of the FBI's control over his fate: "Congressmen can't do shit for you; we're the only ones who can take you off the list." As a result of this coercion, plaintiffs sought administrative relief without success before filing suit.

Perhaps as important as the Court's construction of RFRA's term "appropriate relief" is the sole footnote on the next-to-last page of Justice Thomas' 9-page opinion. The footnote explains that both sides agreed that these FBI agents are entitled to assert a qualified immunity defense when sued in their individual capacities for monetary relief. Moreover, the footnote gratuitously repeats the claim at oral argument that qualified immunity is a "powerful shield" that "protects all but the plainly incompetent or those who flout clearly established law." Slip Opin., p. 8 quoting from Tr. of Oral Arg., p. 42. There could hardly be a broader hint that these FBI agents may well escape any consequence for the conduct summarized above that violated the Free Exercise rights of the three plaintiffs.

As for the juridical importance of this decision, the Court's express approval for the first time of money damages for injuries suffered when Government employees substantially burden an individual's free exercise of sincerely held religious beliefs is a noteworthy construction of RFRA. Indeed, that alone is enough to make this unanimous decision important. But beyond this easy-to-spot importance there is a likelihood that Justice Thomas'

opinion - which did not even spark a concurrence - will nourish an emerging embrace by several Justices of a controversial religious liberty agenda, as well as aggressive litigation about religious exemptions from generally applicable regulation. So, as a result of this decision, the prospect of monetary relief as a means of challenging governmental authority is now a troubling one that makes this decision all the more significant.

Brownback v. King, 592 U.S. ---, 141 S. Ct. 740, 209 L. Ed. 2d 33 (2021)

The Court held that dismissal of a claim against the United States under the Federal Tort Claims Act for conduct by Government employees was a judgment on the merits that can trigger the Act's "judgment bar" foreclosing individual liability claims against those employees.

James King, a 21 year old college student walking to his internship, had a violent encounter with Douglas Brownback and Todd Allen, members of a federal task force. The agents mistook King for a fugitive and beat and choked him so severely that he had to be hospitalized. Instead of prosecuting the agents, King was charged with crimes of which he was ultimately acquitted. King then sued the United States under the Federal Tort Claims Act ("FTCA"), alleging six tort violations under Michigan law. His complaint included *Bivens* claims against the two agents alleging individual liability for multiple violations of his Fourth Amendment rights.

The district court dismissed the FTCA claim on the Government's motion for summary judgment, finding that the United States was entitled to the qualified immunity that would have been available to its employees under Michigan law. The Court also ruled that King's FTCA claims failed in any event because the complaint did not present enough facts to state a plausible claim for relief for any of the tort claims. As to the *Bivens* claims against the individual employees, the Court also granted defendants' motion for dismissal. King appealed only the dismissal of the *Bivens* claims against the task force members, and the Sixth Circuit reversed, holding that the defendant officers were not entitled to qualified immunity. The Court of Appeals also ruled that since the district court's decision did not reach the merits of King's claims, the judgment bar of the FTCA was inapplicable to the *Bivens* claims.

The Supreme Court granted certiorari and unanimously reversed the Sixth Circuit's decision, concluding that the district court's dismissal of the FTCA claim was a final judgment on the merits that can trigger the FTCA's judgment bar - in this case against King's *Bivens* claims. Justice Thomas' opinion for the Court explained that the district court's conclusion that it lacked subject matter jurisdiction on the FTCA claim was a ruling on the merits because all elements of a meritorious FTCA claim also happen to be jurisdictional. Accordingly, the Act's judgment bar is applicable even though the district court held it lacked subject matter jurisdiction. In a footnote, however, Justice Thomas recounts King's argument that the FTCA's judgment bar does not apply to dismissal of claims in the same lawsuit (based on its common

law antecedents.) The Court further notes that because the Sixth Circuit did not address that argument, "[w]e leave it to the Sixth Circuit to address King's alternative arguments on remand." Slip Opin., p.5, n. 4.

Justice Sotomayor filed a concurring opinion that repeats Justice Thomas' footnote reminder that the lower courts did not decide whether resolution of an FTCA claim precludes other claims arising out of the same subject matter in the same suit. Her opinion then emphasizes that there are reasons to question the district court's conclusion that the FTCA's judgment bar applies to claims brought in the same action. On the practical side, Justice Sotomayor notes that if the task force defendants are right that King has to demonstrate malice or bad faith, a jury may never get to decide whether his Constitutional rights were violated when the defendants "stopped, searched and hospitalized him." Concurring Slip Opin., p. 4. Additionally, Justice Sotomayor notes that as a matter of text and purpose, dismissal of all claims in the same action may produce unfair outcomes and may otherwise not be justified.

* * * *

Were it not for the footnote in Justice Thomas' opinion, this wholly innocent college student who was physically assaulted by federal agents and seriously injured would have no remedy at all for what appears to be a clear violation of his rights. As the case stands, King may have an uphill struggle to avoid a qualified immunity defense and to convince the lower courts not to dismiss his Bivens claim on the basis of the FTCA's judgment bar. But Justice Sotomayor's concurrence, while not joined by any other Justice, is at least a guide for making the appropriate judgment bar arguments..

As a matter of construction of the FTCA's judgment bar, Justice Thomas' opinion for a unanimous Court that even a dismissal for lack of subject matter jurisdiction triggers the bar seems justified as a matter of text and common law provenance. The only criticism of his opinion is that, like his opinion in the Tanzin v. Tanvir, supra, Justice Thomas' factual recitation of what actually happened to James King understates the dramatic facts that underlie the case.

Henry Schein, Inc. v. Archer and White Sales, Inc., 592 U.S. ---, 141 S. Ct. 656, 208 L. Ed. 2d 512 (2021)

The Court dismissed the writ of certiorari as improvidently granted.

The Court had granted certiorari to decide "whether a provision in an arbitration agreement exempting certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator."

In a prior decision in the same case, the Court reversed the lower courts' refusal to

compel arbitration by holding that the widely recognized "wholly groundless" exception to arbitrability on which the lower courts relied was inapplicable because of its inconsistency with the Federal Arbitration Act. *Henry Schein, Inc. v. Archer and White, etc*., 586 U.S. ---, 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019). On remand, however, the lower court again declined Henry Schein's request to compel arbitration, and the Supreme Court again granted certiorari to confront the question of who shall decide the issue of arbitrability - the arbitrator or the court.

Within several weeks after oral argument, the Court dismissed the writ of certiorari as improvidently granted. No opinion accompanies this form of dismissal, and no Justice dissented from it. Accordingly, the Fifth Circuit's repeat ruling that a court is to decide the gateway question of who decides arbitrability stands.

* * * *

What an annoying on-again, off-again result here! Although not an employment case, it is clear that the Court's resolution of the question presented by the petition for certiorari could have had a significant impact on whether disputes about arbitrability of workplace disputes are to be decided by arbitrators or courts. Determination of that issue will now have to await another case, leaving both employers and employees without the guidance they had expected. For commentary by a knowledgeable observer immediately following the Court's Rule 46.1 dismissal, see Ronald Mann, "Justices dismiss arbitrability dispute," SCOTUSblog (Jan. 25, 2021, 5:25 PM), https://www.scotusblog.com/2021/01/justices-dismiss-arbitrability-dispute/

II. Opinions from the 'Shadow Docket" and the Order Lists.

The 2020 Term witnessed an expansion - nay, explosion - of the Court's shadow docket, as the exigencies of a rapidly unfolding and volatile pandemic and the norm-bending political pursuits of the prior administration's Justice Department combined to yield a welter of opinions and decisions - all rendered without briefing on the merits, participation of *amici curiae* and (telephonic) oral argument. Indeed, just as this article was being proofed, the Court, by a 6-3 vote in a shadow docket application, lifted moratorium on evictions of needy tenants living in high COVID-19 transmission areas, despite a dramatic spread of the Delta variant of the virus, *Alabama Ass'n of Realtors v. Dep't of Health and Human Services*, 594 U.S. ---, No. 21A23 (2021) (*Per Curiam*). And, two days earlier, the Court ordered by a 6-3 vote on a shadow docket application, reinstatement of the prior administration's policy requiring asylum seekers to stay in Mexico while waiting for a U.S. immigration court hearing. *Biden, President of the U.S. v. Texas*, 594 U.S. --- , No. 21A21 (2021).

Summarized first below, however, is a full dress merits docket decision by the Court in one of the most closely watched cases of the 2020 Term. This highly publicized decision exempting a Catholic social welfare agency from Philadelphia's foster parent certification requirements generally applicable to all similar agencies illustrates in stark terms how the Court

is weaponizing the Free Exercise Clause in a way that could easily cause havoc with enforcement of our employment laws. Furthermore, the religious liberty rationale of the Philadelphia decision is illustrative of how the Court handled several shadow docket applications dealing with COVID-required restrictions on religious worship. One of those decisions is briefly summarized following the Philadelphia case, and the others are cited thereafter for convenience.

The takeaway for the future of employment law is that whatever the Court majority's agenda or ambition may be, there is a clear and present danger that our employment laws could be rendered impotent by what some may view as a tyranny of religious liberty. Because a majority's newly concocted preference for religious exercise over compliance with generally applicable laws seems to be reaching full flower - and thus maximum danger - the topic merits the separate consideration this section offers.

Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. ---, 141 S. Ct. 1294, 209 L. Ed. 2d --- (2021)

The Court decided that Philadelphia's refusal to contract with Catholic Social Services for foster care services unless it agreed to certify same-sex couples as foster parents violates the First Amendment's Free Exercise Clause.

Catholic Social Services ("CSS"), a foster care agency established by the Catholic Church in Philadelphia, carries out the Church's mission to place children in foster homes when that need arises. Philadelphia's foster care system depends on cooperation between the City and private foster care agencies like CSS to place children with foster families when the City's Department of Human Services ("Department") assumes custody of children who can no longer live in their homes. The foster care process involves a referral (i.e., request) by the Department to the agency for a report on available families that the agency has approved as suitable for foster care. The Department then decides which family is the most suitable and supports the family throughout the placement.

CSS objects to certifying same-sex couples and unmarried couples (regardless of their sexual orientation) for foster care. CSS bases its objection on its understanding that certification of a family is an endorsement of the couple's relationship and, according to CSS's religious beliefs, "marriage is a sacred bond between a man and a woman." For more than 50 years CSS has contracted with the City while openly holding to its beliefs. It has not objected to certifying gay or lesbian individuals as single foster parents. Nor has it objected to placement of gay and lesbian children. And, no same-sex couple had ever sought certification, and if one did, CSS would direct the couple to one of more than 20 other agencies in the city that do certify same-sex couples. In 2018, however, after a newspaper article about another agency prompted the Archdiocese to state publicly that CSS would not consider prospective foster parents in same-sex marriages, the Department advised that it would no longer refer any children to CSS and that it would not contract with CSS in the future unless the agency agreed

to certify same-sex couples.

CSS and three foster parents affiliated with it filed suit against the City and the Department. The complaint alleged that the referral freeze violated the First Amendment. CSS sought preliminary injunctive relief that the district court denied, concluding that a contractual non-discrimination requirement and a City fair practices ordinance were neutral and generally applicable and that a Free Exercise claim was thus unlikely to succeed. The Third Circuit affirmed following expiration of CSS's contract with the City. The Court of Appeals concluded that requiring certification of same-sex couples was a neutral and generally applicable condition for renewal of the contract that did not violate the First Amendment under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). CSS and their affiliated foster parents sought review and asked the Supreme Court to reconsider *Smith*. The Supreme Court granted certiorari.

The Supreme Court unanimously reversed the judgment of the Third Circuit. The Chief Justice's opinion for the Court was joined by Justices Breyer, Sotomayor, Kagan, Kavanaugh and Barrett. Finding that forcing CSS to curtail its mission or certify same-sex couples burdens its religious exercise, and concluding that *Smith* is inapplicable here because the City's policies permit individualized exemptions, the Court holds that the City's conduct toward CSS is subject to "the most rigorous of scrutiny" and that it violated the Free Exercise Clause of the First Amendment. Chief Justice Roberts also rejected as inapplicable the City's reliance on its ordinance forbidding discriminatory interference with public accommodations opportunities on the basis of sexual orientation, noting that foster parent certification is not "made available to the public" in the manner of riding a bus, staying at a hotel or eating at a restaurant.

Justice Barrett's concurring opinion, joined fully by Justice Kavanaugh and joined except for the first paragraph by Justice Breyer, expresses skepticism about categorically applying strict scrutiny whenever a neutral and generally applicable law burdens religious exercise. Her opinion seems to favor a much more nuanced and balanced approach to the tension between obedience to laws of general application and obedience to the demands of one's religious tenets.

On the other hand, Justice Alito, joined by Justices Thomas and Gorsuch, filed a 77-page concurrence concluding that *Smith* was wrongly decided, that it should now be overruled and that it should be replaced by the standard it (*Smith*) previously replaced: "A law that a imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling governmental interest." Concurring Slip Opin., p. 73

Justice Gorsuch, joined by Justices Thomas and Alito, filed an opinion concurring in the judgment and expressing at some length the view that *Smith* should be overruled and that it should have happened in this case.

* * * *

Make no mistake about the significance of this non-employment case for employment law. The Court's solicitude for religious expression, like its undisguised disdain for the Smith decision, is a clear signal that generally applicable employment laws may soon become subject to unprecedented Free Exercise Clause limits. The possibility of a religious liberty exception to enforcement of employment discrimination requirements can best be seen in the federal Government's contracts program with the private sector. Contracting parties who choose not to comply with certain non-discrimination requirements based on their religious practices or beliefs are, as a result of this decision, a step closer to being able to claim exemption from Executive Order 11246's or Title VII's prohibitions on discrimination that would require federal contractors to take or refrain from conduct that their religion forbids or requires. And, as readers can plainly see from the concurrences, the precedential value of the Smith case to strike a more nuanced balance between religious liberty and non-discrimination seems minimal at this point.

Readers,if you do not yet recognize my worry about the approaching tyranny of religious liberty, read on to see how the Court dealt with COVID restrictions on indoor worship in several opinions from its shadow docket.

Tandon v. Newsom, 593 U.S. ---, 141 S. Ct. ---, 208 L. Ed. 2d --- (2021)

The Court decided *per curiam*, by a 5-to-4 vote to enjoin California's COVID restriction on at-home indoor religious worship by more than three households pending the Ninth Circuit's disposition of an appeal from enforcement of the restriction.

The Supreme Court majority, noting that this is the fifth time it has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise (*see* cases below), concluded that the worshippers are likely to succeed on the merits of their Free Exercise claim, having been irreparably harmed by the loss of exercise rights even for minimal periods of time and California's having failed to show that public health would be imperiled by employing less restrictive means. The majority premises its views on the conclusion that California treats what it regards as "comparable" secular activities more favorably than at-home worship, pointing to hair salons, retail stores, movie theaters, indoor restaurants and the like where more than three households can gather.

The Chief Justice declined to join the *per curiam* majority, noting that he would deny the application. Justice Kagan's dissenting opinion, joined by Justices Breyer and Sotomayor, points out that the premise of the majority's decision is doubly incorrect: First, California's COVID restrictions treat both secular and religious at-home gatherings the same way, so there is no discrimination against religious exercise. Second, even when at-home activities are compared to activities at secular commercial establishments, two Ninth Circuit judges specifically explained that home settings pose greater danger because of prolonged conversations, smaller and less well-ventilated venues, and a lesser likelihood of enforceable

mask-wearing and social distancing. Because the majority's ruling commands California to ignore science and because the majority treats at-home and commercial venues as equivalent places, the dissenters would deny the application.

* * * *

To the same effect as the *Tandon* decision is the Court's approval of a similar injunction against New York's numerical caps on attendance at religious facilities located in COVID "hot spots" in Brooklyn. **Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. ---, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (*per curiam*).** And, for additional decisions about California's indoor worship restrictions resulting from the COVID-19 pandemic, *see also*, **South Bay United Pentecostal Church v. Newsom, 592 U.S. ---, 141 S. Ct. 716, 209 L. Ed. 2d --- (2021), and Gateway City Church v. Newsom, 592 U.S. ---,141 S. Ct. 1460, 209 L. Ed. 2d --- (2021); Harvest Rock Church v. Newsom, 592 U.S. ---, 141 S. Ct. 889, 208 L. Ed. 2d --- (December 3, 2020) (mem.); Harvest Rock Church v. Newsom, 592 U.S. ---, 141 S. Ct. ---, 208 L. Ed. 2d --- (2021) (Prohibition on indoor worship enjoined, but capacity restrictions and prohibition on singing and chanting indoors upheld.)** Finally, for a detailed argument about closing religious schools in Kentucky, see **Danville Christian Academy v. Beshar, 592 U.S. ---, 141 S. Ct. 527, 208 L. Ed. 2d --- (2020) (Denial of application by private religious school to enjoin a Governor's school-closing order.)**

The upshot of these shadow docket opinions punctuates what a Court majority seems to be saying in other contexts (such as *Fulton, supra*): Religious expression is now a preferred freedom, and even emergency public health restrictions that burden it must be justified by the strictest scrutiny. *Cf. also*, EEOC Compliance Manual on Religious Discrimination revised January 15, 2021 by a divided Commission vote. (Access revised Manual at *www.eeoc.gov/laws/guidance/section-12-religious-discrimination*.) As I have noted in worrisome fashion several times, how the Justices' most favored nations approach to religious expression may play out when compliance with employment laws is alleged to burden a religious employer's free exercise is a question that the Court may confront sooner than later.

III. Grants of Certiorari for 2021 Term

Some observers believe that the 2021 Term will be a blockbuster one, as the Court has already granted review in an abortion case expressly seeking to overrule *Roe v. Wade*, 410 U.S. 113 (1973). Also, the Court will review a Second Amendment case involving the right to carry guns outside the home - another hot button topic. And as this article is being written, the Court is considering a petition challenging Harvard's admissions policies in a way that could permit the Court to effectively scuttle affirmative action in higher education. Nothing remotely as notorious is on the horizon so far in the 2021 Term's docket of labor and employment grants. Of the 30 or so cases on the argument docket so far, the seven listed below present issues related to employment relations in some manner. While none of these seven grants appear

likely to result in pathbreaking decisions that the media will trumpet, the real takeaway is that the Court continues to regard workplace law as an important aspect of its work.

Hughes v. Northwestern University, No. 19-1401

The question presented is whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA.

For practitioners in the retirement benefits field and, more importantly, for the millions of working people who are participants in defined contribution retirement plans, this case promises to clarify the scope of the duty of prudence that plan fiduciaries have to satisfy.

This case is not yet scheduled for oral argument.

Servotronics Inc. v. Rolls-Royce PLC, No. 20-794

The question presented is whether the discretion granted to district courts in 28 U.S.C. 1782(a) to render assistance in gathering evidence for use in "a foreign or international tribunal" encompasses private commercial arbitral tribunals, as the 4th and 6th Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as the 2nd, 5th and, 7th Circuit (here), have held.

The promise of this non-employment case is clarification of the scope of a district court's discretion under the Judicial Code to permit discovery in private commercial arbitration tribunals. While the connection to employment relations is a bit tenuous, a decision favoring inclusion of private arbitration tribunals may encourage litigants in cross-border employment arbitrations to enlist the help of federal courts to obtain evidence that arbitration panels will not allow.

This case is scheduled for oral argument on October 5, 2021.

Babcock v. Kijakazi, No. 20-480

The question presented is whether a civil service pension received for federal civilian employment as a "military technician (dual status)" is "a payment based wholly on service as a member of a uniformed service" for the purposes of the Social Security Act's windfall elimination provision.

Although limited to a particular segment of federal civil service employees who work in dual status as "military technicians," the Court's resolution of this issue under the Social Security Act will determine whether a portion of their pension benefits will be subject to forfeit

as a "windfall."

This case is scheduled for oral argument on October 13, 2021.

Cummings v. Premier Rehab Keller, P.L.L.C., No. 20-219

The question presented is whether the compensatory damages available under Title VI of the Civil Rights Act of 1964 and the statutes that incorporate its remedies for victims of discrimination, such as the Rehabilitation Act and the Affordable Care Act, include compensation for emotional distress.

The availability of damages for emotional distress is often a critical element of a discrimination claim. And, in cases involving the Rehabilitation Act of 1973, such claims tend to engender pointed sympathies on both sides. Amazingly, after more than five decades of enforcement of Title VI of the Civil Rights Act of 1964, there is still no authoritative answer to whether compensation for emotional distress is available as a remedy. This case, which involves a rehabilitation discrimination claim, is poised to provide that answer.

This case is not yet scheduled for oral argument.

U.S. v. Vaello-Madero, No. 20-303

The question presented is whether Congress violated the equal protection component of the due process clause of the Fifth Amendment by establishing Supplemental Security Income (a program providing benefits to needy aged, blind and disabled individuals) in the 50 states, the District of Columbia, and the Northern Mariana Islands, but not including Puerto Rico.

Congress' exclusion of Puerto Rican residents from the SSI program under the Social Security Act is at stake in this case. While SSI benefits are available to eligible individuals who do not live in the 50 states, aged, blind or disabled Puerto Ricans are omitted from statutory coverage. Whether Congress could do so without violating the Constitution will be up to the Court to say.

This case is not yet scheduled for oral argument.

Badgerow v. Walters, No. 20-1143

The question presented is whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act when the only basis for jurisdiction is that the underlying dispute involved a federal question.

This workplace harassment case seeks to resolve a circuit split about whether it is appropriate to "look through" to the dispute that underlies the arbitration to determine whether it

involves a federal question for purposes of the Federal Arbitration Act's applicability.

This case is scheduled for oral argument on November 2, 2021.

CVS Pharmacy Inc. v. Doe, No. 20-1374

The question presented is whether Section 504 of the Rehabilitation Act of 1973 — and by extension Section 1557 of the Patient Protection and Affordable Care Act, which incorporates the "enforcement mechanisms" of other federal antidiscrimination statutes — provides a disparate-impact cause of action for plaintiffs alleging disability discrimination.

Whether federal laws prohibiting disability discrimination afford full protection by including disparate impact claims is an important issue for both workers and employers. That is why the Court's grant of review in this case appears significant.

This case is not yet scheduled for oral argument.

Carson v. Makin, No. 20-1088

The question presented is whether a state violates the Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction.

While not arising under employment laws, the Court's grant of review here offers another angle on the confrontation between religious liberty and operation of otherwise neutral and generally applicable programs. This case is intended to resolve the question left open in *Espinoza v. Montana Dep't of Revenue,* 591 U.S. ---, 140 S. Ct. 2246, 207 L. Ed. 2d 679 (2020) (Free Exercise Clause bars application of state constitution's "no aid" requirement that results in a prohibition on private school tuition assistance to students attending religious schools.)

This case is not yet scheduled for oral argument.

IV. Concluding Observations

The October 2020 Term was assuredly a singular one - marked by the death of Justice Ruth Bader Ginsburg just as it was about to begin and then promptly commenced in the wake of a hurried appointment of Justice Amy Coney Barrett. The term was especially notable for a spavined employment law docket, an expansive shadow docket, the continued absence of oral argument in the courtroom, and a spate of challenges growing out of the loser's dissatisfaction with the outcome of the 2020 Presidential election. And, all this was happening in the midst of a deadly pandemic that has affected virtually every aspect of human life in our nation and around the world. In these circumstances, observations about our employment jurisprudence

seem less pertinent than ever. Yet, as our civic and economic life inevitably moves on, some additional commentary about the 2020 Term may prove helpful in assessing it.

Continuing at the forefront of the Court's decisions affecting the business community is its insistent pursuit of deregulation as a public good. It may be no coincidence that the Chief Justice and Justices Thomas and Alito, three of the main proponents of deregulation started their careers as part of what has been dubbed the Reagan Revolution. That was an era when deregulating the economy, including overt union-busting, was at the top of one party's political agenda throughout the 1980's and early 1990's. Seeing this deregulatory instinct play out anew in the *Cedar Point* decision - this time clothed in the guise of property law principles - seems a natural consequence of the new majority's support for the greatest prerogatives possible for employers, no matter what the effect might be on enforcement of what Congress has enacted as workers' rights. Perhaps I am missing a signal, but I do not see in any of the Court's work during the 2020 Term even a hint that a majority of Justices might lessen their push to free employers from as many workplace regulations as possible. And so, this 21st Century *laissez-faire* regime, complete with a new Gilded Age of blatant inequality, now seems to steer a majority of the Justices.

In like manner, my previously expressed concern about weaponizing the Free Exercise Clause to allow religionists to sidestep regulation of activities ranging from foster care requirements in *Fulton v. City of Philadelphia* to perilous group conduct in *Tandon v. Newsome* is a development that could easily spill into the workplace. Indeed, it already did so to some extent several terms ago when the Court ruled that family-owned employers could, under the Religious Freedom Restoration Act, avoid providing certain contraceptive coverage to female employees based on the owner's religious beliefs. *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). Lest the reader think that I am "crying wolf" about a mission to impair workplace fairness laws with religious liberty handcuffs, one has only to recall how the Court, little-by-little, chipped away at the requirement of public employee agency fees before prohibiting them. *Janus v. AFSCME,* 585 U.S. --- (2018). And if that example is not enough, consider how the Court gradually made arbitration of statutory rights the preferred means of enforcement in the face of Congress' protection of employee collective rights. *Epic Systems v. Lewis*, 584 U.S. --- (2018). So, in light of how a deregulatory majority has gone about altering doctrine by an incrementalist approach, watch for more opportunities for the current majority to use religious liberty to exempt employers from their obligation of fair treatment under neutral and generally applicable Congressional mandates. *Cf., Seattle's Union Gospel Mission v. Woods*, No. 21-144 (Petition for certiorari filed August 2, 2021) (Whether denial of total exemption from non-discrimination laws that state grants to secular small businesses violates the Free Exercise Clause.)

And, what of labor relations in the coming years? Witness the imminent change of Board membership (including, to the author's personal delight, the installation on August 28, 2021, of David Prouty, a friend and former client during his tenure with the Amalgamated Clothing and Textile Workers Union) and the appointment of Jennifer A. Abruzzo as General Counsel of the

Board. These changes portend significant revision of Board doctrine fashioned administratively during the last several years of Republican domination. Further down the road, the prospect for Supreme Court review of what the NLRB (and other agencies) are now doing is assuredly a heightened one. *See, e.g.*, OGC Memorandum GC 21-04 (August 12, 2021) at https://fingfx.thomsonreuters.com/gfx/legaldocs/gdvzyrzbbpw/EMPLOYMENT_ABRUZZO_MEMO_memo.pdf (last accessed August 13, 2021) covering a multitude of areas where the General Counsel has concluded that centralized consideration by mandatory submissions to Advice is now warranted. To impending prospect add a change at the top of the AFL-CIO resulting from the death of its president, Richard Trumka, a few weeks ago. The likely permanent replacement is one of two women with not only a greater interest in organizing, but also an opportunity to counter the influence of the Chamber of Commerce at the Supreme Court with a more vigorous approach to *amici* briefing at both the petition and merits stages of all labor-related cases. *See*, J. Harkavy, "A Modest Blueprint for Representing Working People and Labor Unions in Fraught Times" at pp. 7-8 (September 9, 2019). Available at SSRN: https://ssrn.com/abstract=3450619 or http://dx.doi.org/10.2139/ssrn.3450619

Now an observation of who on the Court showed real interest in employment law: Without doubt, the clarion voice of Justice Thomas could be heard during the 2020 Term in nearly every employment-related decision of consequence. Whether he wrote on assignment for a Court majority, concurred in the Court's judgment or dissented from a Court decision, Justice Thomas filed an opinion in seven of the ten principal employment and adjective decisions reviewed in this article. On a more gossipy note, Justice Thomas' well-known reticence to take part in oral arguments virtually disappeared during the COVID pandemic with the new protocol of structured telephone arguments where interruptions are effectively nullified. His questions have been too-the-point and, so far as I can tell, quite helpful to the process of decision. *See, e.g.*, Carrie Severino, "Justice Thomas has made the new oral argument format a winner," SCOTUSblog (Aug. 18, 2021, 12:37 PM), https://www.scotusblog.com/2021/08/justice-thomas-has-made-the-new-oral-argument-format-a-winner/ In short, my sense is that the voice of Justice Thomas in employment decisions will command greater respect in the ensuing term and perhaps beyond.

Finally, whither the Court itself? Executive Order 14023 (April 9, 2021) established the President Commission on the Supreme Court of the United States ("Commission"). *See*, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/09/executive-order-on-the-establishment-of-the-presidential-commission-on-the-supreme-court-of-the-united-states/. The core function of the Commission is to produce a report analyzing the arguments for and against Supreme Court "reform." Among the most talked-about "reform" proposals are Court packing by adding Justices to the Conference, imposing term or age limits on service by future Justices, and staggering limited terms in order to minimize partisan domination of the Court. What may come of the Commission's work? Perhaps nothing, as any "reform" will require legislation or even Constitutional change for the most radical proposals. In the meantime, however, the Commission will serve as a safety valve to let off steam about what

many partisans regard as the "capture" of the Court during the last Presidency. More immediate change, however, was at the forefront only a couple of months ago during a brief media frenzy about whether Justice Breyer would or should retire. A flurry of competing op-ed's by Court mavens ended when Justice Breyer himself hired a full complement of clerks for the ensuing term and declined to give any indication that he would not sit with his colleagues in the 2021 Term. Now, with the approach of next year's elections that could change the balance of power in the Senate, a new round of speculation about Justice Breyer's plans is already beginning to emerge. *E.g.*, Garrett Epps, "Justice Stephen Breyer Lives in a World of His Own," *Washington Monthly* (October/November 2021) https://washingtonmonthly.com/magazine/september-october-2021/justice-stephen-breyer-lives-in-a-world-of-his-own/. Whatever happens as to Supreme Court "reform" or Justice Breyer's tenure, the effect on employer-employee law could well be significant to all stakeholders in the employment relationship - and to lawyers who advise, litigate and observe our labor and employment jurisprudence.

Readers, staying current with the Supreme Court's employment and labor jurisprudence continues to be a worthwhile task for all of us. My hope is that you will enjoy doing so and that you will stay safe and be well in any case.

Jonathan R. Harkavy
August 28, 2021