PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS FOURTH EDITION

Martin H. Malin
Ann C. Hodges
Joseph E. Slater
Jeffrey M. Hirsch
Michael Oswalt
Anne Marie Lofaso

2023 SUMMER UPDATE

Update prepared by:

Joseph E. Slater
Distinguished University Professor
Eugene N. Balk Professor of Law and Values
University of Toledo

Jeffrey M. Hirsch
Geneva Yeargan Rand Distinguished Professor of Law
University of North Carolina

Michael Oswalt
Professor and Associate Dean for Research and Faculty Development
Wayne State University Law School

Anne Marie Lofaso
Arthur B. Hodges Professor of Law
West Virginia University School of Law

August 2023

Chapter 1, Introduction

A. Differences Between Public Sector and Private Sector Employment

B. Differences in the Laws Governing Public and Private Employment and the Continuing Policy Debate

C. An Overview of the Book's Coverage

Chapter 2, The Boundaries Between the Public and Private Sectors

A. Who Is the Employer?

B. What Is a Public Employer?

Page 49, at the end of Note 1, substitute the last sentence with the following.

In 2022, the NLRB under the Biden Administration published a notice of proposed rulemaking that would replace the 2020 rule and return the joint employer standard to the *Browning-Ferris* approach. *See* NLRB, *Standard for Determining Joint-Employer Status*, 87 Fed. Reg. 54641 (2022), https://www.federalregister.gov/documents/2022/09/07/2022-19181/standard-for-determining-joint-employer-status. The comment period ended in December 2022, and the NLRB is currently working on its final rule.

C. Blurring the Lines Between Public and Private Employment

Chapter 3, Constitutional Rights of Public Employees

A. The Demise of the "Privilege-Right" Distinction

B. Freedom of Speech

Page 75, insert the following at the end of Note 9.

In *Kirkland v. City of Maryville, Tennessee*, 54 F.4th 901 (6th Cir. 2022), a female former city police officer was fired after using her social media account to accuse the county sheriff of sex discrimination and political retaliation. The Sixth Circuit held that the employer's legitimate and significant interest in maintaining a good working relationship between the city police department and the county sheriff's office outweighed the city officer's free speech interest in making these social media posts. The court reasoned that the two departments often shared responsibilities for law enforcement and training, officers in each department had to rely on

officers in the other department in life-threatening circumstances, and the posts clearly risked undermining the relationship between the departments.

Page 76, insert the following as a new Note 10 and renumber the remaining notes.

10. On the other hand, courts often require evidence of real disruption in cases involving core political speech. *Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County*, 39 F.4th 95 (3rd Cir. 2022) enjoined a public employer's ban on face masks bearing political or social-protest messages at work. This had included disciplining employees for wearing masks supporting Black Lives Matter. The court noted that the employer could demonstrate only minimal risk that this speech would cause workplace disruption. Further, the mask policy was not narrowly tailored; it was overbroad by including a wide array of political speech in which employees had long engaged without causing disruption, and underbroad by not including other types of political speech at the workplace. On the other side of the political spectrum, *Dodge v. Evergreen School District #14*, 56 F.4th 767 (9th Cir. 2022) found that a school principal violated the First Amendment by retaliating against a middle school teacher for wearing a "Make America Great Again" hat to a teachers-only cultural sensitivity and racial bias professional development session. The court held that, under *Pickering*, the employer's interest in preventing disruption at sessions did not outweigh the teacher's right to free speech, even if some attendees were offended by the hat.

Page 93, end of the second paragraph, add the following.

These cases will turn on the specific facts in the case. In *Shara v. Maine-Endwell Central School Dist.*, 46 F.4th 77 (2nd Cir. 2022), a bus driver alleged that his employer retaliated against him for complaining to the employer about the frequency of bus safety inspections. The driver further alleged that he made these complaints in his capacity as a union official. The court cited *Montero* for the principle that there was no categorical rule that a person speaking in their capacity as a union member was always speaking as a private citizen. Nonetheless, *Shara* held that in this case, plaintiff made the complaints in his capacity as a School District employee, not as a private citizen. Thus, the First Amendment could not protect his speech. A dissent argued that his comments were a matter of public concern because they involved the safety of schoolchildren, public employees, and other motorists.

Page 95, add the following as a new paragraph after the first paragraph.

Perhaps the most widely publicized case on *Garcetti* and academic speech thus far is *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). This case involved a public university that disciplined a professor because he refused to call a transgender student in his class by her preferred pronouns. The professor sued on a variety of grounds, including free exercise and free speech. The District Court dismissed his claims, but the Sixth Circuit reversed. In so doing, it held that there was an academic freedom exception to *Garcetti* which applied to "all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not." 992 F.3d 492, 507. The court reasoned that "If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity." This could include, among other things, a university rule *barring* professors from using a student's

preferred pronouns. 992 F.3d at 506. "Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship." *Id.* at 505.

Under this approach, even faculty speech that survived *Garcetti* would still be subject to the *Pickering* balancing test. But do you think professors at public universities should receive uniquely favorable treatment under *Garcetti*? If so, why? If not, is that because they should be subject to *Garcetti*, or because no public employees (or many fewer) should be subject to *Garcetti*?

Page 96, before *Dixon v. Toledo*, add the following.

Kennedy v. Bremerton School District
United States Supreme Court, 2022.
142 S.Ct. 2407, 213 L.Ed.2d 755.

Gorsuch, J. (Roberts, C. J., and Thomas, Alito, and Barrett, JJ., joined; Kavanaugh, J., joined, except as to Part III–B)

Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

I

A

Joseph Kennedy began working as a football coach at Bremerton High School in 2008 after nearly two decades of service in the Marine Corps. … Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game. …. In his prayers, Mr. Kennedy sought to express gratitude for "what the players had accomplished and for the opportunity to be part of their lives through the game of football." …. Mr. Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quiet[ly]" for "approximately 30 seconds." ….

Initially, Mr. Kennedy prayed on his own. …. But over time, some players asked whether they could pray alongside him. … Mr. Kennedy responded by saying, " 'This is a free country. You can do what you want.' " … The number of players who joined Mr. Kennedy eventually grew to include most of the team, at least after some games. Sometimes team members invited opposing players

to join. Other times Mr. Kennedy still prayed alone. … Eventually, Mr. Kennedy began incorporating short motivational speeches with his prayer when others were present. … Separately, the team at times engaged in pregame or postgame prayers in the locker room. It seems this practice was a "school tradition" that predated Mr. Kennedy's tenure. … Mr. Kennedy explained that he "never told any student that it was important they participate in any religious activity." … In particular, he "never pressured or encouraged any student to join" his postgame midfield prayers. …

For over seven years, no one complained to the Bremerton School District (District) about these practices. ... It seems the District's superintendent first learned of them only in September 2015, after an employee from another school commented positively on the school's practices to Bremerton's principal. … At that point, the District reacted quickly. On September 17, the superintendent sent Mr. Kennedy a letter. In it, the superintendent identified "two problematic practices" in which Mr. Kennedy had engaged. ... First, Mr. Kennedy had provided "inspirational talk[s]" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of ... game[s]." ... Second, he had led "students and coaching staff in a prayer" in the locker-room tradition that "predated [his] involvement with the program." ...

The District explained that it sought to establish "clear parameters" "going forward." ... It instructed Mr. Kennedy to avoid any motivational "talks with students" that "include[d] religious expression, including prayer," and to avoid "suggest[ing], encourag[ing] (or discourag[ing]), or supervis[ing]" any prayers of students, which students remained free to "engage in." ... The District also explained that any religious activity on Mr. Kennedy's part must be "nondemonstrative (*i.e.*, not outwardly discernible as religious activity)" if "students are also engaged in religious conduct" in order to "avoid the perception of endorsement." .... In offering these directives, the District appealed to what it called a "direct tension between" the "Establishment Clause" and "a school employee's [right to] free[ly] exercise" his religion. ... To resolve that "tension," the District explained, an employee's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities." …

After receiving the District's September 17 letter, Mr. Kennedy ended the tradition, predating him, of offering locker-room prayers. ... He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field. .... Mr. Kennedy further felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer. ... Driving home after a game, however, Mr. Kennedy felt upset that he had "broken [his] commitment to God" by not offering his own prayer, so he turned his car around and returned to the field. *Ibid.* By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks. …

On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. ... He asked the District to allow him to continue that "private religious expression" alone. ... Consistent with the District's policy, … Mr. Kennedy explained that he "neither requests, encourages, nor discourages students from participating in" these prayers, ... Mr. Kennedy emphasized that he sought only the opportunity to "wai[t] until the

game is over and the players have left the field and then wal[k] to mid-field to say a short, private, personal prayer." ... He "told everybody" that it would be acceptable to him to pray "when the kids went away from [him]." ... He later clarified that this meant he was even willing to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. ... However, Mr. Kennedy objected to the logical implication of the District's September 17 letter, which he understood as banning him "from bowing his head" in the vicinity of students, and as requiring him to "flee the scene if students voluntarily [came] to the same area" where he was praying. ... After all, District policy prohibited him from "discourag[ing]" independent student decisions to pray. ...

On October 16, shortly before the game that day, the District responded with another letter. See *id.*, at 76. The District acknowledged that Mr. Kennedy "ha[d] complied" with the "directives" in its September 17 letter. … Yet instead of accommodating Mr. Kennedy's request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song—the District issued an ultimatum. It forbade Mr. Kennedy from engaging in "any overt actions" that could "appea[r] to a reasonable observer to endorse ... prayer ... while he is on duty as a District-paid coach." ... The District did so because it judged that anything less would lead it to violate the Establishment Clause. …

B

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. ... When he bowed his head at midfield after the game, "most [Bremerton] players were ... engaged in the traditional singing of the school fight song to the audience."… Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer. …

This event spurred media coverage of Mr. Kennedy's dilemma and a public response from the District. The District placed robocalls to parents to inform them that public access to the field is forbidden; it posted signs and made announcements at games saying the same thing; and it had the Bremerton Police secure the field in future games. .... Subsequently, the District superintendent explained in an October 20 email to the leader of a state association of school administrators that "the coach moved on from leading prayer with kids, to taking a silent prayer at the 50 yard line." ... The official with whom the superintendent corresponded acknowledged that the "use of a silent prayer changes the equation a bit." *Ibid*. On October 21, the superintendent further observed to a state official that "[t]he issue is quickly changing as it has shifted from leading prayer with student athletes, to a coaches [*sic*] right to conduct" his own prayer "on the 50 yard line." ...

On October 23, shortly before that evening's game, the District wrote Mr. Kennedy again. It expressed "appreciation" for his "efforts to comply" with the District's directives, including avoiding "on-the-job prayer with players in the ... football program, both in the locker room prior to games as well as on the field immediately following games." ... The letter also admitted that, during Mr. Kennedy's recent October 16 postgame prayer, his students were otherwise engaged and not praying with him, and that his prayer was "fleeting." ... Still, the District explained that a "reasonable observer" could think government endorsement of religion had occurred when a "District employee, on the field only by virtue of his employment with the District, still on duty" engaged in "overtly religious conduct." ... The District thus made clear that the only option it would

offer Mr. Kennedy was to allow him to pray after a game in a "private location" behind closed doors and "not observable to students or the public." *Id.*, at 93–94.

After the October 23 game ended, Mr. Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." … The superintendent informed the District's board that this prayer "moved closer to what we want," but nevertheless remained "unconstitutional." *Id.*, at 96. After the final relevant football game on October 26, Mr. Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. … While he was praying, other adults gathered around him on the field. … Later, Mr. Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song. …

C

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative leave and prohibited him from "participat[ing], in any capacity, in ... football program activities." … In a letter explaining the reasons for this disciplinary action, the superintendent criticized Mr. Kennedy for engaging in "public and demonstrative religious conduct while still on duty as an assistant coach" by offering a prayer following the games on October 16, 23, and 26. ... The letter did not allege that Mr. Kennedy performed these prayers with students, and it acknowledged that his prayers took place while students were engaged in unrelated postgame activities. … Additionally, the letter faulted Mr. Kennedy for not being willing to pray behind closed doors. ...

In an October 28 Q&A document provided to the public, the District admitted that it possessed "no evidence that students have been directly coerced to pray with Kennedy." ... The Q&A also acknowledged that Mr. Kennedy "ha[d] complied" with the District's instruction to refrain from his "prior practices of leading players in a pre-game prayer in the locker room or leading players in a post-game prayer immediately following games." … But the Q&A asserted that the District could not allow Mr. Kennedy to "engage in a public religious display." … Otherwise, the District would "violat[e] the ... Establishment Clause" because "reasonable ... students and attendees" might perceive the "district [as] endors[ing] ... religion." …

While Mr. Kennedy received "uniformly positive evaluations" every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor performance evaluation. … The evaluation advised against rehiring Mr. Kennedy on the grounds that he " 'failed to follow district policy' " regarding religious expression and " 'failed to supervise student-athletes after games.' " … Mr. Kennedy did not return for the next season. …

II

A

After these events, Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. ... He also moved for a preliminary injunction requiring the District to reinstate him. The District Court denied that motion… On appeal, the Ninth Circuit affirmed. …

… The Court denied [Mr. Kennedy's] petition [for certiorari]. …

B

After the case returned to the District Court, the parties engaged in discovery and eventually brought cross-motions for summary judgment. … [T]he District Court found that the " 'sole

reason' " for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after the October 16, 23, and 26 games. ...

… Rejecting Mr. Kennedy's free speech claim, the court concluded that because Mr. Kennedy "was hired precisely to occupy" an "influential role for student athletes," any speech he uttered was offered in his capacity as a government employee and unprotected by the First Amendment. ... Alternatively, even if Mr. Kennedy's speech qualified as private speech, the District Court reasoned, the District properly suppressed it. Had it done otherwise, the District would have invited "an Establishment Clause violation." … [The court also rejected Mr. Kennedy's free exercise claim on grounds that even though the [School] District's policies were not neutral toward religion or generally applicable, it had a compelling interest in prohibiting Kennedy's postgame prayer—namely, to (avoiding an Establishment Clause violation.]

C

The Ninth Circuit affirmed. It agreed … that Mr. Kennedy's speech qualified as government rather than private speech because "his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." … [T]he Ninth Circuit further reasoned that, "even if we were to assume ... that Kennedy spoke as a private citizen," the [School] District had an "adequate justification" for its actions. … "Kennedy's on-field religious activity," coupled with … "his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities," were enough to lead an "objective observer" to conclude that the District "endorsed Kennedy's religious activity by not stopping the practice." … And that, the court held, would amount to a violation of the Establishment Clause. …

[The Ninth Circuit rejected the free exercise claim for the same reasons as did the district court, noting that the suspension was narrowly tailored to vindicate its compelling interest in avoiding an Establishment Clause violation. The court later "denied a petition to rehear the case en banc over the dissent of 11 judges," arguing that "the panel erred by holding that a failure to discipline Mr. Kennedy would have led the District to violate the Establishment Clause" and noting that court had incorrectly relied on the "ahistorical" and "atextual" approach adopted in *Lemon v. Kurtzman*, 403 U. S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which the Supreme Court had previously "abandoned."]

* * * We granted certiorari. …

III

… [T]he Free Exercise and Free Speech Clauses of the First Amendment …. work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. ... That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent. ... "[I]n Anglo–American history, ... government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995).

Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law. [See, *e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).] … We begin by examining whether Mr. Kennedy has discharged his burdens, first under the Free Exercise Clause, then under the Free Speech Clause.

A

* * * The [Free Exercise] Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation … by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." … [If that burden is met] this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. …

That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise in question involves, as Mr. Kennedy has put it, giving "thanks through prayer" briefly and by himself "on the playing field" at the conclusion of each game he coaches. * * *

[The Court then explained how the School District's challenged policies were neither neutral nor generally applicable because they sought to restrict Mr. Kennedy's religious practices, at least in part, and their grounds for advising against rehiring Mr. Kennedy—his failure to supervise student-athletes after games—specifically addressed his religious practices and were not applied to other coaches who failed (for non-religious reasons) to supervise student-athletes after games.]

B

When it comes to Mr. Kennedy's free speech claim, our precedents remind us that the First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); see also *Lane v. Franks*, 573 U.S. 228, 231, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014). Of course, none of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages.

To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in [*Pickering*, *Garcetti*], and related cases suggest

proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks "pursuant to [his or her] official duties," this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech. …

At the same time and at the other end of the spectrum, when an employee "speaks as a citizen addressing a matter of public concern," our cases indicate that the First Amendment may be implicated and courts should proceed to a second step. ... At this second step, our cases suggest that courts should attempt to engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." … Among other things, courts at this second step have sometimes considered whether an employee's speech interests are outweighed by " 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " …

Both … agree that Mr. Kennedy's speech implicates a matter of public concern. … They also appear to accept, at least for argument's sake, that Mr. Kennedy's speech does not raise questions of academic freedom that may or may not involve "additional" First Amendment "interests" beyond those captured by this framework. *Garcetti*, 547 U.S. at 425, 126 S.Ct. 1951. ... At the first step of the *Pickering–Garcetti* inquiry, the parties' disagreement thus turns out to center on one question alone: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

Our cases offer some helpful guidance for resolving this question. In *Garcetti*, the Court concluded that a prosecutor's internal memorandum to a supervisor was made "pursuant to [his] official duties," and thus ineligible for First Amendment protection. … In reaching this conclusion, the Court relied on the fact that the prosecutor's speech "fulfill[ed] a responsibility to advise his supervisor about how best to proceed with a pending case." … In other words, the prosecutor's memorandum was government speech because it was speech the government "itself ha[d] commissioned or created" and speech the employee was expected to deliver in the course of carrying out his job. …

By contrast, in *Lane* a public employer sought to terminate an employee after he testified at a criminal trial about matters involving his government employment. ... The Court held that the employee's speech was protected by the First Amendment. ... In doing so, the Court held that the fact the speech touched on matters related to public employment was not enough to render it government speech. … Instead … the "critical question ... is whether the speech at issue is itself ordinarily within the scope of an employee's duties." … It is an inquiry this Court has said should be undertaken "practical[ly]," rather than with a blinkered focus on the terms of some formal and capacious written job description. … To proceed otherwise would be to allow public employers to use "excessively broad job descriptions" to subvert the Constitution's protections. …

Applying these lessons here, … Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. *Lane*, 573 U.S. at 240, 134 S.Ct. 2369. He did not speak pursuant to government policy. He was

not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. See Part I–B, *supra*. Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee. *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951.

The timing and circumstances of Mr. Kennedy's prayers confirm the point. During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. … We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy's prayers took place "within the office" environment—here, on the field of play. … Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

In reaching its contrary conclusion, the Ninth Circuit stressed that, as a coach, Mr. Kennedy served as a role model "clothed with the mantle of one who imparts knowledge and wisdom." ... The court emphasized that Mr. Kennedy remained on duty after games. ... Before us, the District presses the same arguments. … And no doubt they have a point. Teachers and coaches often serve as vital role models. But this argument commits the error of positing an "excessively broad job descriptio[n]" by treating everything teachers and coaches say in the workplace as government speech subject to government control. *Garcetti*, 547 U.S. at 424, 126 S.Ct. 1951. On this understanding, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria. Likewise, this argument ignores the District Court's conclusion (and the District's concession) that Mr. Kennedy's actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities. Others working for the District were free to engage briefly in personal speech and activity. ... That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech. To hold differently would be to treat religious expression as second-class speech and eviscerate this Court's repeated promise that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506, 89 S.Ct. 733.

Of course, acknowledging that Mr. Kennedy's prayers represented his own private speech does not end the matter. So far, we have recognized only that Mr. Kennedy has carried his threshold burden. Under the *Pickering–Garcetti* framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern. See *Lane*, 573 U.S. at 236, 242, 134 S.Ct. 2369.

IV

Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity

normally must satisfy at least "strict scrutiny," showing that its restrictions on the plaintiff 's protected rights serve a compelling interest and are narrowly tailored to that end. … A similar standard generally obtains under the Free Speech Clause. … The [School] District, however, asks us to apply to Mr. Kennedy's claims the more lenient second-step *Pickering–Garcetti* test, or alternatively intermediate scrutiny. … Ultimately, however, it does not matter which standard we apply. The [School] District cannot sustain its burden under any of them.

A

[The Court then rejected the School District's argument, grounded in *Lemon* and its endorsement test corollary, that it had to suspend Kennedy to avoid an Establishment Clause violation. The Court explained that the Free Exercise, Establishment, and Free Speech Clauses "have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." It then clarified that the Court had already overturned *Lemon* and the endorsement test.]

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by " 'reference to historical practices and understandings.' " *Town of Greece*, 572 U.S. at 576, 134 S.Ct. 1811 … . " '[T]he line' " that courts and governments "must draw between the permissible and the impermissible" has to " 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.' " *Town of Greece*, 572 U.S. at 577, 134 S.Ct. 1811 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring)). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some " 'exception' " within the "Court's Establishment Clause jurisprudence." 572 U.S. at 575, 134 S.Ct. 1811 … . The District and the Ninth Circuit erred by failing to heed this guidance.

B

[The Court next rejected the School District's theory that "it was justified in suppressing Mr. Kennedy's religious activity because otherwise it would have been guilty of coercing students to pray," which "amounts to an Establishment Clause violation."]

C

In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should "'trum[p]'" the other two. ... But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause. *Schempp*, 374 U.S. at 308, 83 S.Ct. 1560 (Goldberg, J., concurring). And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights. …

V

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and

Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is [reversed].

Justice Thomas, concurring.

I join the Court's opinion because it correctly holds that Bremerton School District violated Joseph Kennedy's First Amendment rights. I write separately to emphasize that the Court's opinion does not resolve two issues related to Kennedy's free-exercise claim.

First, the Court refrains from deciding whether or how public employees' rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public. ... In "striking the appropriate balance" between public employees' constitutional rights and "the realities of the employment context," we have often "consider[ed] whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). In the free-speech context, for example, that inquiry has prompted us to distinguish between different kinds of speech; we have held that "the First Amendment protects public employee speech only when it falls within the core of First Amendment protection—speech on matters of public concern." … It remains an open question, however, if a similar analysis can or should apply to free-exercise claims in light of the "history" and "tradition" of the Free Exercise Clause….

Second, the Court also does not decide what burden a government employer must shoulder to justify restricting an employee's religious expression because the District had no constitutional basis for reprimanding Kennedy under any possibly applicable standard of scrutiny. … While we have many public-employee precedents addressing how the interest-balancing test set out in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), applies under the Free Speech Clause, the Court has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause. A government employer's burden therefore might differ depending on which First Amendment guarantee a public employee invokes.

Justice Alito, concurring.

The expression at issue in this case is unlike that in any of our prior cases involving the free-speech rights of public employees. Petitioner's expression occurred while at work but during a time when a brief lull in his duties apparently gave him a few free moments to engage in private activities. When he engaged in this expression, he acted in a purely private capacity. The Court does not decide what standard applies to such expression under the Free Speech Clause but holds only that retaliation for this expression cannot be justified based on any of the standards discussed. On that understanding, I join the opinion in full.

NOTES

1. The Court in *Kennedy* holds that the football coach meets both the *Pickering–Connick* balancing test and strict scrutiny, which is demanded under a Free Exercise analysis. The Court does not, however, decide whether one of those standards or both are to be applied. What does this say about public employee religious speech in the workplace?

2. Focusing on the *Pickering–Connick* balancing test, how much, if at all, does *Kennedy* shift the balance in favor of the public employee? What managerial rights to discipline public sector employees engaged in religious speech after *Kennedy*?

3. The focus of Justice Alito's concurrence as excerpted distinguishes the expression at issue in *Kennedy*—prayer—from the expression in any previous public-employee free-speech case before the Court. What do you think Justice Alito is suggesting about the results in those cases and perhaps the results in future cases dealing with religious expression?

C. Freedom of Association and Political Activity

Page 107, add the following as Note 6.

In the run up to the 2022 midterm elections, the same office warned that White House Press Secretary Karine Jean-Pierre violated the Hatch Act when she used the Trump slogan, MAGA, to describe Republican policies.

Page 144, add the following at the end of Note 4.

Relatedly, the Ninth Circuit recently held that a volunteer member of a municipal advisory board " 'can be fired for purely political reasons' " by the city councilperson, an elected official, who appointed her and where that councilperson is authorized by city ordinance to remove her "because the advisory board member is the 'public face' of the elected official who appointed her to the body. See *Lathus v. City of Huntington Beach*, 56 F.4th 1238, 1239 (9th Cir. 2023). In *Lathus*, the councilperson appointed the volunteer to the Citizen Participation Advisory Board ("CPAB"), which has a statutory mandate to " 'provide citizen participation and coordination in the City's planning processes' related to a federal Department of Housing and Urban Development block grant program." *Id.* (citing ordinance). Shortly thereafter, the volunteer was photographed at an immigrants' rights rally standing near individuals thought to be Antifa members. The councilperson dismissed the volunteer when she refused to denounce Antifa. In addition to holding that the volunteer could be first for purely political reasons, supra, the Court held to the extent that the volunteer's activities had First Amendment protection, her refusal to denounce Antifa were appropriate grounds for her dismissal. *Id.* at 1240–43.

D. Due Process of Law

E. Equal Protection

Page 138, add the following citation at the end of the second paragraph.

But see *Naes v. City of St. Louis, Missouri*, 2023 WL 3991638, at *2 (8th Cir. 2023) (per curiam) (unpublished opinion) (explaining—in the context of straight man's employment discrimination lawsuit against police department—that it has not extended *Bostock* to equal protection claims and that the Missouri Supreme Court has not extended the Missouri Human Rights Act to sexual-orientation discrimination claims)

F. Privacy

Chapter 4, Statutory Employment Protections for Public Employees

A. Constitutional Constraint's on Employment Regulation

B. Special Fair Labor Standards Act Rules in Public Employment

C. Civil Service Laws

D. Teacher Tenure Laws

E. Whistleblower Protections

Page 320, insert as new Note 5 and renumber the remaining notes.

5. The Texas Supreme Court recently held that the Texas Whistleblower Act "protects only express reports to an appropriate law enforcement authority that unambiguously identify the employing governmental entity or another public employee as the violator." See *Texas Health and Human Services Commission v. Pope*, 2023 WL 3267606, at *4, 66 Tex. Sup. Ct. J. 786 (Tex. 2023) (express reports against individuals "impliedly" implicating state agency insufficient to trigger Texas Whistleblower Act).

F. Public Sector Pensions and Retirement Benefits

G. Bankruptcy

Chapter 5, Collective Representation in the Public Sector.

A. A Brief History of Representation in the Public Sector

Page 381, last full paragraph, before the final sentence, add the following.

Then in 2023, Florida enacted Senate Bill 256, which, among other things, bars most public-sector unions from having dues deducted directly from workers' paychecks and requires that affected unions maintain at least 60% membership in their bargaining units. Those that do not will be decertified and lose their contracts. Police and firefighter unions are exempted from this law.

Page 382, at the end of the carryover paragraph, add the following.

In 2022, New Jersey enacted S3810 which expands the definition of mandatory subjects of bargaining to those that "intimately and directly affect employee work and welfare." This law also allows a public-sector union to charge a non-dues-paying bargaining unit member for the cost of representation in arbitration proceedings, and to refuse to represent those who do not pay dues. *See* Chapter 13 for more on issues related to those latter rules. That same year, Washington enacted HB 2124, which grants legislative branch employees to right to bargain collectively (beginning May 1, 2024). In 2023, Minnesota enacted SF 3035 which provides, among other things, that unionized teachers will be able to negotiate over adult-to-student rations in classrooms, student-to-personnel ratios, and certain aspects of student testing.

B. Modern Debates over Collective Bargaining in the Public Sector

Page 413, add the following as a new Note 6 and renumber the remaining notes.

On the other hand, in *AFSCME Council 61 v. State of Missouri*, 63 S.W.3d 111 (Mo. 2022), the Missouri Supreme Court (reversing the Court of Appeals) held that a state law removing civil service "just cause" discharge protections from most state employees and specifying that unions could not negotiate over this topic for such employees did not violate the state constitutional right to bargain collectively. The law "does not prevent the State from bargaining in good faith with Unions representing at-will employees. Rather, it merely limits the terms and conditions of employment the State is authorized to bargain." 63 S.W.3d 111, 126. Do you think that any limits on topics of bargaining could violate a constitutional right to bargain collectively? If so, what specific types of limits? If not, why not?

C. The Right to Form and Join Unions

D. The Right to Bargain

E. Unionization in the Absence of Statutory Protection

F. The Diversity of Statutory Protections

Chapter 6, Protecting the Right to Organize

A. The Scope of Protected Activity

Pages 460-470, insert the following case and new notes.

Public Employment Relations Board
State of Iowa
UNI-UNITED FACULTY (AAUP IHEA) AND STEVE O'KANE,
COMPLAINANT/CERTIFIED EMPLOYEE ORGANIZATION
AND
STATE OF IOWA (BOARD OF REGENTS), RESPONDENT/PUBLIC EMPLOYER

July 20, 2022
DECISION AND ORDER

Complainant, UNI-United Faculty (AAUP IHEA) ("United Faculty") and Professor Steve O'Kane filed a prohibited practice complaint on October 4, 2021, with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 and Iowa Administrative Code 621--3.1. The complaint alleges the Respondent, State of Iowa Board of Regents (Regents) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a).

* * *

Based upon the entirety of the record, and having reviewed and considered the parties arguments, PERB concludes the Complainant has not established the Regents committed a prohibited practice pursuant to Iowa Code section 20.10(2)(a). Although O'Kane engaged in concerted activity for the mutual aid or protection of other faculty members, O'Kane's actions in threatening his students' grades were so indefensible that he forfeited the law's protection.

2. Findings of Fact

* * *

2.1.2 August 10, 2021, UNI Email Regarding COVID Policy

Prior to the start of the fall 2021 semester, the UNI [University of Northern Iowa] COVID response group steering committee sent an email to the campus reiterating the Regents' COVID policy. In the email, UNI stated that face coverings were encouraged, but were not required. This email further provided, "The Board of Regents, State of Iowa guidelines prohibit all public universities from requiring masks or vaccinations on campus. It is important not to ask individuals regarding their vaccination status due to privacy issues. Students, faculty, staff, and visitors to campus are not required to wear a mask or other face covering in our campus spaces, with the exception of particular health care settings or research labs." * * *

2.1.3 Faculty Reactions' to Regents' Policy

Over the summer of 2021, some faculty members felt that COVID had ramped up as new variants emerged. Union president [Beverly], Hawbaker, said that faculty were nervous about the Regents' prohibition on mask mandates. They understood that faculty could not require masks in

their own classrooms, but United Faculty began to discuss the flexibility within this policy and the degree to which the policy would be implemented. * * *

2.2 2021 Commencement of Fall Semester and O'Kane's Classroom Mask Mandate

* * *

2.2.2 September 2, 2021, Professor O'Kane's Mask Mandate

In the fall 2021 semester, O'Kane taught Plant Systematics, an upper-level senior graduate course. * * * During the course, O'Kane lectured between twenty minutes and an hour and twenty minutes prior to the hands-on laboratory portion of the class. During the laboratory portion of the class, the students and O'Kane worked closely, occasionally sharing microscopes.

Early in the semester, on September 2, O'Kane * * * implemented a mask mandate in the class. O'Kane felt he needed to take what he believed was the right and moral course of action. O'Kane told the students that a health crisis still existed and the public health measure to take to protect themselves and their community would be to wear a mask. O'Kane then told his students that if they did not wear a mask, the students would not get credit for that day's work. One of the Plant Systematics class members testified that O'Kane told the students they could leave if they were uncomfortable with wearing a mask in his classroom, and leaving would result in not receiving points for the day. The class member also testified that O'Kane did not use a threatening tone when he made this announcement to the class.

On September 2, there were two students in the classroom not wearing masks. One of those students immediately put a mask on and the other was hesitant, but ultimately wore a mask. O'Kane reminded these students in subsequent days to wear a mask, but no student lost points for noncompliance with O'Kane's mask requirement.

O'Kane stated he could not move the class online because the quality of the course would suffer and would be unfair to the students. So instead, he implemented a mask mandate to protect the health and safety of his colleagues and students. O'Kane also believed the Regents' policy was immoral and he should not be told how to run his own classroom.

2.3 2021 Fall Semester after O'Kane's Classroom Mask Mandate

After O'Kane imposed his mask mandate on the students, O'Kane had conversations with other faculty telling them what he had done. He also told several other faculty members to consider a mask mandate. O'Kane emailed some faculty members to let them know of his decision. Hawbaker told O'Kane that United Faculty would support him and would share his decision with others. O'Kane and Hawbaker also discussed their excitement about faculty members from the University of Georgia that similarly planned to mandate masks in the classrooms despite the state's university system not mandating mask-wearing.

2.3.1 O'Kane's Faculty Senate Resolution

After announcing his mask mandate to the students and fellow faculty members, O'Kane drafted a resolution for the University Faculty Senate. Once O'Kane submitted his resolution, all faculty senators had access to the document. In his resolution, O'Kane noted the dangers of COVID. He further stated his opinion that masks were a proven health measure to reduce the spread of the virus. In the resolution, O'Kane requested that faculty members "should manage their own classroom in a way that maximizes their own and their students' health, and, by extension, the health of the broader university and local community. Faculty members should exercise this choice even if disallowed by state law, the Board of Regents, or University of Northern Iowa policy."

During the Faculty Senate meeting on September 27, O'Kane offered this resolution and asked for the Faculty Senate's endorsement. After a closed executive session meeting, the Faculty Senate postponed taking any action on the resolution.

2.3.2 Newspaper Article Outlining O'Kane's Mask Mandate

Also, on September 27, O'Kane interviewed with an eastern Iowa newspaper. The article stated that O'Kane instituted the mask mandate in a University of Northern Iowa's classroom and enforced the mandate through consequences to the students' grades for failure to comply with his mandate. The article quoted O'Kane as saying that his "students, not surprisingly, now all wear masks as they know there will be consequences to their grades." The article provided that faculty at all three campuses sent petitions to the Regents' pleading with them to require masks and vaccines. The article also included information learned from the September 27, Faculty Senate meeting.

2.3.3 O'Kane's Meeting with UNI Administration

After the Faculty Senate meeting, the publication of the newspaper article and receiving a complaint from the community at large about O'Kane's mask mandate, UNI's administration requested a meeting with O'Kane. On September 28 or 29, O'Kane met with various members of the UNI administration including the provost, the biology department head, and Professor Vallentine, the provost for faculty at UNI.1 Union President, Hawbaker, also attended. The meeting was generally collegial. * * * The administration tried to work with O'Kane to devise solutions that would make O'Kane feel safer while teaching. In the meeting O'Kane discussed his rationale in imposing the mask mandate, and UNI administration asked O'Kane questions about his concerns. Although the administration offered other routes O'Kane could take to feel safer, O'Kane stated his purpose was "to inspire others," and "to stand up against a policy that he felt was morally and ethically bankrupt," while trying "to get others to fight back." O'Kane also discussed his belief the Regents' were politically motivated in enacting the prohibition on mask mandates.

2.4 O'Kane's Discipline and its Effects

2.4.1 UNI Administration Disciplined Professor O'Kane

Dean Fritch, the dean of the College of Humanities, Arts, and Sciences at UNI emailed O'Kane a Notice of Disciplinary Action the evening of September 29, 2021. In the disciplinary notice UNI states that it disciplined O'Kane pursuant to two alleged policy violations: violation of the Regents' policy when O'Kane required his students to wear masks, and violation of UNI's policy when O'Kane ""threaten[ed]" or graded students based on compliance with that mask mandate. * * * The notice specified that O'Kane violated the Regents' policy by requiring masks and violated UNI Policy 6.10 regarding responsibilities to students when he "threaten[ed]" consequences to students' grades for refusing to comply with his mask mandate. * * * The policy states in relevant part:

A. Definition: Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking personally on matters of public interest, one is not speaking for the institution.
. . . .

C. Faculty Responsibilities to Students:
. . . .

1. Faculty members have the responsibility for creating in their relations with students a climate that stimulates and encourages students to learn.

. . . .

5. Faculty members have the obligation to make clear the objectives of each course or program and to establish requirements and standards of achievement. This includes attendance, participation, and opportunities for extra credit. Faculty members should teach their courses consistent with the course description in the catalogue and the syllabus.

6. The faculty member owes to the student and the University a fair and impartial evaluation of the student's work. Evaluations should be consistent with recognized standards within the profession.

UNI administration contended that UNI Policy 6.10 does not permit faculty to base a student's grade on something unrelated to the class or assignment or a test in the class. The dean of faculty, Vallentine testified that UNI's primary issue with O'Kane's alleged violation of 6.10 was that O'Kane based students' grades on whether those students were wearing masks.

* * *

Ultimately, the discipline letter stated that UNI determined discipline was warranted. UNI required O'Kane to complete training sessions addressing professional responsibilities, which he completed. O'Kane would receive a "Needs Improvement" on his performance evaluation for the

2021-2022 academic year and would not be eligible for merit pay. UNI also relieved O'Kane from teaching in-person courses for the remainder of the fall 2021 semester.

* * *

3. Conclusions of Law and Analysis

United Faculty argues the Regents committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a) which states:
20.10 Prohibited practices.

. . . .

2. It shall be a prohibited practice for a public employer or the employer's designated representative to:

a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

* * *

3.1 Protected Activity

Section 20.8(3) under the Public Employment Relations Act (PERA) grants employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The National Labor Relations Act (NLRA) contains the same language to grant employees the right to engage in concerted activity. PERB has long held that National Labor Relations Board (NLRB) and federal court decisions are instructive as PERA and the NLRA contain this similar language.

3.1.1 Concerted Activity

Iowa Code defines protected activity in part as engagement in concerted activities for the purposes of mutual aid or protection. The United States Supreme Court determined the term "concerted" describes activities of employees who have joined together to achieve common goals. *City Disposal Sys. Inc*., 465 U.S. 822, 829, 104 S.Ct. 1505, 1511, 79 L.Ed.2d 839. However, the manner in which particular actions of individual employees must be linked to actions of fellow employees to be deemed "concerted" is not clear from the statutory text. *Nat'l Labor Relations Bd. v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984)[.]

* * *

Relying on NLRB case law, federal courts have determined that concerted activity can include conduct engaged in by a single employee. [*Nat'l Labor Relations Bd v.*] *Maine Coast Reg'l Health Facilities*, 999 F.3d [1, 9 (1st Cir. 2021)]. Concerted activities extend to an individual's actions seeking to initiate or to induce or prepare for group action and bringing truly group

complaints to the attention of management. There is no requirement that concerted actions be specifically authorized by others. *Id*. The critical inquiry to determine whether an employee is engaged in a "concerted" activity is not whether the employee acted individually, but whether the employee's actions were in furtherance of a group concern. *Id*. It is sufficient that an employee intends or contemplates as an end result, group activity which will also benefit some other employees. *JCR Hotel, Inc. v. Nat'l Labor Relations Bd*., 342 F.3d 837, 840 (8th Cir. 2003).

The complainant has shown O'Kane engaged in concerted activity under the Act. Although O'Kane acted alone, United Faculty demonstrated O'Kane acted with the intention of inducing group action.

At the August 27 meeting, prior to O'Kane's mask mandate, United Faculty discussed requiring masks in the classroom. Specifically, United Faculty members discussed how many faculty members might be willing to impose mask mandates to show that faculty disagreed with the conditions of their employment, namely the Regents' COVID policy that prohibited them from taking such action. Further, prior to O'Kane implementing his mask mandate, he discussed with Hawbaker whether other professors were also interested in instituting a mask mandate. These facts demonstrate O'Kane considered whether he should impose a mask mandate to induce group action prior to the implementation of his mask mandate on September 2.

Additionally, after O'Kane implemented his mask mandate, he continued to demonstrate that he took this action to induce other faculty members to do the same. O'Kane told other faculty members about his classroom mask mandate, he emailed them about it, and even offered a Faculty Senate resolution requesting faculty members to "manage their own classroom in a way that maximizes their own and their students' health." O'Kane and Hawbaker discussed a similar mask mandate labor dispute at the University of Georgia, and how faculty members banded together on that campus. When O'Kane spoke with UNI administration prior to his discipline, he told them when he enacted the mask mandate, he was trying to get others to fight back against the Regents. Finally, after his discipline, O'Kane stated in his blog, "Disciplined for Requiring My Students to Wear Masks," that he hoped his example would spread to other classrooms. He instituted a mask mandate with the intent of inducing other faculty to take the same measure.

United Faculty also demonstrated O'Kane took action in furtherance of a group concern. Although O'Kane's actions took place when he was in his classroom without other colleagues, O'Kane implemented the mask mandate in furtherance of the concern of other faculty members as well as himself. * * * O'Kane was also involved with United Faculty and their discussion on the different routes they could take due to their concern with the Regents' prohibition on masks and vaccines. United Faculty sent a petition to the Regents in August detailing their concern with the prohibition on a mask mandate. At the August 27 United Faculty meeting, those involved discussed how to deal with this Regents' policy, and talked about requiring masks in the classroom, but ultimately did not endorse that action because they recognized the potential employment consequences. O'Kane had personal motivations for his actions, including being able to manage his own classroom and his moral and ethical feelings about mask mandates, but O'Kane was also addressing fellow faculty member's concern about the conditions of employment, the authority to control their classrooms and the health and safety of faculty, students, and others on campus.

The Regents argue O'Kane's conduct was not protected because he did not implement a mask mandate in concert with other UNI faculty or on the authority of other UNI faculty. Case law clearly states O'Kane did not need to act on the explicit authority of other UNI faculty and his actions do not fall short of the definition of concerted merely because no other faculty member engaged in the same actions. Maine Coast Reg'l Health Facilities, 999 F.3d at 9. Concerted activities extend to individual actions from an employee seeking to initiate or to induce or prepare for group action. *Id.*

The Regents also argue O'Kane instituted a mask mandate enforced by consequences to his students' grades because of his personal belief that a prohibition on mask mandates was immoral. The Regents claim O'Kane's actions were motivated by his own political and moral beliefs, not on behalf of other faculty members. United Faculty has shown O'Kane took action that furthered a group concern. Although O'Kane may have had his own political and moral beliefs, the evidence demonstrates other faculty members shared this concern. *See id*. (stating the critical inquiry is whether the employee's actions were in furtherance of a group concern)[.] * * * United Faculty demonstrated O'Kane engaged in concerted activity.

3.1.2 Mutual Aid or Protection

A showing of concerted activity is not enough to demonstrate the conduct is protected under section 20.8(3). The concerted activity needs to be "for other mutual aid or protection." United Faculty demonstrated O'Kane engaged in concerted activity for other mutual aid or protection.

The mutual aid or protection clause extends section 20.8(3) to include not just collective bargaining or self-organization, but also employee efforts to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. Nat'l Labor Relations Bd*., 437 U.S. 556, 565 (1978). However, the clause is not so broad as to protect concerted activity whose relationship to employees' interest as employees is so distant that it does not come within the mutual aid or protection clause. *Id.* at 567-68.

O'Kane's actions fit within the mutual aid or protection clause. O'Kane implemented a mask mandate because he believed it would improve the safety of his colleagues and the university and community in general. O'Kane's actions, although not pertaining to collective bargaining or self-organization, still relate to the terms and conditions of employment as he was concerned with control within the classroom and for the health and safety of his colleagues as well as the university as a whole.

As such, United Faculty has shown O'Kane engaged in concerted activity for other mutual aid or protection. United Faculty has established O'Kane engaged in protected activity. United Faculty also demonstrated that the Regents' discipline of O'Kane interfered with, restrained, or coerced public employees in the exercise of protected rights.

* * *

3.2 Loss of Protected Status

* * *
[T]he Regents [also] maintain that even if O'Kane's actions constitute protected activity, the method of engaging in this concerted activity resulted in the loss of protected status.

PERB and federal court case law have long held that an employee engaged in concerted activity may lose protection of the Acts due to improper conduct. *Media Gen. Operations, Inc. v. Nat'l Labor Relations Bd*., 560 F.3d 181, 186 (4th Cir. 2009); *Five Star Transp. v. Nat'l Labor Relations Bd.*, 522 F.3d 46, 52 (1st Cir. 2008).

PERB and federal courts have determined that an employee loses the Act's protection when acting in an abusive manner through speech or conduct when having conversations with or about management. See *Media Gen. Operations Inc*., 560 F.3d at 186-88 (stating that insulting, obscene, personal attacks by an employee against a supervisor need not be tolerated even when they occur during otherwise protected activity and concluding an employee's derogatory remarks about management lost the NLRA's protection); *Fort Dodge Firefighters Ass'n*, 1997 PERB 5445, 5500 & 5526 at 2 (stating that profanity and emotional language are not protected activity in every case while an employee is otherwise engaging in concerted activity for mutual aid or protection); * * * *Sioux County Bd. of Supervisors*, 1977 HO 847, 6-7 (finding an employee lost PERA's protection when he physically grabbed the supervisor during a conversation with him). Federal courts have looked at the following factors to determine whether the employee lost protection of the NLRA due to their conduct when engaging in conversations with or about their employer: the place of the discussion, the subject of the discussion, the nature of the employee's outburst, and whether the employer's unfair labor practice provoked the employee's outburst. Media Gen. Operations, Inc., 560 F.3d at 186. * * *

Federal courts have also concluded an employee's actions in third-party communications, such as communications to the consumers of the employer's products, "may lose the veil of protection" if carried out through reckless or disloyal means or if conducted in an excessive or indefensible manner. *Five Star Transp*., 522 F.3d at 52; *see Sierra Pub. Co. v. Nat'l Labor Relations Bd*., 889 F.2d 210, 220 (9th Cir. 1989) (opining that public disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute). Federal courts have determined that an employee's otherwise protected third-party communication loses NLRA protection if the communication is unrelated to the ongoing dispute between the employer and employee or if the communication to the third party is disloyal, reckless, or maliciously untrue. *Five Star Transp*., 522 F.3d at 52.

* * *

3.2.2 Protection for Enforcing Mask Mandate through Loss of Daily Points

The Regents * * * contend that even if O'Kane engaged in protected activity, he lost the Act's protection when he threatened his students' grades. We agree.* * * O'Kane's actions toward his students were indefensible as he threatened his students and acted in a reckless manner toward third party consumers of the University system.

While O'Kane did not threaten violence, O'Kane did threaten harm to his students' grades if they failed to conform to his mask mandate. O'Kane even described [in a public blog post] his actions as using a "stick" to enforce his mask mandate. He told the students they would not receive daily points if they refused to wear a mask. O'Kane's threat to the students' grades was a reckless action that cannot be condoned as protected activity.

O'Kane owed his students a responsibility as their professor to create an encouraging climate. He also owed the students a fair and impartial evaluation. He owed the students these responsibilities not only because of UNI policy, but because of the nature of his position as a professor. He placed both of these duties at risk when imposing his mask mandate. In implementing his mandate, O'Kane put his students in the middle of the conflict between faculty and management. Since O'Kane told his students they would lose points for failure to comply with his mask mandate, they lost the ability to choose to wear a mask even though all other authority figures in the Regents' system gave students that choice.

Although O'Kane engaged in protected concerted activity, he did so in a manner that lost him PERA's protection. O'Kane attempted to increase the use of masks on campus for what he and other faculty members viewed as a necessary safety measure. However, in attempting to change these working conditions, O'Kane made the reckless decision to impose his political and moral beliefs on his students with a threat to their academic status through the loss of points for non-compliance with his self-imposed mask mandate. This extreme action is similar to the type of abuse that PERB and federal law have determined the employer does not need to accept. O'Kane's threat to his students was an unreasonable way to pursue his labor dispute with the Regents and UNI.

Therefore, we conclude O'Kane lost the Act's protections. United Faculty and O'Kane have not established the Regents committed a prohibited practice when disciplining O'Kane.

NOTES

1. Here, the Iowa PERB used the standards adopted by the NLRB and many federal courts for policing employee activity that is both 1) concerted, and 2) for the purpose of the mutual aid or protection, but also includes words or conduct that may render it unprotected as a policy matter. To return to the question introducing the case, do any public sector interests advise against adopting the private sector rules? In *Omaha Policy Union Local 101, IUPA v. City of Omaha*, 274 Neb. 70, 736 N.W.2d 375 (2007), the Nebraska Supreme Court noted:

> "While the [Public Employment Relations Act] does provide public employees some of the same rights granted under the NLRA, it also explicitly removes other rights utilized by private sector employees, most notably the right to strike. Therefore, we view the Act not only as an attempt to level the employment playing field, but also as a mechanism designed to protect the citizens of Nebraska from the effects

and consequences of labor strife in public sector employment."

Ultimately the Nebraska Supreme Court adopted a "flagrant misconduct" standard, largely borrowed from the statute governing federal employee labor relations, and defined as "statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline." The Court emphasized the need to balance "impulsive behavior, against the employer's right to maintain order and respect for its supervisor staff." Does the flagrant misconduct standard provide Nebraska state employers with more lee-way than their private sector counterparts to discipline employees?

2. Outside of angry, profane, or abusive speech, employees face the greatest risk of protest-related loss of protection for "reckless or disloyal" speech or actions directed toward third-parties, usually the public. While disloyalty is notoriously difficult to define, words or conduct that disparage the employer's product or services or break confidentiality, especially without reference to an active labor dispute, are particular danger zones. Why do you think these guardrails exist? Why did the PERB think that O'Kane's "self-imposed mask mandate" breached them?

3. While not in the edited case, the Regents also contended that O'Kane lost protection for acting "insubordinately." The PERB quickly rejected this argument, noting that it "could lead to absurd results," and stating categorically that the "mere violation of a policy cannot be deemed so abusive as to lose PERA's protection." How come?

4. A full-time equipment operator for Clay County also worked during his off hours for the Clay County Fair Board, a private not-for-profit corporation, as did two other county employees. The Fair Board paid them considerably less than the county. The equipment operator, on behalf of himself and his two colleagues, negotiated wage increases with the Fair Board's manager. Subsequently, the manager told the county engineer that the equipment operator had represented that the engineer would not allow the Fair Board to use county equipment unless it paid the equipment operator the same wage rate that the county paid him. Based on this allegation, the county engineer fired the equipment operator whose union then filed unfair labor practice charges. The labor board credited the equipment operator's testimony that he never made such a representation and concluded that the county had discharged him for engaging in the protected activity of negotiating wage increases with the Fair Board. You represent the county. What argument will you make on appeal? See *Clay County v. Public Employment Relations Board*, 784 N.W.2d 1 (Iowa 2010).

B. Access to Employees

C. Employer Coercion

D. Employer Domination of a Labor Organization

E. Employer Discrimination

Page 500, add the following new note.

6. The National Labor Relations Act does not allow for punitive damages, liquidated damages, fines, or even usually attorney fees, leading some to suggest that the law's remedial scheme is too weak to adequately deter violations. California is experimenting with a different approach, newly authorizing the Public Employment Relations Board to fine public employers for preventing or discouraging employees from joining or staying in a union, up to $1,000 per employee plus attorney's fees. Imagine that an employer is required to provide the union with a list of newly hired employees' names, emails, phone numbers, and home addresses to make a membership pitch—but the list is riddled with errors. Should the employer be subject to a fine?

Chapter 7, Recognition of Exclusive Bargaining Representatives

A. Consequences of Exclusive Representation

Page 511, insert the following new Note 3 and renumber the remaining notes.

Note 3. Courts of appeals continue to apply *Knight* in the post-*Janus* world, in a similar way that the Sixth Circuit did here in *Thompson*. See, e.g., *Peltz-Steele v. UMass Faculty Federation*, 60 F.4th 1, 8 (1st Cir. 2023) (rejecting law professor's argument that union, as exclusive representative, violated his First Amendment speech and association rights during negotiations over pay cuts in context of COVID-19 pandemic); Adams v. Teamsters Union Loc. 429, 2022 WL 186045 (3d Cir. Jan. 20, 2022) (nonunion Pennsylvania state employees); *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 968-70 (10th Cir. 2021) (rejecting New Mexico state employee's argument that exclusive representation is compelled speech); Bennett v. AFSCME Council 31, 991 F.3d 724, 733–35 (7th Cir. 2021) (same; Illinois public-school custodian); Ocol v. Chi. Tchrs. Union, 982 F.3d 529 (7th Cir. 2020) (same; nonunion teacher); Akers v. Md. State Educ. Ass'n, 990 F.3d 375, 382 n.3 (4th Cir. 2021) (same; Maryland public-school teachers); Mentele v. Inslee, 916 F.3d 783 (9th Cir. 2019) (same; Washington state childcare providers); Bierman v. Dayton, 900 F.3d 570 (8th Cir. 2018) (same; Minnesota state parent-homecare providers).

B. Determining the Bargaining Unit

C. Special Issues Concerning Certain Types of Employees

7. DUAL-STATUS TECHNICIANS

Ohio Adjutant General's Department v. Federal Labor Relations Authority
Supreme Court of the United States

THOMAS J.

This case requires us to determine whether the Federal Labor Relations Authority (FLRA) properly exercised jurisdiction over an unfair labor practices dispute. On one side were the Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department (collectively petitioners or the Guard). On the other was the American Federation of Government Employees, Local 3970, AFL–CIO (Union), which represents federal employees known as dual-status technicians who work in both civilian and military roles for the Guard.

The Union petitioned the FLRA to resolve the dispute. But, under the Federal Service Labor-Management Relations Statute (FSLMRS or Statute), the FLRA only has jurisdiction over labor organizations and federal "agencies"—and petitioners insist that they are neither. 5 U.S.C. § 7101 *et seq.* We hold, however, that petitioners act as a federal "agency" when they hire and supervise dual-status technicians serving in their civilian role.

I

A

Enacted in 1978, the FSLMRS establishes a comprehensive framework governing labor-management relations in federal agencies. It secures the right of "[e]ach employee" "to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal." § 7102. And, it further guarantees that "each employee shall be protected in the exercise of such right." *Ibid.* To that end, the FSLMRS provides for collective bargaining between federal agencies and their employees' unions, and it bars each from committing unfair labor practices. See §§ 7102(2) and 7116(a)–(b). For example, an agency may not "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Statute; "refuse to consult or negotiate in good faith with a labor organization as required by" the Statute; or "otherwise fail or refuse to comply with any provision of " the Statute. §§ 7116(a)(1), (5), (8).

The Statute creates the FLRA and tasks it with administering this framework, including by investigating and adjudicating labor disputes. § 7105(a)(2)(G); see also §§ 7104 and 7118(a)(1). It provides that the FLRA's general counsel "shall investigate" a charge against "any agency or labor organization" and, if warranted, may issue a complaint calling for a hearing before the FLRA. §§ 7118(a)(1)–(2). The FLRA is then responsible for "conduct[ing] hearings and resolv[ing such] complaints." § 7105(a)(2)(G). If the FLRA determines that an agency or a union has engaged in an unfair labor practice, it "may require" the entity "to cease and desist from violations of [the Statute] and require it to take any remedial action it considers appropriate." § 7105(g)(3).

This case concerns the Statute's application to a unique category of federal civil-service employees: dual-status technicians working for the State National Guards. These "rare bird[s]" occupy both civilian and military roles. *Babcock* v. *Kijakazi*, 595 U. S. ——, ——, 142 S.Ct. 641, 644, 11 L.Ed.2d 424 (2022). They serve as "civilian employee[s]" engaged in "organizing, administering, instructing," "training," or "maintenance and repair of supplies" to assist the National Guard. 10 U.S.C. § 10216(a)(1)(C); see 32 U.S.C. §§ 709(a)(1)–(2); *Babcock*, 595 U. S., at ——, 142 S.Ct., at 644. Yet, they must "as a condition of that employment ... maintain

membership in the [National Guard]" and wear a uniform while working. 10 U.S.C. § 10216(a)(1)(B); see 32 U.S.C. §§ 709(b)(2)–(4). Except when participating as National Guard members in part-time drills, training, or active-duty deployment, see 32 U.S.C. §§ 502(a) and 709(g)(2), dual-status technicians work full time in a civilian capacity and receive federal civil-service pay. See *Babcock*, 595 U. S., at —— – ——, 142 S.Ct., at 644-645; see also 5 U.S.C. § 2101(a).

Importantly, under the Technicians Act of 1968, each dual-status technician is considered "an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. § 709(e). While it is state adjutants general who "employ and administer" dual-status technicians working for their respective State National Guard units, they can only do so pursuant to an express "designat[ion]" of authority by the Secretary of the Army or the Secretary of the Air Force. § 709(d); see also Dept. of the Army, S. Resor, Delegation of Authority Under the National Guard Technicians Act of 1968 (General Order 85, Dec. 31, 1968) (General Order 85) (current order designating the relevant authority).

B

The parties' collective-bargaining relationship dates back to 1971, when the Guard recognized the Union as the exclusive representative of its dual-status technicians. They have since negotiated a number of collective-bargaining agreements (CBAs), the most recent of which was signed in 2011 and expired in 2014. As the expiration date neared, the Guard and the Union entered into negotiations for a new agreement. During this process, in March 2016, they adopted a memorandum of understanding whereby the Ohio Adjutant General promised to abide by certain practices contained in the expired agreement. But, later that year, the Ohio Adjutant General's Department reversed course. It asserted that it was not bound by the expired CBA and did not consider itself bound by the FSLMRS when interacting with dual-status technicians. The Guard also sent letters to dual-status technician Union members, asking them to submit the requisite forms to permit the deduction of Union dues from their pay. The letters advised that, if the technicians did not promptly submit the forms, the Guard would cancel dues deductions on their behalf. The Guard ultimately terminated dues withholding for 89 technicians.

The Union subsequently filed unfair labor practice charges with the FLRA. After investigating, the FLRA general counsel issued consolidated complaints against the "U. S. Department of Defense, Ohio National Guard," alleging that the Guard had refused to negotiate in good faith and interfered with the exercise of employee rights under the Statute through its treatment of technicians' dues deductions. ...

Petitioners argued before the Administrative Law Judge that the Guard was not an "agency" and that dual-status technician bargaining-unit employees were not "employees" for purposes of the Statute. The Administrative Law Judge issued a recommended decision finding that the FLRA had jurisdiction over the Guard, that the dual-status technicians had collective-bargaining rights under the Statute, and that the Guard's actions in repudiating the CBA violated the Statute. It thus ordered petitioners to follow the mandatory terms of the 2011 CBA, bargain in good faith going forward, and reinstate Union dues withholding. A divided panel of the FLRA adopted the Administrative Law Judge's findings, conclusions, and remedial order.

The Guard petitioned for review in the U. S. Court of Appeals for the Sixth Circuit, which denied the petition. … The Sixth Circuit held that the Guard is an agency subject to the Statute when it operates in its capacity as employer of dual-status technicians. The court further found that dual-status technicians are federal civilian employees with collective-bargaining rights under the Statute. Thus, because the FLRA has authority to enforce those collective-bargaining rights, the court concluded that this dispute fell within its jurisdiction.

We granted certiorari to consider whether the FLRA had jurisdiction over this labor dispute under the Statute. …

II

Under the FSLMRS, it is "an unfair labor practice for an agency" "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Statute. 5 U.S.C. § 7116(a)(1). The FLRA's jurisdiction over this unfair labor practices dispute thus turns on whether petitioners are an "agency" for purposes of the Statute when they act in their capacities as supervisors of dual-status technicians, a question bounded by a series of defined terms. The Statute defines an "agency" as "an Executive agency," with exceptions not relevant here. § 7103(a)(3). Then, the term " 'Executive agency,' " … "means an Executive department, a Government corporation, and an independent establishment." § 105. And each of those terms is separately defined: an "Executive departmen[t]" means each of 15 Cabinet-level Departments, including "[t]he Department of Defense," § 101; a " 'Government corporation' means a corporation owned or controlled by the Government of the United States," § 103; and an " 'independent establishment' means" "an establishment in the executive branch," with exceptions not relevant here, "which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment," § 104(1). It is undisputed that the Guard is neither a "Government corporation" nor an "independent establishment," leaving only "Executive department" at issue.

Petitioners work backwards through the links in the statutory chain. They argue that they are not an Executive department because they are not listed among the 15 Cabinet-level Departments specified in § 101. Thus, they claim, they are not an "Executive agency" under § 105 and, accordingly, do not qualify as an "agency" under the Statute. Respondents counter that the components, representatives, and agents of an agency may be required to comply with the Statute. And they emphasize that petitioners exercise federal authority in employing dual-status technicians and must therefore comply with applicable federal law. Respondents have the better of the argument.

A

The Guard, when employing dual-status technicians, functions as an agency covered by the Statute. The Statute defines " 'agency' " to include the Department of Defense, one of the enumerated executive Departments in § 101. § 7103(a)(3); see §§ 101 and 105. And, each dual-status "technician ... is an employee of the Department of the Army or the Department of the Air Force," 32 U.S.C. § 709(e); see also 10 U.S.C. § 10216(a)(1)(A). Those Departments, in turn, are components of the Department of Defense. 10 U.S.C. §§ 111(b)(6) and (8). And, components of covered agencies plainly fall within the Statute's reach. 5 U.S.C. §§ 7103(a)(12) (contemplating collective bargaining between "the representative of an agency" and "the exclusive representative

of employees in an appropriate unit in the agency") and 7112(a) (contemplating the establishment of "appropriate" bargaining units "on an agency, plant, installation, functional, or other basis"). Accordingly, when petitioners employ and supervise dual-status technicians, they—like components of an agency—exercise the authority of the Department of Defense, a covered agency.

The statutory authority permitting the Adjutant General to employ dual-status technicians reinforces this point. Adjutants general appoint dual-status technicians as civilian employees in the federal civil service. See 5 U.S.C. § 2105(a)(1)(F) (providing that the term " 'employee,' " for purposes of Title 5, ordinarily includes "an individual ... appointed in the [federal] civil service by ... an adjutant general designated by the Secretary [of the Army or of the Air Force] under section 709[(d)] of title 32"). And, Congress has required the Secretaries of the Army and Air Force to "designate" adjutants general "to employ and administer" technicians. 32 U.S.C. § 709(d). That designation is the sole basis for petitioners' authority to employ technicians performing work in their federal civilian roles, confirming that petitioners act on behalf of—and exercise the authority of—a covered federal agency when they supervise dual-status technicians.

Here, for example, a 1968 order of the Secretary of the Army "designate[s]" and "empower[s]" each adjutant general "to employ and administer the Army National Guard technicians authorized for his State ... as the case may be." General Order 85, ¶3. Accordingly, dual-status technicians are ultimately employees of the Secretaries of the Army and the Air Force, and petitioners are the Secretaries' designees for purposes of dual-status technician employment. Should a state adjutant general wish to employ federal dual-status technicians, he must do so pursuant to delegated federal authority and subject to federal civil-service requirements. See 5 U.S.C. § 2105(a)(1)(F). Indeed, it would be passing strange if dual-status technicians, who qualify as employees under the Statute, were supervised by an entity not required to safeguard the rights guaranteed employees under the Statute. §§ 7102 (providing that "each employee shall be protected in the exercise of " his right to join or refrain from joining a labor association) and 7103(a)(2)(A) (defining an " 'employee' " as "an individual ... employed in an agency"). The case caption in this matter reflects the Guard's federal function with respect to hiring dual-status technicians; before the FLRA, the case proceeded against the "U. S. Department of Defense, Ohio National Guard," with the Adjutant General and the Adjutant General's Department joining the suit later as intervenors. …

Petitioners contend that federalism concerns require us to read the Statute to exempt them from the FLRA's jurisdiction. But, the FLRA enforces the rights and obligations of *federal* civilian employees and their agency employers. Because adjutants general act on behalf of an agency of the Federal Government with respect to their supervision of civilian technicians, their actions in that capacity do not implicate the balance between federal and state powers. See 10 U.S.C. § 10216(a); 32 U.S.C. § 709(e).

B

The evolution of federal agency-employee relations law and the text of 5 U.S.C. § 7135(b), which functions as the Statute's saving clause, lend further support to the FLRA's exercise of authority over the Guard. Before the FSLMRS was adopted, "labor-management relations in the federal sector were governed by a program established" by a series of Executive Orders, "under which federal employees had limited rights to engage in" collective bargaining. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 91–92, 104 S.Ct. 439, 78 L.Ed.2d 195 (1983). The

Statute's immediate predecessor, Executive Order No. 11491, established the precursor to the current FLRA and listed prohibited unfair labor practices for both federal agency management and unions. See Exec. Order No. 11491, 3 C.F.R. 861 (1966–1970 Comp.). When Congress later replaced that Executive Order with the FSLMRS, it explicitly continued many aspects of the pre-FSLMRS regime: "Policies, regulations, and procedures established under and decisions issued under [E.O. 11491] ... shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of [the Statute] or by regulations or decisions issued pursuant to [the Statute]." 5 U.S.C. § 7135(b). Thus, "decisions issued under [E.O. 11491]" supply critical guidance regarding the FLRA's jurisdiction today.

One such decision is directly on point. In the 1971 case of Mississippi National Guard, 172d Military Airlift Group (Thompson Field), Asst. Sec. Labor/Management Reports (A/SLMR) No. 20 (*Thompson Field*), the Assistant Secretary of Labor—exercising adjudicative authority under [E.O. 11491] analogous to the modern FLRA's—rejected arguments virtually identical to those petitioners advance here. See *id.*, at 2 (describing the state guard's argument "that the provisions of [E.O. 11491] did not apply ... because the employees involved are under the operational control of the Adjutant General of the State of Mississippi, who is appointed and employed pursuant to State law"). The Assistant Secretary reasoned "that National Guard technicians [were] employees within the meaning of " the Executive Order and "employees of the Federal government" under the Technicians Act. *Id.,* at 6. The Assistant Secretary then concluded that the adjutant general had "been designated as an agent of the Secretaries of the Army and the Air Force" in employing and administering dual-status technicians and that this agency relationship created the obligation to comply with [E.O. 11491]. ...

The definitions of "employee" and "agency" that *Thompson Field* examined under [E.O. 11491] were materially identical to those that Congress ultimately adopted in the FSLMRS. Compare 5 U.S.C. §§ 7103(a)(2)–(3) (defining " 'employee' " as "an individual ... employed in an agency," and defining " 'agency' " as "an Executive agency," which § 105 in turn defines as an executive department, a Government corporation, and an independent establishment) with Exec. Order No. 11491, §§ 2(a)–(b) (defining " '[e]mployee' " primarily as "an employee of an agency," and defining " '[a]gency' " as "an executive department, a Government corporation, and an independent establishment"). We would, therefore, ordinarily presume that the FSLMRS maintained the same coverage that existed under the prior regime. … We see nothing to weaken the force of that presumption here. On the contrary, § 7135(b) specifically demonstrates Congress' intent to leave the prior regime in place except where it was specifically altered. And, because the President has not revoked it and neither the FSLMRS nor associated regulations have repudiated it, the decision in *Thompson Field* "remain[s] in full force and effect." § 7135(b).

* * *

We conclude that petitioners are subject to the authority of the FLRA when acting in their capacities as supervisors of dual-status technicians. Each dual-status technician is an employee of the Department of the Army or the Department of the Air Force; those Departments are, in turn, components of the Department of Defense; and the Department of Defense is a covered agency under the Statute. Further, a designation from the Department of the Army is the sole basis for petitioners' authority to employ dual-status technicians. Accordingly, petitioners employ federal

dual-status technicians pursuant to delegated federal authority and subject to federal civil-service requirements. The Statute also explicitly incorporates prior practice, including the decision in *Thompson Field*, which further reinforces our conclusion.

The judgment of the Sixth Circuit is affirmed.

It is so ordered.

[The dissenting opinion of JUSTICE ALITO, joined by JUSTICE GORSUCH, is omitted.]

NOTES

1. Why does the Court call the dual-status technicians at issue here "rare bird[s]"?

2. The Court rejected federalism concerns regarding the FLRA having authority over the Ohio National Guard. What are these concerns, and why did the Court reject them? Do you agree with the Court's analysis?

3. In the following passage, the dissent critiques the majority's conclusion that the FLRA has jurisdiction over the case:

> The Court correctly observes that the FLRA's ability to enter such an order against petitioners "turns on whether petitioners are an 'agency' for purposes of the" Federal Service Labor-Management Relations Statute. … see 5 U.S.C. § 7105(g)(3). But the Court stops short of answering that question, holding instead that petitioners "act as a federal 'agency,' " … "exercise the authority of " a covered agency, … and even "functio[n] as an agency," … . Because petitioners are not *actually* federal agencies, a proposition that the Court does not dispute, the FLRA lacks jurisdiction to enter remedial orders against them.

Ohio Adjutant Gen.'s Dep't v. FLRA, 143 S.Ct. at 1201. Who has the better argument?

D. The Representation Election Process

E. Recognition Without an Election

<u>Chapter 8</u>, Duty to Bargain

A. The Duty to "Meet and Confer"

B. "Surface Bargaining" Versus "Hard Bargaining"

C. The Ban on Unilateral Action Prior to Impasse

D. The Duty to Supply Information

E. The Duty to Bargain During the Life of the Agreement

F. Remedies for Violation of the Duty to Bargain

Chapter 9, Scope of Bargaining

A. History and Terminology

B. Statutory Diversity

Page 661, replace Note 4 with the following.

4. In addition to Wisconsin, which, prior to the most recent change, added many prohibited subjects of bargaining in the 1990s, other states have extensively amended their statutes to limit bargaining. In 2011, Indiana limited bargaining for teachers to wages and wage-related fringe benefits. Tennessee eliminated collective bargaining for teachers in 2011 and moved to a collaborative conferencing regime, described further in Section 8. What accounts for these changes and why have some jurisdictions retained their original scope language? Why might a state instead *expand* subjects of bargaining? In 2023, Michigan restored a litany of previously unbargainable subjects, including teacher placements, performance evaluations, disciplinary policies, classroom observations, and the role of evaluations in compensation. Consider that the state also—on the same day—enacted legislation accepting out-of-state teaching certificates and provided more ways for teachers to earn advanced certification.

C. Diverse Judicial Responses

Page 680, please add the following new notes.

5. Most commonly, an employer unilaterally alters a condition of employment and the issue that arises is whether the condition was a mandatory subject of bargaining. But there are also scenarios where the question is whether a change altered a "condition of employment" in the first place. Is a gym used by employees to workout a condition of employment? What about a locker room or even a restroom? Citing COVID restrictions, in *City of Shelton and Shelton Police Union*, 2022 WL 1442880 (2022), the Shelton Police Department closed all three, relegating patrol officers to porta-potties in the parking lot. The Board defined a "condition of employment" as a past practice that was "clearly enunciated and consistent, endured over a reasonable length of time, and an accepted practice by both parties." The gym, locker rooms, and restrooms easily met that standard and, as "creature comforts," were also mandatory subjects.

6. Can a mandatory subject of bargaining transform into a permissive subject if a union's proposal costs too much money? In *City of Wayne v. Wayne Professional Fire Fighters Union, Local 1620*, MERC Case No. 20-L-1801-CE (2022) the employer conceded that retiree health

benefits for active employees is a mandatory subject but argued that the union's proposal for lifetime health benefits implicated a "seismic policy question" that threatened to restrict the City's ability to "effectively manage its affairs" while unduly "burden[ing]" its "citizens," thus altering the employer's duty to bargain. The Michigan Employment Relations Commission disagreed. Citing *M&G Polymers, USA LLC v. Tacket*, 574 U.S. 427 (2015) and subsequent cases, the MERC noted that "not only may a collective bargaining agreement vest unalterable lifetime health time benefits for retirees, provided that the agreement is explicit and unambiguous, . . . [t]he only point in time during which a union can compel an employer to bargain over such lifetime retiree health benefits is prior to the point at which active employees retire."

Page 704, insert the following as a new Note 3.

3. The COVID-19 emergency prompted many states, counties, and cities to adopt policies requiring that public employees get vaccinated, receive a religious exemption, or face discipline, including discharge. Police officers were especially unlikely to comply, and their unions were often at the forefront of fights challenging the unilateral imposition of the policies. *See* Becky Sullivan, *Police officers and unions put up a fight against vaccine mandates for public workers,* NPR (Oct. 19, 2021) (citing statistics and noting that Chicago's "Fraternal Order of Police . . . repeatedly encouraged officers to not comply with the city's requirement that all municipal employees share their vaccination status"). All told, dozens of decisions considered whether imposing a vaccine requirement on public employees is a mandatory subject of bargaining, with a strong majority determining it is not. Having canvassed a slew of relevant cases from around the country, the Illinois Labor Relations Board's analysis in *Coalition of Unionized Public Employees and City of Chicago*, L-CA-22-014, (Apr. 19, 2023), is representative: "[I]n the public sector, requiring an employer to bargain over a COVID-19 vaccine mandate, would place unacceptable burdens on the employer's inherent managerial authority to maintain standards of service and public health during the pendency of a global pandemic that claimed an overwhelming number of lives and sickened many more." On the other hand, most decisions find that vaccine mandates have bargainable effects, from the implementation date, to sick leave availability for vaccine side effects, to compensable time for receiving the shot, to any disciplinary sanctions themselves.

D. Scope of Bargaining and Public Sector Labor-Management Cooperation

Chapter 10, Strikes

A. The Policy Debate Concerning Public Employee Strikes

B. Strike Prohibitions

C. Legalizing Public Employee Strikes

Chapter 11, Resolution of Bargaining Impasses

A. Mediation

B. Factfinding

C. Interest Arbitration

Page 916, add a new Note 3, as follows.

The COVID-19 pandemic created some challenging and important issues for unions, employers, and interest arbitrators. Consider, for example, *State of IL (CMS/Corrections/AFSCME Council 31*, S-MA-22-121 Interim Award (Arb. Benn., 12/30/21 #766) and Final Award (1/19/22, Arb. Benn #767). The case involved around 10,000 state employees working in forty-six Department of Corrections facilities and five Department of Juvenile Justice facilities across Illinois. The parties were unable to reach agreement as to whether the state could, under Governor Pritzker's Executive Order, mandate that employees at these facilities get COVID-19 vaccinations. The Interim Award begin: "Because of the COVID-19 pandemic, the dispute before this arbitration Panel has life and death consequences. Therefore, as the Chair of this Arbitration Panel, I ordered that time is of the essence to swiftly decide this case." Interim Award, at 1.

The arbitration panel found that existing methods at the facilities to fight the spread of COVID were ineffective. It further found that the employer's authority, interests and welfare of the public, and court precedent all supported the power of governments to impose mandatory vaccination policies. The union had proposed optional vaccination, more frequent testing, better enforcement of mask mandates, improved ventilation systems, and enhanced social distancing. But the panel (with the union representative dissenting) held that vaccination was the best tool for prevention. The union had argued vaccination requirements would lead to many experienced employees quitting, harming the public, but the panel found that argument to be speculative.

The Interim Award remanded the case to the parties to negotiate the implementation of the procedures of a mandatory vaccination program. If they could not complete this task in two weeks, the case would return to the arbitration panel. The major outstanding issues were temporary exemptions for medical reasons, timeframes for receiving vaccinations after exemptions were denied, use of benefit time for COVID-related absences from work, and a bar on vendors and visitors entering the premises of the facilities absent proof of vaccination.

The last of these issues raised a question of the arbitration panel's jurisdiction: was a bar on non-vaccinated vendors and visitors a mandatory subject of bargaining? Arbitrator Benn, writing for the panel, rejected the employer's argument that the issue was outside the panel's jurisdiction. "Given what appear to be compelling legal arguments on both sides of the issue, there are still 'doubts.' That being the case, I can decide this dispute because it cannot be said 'with positive assurance. . .' that the dispute is not to be heard and '[d]oubts should be resolved in favor of coverage.'" Final Award, at 31. The arbitrator noted that this issue involved both a policy matter and an employee safety matter. The arbitrator added that dissatisfied party could later file a ULP on the issue. He then concluded that the state had the legal authority to require all vendors and

visitors to show proof of vaccination, noting that video conferencing accommodations could be made for some. Do you agree with the arbitrator's reasoning on this issue? Can you imagine why the union would have made this proposal?

The Final Award also dealt with other implementation issues, including a variety of specific rules regarding leave and benefit time for employees who were excused from work due to COVID quarantines and infection, employees with approved medical or religious exemptions, employees living with or caring for an individual who tested positive, or a child who experienced side-effects from vaccination, or was excluded from school or day care for COVID reasons. Do you see why these would likely be mandatory topics even though the general decision to impose a COVID vaccine requirement would likely not?

Chapter 12, Administering the Agreement

A. Altering Collective Bargaining Agreements

B. Grievance Arbitration in the Public Sector: Overview

C. Non-Delegability Objections to Arbitrability

D. Arbitral Finality and Judicial Review

Page 1013, insert the following.

Township deploys sixteen firefighters to respond to a three-story apartment building fire. News reports provided by the Union indicate that eleven apartments were destroyed, rendering thirty-five people homeless. The reports also stated that several other fire departments aided the Towns

E. Relationship of Arbitration to Other Dispute Resolution Fora

Chapter 13, Individuals and the Union

A. Union Security and Its Limitations

Page 1075, in Note 8, at end of second-to-last paragraph add the following.

Similarly, in 2023 Florida enacted a law that imposed several changes to most state public-sector unions, except for police, firefighter, and correction officer unions. Among the changes is a prohibition against payroll dues deductions, forcing unions to collect dues directly from employees. In contrast, in 2023 Michigan enacted a law permitting payroll dues deductions for its public-sector unions.

Page 1076, in Note 10, replace the last paragraph with the following.

Right-to-work laws have been enacted in twenty-five states. The National Labor Relations Act has a specific provision authorizing states to enact such laws to bar negotiation of union security provisions in the private sector. Most right-to-work laws were passed in the 1940s and 1950s. However, as noted in Chapter 5, since 2012 Kentucky, Indiana, Michigan, West Virginia, and Wisconsin have enacted right-to-work laws. The Missouri legislature also enacted a right-to-work law in 2017, but it was never implemented because of a petition drive that put the measure before voters, who repealed the measure by a 2–1 margin in 2018. Some members of legislature, however, are attempting to pass a new right-to-work law. The most recent state to enact such a law before 2012 was Oklahoma in 2001. What accounts for these traditionally strong union states enacting right-to-work laws in recent years? Are there political factors at play? Economic factors? Michigan rescinded its relatively new right-to-work law in 2023—is that a sign of things to come or an anomaly?

B. Constitutional Limitations on Exclusivity

C. The Union's Duty of Fair Representation

D. The Union's Internal Governance