# 2NC

## Adv 1

### Rant---2NC

### Bankruptcy Inevitable---2NC

#### Structural supply and demand pressures.

Coface 25 – an economic research firm.

Coface, “US: Insolvencies rise above pre-pandemic levels for the first time,” Coface, 10-12-2025, https://www.coface.com/news-economy-and-insights/us-insolvencies-rise-above-pre-pandemic-levels-for-the-first-time

U.S. business bankruptcies reached 6,574 in Q3 2025, the highest since Q2 2014 and 15% above the 2019 average, marking two consecutive quarters above pre-pandemic levels.

At this stage, rising insolvencies likely reflect supply and demand pressures that were already building up before the trade war, such as higher refinancing and labor costs, as well as sector-specific trends such as retail digitalization or declining reimbursement rates in healthcare.

#### Companies themselves are citing alternate reasons.

Gregg 25 – Business Reporter from the Washington Post.

Aaron Gregg, “Bankruptcies soar as companies grapple with inflation, tariffs,” Washington Post, 12/27/2025, https://www.washingtonpost.com/business/2025/12/27/corporate-bankruptcies-economy/

At least 717 companies filed for bankruptcy through November, according to data from S&P Global Market Intelligence. That’s roughly 14 percent more than the same 11 months of 2024, and the highest tally since 2010.

Companies cited inflation and interest rates among the factors contributing to their financial challenges, as well as Trump administration trade policies that have disrupted supply chains and pushed up costs.

But in a shift from previous years, the rise in filings is most apparent among industrials — companies tied to manufacturing, construction and transportation. The sector has been hit hard by President Donald Trump’s ever-fluid tariff policies — which he’s long insisted would revive American manufacturing. The manufacturing sector lost more than 70,000 jobs in the one-year period ending in November, federal data shows.

Ask The Post AI

Dive deeper

Consumer-oriented businesses with “discretionary” products or services, such as fashion or home furnishings, represented the second-largest group. This contingent usually tops the list and includes many retailers, and its retrenchment is a signal that inflation-weary consumers are prioritizing essentials.

The S&P data reflects both Chapter 11 and Chapter 7 filings. In the former, also known as a reorganization, the business goes through a court-administered process to restructure its debts while it continues to operate. Under Chapter 7, the company closes down, and its assets are sold off.

Economists and business experts say the trade wars have pressured import-heavy businesses, which are reluctant to raise prices by too much for fear of alienating consumers. The White House did not respond to requests for comment.

Though inflation is currently lower than many economists expected — prices climbed at an annual pace of 2.7 percent in November — many businesses still are eating new costs themselves to hold the line on prices for buyers, experts say. That’s leading to a certain culling of the herd as already-fragile companies struggle to keep up.

“These companies are acutely aware of the affordability crisis confronting the average American,” said Jeffrey Sonnenfeld, a professor at Yale University’s School of Management. “They are doing their best to offset the cost of tariffs and higher interest rates but can only do so much. Those with pricing power will pass on the costs over time. … Others will fold.”

Among the total was a surge of “mega bankruptcies,” or filings by companies with more than $1 billion in assets, during the first half of 2025. According to the economic consultancy Cornerstone Research, there were 17 such bankruptcies from January through June, the highest half-year number since the covid-19 outbreak in 2020. Consumer discretionary businesses, including retailers At Home and Forever 21, accounted for several of those filings.

Matt Osborn, a principal at Cornerstone who wrote the September report, said these large companies cited high inflation and interest rates among the factors that have impinged on consumer demand and made it harder to raise capital. Changing federal policies around renewable energy and international trade also were contributors, he wrote.

#### BUT current bankruptcies don’t connect tot ehir impact – absent the PLAN theyr’e super tame and save the economy

Fleischman 22 – Lawyer at MoneyWise Law.

Jay Fleischman, “Without Bankruptcy, America Wouldn’t Exist. Here’s Why,” MoneyWise Law, 12/07/2022, https://www.moneywiselaw.com/bankruptcy-necessary-america/

Bankruptcy is an Engine of Economic Growth

Bankruptcy allows individuals and businesses to discharge their debts and start over. By offering relief from overwhelming debt, bankruptcy allows debtors to focus on rebuilding their financial situation. This also prevents the adverse effects of default from spreading to the broader economy.

Additionally, bankruptcy can stimulate economic growth by freeing up money that can be used for productive purposes. For example, when individuals and businesses can discharge their debts, they may have more disposable income to use to make purchases or investments. This can boost demand for goods and services, which can, in turn, drive economic growth.

Furthermore, bankruptcy protects the American economy by providing a safety net for individuals and businesses facing financial challenges. By offering a way for people to escape from overwhelming debt, bankruptcy can help prevent a downward spiral that could damage the broader economy. This can help to ensure that people and businesses have the financial stability they need to continue contributing to economic growth.

### Plan Doesn’t Solve!!!!---2NC

#### Empirical studies prove unions don’t affect the likelihood of bankruptcies, which means the AFF can’t solve---BUT, they do make successful bankruptcy restructuring more difficult, causing our impacts.

Campello 18 – Professor of Finance at Cornell University.   
Murillo Campello, Janet Gao, Jiaping Qui, and Yue Zhang, “Bankruptcy and the Cost of Organized Labor: Evidence from Union Elections”, September 2017, National Bureau of Economic Research, Working Paper 23869, https://www.nber.org/system/files/working\_papers/w23869/w23869.pdf

7 Concluding Remarks

Using a sample of union elections spanning four decades, we find that union election victories are associated with increased bankruptcy costs, which lead to declines in bond values. As we investigate channels through which unionized labor affects bond values, we find that unionization is associated with increases in bankruptcy costs, yet no apparent changes in the probability of bankruptcy. The impact of unionization on bond values are stronger for financially distressed firms, for firms with underfunded pension plans, and in jurisdictions where unions are deemed to be better funded (non-RTW states).

Overall, our paper sheds new light into how organized labor interacts with financial stakeholders of the firm, unsecured creditors in particular. We show that unions can make bankruptcy more costly, prolonged, and convoluted through the way unionized workers’ rights are assigned under Chapter 11 proceedings. Our study shows that these dynamics are recognized by creditors, who in turn price it into firms’ funding costs. The analysis we put forth may provide new insights for researchers and policymakers in better understanding how firm–labor relations shape corporate access to credit.

#### This is the only card in the debate that does data-based analysis on the relationship between union strength and likelihood of bankruptcy---it looks at union and bankruptcy data across 30 years.

Campello 18 – Professor of Finance at Cornell University.   
Murillo Campello, Janet Gao, Jiaping Qui, and Yue Zhang, “Bankruptcy and the Cost of Organized Labor: Evidence from Union Elections”, September 2017, National Bureau of Economic Research, Working Paper 23869, https://www.nber.org/system/files/working\_papers/w23869/w23869.pdf

2 Data Description and Sample Selection

We combine a number of databases to study the effect of unionization on bond values and bankruptcy costs. This section describes our base data collection process, sampling, and variable construction methods.

2.1 Union Election Data

The NLRB provides detailed data on the results of elections to certify a representative union for a collective bargaining unit for the 1977–2010 period.8 We use information related to the time and location of each union election in the United States, the number of participating and eligible voters, the number of votes “for” and “against” unionization, and the company in which the election took place. Starting from the universe of elections recorded in the NLRB database, we follow the algorithm used in Lee and Mas (2012) for matching company names in the NLRB to their identifier in the Center for Research in Security Prices (CRSP) database. We inspect every match manually and exclude incorrect matches. Our base union election sample contains 5,714 elections.

There is a well-documented decline in the unionization movement in the U.S. (see Western and Rosenfeld (2011)). Our sample spans 33 years and Figure 1 shows that it captures a declining trend in establishment-level union elections. The patterns present in our sample seem consistent with claims that union activity has declined due to factors such as changes in the political climate and public policy, managerial opposition to unions, and the development of labor-saving technologies (DiNardo and Lee (2004)). Despite the decline in the number of union elections, key statistics of election results remain constant over time. For example, as shown in Figure 1, the average vote share in support of union is close to 45% over the entire horizon of our sample. The percentage of successful union elections (not displayed) has also remained constant over time, at around 25%.

2.2 Bond Data

We collect information on publicly traded corporate bonds from multiple data sources. Bond information for the 1977–1997 period is taken from the University of Houston Fixed Income Database (formerly Lehman Brothers Database). This database provides monthend bid prices for each bond issue, as well as issue-level characteristics such as accrued interest, yield to maturity, and credit ratings (see Warga (1998)). For information after 1997, we use transaction-level data from the Mergent Fixed Income Securities Database (FISD) covering the 1997–2004 period and from Trade Reporting and Compliance Engine (TRACE) for the 2005–2010 period. We eliminate all canceled, corrected, and commission trades, following standard procedure in the literature (Bessembinder et al. (2006, 2009)). We also follow existing studies in limiting our sample to U.S. dollar-denominated, fixed-coupon corporate debt issues that are senior, not puttable, and unsecured. Senior, unsecured bonds account for around 95% of all corporate bonds issued.9

2.3 Bond Return Computation

We compute cumulative abnormal returns (CARs) of corporate bonds over several time windows to gauge creditors’ reactions to union elections.10 We use monthly frequencies in calculating bond returns since NLRB election dates are sometimes only reported with monthly precision. Using monthly data also helps alleviate concerns about the impact of market illiquidity on bond prices, as many bonds are infrequently traded. Following Bessembinder et al. (2009), we compute trade size-weighted bond prices for each trading day and use the price on the last trading day of the month as the month-end price. We then calculate the observed return (OR) for bond b in month t as:

ORb,t = ((Pb,t − Pb,t−1) + AIb,t) Pb,t−1 ,

where Pt is the bond price at the end of month t, AIt is the accrued interest that month, and Pt−1 is the bond price at the end of month t − 1.

We calculate abnormal bond returns in three steps. First, we find a benchmark portfolio for each bond based on its risk. Specifically, we classify all senior, unsecured bonds into three-by-three portfolios according to their credit ratings and time-to-maturity.11 We then calculate the value-weighted average return for each portfolio using the returns of every bond in that portfolio. For a given bond b, we find a portfolio with the closest credit rating and time-to-maturity as its benchmark portfolio.

Next, we calculate the abnormal return of bond b using its benchmark portfolio return as the bond’s expected return (ER). The abnormal return (AR) for bond b is thus defined as the difference between the observed bond return (OR) and expected return:

ARb,t = ORb,t − ERb,t. (2)

The firm-level abnormal bond return is computed using the weighted average abnormal returns of all bonds issued by the firm, weighting each bond with its market value.12 Formally, the abnormal bond return AR for firm k at time t is calculated as follows:

ARk,t = X J b=1 wb,tARb,t, (3)

where J is the number of bonds outstanding for firm k; w is the market value of bond b scaled by the total bond market value of firm k. Finally, we compute the cumulative abnormal return (CAR) following union election i for firm k from month Ti,1 to month Ti,2 as:

CAR(k, Ti,1, Ti,2) = X Ti,2 t=Ti,1 ARk,t

An election event is defined as the month in which a union election vote takes place. We examine bond returns accumulated from the month prior to the vote to every three months up to one year following the vote; i.e., CAR(−1, 3), CAR(−1, 6), CAR(−1, 9), and CAR(−1, 12).13 To be included in the sample, firms must have available monthly bond prices from one month prior to the union election to 12 months after the election. This allows us to examine horizons similar to previous work on the effects of unionization (DiNardo and Lee (2004) and Lee and Mas (2012)) and event studies on bond returns (Warga and Welch (1993), Eberhart and Siddique (2002), and Ellul et al. (2011)). Matching bond CARs to union vote data, we are able to study 721 election events in total. It is important to highlight that our sampling essentially gathers information on how unionization affects unsecured bondholders of large, public firms. This goal differentiates our study from the literature that examines broad implications of unions on the performance or policies of small or private firms.

2.4 Other Covariates

We extract firm information from Compustat and equity data from CRSP. We construct several measures of firm risk, including Altman’s Z-Score (Z-Score), Ohlson’s OScore (O-Score), and Merton’s distance to default (Distance-Default). We compute additional measures of firm characteristics: return on assets (ROA), asset size (Size), book-to-market ratio (B/M ), liabilities-to-asset ratio (Liability Ratio), cash-to-asset ratio (Cash), and property, plant, and equipment-to-asset ratio (Tangibility). We winsorize variables at the 1st and 99th percentiles. All variable definitions are shown in Appendix A.

### Link---2NC

#### Given the opportunity---unions will game the system and cause bad bankruptcies.

Gross 14 – Judge on the United States Bankruptcy Court for the District of Delaware, JD from American University.  
Kevin Gross, “In re trump Entertainment Resorts, Inc., et al.”, 10/20/14, United States Bankruptcy Court for the District of Delaware, Case Number 14-12103(KG), https://www.cwsny.com/wp-content/uploads/2014/11/00357393.pdf

FACTS

The Court makes the following factual findings, which are uncontroverted except as noted.

Debtors operated two casinos, now one casino in Atlantic City, New Jersey. While for many years the Atlantic City casinos enjoyed little competition for gambling and related recreational activities on the East Coast of the United States, times have changed dramatically. Surrounding states now permit casino gambling and there is an online gambling industry. The Atlantic City casinos have seen their revenues fall by approximately half since 2006, and three casinos out of twelve are now closed. Ex. 1. One of the three closed is Trump Plaza Hotel and Casino, which the Debtors operated through Debtor Trump Plaza Associates, LLC. Since 2011, Debtors’ EBITDA has fallen from $32 million to negative $6.1 million in 2013, with last twelve months EBITDA of negative $25.7 million as of June 30, 2014. The Debtors’ financial situation is desperate. Not only are their losses large, but they have been unable to obtain debtor in possession financing for their bankruptcy cases and are operating with cash collateral. Debtors’ cash will run out in less than two months. The Debtors have taken steps to reduce their severe losses. They have sold significant assets to raise much needed cash and to reduce their obligations, and they have closed the Trump Plaza Hotel and Casino. 10/2 Tr. 22-24.

The Motion at issue pertains solely to Taj Mahal, which operates the Taj Mahal Casino Hotel, which the Court will refer to as the “Casino.” The Casino is at the North End of the famous boardwalk. The Casino is situated on 35.9 acres of beachfront property. It has over 2,000 hotel rooms, five cocktail lounges, approximately 162,0000 square feet of space for gaming, a large entertainment complex, a gentlemen’s club, an exhibition hall, other recreational facilities, several restaurants and parking for almost 7,000 cars, plus a bus terminal and roof-top helipad. Ex. 1.

William H. Hardie of Houlihan Lokey Capital, Inc. (“Houlihan Lokey”), Debtors’ investment banker, testified in support of the Motion. The Court qualified Mr. Hardie as an expert witness and he also testified as a fact witness. The Debtors, through Mr. Hardie, provided the Court with extensive financial data on the Debtors, including Taj Mahal. Ex. 1, Ex. 5, 10/2 Tr. 22-24. The evidence confirmed the Debtors’ serious losses. From 2012 to 2013, gaming revenues declined 16.4%; hotel room revenues declined 8.3%; and food and beverage sale revenues declined 22.5%. Ex. 1, Attachment E. The trend continued into the first six months of 2014. Additionally, Debtors’ casinos performed worse than other casinos. For Taj Mahal individually, EBITDA declined from a positive $37.3 million for fiscal year 2011 to a negative $5.3 million for the last twelve months. Id. As of September 5, 2014, Debtors’ available working capital cash for its operations was limited to approximately $12 million, which will permit Debtors to operate less than two months – and then, only without paying interest on its secured debt of approximately $286 million. 10/2 Tr. 22. The pension costs alone are $75,000 per week. 10/2 Tr. 24. Mr. Hardie, whose testimony the Court finds was highly credible and was based upon his expertise and specific knowledge of the details of Debtors’ finances and operations, testified without qualification that Debtors must have relief from the CBA without which they can not avoid closing the Casino and liquidating their businesses. 10/14 Tr. 142. Mr. Hardie further testified that the situation is so grim that without the Court granting the Motion and Debtors obtaining other concessions, Debtors would have to give notice to the New Jersey Department of Gaming Enforcement not later than October 20, 2014, that Taj Mahal will close the Casino. 10/14 Tr. 149. These concessions include: savings from the payments to employees under the CBA of $14.6 million per year; assistance from the first lien secured creditor in the form of converting $286 million of outstanding secured debt and making an equity investment of $100 million; property tax relief from Atlantic City and the State of New Jersey; and $25 million of tax credits2 . Mr. Hardie also testified that all of these concessions are necessary to avoid liquidation. 10/14 Tr. 139-40, 148-50.

Taj Mahal has 2,953 employees working at the Casino, 2,041 of whom are full time and the remainder are part-time, seasonal or temporary employees. 1,486 of the employees are non-unionized and 1,467 are unionized. The Union is the largest of the employee unions, and is a party to the CBA, with 1,136 Taj Mahal employees under its umbrella. Ex. 2.

The evidence, which again is uncontroverted, is that Taj Mahal is on the brink of running out of cash to fund its operations and its financial health is poor and deteriorating. 10/14 Tr. 136. Mr. Hardie’s testimony is unequivocal – the onerous terms of the CBA must be changed to avoid liquidation. Such closure would mean all employees will lose their jobs and, of course, salary and benefits. Under the terms of the CBA, Debtors are required to make pension contributions of more than $4 million every year, and $12 million to $15 million per year in health and welfare contributions. The payments applicable to Taj Mahal are $3.5 million for pension contributions and $10 to $12 million forthe health and welfare contributions. The Debtors have also incurred potential liabilities to the pension fund of nearly $197 million for withdrawal because the fund is underfunded. Exs. 2, Attachment A, 3.

Faced with the financial pressures of the CBA, Debtors made a determined effort to engage the Union in discussions. The testimony of Mr. Hardie and Craig Keyser, Debtors’ lead negotiator for the collective bargaining agreements, and the documents admitted into evidence reveal the following attempts and the Unions’s response. The correspondence admitted into evidence is alarming in showing the Debtors were literally begging the Union to meet while the Union was stiff-arming the Debtors.

* By letter, dated March 7, 2014, Debtors asked the Union to begin negotiations for a new CBA which was due to expire in September 2014. The Union responded that it was not ready and would “contact you within the next several months.” Ex. 2, Attachments B, C & D.
* In June 2014, Debtors through Mr. Keyser, again asked to and did meet with the Union. The Union told Debtors that it would instead negotiate with two other casino operators. 10/2 Tr. 63.
* On August 20, 2014, at Debtors’ request, the Debtors and Mr. Hardie met with the Union to discuss terms for a new CBA. Although Debtorsdescribed the worsening financial situation for Taj Mahal, the Union was not receptive to negotiations.
* The Debtors again requested a meeting with the Union and a meeting was held on August 28, 2014, between the Debtors, including Mr. Hardie, and the Union. At the meeting, Debtors proposed modifications to the CBA. The Debtors’ proposal included elimination of the pension contributions to be replaced by a 401k program; and substituting the health and welfare program with (Affordable Care Act) Obamacare coverage which Debtors would subsidize. On September 3, 2014, the Union responded that it was prepared to work with Debtors on the pension but not on the health and welfare proposal.
* Debtors and the Union met again on September 24 and 30, 2014. The Union requested additional information from Debtors which Debtors promptly provided. 10/14 Tr. 23, Ex. 22, Ex. 25, Ex. 29. Debtors had created a data room for the Union, which the Union utilized only briefly. Indeed, the Union stipulated at the hearing that Debtors fully and promptly responded to all requests for information.
* On October 3, 2014, the Debtors again requested another bargaining session with the Union. The Union advised Debtors that it was not available to meet until October 10, 2014, and then only for four hours, this despite the hearing on the Motion scheduled for October 14, 2014. Ex. 24. At this meeting, the Union raised for the first time the possibility of a new pension program but without documents or more information. The Union also made counterproposals concerning several of Debtors’ work related proposals, and asked Debtors for additional information.

It is significant that while Debtors were imploring the Union to engage with them in discussions, offering to meet “24/7" (10/14 Tr. 28), the Union was engaging in picketing, a program of misinformation (Exs. 38-43) and, most egregiously, communicating with customers who had scheduled conferences at the Casino to urge them to take their business elsewhere (Ex. 44-47). It is thus clear that the Union was not focusing its efforts on negotiating to reach agreement with Debtors.

The Proposal (which contains some work-related concession by the Debtors, 10/14 Tr. 136) for a new or modified CBA is as follows (Exs. 10, 11, 12, 35, see Attachment A hereto):

It was not until the October 10 meeting that the Union provided Debtors with a partial counter proposal for further discussion, and a series of questions and requests for information. 10/14 Tr. 47, 137-138. They did so knowing that the hearing on the Motion was scheduled to take place in four days and that Debtors were obligated to advise the New Jersey Division of Gaming Enforcement immediately thereafter if they intended to close. The Casino would close unless agreement could be reached on the terms of the CBA or, in the absence of a negotiated agreement, the Court approved rejection.

Debtors have filed a Chapter 11 Plan of Reorganization with the Court (D.I. 165) and Disclosure Statement (D.I. 166). The Plan is contingent on the rejection of the CBA, property tax relief, the conversion of the secured creditor’s debt to equity and a capital infusion from the secured creditor of $100 Million. The secured creditor has made it clear that it will perform only if the CBA and tax relief contingencies are achieved because the business will not succeed without the relief. Debtors’ reorganization is therefore dependent on rejection of the CBA and the other required relief.

DISCUSSION

A debtor’s assumption or rejection of a collective bargaining agreement is governed entirely by Section 1113 of the Bankruptcy Code. Such action is permissible “only in accordance with the provisions of [Section 1113].” The first question the Court must address in this case is whether Debtors have the authority to reject an expired collective bargaining agreement. Here, the CBA expired on September 14, 2014, after the Petition Date but before Debtors filed the Motion. If the Court determines that the Debtors have such authority, the Court’s analysis will turn to whether the Debtors have satisfied the requirements delineated in Sections 1113(b), and (c) of the Bankruptcy Code.

A. The Court’s Authority Post-Expiration of the CBA

As an initial matter, the Court must determine whether it has jurisdiction to decide the Debtors’ Motion. It is undisputed that the CBA expired by its own terms on September 14, 2015, just five days after the Petition Date. The Debtors filed the Motion on September 26, 2014.

Under the National Labor Relations Act (“NLRA”), employers are required to maintain the status quo after the expiration of a collective bargaining agreement while the employer and the union negotiate the terms of a new collective bargaining agreement. See Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991) (citing 29 U.S.C. §§ 158(a)(5), (d)). In most instances, the status quo is defined by the terms of the expired collective bargaining agreement. “[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.” Id. Here, the Debtors do not assert that they have bargained to an impasse with the Union over a new agreement. So, the parties’ relationship continues to be governed by most, if not all, of the terms of the recently expired CBA. For example, the Debtors are still required to make pension fund contributions on behalf of union employees and provide health insurance to union employees, both obligations defined by the CBA.

The Union argues that the Debtors’ obligations under the expired CBA which remain in effect are statutory, as opposed to contractual, in nature because they arise only by virtue of the Debtors’ status quo obligations under the NLRA. Since Section 1113 only provides for rejection of a collective bargaining agreement, i.e. an executory contract, the Union argues that this Court has no authority to approve an application to reject the Debtors’ statutory status quo obligations. The Union concludes that since the Bankruptcy Code provides no mechanism to alter the Debtors’ statutory status quo obligations, the Court must defer to the National Labor Relations Board’s (“NLRB”) exclusive jurisdiction on these matters.

Courts are divided on the question of whether Section 1113 applies in a situation where a collective bargaining agreement has expired but the terms of the agreement remain in effect by virtue of the employer’s status quo obligations under the NLRA. Compare San Rafael Baking Co. v. N. California Bakery Drivers Sec. Fund (In re San Rafael Baking, Co.), 219 B.R. 860 (B.A.P. 9th Cir. 1998),In re Hostess Brands, Inc., 477 B.R. 378 (Bankr. S.D.N.Y. 2012), In re Sullivan Motor Delivery, Inc., 56 B.R. 29 (Bankr. E.D. Wis. 1985), and In re Chas. P. Young Co., 111 B.R. 410 (Bankr. S.D.N.Y. 1990) (all finding that Section 1113 does not apply to expired collective bargaining agreements), with In re 710 Long Ridge Road Operating Company, II, LLC, 2014 WL 407528 (Bankr. D.N.J. 2014), In re Karykeion, 435 B.R. 663 (Bankr. C.D. Cal. 2010), United Food & Commercial Workers Union, Local 770 v. Official Unsecured Creditors Comm. (In re Hoffman Brothers Packing Co.), 173 B.R. 177 (B.A.P. 9th Cir. 1994), and In re Ormet Corp., 316 B.R. 662 (Bankr. S.D. Ohio 2004) (all finding that Section 1113 does apply to expired collective bargaining agreements).

In Hostess, a case on which the Union relies, the court found that Section 1113 does not apply to an expired collective bargaining agreement. The court reasoned in a bench ruling as follows:

I believe if I were to extend the language of “collective bargaining agreement” to “collective bargaining agreement in effect” or “collective bargaining agreement as it covers the relations between the parties,” I would be basing that conclusion on, first, a policy that is not well-articulated or found in the statute itself. Secondly, I'm of a view that as a factual matter I do not believe it has been established that the post-expiration regime would so interfere with whatever the congressional policy is behind Section 1113 as to the negate, Congress’s policy. . . . And, finally, I believe it would stretch the statute's language too far.

477 B.R. at 383. The court noted that the reference in Section 1113(e) to a collective bargaining agreement which “continues in effect” merely creates an exception to the general rule that Section 1113 does not apply to expired collective bargaining agreements. Id. at 382. The court further noted that in his view a debtor in possession could not assume an expired collective bargaining agreement under Section 1113 and so it would logically follow that a debtor in possession could not reject an expired collective bargain agreement pursuant to Section 1113. Id. at 383.

The Court, though, is more persuaded by the reasoning found in the cases the Debtors cite. For the reasons that follow, the Court finds that the language and legislative purpose of Section 1113 establishes that the Court has jurisdiction to enter an order approving the rejection of obligations that continue in effect under the NLRA in the wake of an expired collective bargaining agreement.

First, Section 1113(e) allows for the modification, on an interim basis, of a collective bargaining agreement “during a period when [it] continues in effect” so long as the debtor shows that the modification is essential to the continuation of the debtor’s business or to avoid irreparable damage to the estate. The Karykeion court noted that “continues in effect” is a term of art regularly used in labor law to refer to the employer’s post-expiration status quo obligations. 435 B.R. at 674 (citing Litton, 501 U.S. at 200). The Karykeion court further observed that Congress enacted Section 1113 in response to the Supreme Court’s Bildisco decision, at a time when “the intersection of the Bankruptcy Code and the NLRA was under heated discussion.” Id. Congress did not use the word “executory” anywhere in Section 1113 but instead selected the phrase “continues in effect” in Section 1113(e). There is a good reason why Congress made this selection as it could have very easily used the word “executory” to mirror Section 365 of the Bankruptcy Code.

The Court is persuaded that Congress selected the phrase “continues in effect” in Section 1113(e) with the intention of giving debtors the authority to modify the continuing effects of an expired collective bargaining agreement. It follows that the concept that a post expiration collective bargaining agreement which “continues in effect” may be rejected is implicit in Section 1113(c) since there is “no logic to support Congressional intent allowing interim modifications to an expired CBA if essential to a Debtor's business or to avoid irreparable harm to the estate as permitted by [Section] 1113(e) but not allowing the rejection of the expired CBA terms if necessary to further the purpose of reorganization provided the conditions of Section 1113(c) are satisfied.” 710 Long Ridge, 2014 WL 407528,at \*13. It is incumbent upon the Court to read the statute so as to avoid such an absurd result. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (“It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”); In re Kaiser Aluminum Corp., 456 F.3d 328, 330 (3d Cir. 2006).

Interpreting Section 1113(c) to allow for the rejection of a post-expiration collective bargaining agreement also comports with the legislative policies underlying Section 1113 and the Bankruptcy Code generally. While the legislative history of Section 1113 has been described to consist of “little more than self-serving statements by opposing partisans,” In re Mile Hi Metal Sys., Inc., 889 F.2d 887, 890 (10th Cir. 1990), the words of the statute and the context in which Congress enacted it are instructive as to its purpose.

As referenced above, Congress enacted Section 1113 in response to the Supreme Court’s Bildisco decision. In Bildisco, the Supreme Court held that that a collective bargaining agreement was subject to rejection by a debtor in possession pursuant to Section 365(a) of the Bankruptcy Code, so long as the debtor could “show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.”NLRB v. Bildisco & Bildisco, 465 U.S. 513, 525-26 (1984). The Bildisco court also found that a debtor in possession is not required to bargain to an impasse prior to rejection and “while a debtor-in-possession remains obligated to bargain in good faith under NLRA § 8(a)(5) over the terms and conditions of a possible new contract, it is not guilty of an unfair labor practice by unilaterally breaching a collective-bargaining agreement before formal Bankruptcy Court action.” Id. at 533-34 (emphasis added). Section 1113 codifies certain parts Bildisco and rejects others. Karykeion, 435 B.R. at 675.

In Section 1113, Congress struck a balance between affording debtors the flexibility to restructure their labor costs on a comparatively expedited basis, see Bildisco, 465 U.S. at 532 (referencing the Bankruptcy Code’s “overall effort to give a debtor-in-possession some flexibility and breathing space”), while interposing a certain level of court oversight and requirements for good faith bargaining, see Section 1113(f) (“No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section”). But, Section 1113 does not require debtors to bargain to an impasse, as is required under the NLRA. It is clear that Congress intended for rejection under § 1113 to be a far more expedited process than collective bargaining under the NLRA. Section 1113(d)(1) requires that the Court hold a hearing on a debtor’s application for rejection within 14 days of its filing. Section 1113(d)(2) furtherrequires that the Court render a ruling on the application for rejection within thirty days of the hearing. While a debtor would likely need to commence bargaining with the union prior to filing its application forrejection in orderto satisfy the requirements of Section 1113, the statute clearly contemplates a much quicker process than the relatively more protracted process contemplated by the NLRA3 .

Further, the Bankruptcy Code gives debtors broad powers to restructure their affairs and preserve value as a going concern. Karykeion, 435 B.R. at 675; 710 Long Ridge, 2014 WL 407528, at \*13. Subjecting the Debtors to a complex and time consuming process overseen by another administrative body in the midst of their restructuring efforts would surely thwart this overriding policy. Which is not to say that the Union is not afforded any of the protections it would otherwise have in a traditional collective bargaining process under the NLRA. Congress provided several checks in Section 1113 to ensure that a debtor is not proceeding too expeditiously with the restructuring of its labor costs. Among these protections, discussed in more detail below, are the requirements that the debtor bargain in good faith, that any changes be necessary to allow reorganization, that the union be treated fairly and equitably in comparison to other stakeholders, and that the balance of the equities clearly favor rejection.

Although they ultimately adopted different standards, both Congress and the Supreme Court in Bildisco recognized the need for an expedited process by which debtors could restructure labor obligations in bankruptcy. In many cases, time is the enemy of a successful restructuring. This concern applies with equal force in a situation where the debtor is bound by the terms of a recently expired collective bargaining agreement pursuant to its status quo obligations under the NLRA. The concern applies with special forcehere, where the uncontroverted evidence demonstrates that the Debtors have months, perhaps weeks, to strike a deal in order to avoid liquidation. If the CBA were set to expire the day after the issuance this opinion, there is no doubt that the Court would have jurisdiction to enter an order approving rejection. But, if the Union is correct, because the CBA expired only a few weeks ago, the Court has no such authority, even though the terms of the expired CBA continue to impose the exact burden on the Debtors’ restructuring efforts that Section 1113 is meant to relieve. This result makes little sense. See Karykeion, 435 B.R. at 675-76; 710 Long Ridge, 2014 WL 407528, at \*13-14. Again, the Court must read the statute, when possible, to avoid such an illogical result. Griffin, 458 U.S. at 575; Kaiser, 456 F.3d at 330.

If the Court were to adopt the Union’s view, it is certain, based on the uncontroverted evidence before the Court, that the Debtors would be forced to close the Casino and liquidate, resulting in the loss of approximately 3,000 jobs, including those of the Union employees. In contrast to the facts before the court in Hostess, the evidence here demonstrates that there is simply no way that the Debtors could complete the collective bargaining process contemplated by the NLRA and avoid liquidation. The CBA is of no force or effect if the Casino closes and the Union employees lose their jobs. This, too, would be an absurd result. Reading Section 1113 to grant the Court jurisdiction to approve rejection of the terms of an expired collective bargaining agreement “avoids an absurd result and promotes consistency with the legislative purpose of the statute and the Bankruptcy Code as a whole.” Long Ridge, 2014 WL 417528, at \*14. See also Karykeion, 435 B.R. at 676.

Further, this result does not intrude on the exclusive jurisdiction of the NLRB to enforce and interpret the provisions of the NLRA, as the Union suggests. The Court merely reads Section 1113 to apply with equal force in a situation where the terms of an expired collective bargaining agreement remain in effect due to the employer’s status quo obligations under the NLRA. In applying Section 1113 to the facts of this case, the Court will interpret and enforce only Section 1113, and not any provision of the NLRA. This is a no greater intrusion on the NLRB’s jurisdiction than if the Court were to apply Section 1113 to a collective bargaining agreement which has not expired by its terms. See Karykeion, 435 B.R. at 675.

The practical impact of the Court’s finding that Section 1113 applies to expired collective bargaining agreements is slight, especially when compared to the violence adopting the Union’s position would do to the legislative purpose of Section 1113 and the Bankruptcy Code generally, which is to facilitate and promote reorganization. See Bildisco, 465 U.S. 513, 528 (“The fundamental purpose of [chapter 11] reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”). Labor unions are on notice that in the event of a bankruptcy, their collective bargaining agreements are subject to rejection pursuant to Section 1113. Reading Section 1113 to apply to the narrow class of expired collective bargaining agreements which remain in effect post-petition due to the employer’s status quo obligations underthe NLRA does not alter and in fact preserves the pre-existing union-employer power dynamic.

The Union’s position, if given credence, would effectively give labor unions the power to hold up a debtor’s bankruptcy case until the union’s demands were met, but only in cases where there is an expired but still controlling collective bargaining agreement. The Court cannot think of nor has the Union offered a good reason for such a distinction between an expired and unexpired collective bargaining agreement. While allowing the Union that sort of hold-up power may be appropriate or even necessary outside of bankruptcy, in a bankruptcy case it wholly ignores the policy and bargaining power balances Congress struck in Section 1113 and exalts form over substance.

Accordingly, the Court finds that it has jurisdiction pursuant to Section 1113(c) to approve an application for rejection of a collective bargaining agreement where the agreement has expired by its terms but the provisions of the agreement remain in effect due to the employer’s status quo obligations under the NLRA.-

### Aviation---2NC

## T

### Overview---2NC

#### That matters a lot in this context.

Hebdon 14 – Associate Dean and Professor, Desautels Faculty of Management, McGill University. Ph.D., Industrial Relations and M.A., Economics, University of Toronto.

Robert Hebdon, “Public Sector Labor Policy: A Human Rights Approach,” Nevada Law Journal, Vol 14:509, Spring 2014, https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1545&context=nlj

Different definitions of collective bargaining rights would likely lead to different empirical estimates of the percentage of the labor force that has bargaining rights. However, because of the predominance of the NLRA and the Railway Labor Act in the private sector, most of the differences among laws occur in the public sector. Thus, for many alternative definitions, for example, one based on the right to strike, [\*517] the change in the percent of the labor force with rights would be largely limited to changes in the number of public employees who had this right. 52

### Violation---AT: PTIV---2NC

#### Here’s one of their solvency cards to prove yes violation. It’s all about shedding CBAs.

Hunter ’22, Georgetown in green [Olivia; July 25; J.D. 2022, Columbia Law School, B.A. 2016, Earlham College; Columbia Business Law Review, “A Bankrupt Bargain,” vol. 2022]

Bankruptcy courts may be courts of equity, 317 but they are still required to follow the letter of the law. 318 While canons of statutory construction may not be in their usual wheelhouse, they are important tools to ensure that a statute is not misread. When there is ambiguity in a statue, a bankruptcy court can and should look to canons of statutory construction to parse congressional intent.3 19 When read closely and with these canons in mind, § 1113 does not allow for rejection of expired CBAs-it instead provides for interim changes to be made to those obligations that "continue in effect" after expiration. Courts interpreting § 1113 should be sure to give each word in the statute meaning; "interim" cannot be glossed over or read out of law. Likewise, variations in terms should be assumed to have significance; a "collective bargaining agreement" must have a different scope than a CBA that "continues in effect." Lastly, courts should be careful to not let the general § 1113 provision to nullify the specific rule in §1113(e). Congress made an exception for expired agreements, and this exception should not be overridden or substituted for judge-made rules based on desired outcomes. This reading not only comports with the text of the statute; it also allows for relief for the debtor without compromising the delicate bargaining process between unions and employers during the post-expiration period.

#### And another.

Velazquez ’25, Georgetown in green [Alvin; March 2025; Associate Professor of Law, Indiana University Maurer School of Law; Maurer School of Law Legal Studies Research Paper Series, “Bargaining for the Common Good in Bankruptcy,” no. 551]

When a corporation files for bankruptcy, it is usually bad news for workers. That is because most corporations are usually looking to slash wages or seek other concessions from workers. Unions that fight back do so risk having the bankrupt corporation seek judicial approval to set aside their collective bargaining agreement. The news is not much better for public sector workers when a government goes into bankruptcy because the law forces governments to prioritize debt payments to financial creditors over workers. Certain funds, often called “vulture funds”, opportunistically purchased distressed governmental debt such as Puerto Rico’s cheaply and then used the bankruptcy process to extract profits at a cost to workers and the public. What happened in Puerto Rico’s bankruptcy challenged that convention. This article explains how unions learned from previous engagements to engage their membership, organize with public allies, and use the bankruptcy code to bargain for the common good to prevent pension cuts and protect their collective bargaining agreements.

### CI---MUST READ---2NC

#### Sentelle is neg

Sentelle ’13 [David B., Karen LeCraft Henderson, and Thomas B. Griffith; March 8; Senior Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit; Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit; Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit; U.S. Court of Appeals for the District of Columbia Circuit, “AFGE, AFL‑CIO, Local 3669 v. Shinseki,” No. 11‑5359, 709 F.3d 29]

We have consistently distinguished between the limited collective bargaining right provided by § 7422 and labor rights more broadly. In Local 589, we stated that "Congress has gradually extended some of the protections in chapter 71 of title 5 to VA medical personnel, for example . . . by granting all VA medical personnel limited collective bargaining rights in 1991." 73 F.3d at 395 (emphases added). [\*35] Similarly, in United States Department of Veterans Affairs, Washington, D.C. v. FLRA, we differentiated the "right to negotiate collective bargaining agreements, or to administer such agreements through grievance arbitration procedures" from "other rights protected by the FSLMRS, including 'the right to form, join, or assist a labor organization without fear of penalty or reprisal.'" 1 F.3d 19, 21, 303 U.S. App. D.C. 60 & n.1 (D.C. Cir. 1993) (quoting United States Department of Veterans Affairs, Veterans Administration Medical Center, San Francisco, Cal., 40 F.L.R.A. 290, 301 (April 19, 1991)); cf. FLRA v. United States Department of the Treasury, Financial Management Service, 884 F.2d 1446, 1449, 280 U.S. App. D.C. 236 (D.C. Cir. 1989) (referring to "collective bargaining" as a "process" of "contract negotiation"); id. at 1461 (Sentelle, J., concurring) (distinguishing between "collective bargaining" and "other representational activities"). Finally, the VA's interpretation does violence to the statutory text. It would be nonsensical to read the phrase "engage in collective bargaining with respect to conditions of employment," 38 U.S.C. § 7422(a), as "engage in labor rights with respect to conditions of employment."

#### Kaufman isn’t intendeing to define

Kaufman ’82 [Joseph S., Linda R. Hirshman; April 21; Attorney for Petitioners, Baltimore, Maryland; Attorney for Respondent, Chicago, Illinois; Supreme Court of the United States, “Oral Arguments: Jackson Transit Authority et al. v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC,” No. 81-411]

MRS. HIRSHMAN: Mr. Chief Justice, and may it please the Court:

Your Honor, the Section 13(c) preserves rights. That language is right in the statute. If you look at Section 13(c)(2) you see that it says the continuation of collective bargaining rights. There is no distinction between create, for our purposes here, between creating rights and preserving the rights as they existed before.

QUESTION: Why not? Why not?

MRS. HIRSHMAN: Because when these employees were in the private sector they had rights to collective bargaining including enforceable collective bargaining agreements which could not be torn up months after they were concluded. And what Congress did in 13(c) was look at that situation and say we're going to preserve those rights for you. [\*21] We are not going to all federal funding to be the vehicle by which you are transferred out of that right-laden position.

#### It’s a podcast

#### Rights” are not “agreements.”

Hayes 15, Director of the Office of Labor Management Standards, JD from Cornell University (Michael J. Hayes, August 13, 2015, “Re: FTA Application Sacramento Regional Transit District FULL FUNDING GRANT AGREEMENT South Sacramento Corridor Phase 2 Project (Extension of South Corridor LRT Service from Meadowview Road to Cosumnes River College) CA-03-0806-03 and CA-03-0806-04,” Document 87-3 in ECF for Amalgamated Transit Union International, et al v. USDOL, et al, United States Court of Appeals for the Ninth Circuit, No. 23-15503, University of Kansas Libraries, Lexis)

The key terms in section 13(c)(2) are "continuation" and "collective bargaining rights." The term "continuation" means "a keeping up or going on without interruption; prolonged and unbroken existence or maintenance." Webster's New World Dictionary of the American Language 319 (college ed. 1962). Thus, "when the transit employees had collective bargaining rights that could be affected by the federal assistance \* \* \* these rights must be 'continued' before assistance will be awarded to the public transit authority." United Transportation Union v. Brock, 815 F.2d 1562, 1564-65 (D.C. Cir. 1987). The phrase "collective bargaining rights" refers to employees' right to designate a representative and to bargain collectively through that representative with the employer with respect to wages, hours, and other conditions of employment. See 29 U.S.C. § 158(d); Allied Chemical and Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 164 (1971); cf. State of California v. Taylor, 353 U.S. 553, 560 (1957) (under Railway Labor Act, "(E)ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions") . "Collective bargaining rights" are therefore not substantive terms of collective bargaining agreements. Instead, the phrase refers to a process that was universally understood in 1964, and now, "to require, at a minimum, good faith negotiations, to a point of impasse, if necessary, over wages, hours and other terms and conditions of employment." Donovan, 767 F.2d at 159.

#### The agreement is totally distinct.

Schmitt 22, Attorney General for the State of Missouri, JD from Saint Louis University (Eric S. Schmitt, January 19, 2022, “Appellants’ Brief,” American Fedn. of State v. Missouri, No. SC99179, Supreme Court of Missouri, University of Kansas Libraries, Lexis)

SB 1007's limitations on the State's ability to agree to three types of provisions in a CBA does not violate article I, section 29. SB 1007 prohibits the State from agreeing to for-cause protections, grievance procedures for adverse employment decisions, and seniority protections, all of which conflict with the mandatory at-will provisions of section 36.025. The plain language of article I, section 29 only guarantees the right to "bargain collectively." That is, it guarantees that employees may participate in a particular process, but it does not guarantee that collective bargaining will reach any particular outcome and does not prescribe any additional requirements for the bargaining process. Under its ordinary and usual meaning, both in 1945 and today, the verb "bargain" denotes the process of negotiating, not an outcome. See WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 219 (1952) (defining "bargain" as "to negotiate over the terms of an agreement or contract") (A0222); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 176 (2002) (defining "bargain" as "to negotiate over the terms of an agreement or contract") (A0225). Thus, to guarantee that someone may [\*57] "bargain" indicates that they will be allowed to negotiate-it does not guarantee an agreement, a substantive outcome, or even a range of outcomes.

This Court agreed with this definition of "bargain collectively" in its Ledbetter case. It wrote: "By 1945, when article I, section 29 was adopted as part of Missouri's current constitution, the words 'bargain collectively' were common usage for negotiations conducted in good faith and looking toward a collective agreement." 387 S.W.3d 360, 366 (Mo. banc 2012). And as this Court noted in Quinn v. Buchanan-an early case addressing this constitutional right-article I, section 29 "is not a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations." 298 S.W.2d 413, 418 (Mo. banc 1957) ( overruled on other grounds by E. Mo. Coal. of Police v. City of Chesterfield, 386 S.W.3d 755, 761-62 (Mo. banc 2012)). Thus, contrary to the circuit court's holdings, the right to "bargain collectively" and to have the State bargain in good faith does not require that the State be able to agree to every conceivable CBA provision, or even agree to any provision regarding so-called "core" or "mandatory" topics.

#### That’s the gold standard of the topic. It’s labor law’s doctrinal bedrock.

Racabi 24 – Associate Professor, School of Industrial and Labor Relations, Cornell University. Associate Faculty, Cornell Law School. J.S.D., Harvard. L.L.B., Haifa University.

Gali Racabi, “Balancing is for Suckers,” Cornell Law Review, Vol. 109:63, 2024, https://publications.lawschool.cornell.edu/lawreview/wp-content/uploads/sites/2/2024/01/Racabi-final.pdf

Balancing seems inherent in how courts, agencies, lawyers, and scholars think and practice labor law. in some fundamental way, balancing is what labor law is about. This Part highlights some of the more influential explicit and implicit balancing cases. Implicit cases are ones in which employers’ interests are identified explicitly, but the method of balancing or the fact of balancing is implicit. The explicit ones are those in which those two stages, or the goal of a balanced outcome, are straightforward.

The goal of collecting these examples is to demonstrate the pervasiveness of balancing in the most seminal labor law decisions, in labor law’s doctrinal bedrock. The goal is to show that Tesla, though supportive of workers’ claims and fipping previous republican-majority Board decisions, is very much in line with the meta-doctrine of our labor law—balancing must be accomplished.

The shape of this meta-doctrine is that though workers enjoy section 7 rights, employers have an equally valuable right to counter and challenge all section 7 rights’ claims. Thus, actualizing section 7 rights is always the business of employers and always up for Board and judicial scrutiny. Wherever workers claim they are protected for engaging in concerted activities, there we will find a claim for mirroring and opposing employers’ statutory recognized interest. The scope of such employers’ interests is at least as broad, at least as vital, and legally valid as section 7 rights are. To demonstrate this claim, consider some examples.

### Precision---2NC

#### Strength refers to ability to withstand opposing considerations.

Copley 23 – Lecturer in Law, University of Southern Queensland School of Law and Justice; Centre for Heritage and Culture

Julie Copley, “A right to adequate housing: Translating ‘political’ rhetoric into legislation,” Australian Property Law Journal, Vol. 31, No. 2, pp. 71–98, 2023,

Nexis

In constitutional and human rights theory and practice, rights have two components.139 One is the scope of a right: the specific protections falling within the reach of the right.140 The other is the strength of a right: the right’s ‘power to withstand opposing considerations’, described also as the ‘core’ of the right.141 Örücü argues that positivisation of human rights is assisted greatly by identifying a right’s ‘inviolable and indefeasible content’.142 For a legislative process, Örücü says an identified core serves to check the tendencies of legislatures to confine rights, and to create extra awareness of the role and significance of a right among citizens, courts, scholars and those exercising public power.143

#### Consensus.

Nickel 05 – Professor of Law, Arizona State University College of Law

James W. Nickel, “Who Needs Freedom of Religion?” University of Colorado Law Review, Vol. 76, pp. 941–964, 2005, Nexis

The weight of a liberty or right is its strength or power to prevail when it conflicts with other considerations. The scope of a right is the benefit, freedom, power, or immunity that it confers upon its holders. For example, specifying the scope of the right to freedom of movement involves describing a set of freedoms in the area of movement and residency that the holders of the right enjoy. If a right lacks exceptions, that is a matter of scope. If it is absolute, that is a matter of weight or priority. We are often uncertain whether to attribute the failure of a right to dictate the result that should be followed in a particular case to an implicit qualification within the right (scope) or to subjection to other considerations (weight).

#### More evidence.

Bone 93 – Professor of Law, University of Texas School of Law

Robert G. Bone, “Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity,” Vanderbilt Law Review, Vol. 46, pp. 561–672, May 1993, Nexis

Three features of the participation right are critical to the evaluation of distributional schemes: scope, strength, and commensurability. Scope defines the kind of entitlement the right confers. In an illuminating treatment of distributional lotteries, Professors Lewis Kornhauser and Lawrence Sager distinguish three kinds of entitlement: those that guarantee treatment as an equal, those that guarantee equal treatment, and those that guarantee access to the good itself. 204

The participation right obviously guarantees much more than treatment as an equal. Treatment as an equal requires no particular level of participation. Indeed, it makes no demand on distributional outcomes at all. It only requires that each person's interests be fairly considered in the distribution process. 205 So long as this condition is satisfied, any distributional scheme, even one that distributes only to those who litigate most efficiently, would be perfectly consistent with the right.

Furthermore, the participation right entitles its holder to more than just equal treatment. Equal treatment is a comparative norm; it gives person A a benefit only if person B receives the benefit as well. 206 Thus, equal treatment would be perfectly satisfied if no one received anything at all. The participation right is not contingent in this way; its guarantee of litigation control does not depend on the participation opportunities others receive. 207

On the other hand, there is a way in which the right is contingent. No one could insist on the robust form of control associated with an adversarial trial, for example, if American adjudication had always been [\*629] based on a judge-centered, inquisitorial model. 208 Thus, the participation right confers an entitlement to the process good itself, but the scope of the right depends to a significant extent on conventionally accepte procedural norms.

If conventional norms supported a participation right that only guaranteed an opportunity for input into a lawsuit, the scarcity problem could be easily solved. For example, a court could litigate sample cases with a committee of lawyers representing different plaintiffs or hold a fairness hearing at which plaintiffs could air objections about the sampling procedure and the appropriateness of their individual verdicts. 209 The participation right, however, extends beyond limited input; the "day in court" ideal has traditionally guaranteed a large measure of individual control over litigation strategy.

The second question concerns the strength of the participation right and in particular whether all parties have equally strong rights. This consideration is important because a lottery that gives all plaintiffs equal probabilities might be unfair if some plaintiffs have stronger rights than others. As used here, the "strength" of a right is a comparative notion. While all participation rights guarantee the same degree of individual control, stronger rights deserve greater weight when there is a rights conflict, and they entitle their holders to some form of priority in a distribution scheme. 210

Some commentators argue that participation rights are stronger for personal injury than for property damage cases, but precedent offers little support for this position. 211 One might be tempted to draw a simila [\*630] distinction by focusing on the severity of the injury, arguing, for example, that cancer victims have stronger participation rights than those who suffer from less severe forms of injury. Distinctions of this kind might make sense if the participation right depended on psychological factors that varied with the degree or kind of harm. But this is not the case. The right protects autonomy and dignity values that assure fair treatment at the hands of the state, and those values do not depend on the nature of mass tort injury. 212 Thus, I shall assume that the strength of the right is the same for all cases.

### Limits---2NC

#### 1. Right to strike.

Myall 19 – Researcher and State-Level Economic Policy Analyst for Maine Center for Economic Policy, M.A. in Public Policy and Management from the University of Southern Maine.

James Myall, ‘Right to strike would level the playing field for public workers, with benefits for all of us,” Maine Center for Economic Policy, 4/17/2019, https://www.mecep.org/blog/right-to-strike-would-level-the-playing-field-for-public-workers-with-benefits-for-all-of-us/#:~:text=All%20of%20us%20have%20a,as%20other%20employees%20in%20Maine

All of us have a stake in the success of collective bargaining. But a union without the right to strike loses much of its negotiating power. The right to withdraw your labor is the foundation of collective worker action. When state employees or teachers are sitting across the negotiating table from their employers, how much leverage do they really have when they can be made to work without a contract? It’s like negotiating the price of a car when the salesman knows you’re going to have to buy it — whatever the final price is.

Research confirms that public-sector unions are less effective without the right to strike. Public employees with a right to strike earn between 2 percent and 5 percent more than those without it.[ii] While that’s a meaningful increase for those workers, it also should assuage any fears that a right to strike would lead to excessive pay increases or employees abusing their new right.

#### 2. The Ghent model.

Dimick 12 – Law Professor at the University at Buffalo School of Law, Ph.D in Sociology from the University of Wisconsin-Madison. J.D. from Cornell Law School.

Matthew Dimick, “Labor Law, New Governance, and the Ghent System,” University at Buffalo School of Law, 2012, https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1082&context=journal\_articles

\*Italics in original\*

*The Ghent system is a voluntary system of unemployment insurance in which labor unions administer publicly subsidized insurance funds and, along with employers and the state, participate in unemployment insurance policymaking. The Ghent system helps overcome three separate problems in collective employment relations that existing labor law in the United States attempts to resolve in evidently ineffective ways, which the EFCA had sought to reform. First, the Ghent system encourages employers to recognize and bargain with unions by providing workers with incentives to join labor unions prior to and independent of the employers' recognition of the union. Second, voluntary, union-administered unemployment insurance provides an alternative "selective incentive" that reduces free riding on collective union goods. Finally, union and employer collaboration in unemployment insurance policy generates efficiency gains that underwrite cooperative labor relations and reduce employer resistance and workplace adversarialism. In exchange for generous unemployment benefits, unions yield on employment-protection rules, giving employers more flexibility in the workplace-a bargain referred to as "flexicurity." The Article concludes by drawing policy lessons from the Ghent system analysis. A "progressive-federalist" strategy of unemployment insurance reform at the state level may be more feasible than federal labor law reform because of the broad deference states enjoy under the federal Social Security Act, but non-legislative lessons can also be applied, as several contemporary and U.S. examples illustrate.*

#### 3. Right-to-work.

Reis 23 – Associate Government Relations Manager for the American Heart Association, MPA in Legislative Affairs and Advocacy from the George Washington University.

Branden J. Reis, “Right-to-Work Laws: Impacts on the Labor Market, Union Organizing, and Social Equity,” Policy Perspectives, Vol. 30, 2023, https://journal.policy-perspectives.org/articles/volume\_30/10\_4079\_pp\_v30i0\_08.html

Right-to-work (RTW) laws do not require workers to pay dues in order to become a member of a labor union as a condition of employment. State governments, particularly those in the Midwest and South, have introduced RTW laws to attract businesses and industrialize local economies. Consequently, the laws increase competition among nonunion workers, driving wages down. The laws also weaken labor unions’ ability to bargain for wage increases, especially as unions are strained to bargain for workers that are not dues-paying members. After implementation, RTW laws generally increase economic inequality. However, the local socioeconomic conditions, such as racial and gender diversity in the labor force, can influence the demand for union representation and may impact the degree to which economic inequality will change. There have been repeated attempts to expand RTW to the national level, but these attempts would risk magnifying wage disparities, undermining unions’ bargaining power, and exacerbating socioeconomic inequalities.

### Aff Ground---2NC

#### That preserves aff diversity and flex related to *which* interests supersede and *how* that's applied. Here are a few examples among countless others BUT with a core unified DA.

Racabi 24 – Associate Professor, School of Industrial and Labor Relations, Cornell University. Associate Faculty, Cornell Law School. J.S.D., Harvard. L.L.B., Haifa University.

Gali Racabi, “Balancing is for Suckers,” Cornell Law Review, Vol. 109:63, 2024, https://publications.lawschool.cornell.edu/lawreview/wp-content/uploads/sites/2/2024/01/Racabi-final.pdf

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1.Explicit Balancing

On the list of cases in which balancing is a goal or a method for deciding doctrinal outcomes, we can find cases such as Republic Aviation v. NLRB, whereby the Supreme Court saw a standoff between workers’ section 7 right to solicit union materials and employers’ rights to maintain discipline.69 In cases of hospitals and health-care facilities, the Board also adds consumers’ interests to the mix, finding they weigh against these section 7 rights.70 This addition is unique to the labor context; no general and amorphous patient rights are likely to interfere with employers’ managerial interests in other cases.

In multiple cases involving striking and concerted activities, the Board has declared that a “legitimate and substantial business justification” might trump section 7 rights in particular circumstances.71 In cases of union’s demands for information, for example, to investigate and remedy contract violations, the Board must balance the need for information against the “legitimate and substantial confidentiality interests established by the employer.”72 In Caesars Entertainment,73 the Board balanced employees’ NLRA rights and employers’ interests to establish that employers may lawfully restrict employees’ nonbusiness use of the employers’ IT systems, unless the restriction is discriminatory or employees have no other reasonable means of communicating with each other.

2.Implicit Balancing

On the list of implicit balancing cases, we can find the 1943 Peyton Packing Co., which created the original distinction between on-the-clock and off-the-clock time concerning the right of employees to solicit union material.74 The implicit part here is the court’s cryptic assertion underlying the distinction that “working time is for work.” it is dififcult to discern such a limitation on section 7 rights from the text. Similarly, the Mackay Radio court found an employer’s right to bring permanent replacements for striking workers following an inherent right to keep the business operating.75 Adding “reasonableness” requirements to workers’ concerted activities, again, with no statutory anchoring, is also commonplace.76 [Footnote 76] Vemco, inc. v. nlrB, 79 F.3d 526, 530 (6th cir. 1996); Quietfex Mfg. co., 344 n.l.r.B. 1055, 1056 (2005) (determining that twelve-hour stoppages are beyond “reasonable time” by balancing employee’s section 7 rights and employer property rights). [End FN]

Workers may also lose the protection of their statutory rights if, while engaging in otherwise protected activities, they are being too rude, too sarcastic, too exuberant,77 or too vulgar78 or are operating without the authority of fellow employees.79 [Footnote 78] See carleton coll. v. nlrB, 230 F.3d 1075, 1081 (8th cir. 2000) (holding sarcastic and vulgar language not protected); cellco P’ship, 349 n.l.r.B. 640, 646 (2007) (fnding that the employee lost protection because of egregious behavior). “employees are permitted some leeway for impulsive behavior when engaged in concerted activity, this leeway is balanced against an employer’s right to maintain order and respect.” Piper Realty Co., 313 n.l.r.B. 1289, 1290 (1994); nlrB v. Pier sixty, llc, 855 F.3d 115, 123 (2d cir. 2017); inova Health sys. v. nlrB, 795 F.3d 68, 87 (D.c. cir. 2015), enforcing 360 n.l.r.B. no. 135 (2014); consumers Power co., 282 n.l.r.B. 130, 132 (1986). [End FN] Concerted activity might also lose coverage when it “undermine[s] employer[s’] authority.”80[Footnote 80] See nlrB v. starbucks corp., 679 F.3d 70, 79 (2d cir. 2012); Felix indus., inc. v. nlrB, 251 F.3d 1051, 1055 (D.c. cir. 2001) (describing case where employee called supervisor “fucking kid” three times); Stanford N.Y., 344 N.L.R.B. 558, 558–59 (2005) (holding this factor favored lost protection when employee called general manager “a fucking son of a bitch”). [End FN] Nor do workers’ statutory rights extend to areas that lie at the “core of entrepreneurial control” or in areas “fundamental to the basic direction of [the] corporate enterprise.”81 Other assertions of unenumerated managerial rights under the NLRA went even further, stating, “[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business” and the employers’ “need for unencumbered decisionmaking.”82

It is important to note that while it is easy to find such a one-sided assertion of employers’ rights born out of thin air, all the dissenters usually had to offer is an accusation of a lack of balance. So, the aforementioned First National Maintenance majority, which hailed the unencumbered rights of employers, was opposed by its dissent not for making employers’ rights up but for failing to balance such rights with those of employees properly.83

This descriptive fact—labor law and balancing go hand in hand—outlines labor law’s doctrinal opinions. The structure of most majority and dissenting opinions is remarkably similar— one calls doctrinal outcome X balanced, and the other states it is not balanced and calls for doctrinal outcome Y. The places change as control over the Board shifts and as the ideological and professional judicial norms adapt, but this structural feature is always there, if not explicitly, implicitly. It is this descriptive fact I will try to anchor in law and policy arguments. and, after failing to do so, I will offer some alternatives.

### Functional Limits---2NC

### Reasonability---2NC

## Adv CP

### Aviation Planks

#### prohibit bankruptcy filings in the aviation sector,

#### eliminate collective bargaining rights in the aviation sector,

### AT: Add On

#### Income inequality is low. Aff data is inaccurate.

Gramm et al. 24 – former U.S. Senator, former Professor of Economics at Texas A&M University, PhD in Economics from the University of Georgia; Eminent Scholar and Professor of Economics Emeritus in the Department of Economics at the University of Auburn, PhD in Economics and Political Theory from Louisiana State University, M.A. in Economics and History from St. Mary’s University; former Assistant Commissioner at the Bureau of Labor Statistics, Economist at the CATO Institute, M.A. in International Political Economy from the University of Wisconsin-Madison.

Phil Gramm, Robert Ekelund, and John Early, “The Myth of American Inequality,” 05-01-2024, https://www.bloomsbury.com/us/myth-of-american-inequality-9798216332466/

According to the Census Bureau, the average income of the top 20 percent of households in America in 2017 was 16.7 times higher than the average income of the bottom 20 percent of households, and income inequality has grown more or less consistently since World War II. The Census Bureau also finds that the percentage of Americans living in poverty has been largely unchanged since the War on Poverty was implemented in the mid-1960s.4 The Bureau of Labor Statistics (BLS) data on inflation-adjusted average hourly earnings for production and nonsupervisory workers led the Pew Institute to note in August 2018, “In real terms average hourly earnings peaked more than 45 years ago.”5

If this doesn’t sound like the America you live in, that is because it’s not. There are at least three dead giveaways to the fact that the official measurements of the economic well-being of Americans are wrong. The most obvious clue is that from the ramp-up of funding for the War on Poverty in 1967 to 2017, annual government transfer payments to the average household in the bottom 20 percent of the income distribution rose more than fourfold in inflationadjusted dollars from $9,677 to $45,389.6 And yet the official poverty measures tell us that the percentage of people living in poverty hardly changed during that fifty-year period.

Another clear indication that the numbers are wrong was an admission by Census itself. The annual Census report on income and poverty showed that median household income was down 2.9 percent in 2020 and 3.3 million additional Americans had fallen into poverty.7 These numbers failed the laugh test in a year when federal spending, mostly on transfer payments, rose almost 50 percent and personal savings exploded. The Census explained that its income measure didn’t count stimulus checks, since many were paid as refundable tax credits, and didn’t count any other noncash benefits like food stamps. Census reported that if it had counted some of these missing payments, median household income would have risen by 4.0 percent instead of falling 2.9 percent, and the poverty rate would have fallen 2.6 percent instead of rising 1.0 percent.8

The final clue that the official numbers do not reflect reality is that while highly publicized numbers from the Bureau of the Census on household income inequality show that in 2017 the bottom 20 percent of households had an average income of $13,258,9 other, less publicized data from the Bureau of Labor Statistics show that these same households spent $26,091 on consumption—two times more than their income.10 Households in the second 20 percent income group spent 11.0 percent more than their Census income. Census also reports that the top 20 percent of households had average annual income of $221,846, but BLS reports they consumed only $116,998.

Clearly there is something wrong here. The bottom quintile can consume more than twice its Census income only because the Census does not count twothirds of transfer payments as income for those who receive them. The Census report that the top 20 percent of households averaged 16.7 times as much income as the bottom 20 percent can be reconciled with the BLS report that they only consumed 4.5 times as much only by adding the value of transfer payments received to the income of the bottom 20 percent and subtracting the taxes paid by the top 20 percent.

#### No societal collapse impact.

Dr. Florian Jehn 25, PhD, Senior Researcher, Environmental Science, European Leadership Network, "The People's History of Collapse," Effective Altruism Forum, 08/06/2025, https://forum.effectivealtruism.org/posts/2fsu5c7k5MvbE8Dm6/the-people-s-history-of-collapse.

Before we dive into what these global shocks might be, let’s recap a bit the main patterns we can see from all these historical ideas and examples. Much of this is related to inequality. More equal and inclusive societies tend to weather shocks much better. Also, more unequal societies tend to suffer more from a variety of problems which make them less well equipped to react to crises. Wealth gives you power. The more wealth you have, the more you can shape society to be more like your preferences and the personal preferences of a single person seldom overlaps with which would be best for a society as whole. Wealth inequality is self-reinforcing. In our modern societies the wealth you gain from having capital is much bigger than the wealth you gain from labor. Therefore, the rich tend to get richer, which in turn increases their undue influence on society. This further gets entrenched via debt. If I owe someone money, it gets much more difficult to resist them, as they have an additional power over me. But also via rich people buying things like media companies or lobbying teams to influence politics. Power begets power.

Besides these direct negative consequences, inequality also leads to a variety of follow-up problems. Inequality leads to unequal power which leads to corruption. The greater the discrepancy in power, the more opportunities arise to exploit this power. Corruption decreases trust in the state and in other people, removing the glue that holds society together. Inequality also makes oligarchy easier. If you have more wealth and power, it gets easier to carve out a part of society that you tightly control. As wealth inequality grows, more elites compete for high-status positions. Aristocrats, lawyers, nobles, and generals—those with resources—either organize rebellions or take over existing ones. This rise in elite competition is central to structural-demographic theory, a model first developed by Jack Goldstone and refined by Peter Turchin (4). It just seems that inequality is inherently corrosive to every society.

In addition, to these factors which are very directly related to inequality, there are also two other factors that come into play:

Imperial Overstretch: Empires like Rome, the Qin, and the Mongols believed their rule was divinely ordained and should be universal. The British and other colonizers saw themselves as civilizing savages, while Islamic rulers expanded the umma. Conquest offered legitimacy and practical benefits: neutralizing threats, securing resources, and rewarding elites with land and plunder. However, expanding borders often created new enemies and increased costs, leading to “imperial overstretch.”

Declining Energy Ratio: Societies depend on energy, and the ratio of energy expended to energy gained, called “Energy Return on Investment” (EROI), is crucial. Many civilizations, like the Western Roman Empire, faced declining energy ratios due to dwindling resources and environmental degradation. However, a poor energy ratio alone rarely causes collapse—it contributes, but other factors are typically involved.

These problems are interconnected. Resource extraction, whether from people or nature, faces diminishing returns. The severity depends on a society’s resilience and its ability to adapt. Larger empires with advanced technology and control systems can expand further and are less prone to rapid collapse. However, extractive institutions and inequality breed oligarchy, corruption, and elite competition. As these factors interact, they worsen each other—corruption fuels inequality, and oligarchy leads to poor environmental management. The state becomes fragmented, with elites draining resources, gradually hollowing it out.

Taking all this together, Kemp formulates a general four step process of collapse (Figure 5). Extractive institutions lead to inequality. This in turn leads to weakening processes like corruption. Once the society is weakened enough, it essentially just waits for a trigger to start the process of collapse.

A diagram of a financial problem

AI-generated content may be incorrect.

What makes societies resilient against collapse

There are some universal principles, such as knowledge storage and creation, which large states and empires excel at. For instance, historical empires often stored and passed on technological advances, contributing to long-term resilience. Similarly, strong religious or ideological unity, and the ability to reform and decentralize (as seen in the Byzantine Empire) also help reduce intra-elite competition, which makes societies more resilient.

However, there’s a strong argument that more inclusive and democratic systems are an even more important factor during crises. Studies by Peter Peregrine (5) show that societies with greater political inclusivity and collaboration tend to be more adaptable to catastrophes like climate change or disease outbreaks. Modern democracies are often more resilient in part because they allow diverse viewpoints to shape decisions, leading to more comprehensive solutions during disasters (6). Citizens’ assemblies, which have proven successful in addressing polarized issues, exemplify this. Also, there are many other examples where the collective wisdom of crowds works pretty well: forecasting, foresight, collective intelligence. Distributed information processing seems to result in better decisions. Also, this decreases the influence of people high in the dark triad and the corrupting influence of power.

Yet, many modern democracies are still indirect in how they channel citizen input, limiting their potential. A more direct application of participatory decision-making could improve resilience even further.

But resilience is a double-edged sword: a system can be resilient even when it’s a bad one. This makes democracy crucial because it not only fosters resilience but also has the best chance of creating a good system that’s worth sustaining. Interestingly, societal collapse often was a path to enable more inclusive government. In many historical examples, collapse led to less dominance hierarchy and more egalitarian societies afterwards. So, in some way societal collapse could be seen as a cultural adaptation to too high inequality and too little inclusivity. Also, as we discussed earlier, debt is an important mechanism to enforce dominance hierarchies, but if your society collapses, this also usually erases all debt and provides the following societies a clean slate on which they can start again.

Modern day collapse

Historically, it looks like societal collapse is less of a problem than you might think. When we look at history, the most brutal and horrible events almost exclusively happened when a new Goliath rises (e.g. the rise of the Mongol Empire or the conquest of the Americas). When groups of humans try to rise to the stop in their own society they often use violence. When they succeed and start conquering their neighbors with their newfound power, it usually gets even more brutal. However, on the other side of the arc of history, in societal collapse we seldom see brutality at that scale. Instead, we see societies that erase their debts, level hierarchies and decentralize, so they can live more egalitarian again.

## Distinguish CP

### Overview---2NC

### Perms

### AT: Guts Doctrine---2NC

#### The Court does not consider itself to be bound by precedent.

HLR 23 – Harvard Law Review Note

Harvard Law Review, The Thrust and Parry of Stare Decisis in the Roberts Court, 137 Harv. L. Rev. 684 (Dec. 2023), https://harvardlawreview.org/print/vol-137/the-thrust-and-parry-of-stare-decisis-in-the-roberts-court/#footnote-ref-8

Professor Karl Llewellyn famously demonstrated that for almost every canon of statutory interpretation, there exists an opposite and equally plausible countercanon.1 Fashioning a fencing analogy, he described each pair of dueling canons as containing a “[t]hrust” and “[p]arry.”2 More than seventy years after Llewellyn’s seminal work, the same dynamic of thrust and parry appears to be operating behind the Supreme Court’s reasoning in a context different from — and potentially more alarming than — statutory interpretation: stare decisis. While one should beware any attempt to reduce the Roberts Court’s jurisprudence into a simplistic arc,3 this Court is undeniably marked by many moments of overturning precedent.4 This Note assembles and structuralizes the various modes of reasoning used by the Justices in either preserving or discarding precedent to demonstrate that stare decisis is not, as some may believe, “a bedrock principle of the rule of law”5 but rather a malleable rhetorical tool.

The raw observation that the Roberts Court has on many occasions flouted stare decisis is not in itself groundbreaking.6

[Footnote 6 *See, e.g.*, Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 Harv. L. Rev. 23, 53 (2022) (“[T]he Roberts Court does not appear to consider itself particularly bound by stare decisis.”).)

#### Empirics.

Howe 25 – Co-founder of SCOTUSblog and primary reporter, served as counsel for Supreme Court cases, previously professor at American University School of Law, J.D. from Georgetown University.

Amy Howe, “Overturning precedent on the Roberts court,” SCOTUSblog, 10/29/2025, https://www.scotusblog.com/2025/10/overturning-precedent-on-the-roberts-court/

And even if the Roberts court has overruled, on average, relatively few precedents, some of the recent cases in which it has done so have been landmark ones, such as Dobbs v. Jackson Women’s Health Organization, in which the court overturned which recognized a constitutional right to an abortion, and Loper Bright Enterprises v. Raimondo, in which the justices struck down the Chevron doctrine, which counseled courts to defer to federal agencies’ interpretation of a statute.

As a general rule, courts apply the doctrine of stare decisis, which literally means “to stand by things decided.” It is the principle that courts should follow their earlier decisions in similar cases – even if they might believe they are wrong – unless there is good reason to do otherwise. The doctrine is intended to promote stability, predictability, a sense of fairness, and public confidence in the courts.

At the same time, the Supreme Court has made clear that stare decisis “is not an inexorable command,” particularly when it comes to the interpretation of the Constitution. “An erroneous constitutional decision can be fixed by amending the Constitution,” Justice Samuel Alito acknowledged in Dobbs, “but our Constitution is notoriously hard to amend.”

In recent decisions that overruled earlier cases, the justices in the majority began their analysis by considering the merits of the question at the center of the dispute. In Dobbs, for example, Alito concluded that “a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.”

In Loper Bright, Chief Justice John Roberts wrote that the Chevron doctrine “defies the command of the” Administrative Procedure Act, the federal law governing administrative agencies, “‘the reviewing court’—not the agency whose action it reviews—is to ‘decide all relevant questions of law’ and ‘interpret . . . statutory provisions.’”

And in another notable decision, Janus v. American Federation of State, County and Municipal Employees, the court overturned Abood v. Detroit Board of Education, a 41-year-old decision holding that government employees who are represented by a union but do not belong to that union can be required to pay a fee to cover the union’s costs to negotiate a contract that applies to all employees. In a 5-4 opinion written by Alito, the majority agreed with the challengers that such “arrangements violate the First Amendment.”

#### That zeros solvency. AND it proves the CP solves better by eliminating a potential motive to overturn.

Roser-Jones 24 – Assistant Professor, The Ohio State University Moritz College of Law

Courtlyn G. Roser-Jones, “The Roberts Court and the Unraveling of Labor Law,” 108 MINN. L. REV. 1407 (February 2024), Nexis

Indeed, it is this conservative judicial activism and commitment to anti-labor decisions where the Lochner Court and the Roberts Court are most alike. However, Cedar Point Nursery also highlights significant differences between the two. While both the Lochner Court and the Roberts Court have applied constitutional theories to undo labor regulation, only the Roberts Court has done so in the face of decades of administrative precedent and constitutional interpretations upholding the NLRA.280

In defense of the Lochner Court, the modern labor scheme was untested, and decades of interwoven Board decisions did not exist when the validity of labor law clashed with the Lochner Court. Furthermore, while the Lochner Court's laissez-faire constitutional values were used to invalidate labor laws, the Court was at least consistent in these values-applying steady freedom of contract principles to a variety of cases over the Lochner Era's thirty-plus years.2 8 1 But the Roberts Court is so committed to invalidating labor laws that it is willing to run roughshod over its own professed interpretive methods and institutional values, and some of the High Court's most seminal decisions to do so. 2 8 2 As such, nods to their decisions being limited to circumstances involving labor, or rather, true applications of precedents despite being utterly transformative in context are perhaps even more institutionally costly than a Lochner Court with steady views on a constitutional landscape contrary to the democratic government branches.

The "nine old men" who made up the Lochner Court were rightly criticized in the 1930s for being out of touch with the changing world and using their own laissez-faire constitutional views to thwart popular reforms. 283 But they were at least consistent-rather, everything around them had changed. The Roberts Court, on the other hand, not only holds views different from a majority of the public's when it comes to labor law, but also compromises its own interpretative theories and popular Court precedents when these do not yield the anti-labor outcomes the Court wants. 284 In this respect, the long-term consequences of the Roberts Court will likely end up being far more significant for labor law than the Lochner Court's, and far more institutionally delegitimizing, too.285

B.UNDOING CONCERTED ACTIVITY PROTECTIONS AND SHIELDING ECONOMIC LOSS After recalibrating the weight given to individual property rights in Cedar Point Nursery, the Court sought out another opportunity to balance these weighted interests against labor rights. Only this time, in Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174,286 the Court had the quintessential protected concerted activity-the "strike"-in its crosshairs. While the number of strikes had been steadily declining in decades prior, Glacier Northwest, Inc. arrived during a wave of headline-grabbing organizing, strikes, and collective bargaining activity that led to historic increases in employee pay and benefits. 287 Glacier Northwest, Inc. involved one of these strikes, this one ending with a Seattle-based concrete company (Glacier Northwest) agreeing to "record-setting" collectively- (describing the problems with a Court that is "out of step with the populace" like that of the 1930s). 284. Cf. id. (noting popularity of left-leaning policies among Americans). 285. See id. (describing "the makings for a serious collision" between the Court and the public). 286. Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 500 P.3d 119 (Wash. 2021), rev'd, 143 S. Ct. 1404 (2023). 287. See Faiz Shakir, America Is in the Midst of a Dramatic Labor Resurgence, NEW REPUBLIC (Oct. 8, 2021), https://newrepublic.com/article/163936/ america -midst-dramatic-labor-resurgence [https://perma.cc/47U8-HEYY] (describing a "renewed breath of labor activism" and the highest approval rating of unions in decades); Max Zahn, Amazon and Starbucks Workers Led a Union Resurgence in 2022. Will It Last?, ABC NEWS (Dec. 22, 2022), https://abcnews .go.com/Business/amazon-starbucks-workers-led-union-resurgence-2022/story? id=95090198 [https://perma.cc/DDGB-LAEU] (discussing a fifty-three percent increase in petitions for union representation and the highest level of public support for unions since 1965). 1473 MINNESOTA LAW REVIEW bargained-for employment terms.288 But the strike's contract victories have since been eclipsed by the strike-related litigation that followed. By overshadowing this labor victory, Glacier Northwest, Inc. was already a win in the eyes of labor opponents. 289 But by the time Glacier Northwest, Inc. arrived at the Supreme Court, the case came with colossal implications for the legal right to strike and the new wave of labor activity in general. The key events at Glacier Northwest began in the summer of 2017, when the company and International Brotherhood of Teamsters Local Union No. 174 (Local 174) began new contract negotiations. 290 Negotiations, however, did not go smoothly, and Local 174 filed a charge with the NLRB alleging Glacier Northwest had refused to bargain in good faith. 29 1 Likewise, on July 22, 2017, members of Local 174 voted to authorize a strike, and the union gave notice to Glacier Northwest that a strike could commence at any time. 292 That time came the morning of August 11, 2017, when fiftyeight employees across three Glacier Northwest locations went on strike. 293 Included in these striking employees were several truck drivers who, when the strike began, were either in the process of having their truck loaded with concrete or had already set out to make deliveries with batched concrete in tow. There was widespread confusion among these drivers about what to do with the ready-made concrete in the trucks when the strike commenced, and drivers took various courses of action. 294 Most truck drivers returned their trucks to Glacier Northwest's facilities with the truck's mixing drum left spinning, so as to prevent the concrete inside from hardening and causing damage to the truck.295 Three drivers returned their trucks and, upon specific direction, dumped their remaining concrete into facility bunkers. 296 Another driver completed all his deliveries before returning to the facility, having tried but been unable to get other instructions from a supervisor on the radio. 297 Another driver brought his loaded truck back to the company facility, turned it off, and left the truck there with the key in the ignition.298 Once the strike began and drivers returned loaded trucks to the facility, Glacier Northwest needed to take quick action to prevent the loaded concrete from hardening in the truck's drums and causing damage.299 With the help of non-striking employees, the company managed to identify all the trucks with concrete inside, offload the mixed concrete into facility bunkers, and prevent any truck damage-but the dumped concrete was destroyed. 300 Within eight days, the parties had agreed to a new contract and the strike was over.301 But after Glacier Northwest sent disciplinary letters to sixteen drivers for failing to deliver their batched concrete during the onset of the August 11th strike, Local 174 amended its NLRB charge to include these letters as alleged interferences in the drivers' protected activity. 30 2 Four months later-rather than first challenging the protective nature of the drivers' activities via the ongoing NLRB's investigation- Glacier Northwest sued Local 174 in state court for the concrete loss and other related damages.30 3 While state lawsuits involving striking activities are generally preempted under the NLRA,304 Glacier Northwest's complaint alleged their claims fell within an exception to Garmon preemption reserved for intentionally violent or tortious acts.30 5 Indeed, the company's short complaint did not mention the words "strike" or "work stoppage" at all.3 0 6 Rather, it alleged a "conspiracy" to "sabotage" its business relationships by the union and its members, and a carefully timed "abandon[ment]" of its property, done with the "malicious" intent of its "ruination and destruction."3 0 7 Relying on this recitation of the facts, the company went on to allege that, even if Local 174's activities did not fall within this limited exception to Garmon preemption for intentionally tortious acts, its claims were still not preempted by the Board.308 Glacier Northwest highlighted the behavior of the truck drivers who returned their full trucks to their facilities and turned them off and, omitting any discussion about the other drivers' activities, alleged this behavior to be so indefensibly far from the reasonable precautions employees must take to protect property from imminent harm during the commencement of a strike that it was not even arguably protected under the NLRA.309 Years of procedural mess would follow, as the same striking event was adjudicated contemporaneously through administrative and Washington State judicial processes. First, the union amended its pending NLRB charge against Glacier Northwest to include their initiation of the litigation as also violative of the Act.3 10 Then Local 174 filed a motion to dismiss Glacier Northwest's lawsuit as preempted by the NLRB.311 After a state trial court granted Local 174's motion to dismiss on preemptive grounds and an appellate court reversed, 312 the Washington Supreme Court reinstated the dismissal of the lawsuit in December 2021.313 In its opinion, the court distinguished "intentional destructions" of property that fell within the exception to Garmon, and those property losses that are the direct result of a work stoppage during a labor dispute. 314 Glacier Northwest's claims being the latter, the court reasoned that they were not excluded from Garmon-lest every strike that was timed strategically to maximize employers' economic losses would fall outside of Garmon's purview.3 15 As for whether employees took reasonable precautions to protect Glacier Northwest's property from foreseeable, imminent harm, the state's highest court left this determination to the Board. 316 Acknowledging the employers' property interests behind the reasonable precautions standard and the interests of striking employees in leveraging the incidental destruction of perishable goods as a bargaining tactic, the court noted that when two competing labor principles are implicated as they were here, "the strike is, at least, arguably protected conduct under section 7."317 About a month after the Washington Supreme Court's decision, the NLRB's Regional Director completed its initial investigation of the union's charge and issued a complaint against Glacier Northwest. 318 Among other things, the agency's complaint asserted that the truck drivers probably had been engaged in arguably protected conduct when they stopped working and took the precautions they did on August 11th.319 But, despite the NLRB's initial investigation giving credence to the lawsuit's preemptive status and providing a fuller picture than Glacier Northwest's complaint of the facts and circumstances on August 11th, the Supreme Court granted Glacier Northwest's certiorari petition in October 2022.320 Regardless of the agency's views, the Court would decide "whether the NLRA preempts Glacier's tort claims alleging that the union intentionally destroyed its property during a labor dispute." 321 Now represented by anti-union juggernaut, Jones Day, Glacier Northwest's Supreme Court briefs and oral argument took issue with the standard the Washington court applied in deciding whether the union's conduct was preempted as arguably protected under the NLRA.322 But the case's unique procedural circumstances also meant that the company needed to convince the Court of this interpretation in a false reality, that false reality being the factual allegations made against the union in Glacier Northwest's own initial complaint. 323 While the NLRB's investigation and complaint had discredited Glacier Northwest's factual allegations of coordinated "sabotage" and the "abandon[ ment]" of trucks without taking any reasonable precautions to protect the company's property, 324 the motion to dismiss stage and appellate reviews accepted the allegations in the complaint as true.325 And while the company had some help directing the Justices to the four corners of their complaint, the elephant in the room-what to do with the agency's subsequent complaint,326 nine-day hearing, and hundreds of pages in post-hearing briefs 327-soon engulfed oral argument.328 So much so, that by its conclusion, some Justices seemed prepared to toss the entire line of Board cases at the center of the procedural mess the Court helped to make. 329 Even more drastic, at least two Justices appeared ready to toss Garmon preemption altogether.330 In light of the more extreme alternatives, when the Court did decide Glacier Northwest, Inc. on June 1, 2023, many proponents of labor law's integrative design heaved a sigh of relief.331 note 300 (quoting the language in Petitioner's Complaint to describe the Union's actions on August 11, 2017). Yes, the union had lost eight to one, 332 but the majority opinion written by Justice Barrett had left intact labor's preemption regime, and the line the Board had drawn between work stoppages timed when the incidental destruction of perishable goods was foreseeable, and work stoppages where employees must take "reasonable precautions" to protect their employer's property from foreseeable, aggravated, and imminent harm.333 Accepting the complaint's allegations as true, Glacier Northwest, Inc.'s fact-specific and narrowly tailored opinion viewed the union's activities as more akin to killing the cow than spoiling the milk,334 or more like stopping a molten iron pour mid-production than stopping mid-production the making of cheese. 335 Rather than getting rid of the Board's delineating line between perishable goods and non-perishable property, Justice Barrett's opinion, if anything, expanded on it. Adding an addendum to the protection of work stoppages when the destruction of perishable products is foreseeable, her majority opinion carved out a caveat for when striking employees "prompt ... the creation of the perishable product."33 6 While this decision is not the disastrous tort damages for work stoppages when the destruction of any product is foreseeable holding Glacier Northwest, Inc. could have been, 337 it is not without consequence. For one, different types of workers do countless different things in relation to perishable products that could be construed as prompting their creation. And now, Glacier Northwest, Inc. is open season for an array of courts and jurisdictions to opine on where the legal limits of all these countless activities are. Particularly, the prompting of perishables standard, or the idea of starting or completing any product production seems an especially grey area for the wave of new organizing activities in (expressing hesitant optimism that the Court had not done away with Garmon altogether). the service, creative, and intellectual industries. 338 After Glacier Northwest, Inc., can graduate students who time their striking activities around finals be liable to a university because, in beginning to teach the semester, they have prompted the production of an entire fourteen week course?33 9 What if they miss grant opportunities because a timed strike begins during the grant application process? Can Starbucks baristas stop work mid-pumpkin spice latte, or does Glacier Northwest, Inc. not apply to de minimis prompts of perishable products however delicious and seasonal they may be? The workers affected by this decision span almost every conceivable industry and occupation. 340 Besides avoiding these inevitable incongruities being precisely the point of the NLRB, it is hard to imagine that riskaverse workers who handle perishable products, or those who live in places where state court judges are hostile to unions, will not have Glacier Northwest Inc.'s four-year litigation in the back of their mind when deciding whether or when to strike. 34 1 Indeed, if employers collectively bargain to lessen the economic harm of a strike, but Glacier Northwest, Inc. also minimizes a strike's economic harms, then some employers may forego collective bargaining.342 But regardless as to whether lawsuits to recover strike-related economic damages are successful in assessing tort liability under Glacier Northwest, Inc.'s new "prompting production" standard, in just allowing a potential lawsuit to impact workers' striking tactics, the Court has already struck the heart of labor law's purposeful design and disrupted the Board's careful balancing of competing interests. 34 3 Speaking of drawn-out litigation and the disproportionate cost it imposes on organized labor interests, Glacier Northwest, Inc., as written, may have another lasting procedural legacy to this effect. An oddity of Glacier Northwest, Inc. was that no one thought the company's initial lawsuit had a chance of succeeding on the merits by the time the case reached the Court for oral argument. Indeed, arguing counsel for Glacier Northwest conceded almost as much, admitting that while the Court must take the facts alleged in the pleadings as true at the motion to dismiss stage, after costly discovery, the Board's proceedings would likely be persuasive evidence for a dismissal at summary judgment. 344 Likewise, if nothing else, Glacier Northwest, Inc. creates an overlapping jurisdiction where an employer who suffers strike-related economic harm can craft such intentional striking activity as an intentional tort.345 Then with an artfully crafted complaint, employers can sustain a lawsuit in state court concurrently with the Board's proceedings for months, if not years. 346 C. DIMINISHING THE BOARD AND LABOR LAW'S UNDERLYING PRINCIPLES Both Glacier Northwest, Inc. and Cedar Point Nursery undergo a significant rebalancing of workers' collective and employers' property interests. But their questioning of labor law's facilitative protections and underlying redistributive principles is perhaps not even the most appropriate headline. Instead, even more concerning about these cases may be that the Court decided to hear them at all. That the Roberts Court appoints itself- instead of Congress or the expert regulatory agency-as the decision-maker on labor policy is the most threatening to our democracy.347 As Justice Jackson highlights in her dissent, a strict preemption regime has defined U.S. labor law for decades. 348 In light of the Board's expertise and the importance of uniform application of labor law's centralized labor regime, federal and state courts are preempted from deciding cases where an activity is arguably subject to Section 7 or Section 8 of the NLRA.349 And although the NLRB is not immune to criticism, nowhere else in labor law has it earned its deference quite like it has in its protection of concerted activity, like the strike, while maintaining to the greatest extent possible individual property interests. 350 Charged with this challenge early on, the Board has answered difficult line-drawing questions concerning sit down strikes, slow-down strikes, intermittent strikes, wildcat strikes, and everything in between.35 1 It has been asked to apply opaque language like "coercive" to secondary concerted activities, while walking the constitutional tightrope that recognizes speech outside of the labor contexts as being the most persuasive to the extent it persuades people into taking actions they wouldn't have otherwise done. 352 One could only imagine the different and conflicting interpretations of labor law's restrictions on secondary concerted activity, had a bunch of different courts-all with their own local procedures and attitudes towards organized laborbeen allowed to opine. Fortunately, uniformity in the law governing industrial relations has embodied the Court's interpretation of labor law's broad preemption doctrine until now. 353 Nevertheless, if the Roberts Court's anti-labor decisions can be consistently reconciled with any value at all, it is with its crusade against the regulatory state. 354 There was no need to hear Glacier Northwest, Inc. The Washington Supreme Court had decided unanimously in the union's favor, there was no split in the circuit courts, and the agency's subsequent complaint provided the Court with plenty of grounds to vacate the judgment below and remand to the lower court's for consideration. 355 So, why take another politically unpopular case that that threatens to erode the Supreme Court's legitimacy in the eyes of a public, if not also to strike another decided blow to the authority of federal agencies? There are "dark clouds" shadowing the Glacier Northwest, Inc. opinion. 356 These clouds are in full view in Justices Gorsuch and Thomas's Glacier Northwest, Inc. concurrence, where they proclaim their willingness to do away with Garmon preemption as soon as the court can get a better case with which to achieve this objective. 357 Hinting at this outcome, lifelong enemy of the administrative state, Justice Gorsuch, asked employer's counsel at oral argument for Glacier Northwest, Inc. "[w]hat's at stake" in allowing state courts, rather than the NLRB, to hear claims against striking workers. 358 Answering the Justice's question, the attorney said, frankly, that Glacier Northwest preferred not to be in a venue "where the agency is the judge, jury, and executioner" of their claims. 359 The overwrought terminology about agencies as executioners reeks of the conservative majority's expressed views of federal agencies, and litigants are catching on.360 [BEGIN FOOTNOTE 360] 360. See West Virginia v. Env’t Prot. Agency, 142 S. Ct. 2587, 2618 (2022) (proclaiming that federal agencies’ regulatory powers “pose a serious threat to individual liberty”). [END FOOTNOTE 360] And, for anyone against the administrative state, the NLRB is an irresistible target. It is the model New Deal administrative agency. An agency where expertise and professionalism, balanced by political accountability and careful institutional design, was thought to yield the best possible governance in a decidedly imperfect and changing world.36 1

Because of the particularly high hopes it had for the Board at the time it was created, Congress vested broad discretion in it for interpreting and administering labor law.36 2 But today, Glacier Northwest, Inc.'s attempt to narrow this discretion highlights how this Court's broad goals of unraveling labor and reigning in federal agencies' power-even when Congress directs this power explicitly to it-are inextricably linked. 36 3 That the deregulatory goal "shifts more power to courts" to apply the NLRA's malleable statutory language in lieu of the Board enables the Roberts Court to have an even more determinative role in the once-democratic labor-policy debate.364

### Solves---2NC

#### The case can be distinguished.

Re 14 – UCLA Law School Assistant Professor.

Richard Re, November 2014, ESSAY: NARROWING PRECEDENT IN THE SUPREME COURT, 114 Colum. L. Rev. 1861

Pick your least-favorite Supreme Court precedent--the one that, in your view, was most wrongly decided--and imagine that you are a Justice. If asked to apply the precedent in a new case, you would probably try to distinguish it. In other words, you would like to conclude that the precedent, when best understood, does not actually apply to the new case before you. But what if you think that the precedent, when best read, does apply to the new case at hand? You would then be faced with an uncomfortable choice. You could overcome your opposition to the precedent and follow it, notwithstanding its wrongness and any resulting injustice. Alternatively, you could overrule the disfavored case, notwithstanding the drastic nature of that action. Yet another option remains. Instead of either following the precedent or overruling it, you could narrow it. That is, you could interpret the precedent in a way that is more limited in scope than what you think is the best available reading. If you took that last route, then the precedent would survive in an altered form. It would remain on the books and valid within a certain domain. But it would have been denied a zone of application that, when best read, it should have had.

#### It's not distortionary.

Walsh 15 – U. Richmond, Associate Professor of Law.

Kevin Walsh, 2/11/15, Richard M. Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861 (2014), courtslaw.jotwell.com/expanding-our-understanding-of-narrowing-precedent/

Re argues that “[l]egitimate narrowing is the decisional-law analogue to the statutory-law canon of constitutional avoidance.” The analogy holds insofar as both techniques exploit ambiguities to constrain the legal force of one source of legal authority (a precedent or a statute) as a way of giving effect to other legal principles (whether found in other cases or the Constitution or some background source of legal principles). But another, and in some circumstances closer, analogy may be holding a statute partially unconstitutional coupled with statutory severance. After all, as Re puts it elsewhere in the essay, narrowing effects “a partial erasure of decisional law.” Following this insight a bit further might lead one to believe that when narrowing ventures beyond strained distinguishing (akin to constitutional avoidance), it becomes partial overruling (akin to partial unconstitutionality plus severance).

One benefit of recognizing the functional equivalence of narrowing and partial overruling in certain circumstances is to highlight what may be an unduly constricted but pervasive misunderstanding of lower-court freedom to narrow Supreme Court precedent. Re’s essay understandably brackets off implications for vertical stare decisis; assessing the legitimacy of narrowing by lower courts presents different and harder issues than horizontal narrowing. But by showing that narrowing is common and often legitimate at the horizontal level, the essay’s taxonomy at least reveals that it is a mistake to preemptively rule out the possibility of all lower-court narrowing simply by affixing to it the label of partial overruling.

To explore what this might mean for vertical stare decisis, it would be illuminating to run through each of the examples of legitimate narrowing that Re discusses at the Supreme Court level and to inquire whether a lower court would likewise have been free to narrow. That is, would the lower court have complied with governing stare decisis norms by narrowing precedent in the way that the Supreme Court did? If the answer for a given case is “yes,” even though the kind of narrowing that the lower court engaged in could easily be understood as an instance of partial overruling (i.e., overruling with respect to a particular set of potential applications), then the principle that lower courts may not anticipatorily overrule an undermined precedent may have a more confined reach than many think. Take, for example, Hein v. Freedom from Religion Foundation, in which the Supreme Court held that the taxpayer standing authorized by Flast was limited to specific legislative appropriations rather than executive action funded by general discretionary appropriations. This narrowing of Flast could be understood as a partial overruling of it. And yet the line adopted by the governing plurality decision is the very line identified and applied by the district court. While the Seventh Circuit reversed this decision (and itself was later reversed in turn), the discussion throughout was about how best to apply the set of cases in the Flast line rather than about whether the district court or court of appeals had violated some norm of vertical stare decisis. And that is as it should be.

The practical fluidity of the conceptual boundaries between narrowing a precedent, partially overruling a precedent, and figuring out the best application of a set of precedents gives rise to a final observation. The customary way of thinking about how particular judicial decisions change the content of the law is in terms of their effect on particular legal materials like a precedent or a statute, and usually in terms of subtraction. Narrowing Precedent sharpens this way of thinking. But using Re’s conceptual tools can reveal a different frame altogether, one that is consistent with Re’s even while describing changes in the content of the law in a precisely opposite manner.

Re’s central concept is the idea of the best reading of a precedent. In his taxonomy, the mirror image of narrowing (“not applying a precedent, even though the precedent is best read to apply”) is extending (“applying a precedent where it is not best read to apply”). The reason that both narrowing and extending can be legitimate practices is that precedents are never best read in isolation from all the other relevant legal materials in a case. The inquiry in every case is what the court has added or should add to the law going forward; only sometimes does this also involve the metaphorical paring back or cutting out of some particular source of law. And even then, there is no conceptual or legal need to describe that removal in terms of excision rather than displacement. For instance, the narrowing of Flast is simultaneously the extension of the principles and cases that countervail against taxpayer standing.

#### It avoids fragmentation.

Re 14 – UCLA Law School Assistant Professor.

Richard Re, November 2014, ESSAY: NARROWING PRECEDENT IN THE SUPREME COURT, 114 Colum. L. Rev. 1861

Practicality has distinctive implications in the Supreme Court. When lower courts assume the authority to narrow higher-court precedents, several severe practicality problems can result. Perhaps most importantly, different lower courts are likely to narrow in different ways, yielding fragmentation of the doctrinal landscape and all the normal difficulties of national disuniformity. In addition, each higher-court precedent would be subject to frequent and nearly immediate narrowing by a multitude of lower courts, thereby undermining public reliance on higher-court rulings. But these difficulties do not arise when the Court narrows. Because its decisions to revisit precedent necessarily sweep in the entire country, the Court can narrow without spawning doctrinal fragmentation. And, as a single body that hears only several dozen cases per year, the Court is unlikely to narrow at a rate that would jeopardize reliance interests.

Moreover, practicality is generally a less pressing concern in connection with narrowing, as compared with overruling. For one thing, narrowing typically preserves significant aspects of the doctrinal status quo ante n75 and so is less likely than overruling to disrupt precedent-based expectations. n76 For another thing, the Court itself can more easily reverse course after narrowing, since a decision to narrow tends to signal that a doctrinal area is in flux. n77 Most importantly, narrowing creates a window for responsive action by private parties, political branches, and courts. n78 [\*1879] By problematizing a disputed area of law, an act of narrowing can catalyze new research, reflection, and creativity in the affected jurisprudential area, while enhancing the Court's own flexibility to act. In all these respects, narrowing can offer a fruitful form of judicial minimalism. n79

## Injunctions

## Adv 2

### They Don’t Solve---2NC

#### If it’s just norms and info – that fails

Budow 21 – Labor and Employment Attorney, Kauff McGuire & Margolis LLP, and Adjunct Professor of Law, Fordham University School of Law

Scott A. Budow, “How the Roberts Court Has Changed Labor and Employment Law,” Illinois Law Review Online, September 12, 2021, https://illinoislawreview.org/online/how-the-roberts-court-has-changed-labor-and-employment-law/.

Supreme Court justices collectively cast 134 votes in the 15 cases discussed in this article. Those cases spanned civil procedure, constitutional law, and statutory interpretation. There is no unifying judicial philosophy—such as originalism or textualism123—that neatly explains why conservative justices would reliably vote in one manner and liberal justices in the opposite manner for these cases. Yet, if all one knew was that conservative justices favor employers and liberal justices favor workers, that person would have correctly predicted 132 of the 134 votes cast (98.5%).124

[Footnote 125] There is no such thing as a judicial philosophy that explicitly favors workers or employers. See e.g., Noah Feldman, Democrats’ Misguided Argument Against Gorsuch, Bloomberg (Mar. 15, 2017, 7:30 AM), https://www.bloomberg.com/opinion/articles/2017-03-15/democrats-misguided-argument-against-gorsuch [https://perma.cc/WQ6V-KBWV] (“But the thing is, siding with workers against employers isn’t a jurisprudential position. It’s a political stance.”). [End FN 125] If judicial philosophy rather than political motivation explained the underlying dynamics, and we assume that judicial philosophy in the abstract is no more likely to favor employers than workers,125 then the Court’s collective votes are the equivalent of flipping a coin 134 times and getting heads 132 times. Statistically, this is virtually impossible, occurring just 1 out of every 2.4 x 10^21 times *[\*ed: this is 1 in 2.4 sextillion, or 1 in 2.4 thousand trillion]*. Even if one assumes that the conservative wing is one ideological bloc and the liberal wing another ideological bloc, rather than a collection of individual votes, the numbers are still startling. In the 15 cases noted here, the blocs voted in unison as one would expect 29 of 30 times. Using the coin flip analogy, this should occur 1 in every 34.6 million times.

Justices Souter and Stevens often voted with the liberal wing despite being appointed by Republican presidents. Focusing on the 11 cases mentioned in this article since they retired, one could have correctly predicted 96 of 98 votes based on the party that nominated the justice (with Democrats favoring workers and Republicans favoring employers), which is also virtually impossible, occurring just 1 out of every 6.53 x 10^22 times. Alternatively, analyzing ideological blocs reaches substantially the same conclusion: the Democratic-appointed bloc voted for workers in each of the 11 cases, and the Republican-appointed bloc voted for employers in 10 of the 11 cases. Using the coin flip analogy, this should occur 1 in every 182,361 times.

Indeed, other studies analyzing voting patterns have demonstrated that each Republican appointed justice is “more favorable to business” than each Democratic appointed justice,126 which would be a remarkable coincidence if each justice was truly motivated by judicial philosophy.127

Justices on either side of the divide of the Roberts Court may find it both individually and institutionally expedient to claim that they are merely applying an objective judicial philosophy. At least on labor and employment law, that theory does not appear explanatory. Instead, the sizable percentage of the public that believes that the Court is driven by politics128 may have a point, despite what the justices on that Court may claim.

The result of that pattern is a legal playing field that significantly favors employers relative to the rules that existed prior to 2005. Further, with the confirmation of Justice Coney Barrett, the Court now has six conservative justices, none of whom appear close to retirement based on their age.129 As a result, the Court is likely to continue issuing decisions, perhaps for decades to come, consistent with its recent practice.

### Rant---2NC

### !D---Cyber---2NC

### !D---Fraud---2NC

### !D---Biotech---2NC