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The Supreme Court's 2021–22 Term in Review

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Introduction

The 2021–22 term became one of the most momentous in the Supreme Court's 233-year history. The Court decided blockbuster cases on a wide range of issues such as abortion, gun rights, religious freedom, and climate change. For the first time in history, a draft opinion in a groundbreaking case leaked to the public. Dissatisfaction with the Court's decisions led to protesters showing up at Justices' homes in some instances to intimidate them. And Justice Stephen Breyer announced his retirement, paving the way for the historic nomination (and eventual confirmation) of Justice Ketanji Brown Jackson as his replacement.

The sixty-six cases resolved in the 2021–22 term included significant decisions affecting the workplace as well as other vital aspects of everyday life.[1] This term's labor and employment cases addressed distinct yet sweeping issues ranging from the COVID-19 vaccine mandates to mandatory arbitration. The Court considered complex constitutional questions spanning topics from sovereign immunity to the ostensible clash between the Free Exercise and the Establishment Clauses in the First Amendment. And the decisions provided practical guidance to both employers and employees across a broad spectrum of workplace benefits issues involving health plans, workers' compensation laws, and pension and retirement payments.

In the 2021–22 term, the number of unanimous decisions declined sharply compared with past years. Majority-making coalitions made up only of "conservative" Justices increased, as did the dissents issued by the "liberal" Justices.[2] Perhaps relatedly, polls conducted over this

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1. While some of the Court's other opinions published this term could affect workplace laws and policies, this article focuses only on cases raising a question directly implicating a labor and employment statute or rule.

2. *See* Angie Gou, Ellena Erskine & James Romoser, SCOTUSBlog, Stat Pack for the Supreme Court's 2021–22 Term (2022), https://www.scotusblog.com/wp-content

time period revealed a decrease in public confidence in the Court's ability to issue apolitical opinions—a development that could have lasting ramifications in homes and workplaces across the country.[3]

I. COVID-19 Vaccines—To Mandate or Not to Mandate

Three Supreme Court cases decided in the 2021–22 term involved the Biden administration's attempts to address the COVID-19 pandemic through vaccine-related mandates. These efforts were met with mixed success.

In the first case, *Biden v. Missouri*, the Court considered whether the Department of Health and Human Services (HHS) could enforce an interim final rule requiring that healthcare staff at facilities participating in federal Medicare and Medicaid programs be fully vaccinated against COVID-19 unless they qualify for a medical or religious exemption.[4] HHS issued the rule in November 2021 after finding that such vaccinations were "necessary for the health and safety of individuals to whom care and services are furnished."[5] But two federal district courts—in Missouri and Louisiana—put the mandate on hold.

In the second case, *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, the Court pondered whether the Department of Labor (DOL) could enforce an emergency temporary standard requiring that employers with at least 100 employees ensure that their workforces were fully vaccinated against COVID-19 or show a weekly negative test and wear masks while at work.[6] DOL issued the standard in November 2021 arguing that it was necessary to protect employees from grave danger resulting from the pandemic.[7] Many states, businesses, and non-profit organizations initially challenged DOL's standard in federal courts of appeals across the country. After the U.S. Court of Appeals for the Fifth Circuit temporarily put the mandate on hold, the challenges were

/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/527CS3CP]; Kalvis Golde, *In Barrett's First Term, Conservative Majority Is Dominant but Divided*, SCOTUSBlog (July 2, 2021, 6:37 PM), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided [https://perma.cc/2AQ87ED3].

3. Amanda Savage, *Americans' Respect for the Supreme Court Has Dipped. That Might Affect the Justices' Decisions This Term*, Wash. Post (Oct. 4, 2021), https://www.washingtonpost.com/politics/2021/10/04/americans-respect-supreme-court-has-dipped-that-might-affect-justices-decisions-this-term [https://perma.cc/R8SH-YUPN]; Carlie Porterfield, *Public Confidence in Supreme Court Sinks to 25%, Poll Says*, Forbes (June 23, 2022, 6:05 PM EDT), https://www.forbes.com/sites/carlieporterfield/2022/06/23/public-confidence-in-supreme-court-sinks-to-25-poll-says [https://perma.cc/LUW2-N55T].

4. Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam).

5. *Id*. at 651.

6. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam).

7. *Id*. at 668 (Gorsuch, J., concurring).

consolidated in the U.S. Court of Appeals for the Sixth Circuit, which reinstated DOL's standard.

Both cases came to the Supreme Court in December 2021 via emergency-stay appeals.[8] The Court opted to expedite the actions and held oral argument on whether the vaccine mandates could remain in place while the challenges proceeded in the lower courts. After hearing nearly four hours of arguments on the cases, the Court issued a pair of unsigned opinions just six days later, on January 13, 2022.

In *Biden v. Missouri*, the Court held in a per curiam opinion that HHS was authorized to enforce the rule requiring healthcare workers be vaccinated against COVID-19. In reaching its decision, the Court emphasized that one of HHS's core functions is "to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety."[9] To do so, HHS has routinely required those providers to comply with various conditions to receive federal funding.[10] Finding that "the COVID-19 virus can spread rapidly among healthcare workers and from them to patients . . . [who] are often elderly, disabled, or otherwise in poor health," the Court ruled that HHS determined that a vaccine mandate was "necessary to promote and protect patient health and safety in the face of the ongoing pandemic."[11] Such a rule, the Court found, "fits neatly within the language of the statute" and the authority given to HHS by Congress.[12]

Justice Clarence Thomas authored a dissenting opinion joined by Justices Samuel Alito, Neil Gorsuch, and Amy Coney Barrett. After concluding that the Biden administration failed to make "a strong showing that the hodgepodge of provisions authorizes a nationwide vaccine mandate," Justice Thomas asserted that HHS lacked the congressional authority to enforce the vaccine mandate.[13] Justice Alito also filed a dissenting opinion joined by Justices Thomas, Gorsuch, and Barrett. Building on Justice Thomas's opinion, Justice Alito further reasoned that even if the Biden administration had the authority to require the emergency vaccine mandate, it was improper because HHS failed to "comply with the commonsense measure of seeking public input" through established and routine notice-and-comment procedures.[14]

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8. Emergency stays or applications are filed with a particular Justice based on the federal judicial circuit in which the matter is litigated. SUP. CT. R. 22. The assigned "circuit" Justice may act on an application alone or refer it to the full Court for consideration. *Id.* R. 22–23. If the full Court acts on an application, five Justices must agree for the Court to grant a stay. *Id.* R. 23.

9. *Biden*, 142 S. Ct. at 650.

10. *Id*. at 650–51, 653.

11. *Id*. at 651–52 (internal quotations omitted).

12. *Id*. at 652.

13. *Id*. at 656 (Thomas, J., dissenting).

14. *Id*. at 659 (Alito, J., dissenting).

The Biden administration's policy approach did not fare as well in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*. Describing DOL's vaccine-or-test mandate as a "significant encroachment into the lives—and health—of a vast number of employees," the Court asserted that Congress must speak clearly when "authorizing an agency to exercise powers of vast economic and political significance."[15] Here, according to the majority, Congress did not.[16] The Court found that although "COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most."[17] And while DOL may "set workplace safety standards," it may not issue "broad public health measures."[18]

In a separate concurring opinion, Justice Gorsuch (joined by Justices Thomas and Alito) posited that the vaccine mandate was improper under the "major questions doctrine" because Congress did not clearly indicate its intention to assign to DOL—or any federal agency—the authority to issue a vaccine mandate."[19]

Justices Breyer, Sonia Sotomayor, and Elena Kagan filed a joint dissenting opinion, finding that DOL had already been granted sufficient authority by Congress to issue the vaccine mandate.[20] Relying on DOL's substantial evidence that COVID-19 presented a "grave danger to millions of employees," the dissenting Justices found that the vaccine mandate was "necessary" to address the dangers of the "new hazard."[21] They also questioned the Court's decision to "displace the judgment of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions."[22]

The third case, *Austin v. United States Navy Seals*, involved the Biden administration's emergency application for a partial stay of a federal district court judge's ruling in a case challenging the Navy's

15. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022).

16. *Id*.

17. *Id*.

18. *Id*. DOL officially withdrew the emergency temporary standard, effective January 26, 2022. 87 Fed. Reg. 3928 (2022). On remand, the Sixth Circuit dismissed the case as moot on February 18, 2022. Order at 2, *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccine and Testing*, 86 Fed. Reg. 61,402, 21 F.4th 357 (6th Cir. 2021) (No. 21-7000).

19. *Id*. at 667–68 (Gorsuch, J., concurring). Interestingly, the Court invoked the "major questions doctrine" two additional times this term—over dissents by the liberal bloc—to limit federal agency power. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (finding that Centers for Disease Control and Prevention exceeded its authority in issuing nationwide moratorium on evictions of tenants living in counties experiencing high levels of COVID-19 transmission); West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607–09 (2022) (holding that Congress did not give Environmental Protection Agency authority to devise carbon emissions caps related to climate change).

20. *Id*. at 670 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

21. *Id*. at 672.

22. *Id*. at 676.

vaccine mandate for its service members.[23] In a one-paragraph order, the Court put the judge's order on hold insofar as it forbade the Navy from making changes to deployment, assignment, and other operational decisions of the Navy's elite special forces community.[24] Justice Brett Kavanaugh issued a concurring opinion in which he expressed his agreement, stating simply that "the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces."[25]

Justice Alito penned a ten-page dissenting opinion, joined by Justice Gorsuch, expressing concern that the Court's order would give the Navy "*carte blanche* to warehouse respondents for the duration of the appellate process, which may take years."[26] Professing to be "wary . . . about judicial interference with sensitive military decision making," Justice Alito indicated that he would limit the order to "the selection of the Special Warfare service members who are sent on missions where there is a special need to minimize the risk that the illness of a member due to COVID-19 might jeopardize the success of the mission or the safety of the team members."[27] While not authoring a dissenting opinion, Justice Thomas simply stated that he would deny the partial stay application.[28]

Taken together, these pandemic-related cases shed light on the Court's views regarding the scope and limits of federal agency actions and authority. For example, the Court explained that if DOL expects its workplace-related COVID-19 safety measures to be upheld, the regulator must narrowly tailor its mandates to specific hazards in certain jobs. Second, the Court's decisions clarify that broader pandemic-related mandates—whether they relate to vaccines or testing—must come from Congress or the states, absent clear statutory language that grants a federal agency the ability to issue such directives. The evolution and application of the "major questions doctrine," in particular, portend an ongoing churn in administrative law.

II. The Evolving Jurisprudence of Mandatory Arbitration

In the 2021–22 term, the Supreme Court focused on mandatory arbitration once again, issuing five decisions on the topic. Three of these rulings dealt with workplace disputes. While two of the cases resulted in unanimous decisions on arguably narrow interpretations of the Federal Arbitration Act of 1925 (FAA), the third case delivered a fractured

23. Austin v. U.S. Navy Seals, 142 S. Ct. 1301 (2022).
24. *Id*. at 1302.
25. *Id*. at 1302 (Kavanaugh, J., concurring).
26. *Id*. at 1304 (Alito, J., dissenting).
27. *Id*. at 1306.
28. *Id*. at 1301 (Thomas, J., dissenting).

opinion that could have broader ramifications for both employers and employees.[29]

In *Morgan v. Sundance, Inc.*, Robyn Morgan sued Sundance, her employer and a Taco Bell franchisee, for unpaid overtime wages allegedly owed to her and other similarly situated employees.[30] For months, Sundance defended against the collective action lawsuit "as if no arbitration agreement existed."[31] It moved to dismiss the case, answered the complaint and asserted defenses (but none mentioning arbitration), and even engaged in joint mediation.[32] And then, nearly eight months after the suit's filing, Sundance moved to compel individual arbitration.[33] Morgan opposed the motion, alleging that Sundance had waived its right to that forum.

The Supreme Court posed the question before it as whether "the defendant's request to switch to arbitration [has] come too late?"[34] The lower courts in the case applied precedent from the U.S. Court of Appeals for the Eighth Circuit to decide the waiver issue. Under that precedent, a party can only be found to have waived its contractual right to arbitration if it "prejudiced the other party by its inconsistent actions."[35] Writing for the unanimous Court, Justice Kagan concluded that the appellate court was "wrong" to require such prejudice to show waiver in the arbitration context.[36] The FAA's policy favoring arbitration "does not authorize federal courts to invent special, arbitration-preferring rules."[37] Accordingly, the Court instructed the Eighth Circuit on remand to apply "the usual federal procedural rules, including any rules related to a motion's timeliness" to the defendant's motion to compel arbitration in this case.[38]

The next case, *Southwest Airlines Co. v. Saxon*, also dealt with allegations of unpaid overtime wages.[39] Latrice Saxon, an airline ramp supervisor, filed suit arguing that her employer Southwest Airlines had failed to pay overtime wages to her and a class of airline ramp supervisors.[40] Saxon's work frequently required her to load and unload baggage, air mail, and commercial cargo on and off airplanes that travel

29. The FAA generally provides for the judicial facilitation of private disputes through arbitration. *See* 9 U.S.C. §§ 1–16.

30. Morgan v. Sundance, 142 S. Ct. 1708, 1709 (2022).

31. *Id*. at 1711.

32. *Id*.

33. *Id*.

34. *Id*.

35. *Id*. at 1712. Nine circuits have invoked the strong federal policy (embodied by the FAA) favoring arbitration in support of an arbitration-specific waiver rule demanding a showing of prejudice; two circuits have rejected that rule. *Id*.

36. *Id*. at 1712–13.

37. *Id*. at 1713. "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id*.

38. *Id*. at 1714.

39. Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1783 (2022).

40. *Id*. at 1787.

across the country.[41] Southwest moved to dismiss Saxon's lawsuit based on the arbitration agreement contained in her employment contract.[42] Opposing that motion, Saxon responded that airline ramp supervisors, like her, comprise a "class of workers engaged in foreign or interstate commerce" and, thus, were exempt from the FAA's coverage.[43]

Siding with Saxon, the Court unanimously held that airline ramp supervisors like her fell into the FAA's transportation worker exemption.[44] Authoring the opinion for the Court, Justice Thomas analyzed the FAA's exemption language using its "ordinary, contemporary, and common meaning."[45] After finding that Saxon belonged to a "class of workers" who physically load and unload cargo on and off airplanes, the Court evaluated whether that class was "engaged in foreign or interstate commerce."[46] Relying in part on decisions issued close to when the FAA was enacted in the 1920s, the Court reasoned that cargo loading and unloading has long been understood to be "intimately involved" with the interstate transit of such cargo.[47] In addition, Justice Thomas observed that the FAA's transportation worker exemption's reference to "wharfage" serves as further evidence that Congress saw workers who load or unload cargo—whether on ships docked at a wharf or on airplanes parked on a tarmac—as engaged in matters of "foreign or interstate commerce."[48]

Viking River Cruises, Inc. v. Moriana, the final arbitration case of the term, was less straightforward.[49] Angie Moriana filed a state court action against her employer Viking River Cruises under California's

41. *Id*.

42. *Id*.

43. *Id*. Specifically, the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id*. (citing 9 U.S.C. § 1). This is sometimes referred to as the FAA's transportation worker exemption.

44. *Id*. at 1793. Justice Barrett took no part in the consideration or decision of the case.

45. *Id*. at 1788.

46. *Id*. at 1789. Justice Thomas rejected Saxon's contention that the relevant "class of workers" should include virtually all employees in the airline industry because other categories in the FAA's transportation worker exemption, such as "seamen," did not include the entire maritime industry, but only those who "work on board a vessel." *Id*. at 1790–91. He also rejected Southwest's three arguments asserting that the class should be limited to only those workers who accompany the transported goods. First, Justice Thomas found that another category in the FAA's exemption—"railroad employees"—was not restricted to workers who traveled across state lines. *Id*. at 1791–92. Second, he dismissed as flawed the airline's analogies to other categories of workers more distantly related to interstate commerce. *Id*. at 1792. And last, Justice Thomas concluded that there was no reason to elevate the FAA's generally pro-arbitration purpose over the actual words Congress chose to exclude cargo loaders from the FAA's reach. *Id*. at 1792–93.

47. *Id*. at 1790.

48. *Id*.

49. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022).

Private Attorneys General Act (PAGA).[50] In the lawsuit, Moriana alleged wage-and-hour violations of the California Labor Code sustained by her as well as other Viking employees.[51] Viking moved to compel arbitration of Moriana's individual employment claim and to dismiss her PAGA claims involving other Viking employees.[52] Notably, Moriana's arbitration agreement contained a "class action waiver" providing that she could not bring any dispute as a class, collective, or representative action under PAGA. It also contained a severability clause stating that if aspects of the waiver were found unlawful, any remaining valid portions would be "enforced in arbitration."[53]

Under PAGA, individuals may initiate an action against a former employer for alleged state labor violations affecting them as well as "other current or former employees" to obtain civil penalties that previously could have been recovered only by the state.[54] California precedent holds that a PAGA suit is a "representative action" where the plaintiff may sue as an agent or "private attorney general" of the state.[55]

Relying on state law precedent, including *Iskanian v. CLS Transportation Los Angeles, LLC*, the California courts denied Viking's motion to compel arbitration of Moriana's individual claim and dismiss her PAGA claims, holding that "categorical waivers of PAGA standing are contrary to state policy."[56] The courts also found that "PAGA claims cannot be split" into arbitrable individual claims and non-arbitrable representative claims.[57] The Supreme Court granted certiorari to decide whether the state courts erred in reaching these conclusions.

In an 8–1 opinion authored by Justice Alito, the Court addressed these two discrete lower court arbitration holdings as they relate to the FAA. First, the majority found that the FAA does *not* preempt *Iskanian*'s prohibition on wholesale waivers of PAGA claims.[58] Rejecting both parties' arguments, the Court stated that "[n]othing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals."[59] The majority acknowledged that non-class representative actions where a single agent litigates on behalf of a single principal necessarily depart from the strict norm of bilateral dispute resolution (a norm that Viking urged

50. *Id*. at 1916.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*. at 1914.
55. *Id*.
56. *Id*. at 1916 (citing Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 149, 151 (Cal. 2014)).
57. *Id*.
58. *Id*. at 1922.
59. *Id*.

should be the rule).[60] Nonetheless, as the Court reasoned, the Court has "never held that the FAA imposes a duty on states to render all forms of representative standing waivable by contract" or that such suits "are inconsistent with the norm of bilateral arbitration."[61] The Court concluded that "nothing in our precedent suggests that, in enacting the FAA, Congress intended to require states to reshape their agency law to ensure that parties will never have to arbitrate in a proceeding that deviates from bilateral arbitration in the strictest sense."[62]

At the same time, the Court held that the FAA *does* preempt *Iskanian*'s rule insofar as that California precedent precludes division of PAGA actions into individual and non-individual claims through an arbitration agreement.[63] While acknowledging that Congress adopted the FAA "in response to judicial hostility to arbitration," the Court honed in on the "equal-treatment principle," which may be used to preempt "any state rule discriminating on its face against arbitration."[64] Here, PAGA permits a party "to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate."[65] The Court determined that this built-in joinder mechanism in the arbitration context conflicts with the FAA.[66] Indeed, *Iskanian*'s prohibition on the "contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine the issues subject to arbitration and the rules by which they will arbitrate, and does so in a way that violates the fundamental principle that arbitration is a matter of consent."[67] According to the Court, *Iskanian*'s "indivisibility rule effectively coerces parties to opt for a judicial forum rather than forgo[ing] the procedural rigor and appellate review of the courts to realize the benefits of private dispute resolution."[68]

Based on the Court's holding, Viking was entitled to compel arbitration of Moriana's individual claim, which left open only the question of what to do with her PAGA claims on behalf of other employees. On that issue, the Court noted that "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual has

60. *Id*. at 1921. Viking posited that an arbitration proceeding is "bilateral" only if it involves two and only two parties and is "conducted by and on behalf of the individual named parties only." *Id*. Disagreeing, the Court noted myriad examples of non-class representative actions in which a single agent litigates on behalf of a single principal, including "shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons." *Id*. at 1922.

61. *Id*.

62. *Id*. at 1923 (internal quotations omitted).

63. *Id*.

64. *Id*. at 1917.

65. *Id*. at 1923.

66. *Id*. at 1924.

67. *Id*. at 1923 (internal quotations and citations omitted).

68. *Id*. at 1924 (internal quotations omitted).

been committed to a separate [arbitration] proceeding."[69] And under the Court's understanding of PAGA's standing requirement, a plaintiff has standing to maintain non-individual PAGA claims in an action "only by virtue of also maintaining an individual claim in that action."[70] As a result, the Court found that "Moriana lacks standing to continue to maintain her non-individual claims in court, and the correct course of action is to dismiss her remaining claims."[71]

Justices Sotomayor and Barrett filed separate concurrences. Justice Sotomayor agreed with all of Justice Alito's opinion and wrote to explain that she especially approved of the discussion in Part II regarding the "important limitations on the preemptive effect of the . . . FAA" and invited California to "have the last word" through the courts or the legislature.[72] Justice Barrett, on the other hand, joined Part III of the opinion only and thought it "unnecessary to . . . address[] disputed state law questions as well as arguments not pressed or passed upon in this case."[73]

Justice Thomas was the lone dissenter. Maintaining the view that the FAA does not apply to state court proceedings, he would find that "the FAA does not require California courts to enforce an arbitration agreement that forbids an employee to invoke the state's [PAGA]."[74]

Collectively, these cases underscore once again the ongoing central role that arbitration plays in our legal system to resolve workplace disputes. The decisions also suggest that, while the Court may adhere to precedent as it continues to shape arbitration law, it also may seek to ground more cases in the FAA's statutory text rather than in a more general policy favoring arbitration.

III. State Sovereign Immunity—"Sacrifice . . . for the Good of the Common Defense"

In *Torres v. Texas Department of Public Safety*, the Supreme Court considered whether states have waived their sovereign immunity to private suits for damages under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[75] While serving as an Army Reservist in Iraq, Le Roy Torres "was exposed to toxic burn pits" and "returned home with constructive bronchitis" that "left him unable to

69. *Id*. at 1925.
70. *Id*.
71. *Id*.
72. *Id*. at 1925–26 (Sotomayor, J., concurring).
73. *Id*. at 1926 (Barrett, J., concurring in part and concurring in the judgment, with whom Kavanaugh, J. joins, and with whom Roberts, C.J. joins except as to the footnote).
74. *Id*. (Thomas, J., dissenting).
75. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455 (2022). USERRA safeguards servicemembers' rights to return to their civilian jobs after military service and not be harmed because of their present, past, or future military service. *See* 32 U.S.C. §§ 4301–4335.

work at his old job as a state trooper."[76] After Texas refused to accommodate Torres's request for reemployment, he filed suit in state court alleging that Texas had violated USERRA.[77] Invoking sovereign immunity, Texas moved to dismiss Torres's lawsuit. After a state trial court denied the motion, a state intermediate appellate court reversed, finding that Congress could not authorize private suits against nonconsenting states in this context.[78]

After the state intermediate appellate court's decision in this case, the Supreme Court decided *PennEast Pipeline Co. v. New Jersey*, where it recognized that states had waived sovereign immunity as to the exercise of the federal eminent domain power under the structure of the Constitution pursuant to the "plan of the Convention."[79] The Court then granted Torres's petition for certiorari to decide whether, in light of the intervening *PennEast* decision, "USERRA's damages remedy against state employers is constitutional."[80]

In a 5–4 decision authored by Justice Breyer, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Kavanaugh, the Court held that states had waived sovereign immunity to private suits for damages under USERRA.[81] According to the majority, Congress enacted USERRA pursuant to the nation's war powers in Article I of the Constitution. Relying on the legal analysis in *PennEast*, the Court reasoned that states—upon entering the Union—had "agreed to sacrifice their sovereign immunity for the good of the common defense" and yield to federal policy to build and keep a national military.[82] Building on this framework, the Court found that USERRA's legislative history recognizes a veteran's "right to return to civilian employment without adverse effect on . . . career progress" with a federal, state, or private employer, and authorizing suits if any of those employers refuse to employ them.[83] Citing USERRA's clear statutory language, the Court held that Congress used its federal power "to authorize suits against state employers" for damages.[84]

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76. *Torres*, 142 S. Ct. at 2461.
77. *Id*.
78. *Id*.
79. *Id*. (citing PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2258 (2021)).
80. *Id*.
81. *Id*. at 2460. Before this decision, sovereign immunity—either by statute, case law, or both—had been recognized as a basis for blocking USERRA lawsuits against nineteen states (Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Kentucky, Maine, Massachusetts, Michigan, Nevada, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, West Virginia, and Wyoming).
82. *Id*. at 2460, 2469. Relying on *PennEast*, the Court found that "the states ultimately ratified the Constitution knowing that their sovereignty would give way to the national military policy." *Id*. at 2464.
83. *Id*. at 2460–61 (citing H.R. Rep. No. 105-448, at 2 (1998)).
84. *Id*. at 2466.

Justice Kagan concurred in the majority opinion, noting that the Court's "sovereign immunity decisions have not followed a straight line."[85] Finding that "the war powers . . . were complete in themselves" and "given by the States, entirely and exclusively, to the Federal Government," she agreed that the states had "waived their sovereign immunity to any suit Congress authorized under the war powers."[86]

Justice Thomas filed a dissenting opinion, joined by Justices Alito, Gorsuch, and Barrett, reasoning that the issue in question had already been decided by another case, *Alden v. Maine*.[87] Rejecting the *PennEast* legal analysis, he believed that the *Alden* decision better demonstrated how the states "did not implicitly consent to private damages actions," filed in either federal or state court, "whether authorized by Congress['s] war powers or any other Article I power."[88]

The *Torres* decision is significant in the complex jurisprudence of sovereign immunity. Under Chief Justice William Rehnquist, the Court often sought to return power to the states at the expense of the federal government. During his tenure, the Court issued several "new federalism" decisions preventing individual damages suits against states under several federal labor and employment laws.[89] While the Court has generally adopted a standard of limiting waivers of state sovereign immunity, *Torres* demonstrates a growing trend that, under Chief Justice Roberts, the Court may be more willing to allow exceptions to this rule.[90]

IV. Faith, Football, and the First Amendment

In the last week of the 2021–22 term, the Supreme Court issued two decisions about religion and schools. Both dealt with complex and sometimes confusing First Amendment jurisprudence and were decided along the same 6–3 ideological lines; one squarely dealt with employment.[91]

In *Kennedy v. Bremerton School District*, the Court considered the ostensible tension between the Free Exercise and the Establishment Clauses in the First Amendment.[92] Joseph Kennedy, a public high school football coach, prayed on bended knee on the football field's fifty-yard

85. *Id*. at 2469 (Kagan, J., concurring).
86. *Id*.
87. *Id*. at 2470 (Thomas, J., dissenting) (citing Alden v. Maine, 527 U.S. 706 (1999)).
88. *Id*.
89. *See* Alden v. Maine, 527 U.S. 706, 759–60 (1999) (overtime pay); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000) (age discrimination); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (disability discrimination).
90. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) (bankruptcy); PennEast Pipeline Co. v. New Jersey, 1414 S. Ct. 2244, 2263 (2021) (eminent domain).
91. In the other case, *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022), the Court struck down a Maine state law that banned the use of public funds to enable students to attend a private school that provides religious instruction.
92. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

line after each game.[93] Sometimes he prayed alone; other times student players joined him.[94] His employer, the Bremerton School District, asked that he discontinue the practice to avoid the perception that the school was endorsing religion and to prevent the school from running afoul of the Establishment Clause.[95] Kennedy refused, indicating that his religious beliefs compelled him to offer post-game prayers on the football field.[96] Bremerton placed Kennedy on paid administrative leave and then declined to renew his employment contract the following season.[97]

Kennedy, a public employee, sued Bremerton for violating his rights under the Free Speech and Free Exercise Clauses in the First Amendment. On the Free Speech claim, both courts found that Kennedy's speech qualified as "government [or public] rather than private speech" given the timing and location of his prayers at the public school's football games.[98] As such, it was not protected by the First Amendment. Even if Kennedy's speech were private in nature—and thus protected under the First Amendment—the lower courts held that Bremerton had permissibly suppressed it to avoid violating the Establishment Clause by arguably endorsing Kennedy's religious speech. Relying on *Lemon v. Kurtzman* and its progeny for the proposition that "the Establishment Clause is implicated whenever a hypothetical reasonable observer could conclude the government endorses religion," the district court found for Bremerton, and the U.S. Court of Appeals for the Ninth Circuit affirmed.[99] For similar reasons, both courts rejected Kennedy's Free Exercise claim. Specifically, they found that, even if Bremerton's actions restricting Kennedy's sincere religious exercise were not neutral or generally applicable, it had pursued a narrowly tailored approach of restricting his prayers at the public school's football

93. *Id*. at 2416.
94. *Id*.
95. *Id*. at 2416–17.
96. *Id*. at 2417.
97. *Id*. at 2418–19.
98. *Id*. at 2420. Under the Court's precedents, there is a two-step process for assessing the interplay between free speech rights for public employees like Kennedy. *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., 391 U.S. 563, 568 (1968); Garcetti v. Ceballos, 547 U.S. 410, 423 (2006). First, there is a threshold question as to whether the speech at issue is "pursuant to [the employee's] official duties" or private in nature. *Kennedy*, 142 S. Ct. at 2423 (quoting *Garcetti*, 547 U.S. at 421). When the public employee engages in private speech, i.e., "speaks as a citizen addressing a matter of public concern," the First Amendment is implicated, and courts should proceed to the second step. *Id.* (citations omitted). At this step (i.e., where there is private speech by a public employee), courts should "engage in a delicate balancing of the competing interests surrounding the speech and its consequences." *Id*. at 2425 (citations omitted).
99. *Kennedy*, 142 S. Ct. at 2420 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

games to serve its compelling state interest in avoiding an Establishment Clause violation.[100]

In a 6–3 decision written by Justice Gorsuch, the Court reversed the Ninth Circuit. According to the majority, Kennedy had met his burden under the Free Speech and Free Exercise Clauses to "demonstrate an infringement of his rights," which then shifted the burden to Bremerton to show that its actions were "justified and tailored" consistent with the Court's precedents.[101] On the Free Speech claim, the Court found that Kennedy had demonstrated that his prayers were private speech not performed as part of his "duties as a coach" and thus protected by the First Amendment.[102] On the Free Exercise claim, the majority determined that Kennedy had shown that his desire to pray was sincere and that Bremerton's actions targeted the "religious character" of his conduct and thus were neither neutral nor "applied in an even-handed" manner.[103]

By contrast, the Court found that Bremerton failed to meet its burden to show its actions passed First Amendment muster. Specifically, Bremerton could not prove that its actions toward Kennedy were justified under the requisite constitutional balancing principles.[104] Rejecting the Ninth Circuit's analysis, the Court noted that it had "long abandoned *Lemon* and its endorsement test."[105] The proper analysis instead, the Court explained, requires courts to interpret the Establishment Clause by "reference to historical practices and understandings."[106] Here, the Court found no evidence to support Bremerton's argument that Kennedy's religious activity would cause the school to "coerc[e] students to pray."[107] In the end, the Court held that Bremerton's actions

100. *Id*. A plaintiff may prove a Free Exercise violation by showing that a government entity has burdened his sincere religious practice pursuant to a policy or practice that is neither "neutral" nor "generally applicable." To avoid liability, the government entity must satisfy "strict scrutiny" by showing that its course of action was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Id*. at 2421.

101. *Id*. at 2421.

102. *Id*. at 2424–25.

103. *Id*. at 2423. According to Justice Gorsuch, Bremerton "permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls." *Id*.

104. *Id*. at 2426. The Court concluded that whether one views the case "through the lens of the Free Exercise or Free Speech Clause"—and applies "strict scrutiny" or the second step of the *Pickering-Garcetti* test—Bremerton could not "sustain its burden under any [standard]." *Id*.

105. *Id*. at 2427 (citing two earlier decisions in *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (plurality opinion) and *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (plurality opinion)).

106. *Id*. at 2428 (internal quotations omitted). While the Court failed to provide a deep analysis of the application of the appropriate test to the specific facts in this case, it generally asserted that "the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Id*. at 2416.

107. *Id*. at 2429.

"rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech."[108]

Justice Sotomayor offered a robust dissent joined by Justices Breyer and Kagan. Using photographs of Kennedy praying on the public school's football field, she argued that the majority opinion "misconstrues the facts" of the case by depicting Kennedy's prayers as "private and quiet" when in actuality they caused "severe disruption to school events."[109] On the law, Justice Sotomayor noted the "twin Establishment Clause concerns of endorsement and coercion," particularly in elementary and secondary schools, and lamented the majority's rejection of the *Lemon* test in favor of what she argued is a new "history and tradition" test.[110] Under her reading of the precedents, Justice Sotomayor would find that Bremerton's "directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation."[111]

The Justices were greatly divided on this case. The majority and dissenting opinions could not even agree on whether this decision reflects a "mere shadow of a conflict" between the Free Exercise and Establishment Clauses (as the majority reasoned) or whether the decision erodes "our Nation's longstanding commitment to separation of church and state" (as the dissent warned).[112] Thus, states will continue to grapple with how best to balance religious expression in public schools with constitutional requirements and the day-to-day need for effective supervision of teachers and coaches in public schools.

V. Employee Benefits . . . from Health to Wealth

During the 2021–22 term, the Supreme Court heard five cases about workplace benefits implicating virtually every major phase in the employment lifecycle. The Court addressed disputes as varied as the extent of coverage in health plans, the application of workers' compensation laws, and post-employment pension and retirement benefits under the Employee Retirement Income Security Act of 1974 (ERISA).[113]

In *Marietta Memorial Hospital Employee Health Benefits Plan v. DaVita Inc.*, the Court considered how to properly allocate medical care costs for outpatient dialysis between private health plans and

108. *Id*. at 2433.
109. *Id*. at 2434 (Sotomayor, J., dissenting).
110. *Id*. at 2442, 2449.
111. *Id*. at 2446.
112. *Compare id*. at 2432 (majority opinion), *with id.* at 2434 (Sotomayor, J., dissenting).
113. ERISA sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protections for participants in such plans. *See* 29 U.S.C. §§ 1001–1461.

Medicare.[114] The Marietta Memorial Hospital Employee Health Plan was an employer-sponsored group health plan that offered outpatient dialysis benefits to individuals with end-stage renal disease (ESRD).[115] While Marietta's health plan offered the same terms of coverage for outpatient dialysis to all of its participants, it provided relatively low reimbursement rates for such services.[116] DaVita, one of two major dialysis providers in the country, provided costly treatments to people suffering from ESRD who were enrolled in Marietta's health plan. After DaVita received only a fraction of the requested reimbursement for claims related to outpatient dialysis, it sued Marietta for alleged violations of the Medicare Second Payer Statute (MSPS).[117]

The MSPS makes Medicare a "secondary" payer to a participant's existing health plan for certain medical services, including outpatient dialysis, when the health plan already covers the same services.[118] To prevent health plans from circumventing their primary-payer obligation for ESRD, the statute imposes two constraints. First, a health plan "may not differentiate in the benefits it provides between individuals having [ESRD] and other individuals covered by such plan on the basis of the existence of [ESRD] . . . or in any other manner."[119] Second, a health plan "may not take into account that an individual is entitled to or eligible for Medicare due to ESRD."[120]

In a 7–2 opinion written by Justice Kavanaugh, the Court held that a health plan that uniformly provides limited benefits for outpatient dialysis to all participants does not violate the MSPS.[121] Here, Marietta's health plan "provides the same benefits, including the same outpatient dialysis benefits, to individuals with and without [ESRD]" and thus did not "differentiate in the benefits it provides [to] individuals."[122] While DaVita argued that the MSPS authorizes liability even when a health plan limits benefits in a uniform way if the limitation has a disparate impact on participants with ESRD, the Court held that "the statute cannot be read to encompass a disparate-impact theory."[123] Moreover, because the health plan provides the same outpatient dialysis benefits to all participants—whether or not they are entitled to or eligible for Medicare—the plan cannot be said to "take into account" whether its participants are entitled to or eligible for Medicare.[124]

114. Marietta Mem'l Hosp. Emp. Health Benefits Plan v. DaVita Inc., 142 S. Ct. 1968 (2022).
115. *Id*. at 1972.
116. *Id*.
117. *Id*.
118. *Id*.
119. *Id*. (internal quotations omitted).
120. *Id*. (internal quotations omitted).
121. *Id*.
122. *Id*. (internal quotations omitted).
123. *Id*.
124. *Id*. at 1975.

Justice Kagan filed a dissenting opinion, joined by Justice Sotomayor, in which she noted that, because ninety-seven percent of people diagnosed with ESRD undergo some form of dialysis, "[o]utpatient dialysis is an almost perfect proxy for ESRD."[125] She thus argued that Marietta's health plan violated the MSPS because "singling out dialysis for disfavored coverage differentiates in the benefits it provides between individuals having ESRD and other individuals."[126] Because the MSPS's provisions on ESRD were "designed to prevent [health] plans from foisting the cost of dialysis onto Medicare," Justice Kagan called on Congress to provide a remedy.[127]

This term the Court also reviewed two cases raising relatively discrete issues involving workers' compensation laws. In the first case, *United States v. Washington*, the Court analyzed whether a Washington state workers' compensation law violated the Constitution's Supremacy Clause.[128] Under established doctrine, the federal government is immune from state laws that seek to "directly regulate or discriminate against it."[129] Absent congressional consent, states generally have limited authority to enforce their laws at federally owned facilities and on federal land. In 1936, Congress enacted a law to fill gaps in coverage for work-related injuries sustained by federal contractors engaged in work at federally owned facilities and on federal lands. This federal law waived sovereign immunity by permitting state authorities charged with enforcing workers' compensation laws to "apply" those laws to work performed at federally owned facilities and on federal lands "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the state."[130]

Here, the state workers' compensation law at issue affected only federal contractors who worked at the "Hanford site," a large 500-square mile tract of land in Washington state used to develop and produce nuclear weapons during World War II.[131] To ease the burden of proof in workers' compensation claims filed by federal contractors at the Hanford site, the state created a "causal presumption" that certain diseases and illnesses were caused by cleanup work at the Hanford site, thereby greatly increasing workers' compensation costs for the federal

125. *Id*. at 1975 (Kagan, J., dissenting). Justice Kagan also noted that 99.5% of DaVita's outpatient dialysis patients have or developed ESRD. *Id*.

126. *Id*. at 1976.

127. *Id*. Within weeks of the decision, Congress introduced bipartisan legislation entitled the "Restore Protections for Dialysis Patients Act" in both houses. *See* S. 4750 (2022); H.R. 8594 (2022).

128. United States v. Washington, 142 S. Ct. 1976 (2022).

129. *Id*. at 1982. This concept is also known as "intergovernmental immunity." *Id*.

130. *Id*. (citing 40 U.S.C. § 3172).

131. *Id*.

government.[132] The question in this case is whether *this* state workers' compensation law falls within the scope of the congressional waiver.

Delivering the opinion for a unanimous court, Justice Breyer found that the Washington state workers' compensation law "singl[ed] out the Federal Government for unfavorable treatment" by explicitly treating federal contractors at the Hanford site differently than state or private workers generally.[133] By imposing costs on the federal government that state and private entities did not have to bear, the law violated the Supremacy Clause. The Court also rejected the state's arguments for a broad reading of the relevant waiver provision. Instead, the Court favored "a narrower waiver of immunity, namely, as only authorizing a State to extend its *generally applicable* state workers' compensation laws to federal lands and projects within the State."[134] According to the Court, the waiver did not "clearly and ambiguously authorize Washington's discriminatory [workers' compensation] law."[135]

The Court's second workers' compensation case, *LeDure v. Union Pacific Railroad Co.*, involved an injured railroad worker's claims under the federal Locomotive Inspection Act and the Federal Employers' Liability Act.[136] Together, these two worker injury statutes regulate the safe "use" of locomotives and provide for "negligence" claims in circumstances "a reasonable person would foresee as creating a potential for harm."[137] In this case, Bradley LeDure was a conductor employed by Union Pacific.[138] In 2016, while servicing a train, LeDure fell on the locomotive's exterior walkway and sustained multiple injuries.[139] LeDure claimed that "Union Pacific failed to maintain the walkway free of hazards," as required by the Locomotive Inspection Act.[140] The district court granted Union Pacific's motion for summary judgment and dismissed LeDure's claims with prejudice.[141] The U.S. Court of Appeals for the Seventh Circuit affirmed a finding of no liability because the locomotive at issue was stationary on a sidetrack and thus not "in use"

132. *Id*. at 1982–83.

133. *Id*. at 1984.

134. *Id*. at 1985 (emphasis added). For example, the waiver requires states to apply workers' compensation laws "in the same way and to the same extent" as if the premises were under the state's exclusive jurisdiction. *Id*. (quoting 40 U.S.C. § 3172).

135. *Id*. at 1986 (internal quotations omitted). In addition, while Washington argued that the case was moot because it had amended the workers' compensation law at issue, the Court disagreed, finding that a decision in the federal government's favor might allow it to recoup or avoid workers' compensation expenses. *Id*. at 1983.

136. LeDure v. Union Pac. R.R. Co., 142 S. Ct. 1582 (2022) (per curiam).

137. LeDure v. Union Pac. R.R. Co., 962 F.3d 907, 910 (7th Cir. 2020) (internal quotations and citations omitted). Certain background facts detailed here were taken from the Seventh Circuit's decision because pertinent information was not included in the Court's per curiam opinion.

138. *Id*. at 909.

139. *Id*.

140. *Id*.

141. *Id*.

or operable at the time of LeDure's injury.[142] The appellate court also determined there was insufficient evidence to show that Union Pacific "knew or should have known about the . . . hazard."[143]

In a single sentence per curiam opinion, the Court held that the Seventh Circuit's "judgment is affirmed by an equally divided Court."[144] As is customary in these circumstances, the Court revealed only that the vote was evenly split but not the identities on each side. Notably, the split occurred because prior to her appointment to the high court, Justice Barrett had served on the Seventh Circuit panel that decided the case and thus had recused herself from participating in the proceedings before the Court.

This term, the Court also evaluated another rather distinct issue related to the Social Security pension benefits available to a small group of federal workers in *Babcock v. Kijakazi*.[145] Dual status military technicians are defined as federal civilian employees who provide technical or administrative assistance to the National Guard.[146] These technicians are "required as a condition of that employment to maintain membership in the [National Guard] and must wear a uniform while working."[147] For their full-time civilian work, "they receive civil-service pay and, if hired before 1984, . . . pension payments from the Office of Personnel Management."[148] At the same time, as part-time National Guard members who engage in military training and drills, "they receive military pay and pension payments from a different arm of the Federal Government" (i.e., the Defense Finance and Accounting Service).[149]

David Babcock worked as a dual status military technician for over thirty-three years.[150] Babcock retired from his dual status military technician position in 2009, at which time he began receiving both his civil-service and military pension benefits. In 2014, he fully retired and applied for Social Security retirement benefits. Based on his civil-service pension, the Social Security Administration (SSA) reduced his retirement benefits.[151] Babcock asked for reconsideration, noting that he qualified for the "uniformed-services exception" from the reduction because he had served as a dual status military technician. SSA did not change its determination.[152] The district court entered judgment

142. *Id*. at 910–11.
143. *Id*. at 911.
144. LeDure v. Union Pac. R.R. Co., 142 S. Ct. 1582 (2022) (per curiam).
145. Babcock v. Kijakazi, 142 S. Ct. 641 (2022).
146. *Id*. at 643.
147. *Id*. at 644 (quoting 10 U.S.C. § 10216(a)(1)(B)).
148. *Id*.
149. *Id*.
150. *Id*.
151. *Id*. at 645.
152. *Id*.

against Babcock, and the Sixth Circuit affirmed, concluding that "Babcock's civil-service pension payments were based on service in a civilian capacity and therefore did not fall within the uniformed-services exception."[153]

Generally, retirees eligible to receive Social Security retirement benefits earn such benefits according to a progressive formula that awards percentage points based on average past earnings.[154] Originally, the formula did not count earnings from jobs exempt from Social Security taxes and in which they might receive separate pensions.[155] Congress responded to this possible "'windfall' by modifying the formula to reduce benefits when a retiree receives a separate pension payment."[156] But Congress exempted several categories of pension payments, including "a payment based wholly on service as a member of a uniformed service."[157] In short, in certain circumstances, workers receiving pension payments for "service as a member of a uniformed service" can receive greater Social Security retirement benefits than other similarly situated workers.[158]

In an 8–1 opinion authored by Justice Barrett, the Court held that dual status military technicians, like Babcock, were not entitled to the uniformed-services exception for the civil-service pension they received because it was not "based wholly on service as a member of a uniformed service."[159] Recognizing that dual status military technician positions are unique in that they condition civilian employment on membership in the National Guard, the Court nevertheless found a "condition of employment is not the same as the capacity in which one serves."[160] Here, the decision ultimately rested on the statutory scheme where Congress clearly classified dual status military technicians as civilian employees for purposes of pay and pension benefits.[161]

Justice Gorsuch alone dissented. Based on the unique work attributes of dual status military technicians, he would have held that they "serve as members of the National Guard in all the work they perform" and, as such, are entitled to the uniformed-services exception (i.e., higher Social Security retirement benefits).[162]

In *Hughes v. Northwestern University*, the Court considered allegations made by April Hughes and other affected employees that administrators for Northwestern's defined-contribution retirement plan

153. *Id*.
154. *Id*. at 643–44.
155. *Id*. at 644.
156. *Id*.
157. *Id*. (quoting 42 U.S.C. § 415(a)(7)(A)(III)).
158. *Id*.
159. *Id*. at 645.
160. *Id*. at 646.
161. *Id*. at 646–47.
162. *Id*. at 647 (Gorsuch, J., dissenting) (internal quotations omitted).

violated ERISA's duty of prudence.[163] Under Northwestern's retirement plan, a participant chooses how to invest funds from a menu of options selected by the plan administrators. The performance of chosen investments, coupled with the deduction of associated fees, determines the participant's amount of retirement income.[164] Here, Hughes and the affected employees specifically alleged that Northwestern failed to monitor and control recordkeeping fees resulting in higher costs to plan participants, offered mutual funds and annuities as "retail" share classes that carried higher fees than those charged by otherwise identical low-cost plans with the same investments, and caused plan participant confusion and poor investment decisions by offering too many investment options.[165] After the district court granted Northwestern's motion to dismiss, the Seventh Circuit affirmed, concluding that Hughes and the affected employees' allegations failed as a matter of law because Northwestern provided other low-cost investment options.[166]

Writing for a unanimous Court, Justice Sotomayor held that the Seventh Circuit erred in relying on the retirement plan participants' ultimate choices over their investments to excuse Northwestern's allegedly imprudent decisions.[167] Relying on earlier precedent, the Court found that Northwestern failed to comply with ERISA's requirement that plan administrators fulfill their continuing duties to monitor all plan investments and improve imprudent ones.[168] Here, Northwestern—like all plan administrators—should have conducted its "own independent evaluation to determine which investments may be prudently included in the plan's menu of options."[169] Failing to remove an imprudent investment from the plan within a reasonable time was a "breach their duty."[170] The Court noted that the Seventh Circuit's "exclusive focus on investor choice elided . . . the duty of prudence."[171] Ultimately, the Seventh Circuit's decision was vacated and the case was remanded for further proceedings.[172]

This collection of cases demonstrates the variety of employee-benefits disputes that can garner the Court's attention, even within a single term. Some holdings will undoubtedly reverberate more broadly. For example, *Hughes* may cause legal practitioners to advise their clients to revisit fiduciary responsibilities to limit and regularly curate

163. Hughes v. Nw. Univ., 142 S. Ct. 737 (2022).
164. *Id*. at 740.
165. *Id*. at 741.
166. *Id*. at 740.
167. *Id*. (Barrett, J., took no part in the consideration or decision of this case).
168. *Id*. at 741.
169. *Id*. at 742.
170. *Id*.
171. *Id*.
172. *Id*.

investment options under covered retirement plans. However, other cases—like *LeDure*—resolved more discrete worker injury issues that will likely have a much more limited workplace impact.

Conclusion

The Supreme Court's 2022–23 term already comprises more labor and employment law cases across a broad spectrum, including:

- *Glacier Northwest v. International Brotherhood of Teamsters*, No. 21-1449, involves allegations of whether the National Labor Relations Act impliedly preempts a state court claim against a union for intentionally destroying an employer's property. Here, sixteen cement truck drivers went on strike and engaged in a work stoppage. Unable to transport the cement that had been mixed, the company had to dump it. Oral argument was held on January 10, 2023.
- *Helix Energy Solutions Group v. Hewitt*, No. 21-984, will address whether highly paid employees who receive compensation on an hourly, daily, or shift basis are entitled retroactive overtime pay under the Fair Labor Standards Act. The Court decided the case on February 22, 2023.
- *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168, is primarily about personal jurisdiction, but was filed under the Federal Employers' Liability Act. The issue before the Court is whether a Pennsylvania court can hear a lawsuit brought against a Virginia-based railroad company by a Virginia man who worked for the company in Virginia and Ohio. The impetus for the case is a Pennsylvania state law that imposes general jurisdiction on any company doing business in the state. Oral argument was held on November 8, 2022.
- *The Ohio Adjutant General's Department v. Federal Labor Relations Authority*, No. 21-1454, involves dual status military technicians—the subject of the *Babcock* case, discussed *supra*. This case involves whether, for purposes of labor negotiations, these workers are considered federal civilian employees or members of their state National Guards. In this case, the Ohio National Guard ended its forty-five-year bargaining relationship with a public sector union, prompting the instant lawsuit. If dual status military technicians are deemed federal workers for labor negotiation purposes, the Federal Labor Relations Authority can continue to regulate their labor practices pursuant to the Civil Service Reform Act. Oral argument was held on January 9, 2023.

While we likely will see more labor and employment cases added to the Court's docket next term, we *won't* be seeing additional opinions by

Justice Breyer. In the speech announcing his retirement after twenty-seven years on the high bench, Justice Breyer reflected upon how "this is a complicated country . . . more than 330 million people . . . it's every race, it's every religion . . . it's every point of view possible."[173] And yet, Justice Breyer emphasized, "[I]t's kind of a miracle . . . [to] see all those people . . . so different in what they think" agree to come before the Court to "to help solve their major differences under law."[174]

Echoing the past sentiments of Presidents George Washington and Abraham Lincoln, Justice Breyer noted that this country's steadfast dedication to democracy, equality, and liberty is an untested "experiment."[175] It is "still going on," he said.[176] This generation and the ones that come afterward, he observed, must play a role in determining whether the great American experiment will continue to work. And in his parting words, Justice Breyer shared his sincere belief and hope with all of us . . . that it will.[177]

173. *Read Justice Breyer's Remarks on Retiring and His Hope in the American "Experiment,"* NPR (Jan.27, 2022), https://www.npr.org/2022/01/27/1076162088/read-stephen-breyer-retirement-supreme-court [https://perma.cc/WVL2-HCBE].

174. *Id*.

175. *Id*.

176. *Id*.

177. *Id*.