

**Joint Newsletter for AALS Sections on  
Labor Relations and Employment and  
Employment Discrimination  
2019**

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*This newsletter has been compiled by the Secretaries of the sections:  
**Stacy Hawkins** (Rutgers, Employment Discrimination Section) & **Charlotte Garden** (Seattle  
University, Labor Relations and Employment Section)*

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## AALS Section Events

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### *Joint Section Breakfast*

#### **Friday, January 4, 7:00 AM – 8:30 AM – Joint Section Breakfast**

*Grand Salon Section 9, First Floor, Hilton New Orleans Riverside*

*Labor Relations and Employment Law and Employment Discrimination Law*

The cost is \$45.00. You must purchase your ticket to the event at least 24 hours prior to the breakfast (tickets will not be sold at the door). Information on purchasing tickets is available [here](#).

### *Section Programs*

#### **Thursday, January 3, 3:30 PM – 5:15 PM – *New & Emerging Voices Program***

*Grand Salon Section 12, First Floor, Hilton New Orleans Riverside*

*Labor Relations and Employment Law and Employment Discrimination Law*

Presenters:

- Katie Eyer – “*Statutory Originalism*” and *LGBT Rights*, commentator Victoria Nourse
- Andrew Elmore – *Third-Party Accommodations of Workplace Risk*, commentator Aida Alaka
- James Nelson – *Corporate Disestablishment*, commentator Marcia McCormick

#### **Friday, January 4, 8:30 AM – 10:15 AM - *Automatic Discrimination: Algorithms, Big Data, and the Law of Employment Decisions***

*"Camp" Room, Third Floor, Hilton New Orleans Riverside*

*Employment Discrimination Law, Co-sponsored by Labor Relations and Employment Law & Internet and Computer Law*

Moderator: Joseph Fishkin, University of Texas School of Law

Speakers: Ifeoma Ajunwa, Cornell Law School  
Stephanie Bornstein, University of Florida Fredric G. Levin College of Law  
Pauline T. Kim, Washington University in St. Louis School of Law  
Andrew Selbst, Postdoctoral Scholar, Data & Society Research Institute  
Charles A. Sullivan, Seton Hall University School of Law  
Kelly Trindel, Ph.D., Head of I/O Science & Diversity Analytics, Pymetrics

Employers across our economy are increasingly using new, technologically sophisticated tools to make decisions about which employees to hire, promote, and fire, as well as decisions about performance evaluation and pay. Some of these tools draw on unusual data sources; others use new “big data” methods to mine data for relevant correlations and inferences. How are legal actors—employers, employees, judges—supposed to decide whether the actions employers take with the help of these new tools constitute discrimination? Employment discrimination law is only beginning to come to grips with this question, which raises fascinating questions of its own about how best to apply theories such as disparate treatment and disparate impact to these novel decision-making methods. This panel will bring together many of the leading scholars in this rapidly emerging field from both inside and outside the legal academy to evaluate these questions. *Business meeting at program conclusion.*

**Friday, January 4, 10:30 AM – 12:15 PM - *Increasing Tension: Labor and Employment Law Protections and Religious Accommodations***

*Grand Salon Section 22, First Floor, Hilton New Orleans Riverside*

*Labor Relations and Employment Law, Co-sponsored by Employment Discrimination Law*

Moderator: Joseph Mastrosimone, Washburn University School of Law

Speakers: Charlotte Garden, Seattle University School of Law  
Christopher C. Lund, Wayne State University Law School  
Marcia L. McCormick, Saint Louis University School of Law  
Saerom Park, Associate General Counsel, Service Employees  
International Union (SEIU)

Speaker from a Call for Papers: Dallan F. Flake, Ohio Northern University, Pettit College of Law

This program will focus on the increasing tension between workplace and antidiscrimination laws and religious freedom. Panelists will explore the challenges presented by this tension when religious exemptions from workplace and antidiscrimination laws are provided to religious organizations, employers with deeply held religious beliefs, and individual employees. A panel of leading labor and employment law and law and religion scholars will address that issue from varying perspectives, including constitutional law (religious freedom and/or compelled speech and association in the workplace), traditional labor law (NLRB’s jurisdiction over religiously affiliated employers and the impact on employee organizing drives), and employment discrimination law. *Business meeting at program conclusion.*

**Friday, January 4, 9:00 AM – 12:00 PM - *Gender, Race and Competition in the New Economy***

*Grand Salon Section 16, First Floor, Hilton New Orleans Riverside*

Section on Socio-Economics, Co-sponsored by Employment Discrimination Law

*Please Note: This Program is scheduled during the same time as the Employment Discrimination Section Panel. However, the Program is split between two parts and the Employment Discrimination portion of the Program will take place during the second half of the Program.*

**Panel 1: 9:15 AM – 10:40 AM - *Employee Ownership, Big Data, Diversity & Corporate Governance***

Moderator: June Rose Carbone, University of Minnesota Law School

Speakers: Tamara C. Belinfanti, New York Law School  
Frank A. Pasquale, University of Maryland Francis King Carey School of Law  
Steven A. Ramirez, Loyola University Chicago School of Law

**Panel 2: 10:50 AM – 12:00 PM - *Employment Discrimination Law's Response to These Developments***

Speakers: Naomi R. Cahn, The George Washington University Law School  
June Rose Carbone, University of Minnesota Law School  
Jessica Clarke, Vanderbilt University Law School  
Michael L. Selmi, The George Washington University Law School

Anti-discrimination law took hold during an era in which “good jobs” involved “narrow portals of entry” into secure career ladders. The predominant economic theory of discrimination at the time suggested that different treatment involved employment and consumer “tastes” or dislike of other groups. Today’s economy has dismantled the secure employment and predictable career ladders of mid-century America. In the process, inequality has grown, and the dominance of white (and in some cases Asian) men has increased in the upper reaches of the economy. Indeed, while the gendered wage gap has narrowed overall, the gap has increased for college graduates since the early nineties. This panel will consider how to understand the redefinition of “good jobs” in a networked economy, the new remade terms of competition among employees, and the implications for gender and racial diversity. *Business meeting at program conclusion.*

## Other AALS Programs of Interest

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### **Wednesday, January 2**

**6:30 PM – 7:30 PM – *New Law Teachers Reception***

*Canal Room, Third Floor, Hilton New Orleans Riverside*

### **Thursday, January 3**

**10:30 AM – 12:15 PM – *Sexual Harassment & Violence Narratives: #MeToo, the Kavanaugh Allegations and Title IX Guidance***

*St. James Ballroom, Third Floor, Hilton New Orleans Riverside*

*AALS Hot Topics Program, Co-sponsored by Civil Rights*

**10:30 AM – 12:15 PM – *Worker Justice in the Food System***

*Jackson Room, Third Floor, Hilton New Orleans Riverside*

*Agriculture & Food Law, Co-sponsored by Women in Legal Education*

**1:30 PM – 3:15 PM – *The Future of Sexual Harassment***

*Grand Salon 15 & 18, First Floor, Hilton New Orleans Riverside*

*AALS Discussion Group*

### **Friday, January 4**

**8:30 AM – 10:15 AM - *Religious Exemptions and Harm to Third Parties***

*Grand Salon Section 10, First Floor, Hilton New Orleans Riverside*

*AALS Hot Topics Program*

**12:15 PM – 1:30 PM – *Women in Legal Education Luncheon***

*Grand Ballroom A, First Floor, Hilton New Orleans Riverside*

### **Saturday, January 5**

**12:15 PM – 1:30 PM – *Minority Groups Luncheon and Business Meeting***

*Grand Ballroom A, First Floor, Hilton New Orleans Riverside*

**4:30 PM – 5:30 PM - *Workshop for Pretenured Law School Teachers of Color Reception***

*Quarterdeck A, Riverside Building, Hilton New Orleans Riverside*

## Faculty News

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**Jason Bent** (Stetson) was promoted to full professor and will begin serving as Associate Dean for Academic Affairs beginning in January 2019.

**Gilbert Paul Carrasco** (Willamette) was awarded a Fulbright to teach Comparative Constitutional Rights at Ukrainian Catholic University in their LL.M. Human Rights Program last spring.

**Jessica Clarke** (Vanderbilt) moved from Minnesota Law School to Vanderbilt Law School.

**Katie Eyer** (Rutgers) was tenured and promoted to full professor. She was the recipient of several honors and awards, including a Board of Trustees Research Fellowship for Scholarly Excellence (awarded to those recently promoted with tenure whose work shows exceptional promise), a Presidential Fellowship for Teaching Excellence (awarded for excellence in teaching and scholarly work), and the 2018 Lastowka Award for Scholarly Excellence. In December 2018, she was elected to the membership of the American Law Institute (ALI).

**D. Wendy Greene** (Samford-Cumberland) will be visiting in the spring of 2019 at Washington and Lee University School of Law. During the spring of 2018, Professor Greene served as an Inaugural Visiting Scholar at the University of California, Irvine School of Law's Center on Law, Equality, and Race (CLEaR). Her article, *Splitting Hairs: The 11<sup>th</sup> Circuit's Take on Workplace Bans against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 MIAMI L. REV. 987 (2017), earned the 2018 Lightfoot, Franklin, and White Best Faculty Scholarship Award. Her article, *Pretext Without Context*, 75 MO. L. REV. 403 (2010), was cited in a Petition of Writ of Certiorari filed with the U.S. Supreme Court in *McDaniel v. Perdue*, 2018 WL 1505536 (March 19, 2018). She was interviewed by fellow Professor Nareissa Smith in *Is Your Job's Dress Code Racist?* for the African-American Attorney Network Interview (May 8, 2018) <https://aaattorneynetwork.com/is-job-dress-code-racist/>. She served as an invited contributor for the Human Rights Campaign (HRC) report, "[Discrimination Based on Perceived Characteristics](#)," released in August 2018. The HRC Report advocates for more comprehensive statutory protection on federal and state levels against "misperception discrimination"—a term Professor Greene coined in her article, *Categorically Black, White, or Wrong: The State of "Misperception Discrimination" and Title VII Protection*, 47 MICH. J. L. REF. 101 (2013), which describes discrimination based upon an employer's erroneous perception about an employee's or applicant's racial, ethnic, gender, or religious identity. Her article served as a definitive source for the HRC Report.

**Stacy Hawkins** (Rutgers) was tenured and promoted to full professor. She was also the recipient of the 2018 Derrick A. Bell Award from the AALS Minority Groups Section and was voted Co-Professor of the Year by the 2018 graduating class.

**Orly Lobel** (San Diego) was named by the Sisk-Leiter scholarly impact study as one of the 20 Most-Cited Public Law Scholars in the U.S. for the period of 2013-2017. Lobel's book, *YOU DON'T OWN ME: HOW MATTEL V. MGA ENTERTAINMENT EXPOSED BARBIE'S DARK SIDE* (2017), was awarded Gold Medalist, Best Business Book - Winner of the Independent Publisher's 2018 Book Award; Gold Medalist, The Nonfiction Authors Association (2018); and Winner of the 2018 Thornes Book Award for Outstanding Legal Scholarship.

**Ann C. McGinley** (Nevada) together with Ruben Garcia is the co-director of the new Workplace Law Program at UNLV Boyd School of Law. Ann and Ruben are proud to announce the graduation of James Rich, the first Boyd Law graduate to earn a concentration in Workplace Law at UNLV.

**Angela Onwuachi-Willig** (Boston) left her position as Chancellor's Professor of Law at UC Berkeley School of Law and began her service as Dean and Professor of Law at Boston University School of Law on August 15, 2018. She delivered the Derrick Bell Lecture at NYU Law School in November 2018, and her article *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1124–25 (2017), received the 2018 John Hope Franklin, Jr. Prize from the Law and Society Association.

**Jessica Roberts** (Houston) was promoted to full professor and named the Alumnae College Professor in Law. The Health Law Program she directs was ranked #2 by *US News and World Report*. She also received a grant from NIH and is the co-principal investigator for the Development of Recommendations and Policies for Genetic Variant Reclassification. She is also a Legal Team member for another NIH grant on Reporting Adult-Onset Genomic Results to Pediatric Biobank Participants and Parents.

**John Rumel** (Idaho) was promoted to full professor. He presented "*We Aren't Getting Anything Younger – Age Discrimination: School District Obligations and Teachers Rights*", during a Concurrent Session Paper Presentation at the 2018 Education Law Association Annual Conference, and he is featured in *Supreme Court Nominee Judge Kavanaugh and Federal Employment Law*, University of Idaho College of Law – Kavanaugh Project, video presentation, <https://vimeo.com/album/5363174/287119304>, Fall 2018.

**Sandra Sperino** (Cincinnati) was awarded the Faculty Excellence Award, which recognizes the most significant faculty contribution to scholarship within the academic year.

**E. Gary Spitko** (Santa Clara) was appointed Associate Dean for Research as of January 1, 2019.

**Suja Thomas** (Illinois) was awarded High Distinction for Books for the Pound Civil Justice Institute's 2019 Civil Justice Scholarship Award for her book, *THE MISSING AMERICAN JURY*.

## 2018 Publications

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### Books

KATIE EYER, A CASEBOOK SECTION COMPANION TO THE CANON OF RATIONAL BASIS REVIEW, <https://ssrn.com/abstract=3086830> (2018).

JASON BENT AND RAMONA PAETZOLD, THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION (2018-19 ed.)

D. WENDY GREENE, #FREETHEHAIR LOCKING BLACK HAIR TO CIVIL RIGHTS MOVEMENTS (under contract University of California-Berkeley Press)

GILLIAN LESTER, HUGH COLLINS & VIRGINIA MANTOUVALOU, PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW (Oxford U. Press, 2018)

EMPLOYMENT LAW, 6<sup>TH</sup> EDITION (eds. Orly Lobel, Mark Rothstein, et al 2019)

EMPLOYMENT LAW, HORNBOOK SERIES 6<sup>TH</sup> EDITION (eds. Orly Lobel, Mark Rothstein et al 2018)

JESSICA ROBERTS AND ELIZABETH WEEKS LEONARD, HEALTHISM (2018).

SANDRA SPERINO, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (Bloomberg, 2018).

### Book Chapters & Articles

Bradley Areheart and Jessica L. Roberts, *GINA, Big Data, and the Future of Employee Privacy*, 128 YALE L. J. (forthcoming 2019).

Bradley Areheart, Commentary, Young v. UPS, 135 S. Ct. 1338 (2015), in FEMINIST JUDGMENTS: EMPLOYMENT DISCRIMINATION OPINIONS REWRITTEN (Ann McGinley & Nicole Porter eds., forthcoming 2019).

Stephen Befort, *The Declining Fortunes of American Workers: Six Dimensions and an Agenda for Reform*, FLA. L. REV. 189 (2018).

Stephen Befort, *Employee Handbooks and Policy Statements: From Gratuities to Contracts and Back Again*, EMP. RTS. & EMP. POL'Y J. 307 (2018).

Gilbert Paul Carrasco, "Short-Hoeing the Long Row of Bondage: From *Braceros* to Compassionate Farm Worker Migration," Chapter 6 in Steven W. Bender & William F.



Arrocha, *COMPASSIONATE MIGRATION AND REGIONAL POLICY IN THE AMERICAS* (London: Palgrave Macmillan, 2017).

Jessica Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018).

Katie Eyer, *The New Jim Crow is the Old Jim Crow*, 128 YALE L. J. -- (forthcoming 2018)

Katie Eyer, *Statutory Originalism and LGBT Rights*, -- WAKE FOREST L. REV. -- (forthcoming 2018).

Katie Eyer, *Animus Trouble*, 49 STETSON L. REV. -- (forthcoming 2018) (symposium article).

Katie Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018).

Michael Fischl, BOOK REVIEW SYMPOSIUM: *Efficiency and Its Discontents*, Vol. 9, No. 2 JURISPRUDENCE: AN INTERNATIONAL JOURNAL OF LEGAL AND POLITICAL THOUGHT (2018).

Stacy Hawkins, *What the Supreme Court's Diversity Doctrine Means for Workplace Diversity Efforts*, 33 A.B.A. J. LAB. & EMP. L. -- (forthcoming 2018).

Stacy Hawkins, SYMPOSIUM: *Batson for Judges, Police and Teachers: Lessons in Democracy from the Jury Box*, 23 MICH. J. RACE & L. 1 (2018).

Orly Lobel, Yuval Feldman & Samuel I. Becher, *Consumer(s) Law* in LEGAL APPLICATIONS OF MARKETING THEORY (Jacob Gerson & Joel Steckel eds forthcoming 2019).

Orly Lobel, *The Goldilocks Path of Legal Scholarship in a Digital Networked World*, Symposium, *The Future of Legal Scholarship*, LOY. L. REV. (forthcoming 2019).

Orly Lobel, *Regulating the Sharing Economy: Self-Governance, Efficiency & Values*, GLOBAL LAW JOURNAL (2018).

Orly Lobel, *Coase & the Platform Economy*, in the SHARING ECONOMY HANDBOOK (forthcoming 2018).

Orly Lobel, *Secrets and Innovation: The Defend Trade Secret Act as Part of the New Secrecy Ecology*, BUSINESS, ENTREPRENEURSHIP AND TAX L. J. (2018).

Orly Lobel and Kenneth Bamberger, *Platform Market Power*, BERKELEY L. AND TECH J. (2018).

Orly Lobel, Adam Finekl, Chris Deubert, Glenn Cohen & Holly Lynch, *The NFL as a Workplace: Applying Occupational Health and Safety Laws to Protect Players*, ARIZ. L. REV. (2018).

Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Feb 2018).

Martha T. McCluskey, *Are We Economic Engines Too? Precarity, Productivity, and Gender*, 49 U. OF TOL. L. REV. 631 (2018).

Ann McGinley, *Gender, Law, and Culture in the Legal Workplace: A Chilean Case Study*, 60 ARIZ. L. REV. 675 (2018);

Ann McGinley, *Genero, derecho y cultura en los lugares de trabajo jurídicos: Un caso chileno de estudio*, 3 LATIN AMER. LEG. STUD. (2018), available at <http://lals.uai.cl/index.php/rld/article/view/38> and can be downloaded in English or Spanish).

Ann McGinley, *The Masculinity Motivation*, STAN. L. REV. (Online) (June 2018).

Angela Onwuachi-Willig and Ifeoma Anjuwa, *Getting Beyond McCleskey v. Kemp: Combatting the Labor Market Exclusion of the Formerly Incarcerated Through Racial Impact Statements*, 116 NW. U. L. REV. 1385 (2018).

Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, YALE L.J. FORUM (June 18, 2018).

Jessica Roberts and Dave Fagundes, *Housing, Healthism, & the HUD Smoke-Free Policy*, 113 NW. U. L. REV. -- (forthcoming 2019).

Jessica Roberts, *Nudge-Proof: Distributive Justice & the Ethics of Nudging*, 116 MICH. L. REV. 1045 (2018) (book review).

Jessica Roberts, *Progressive Genetic Ownership*, 93 NOTRE DAME L. REV. 1105 (2018).

Jessica Roberts and Elizabeth Sepper, *Sex, Religion, and Politics, or The Future of Healthcare Antidiscrimination Law*, 19 MARQ. BEN. & SOC. WELFARE L. REV. --- (forthcoming 2018) (invited symposium contribution)

John Rumel contributed a chapter to FEDERAL ANTIDISCRIMINATION LAW, ADMINISTRATORS' GUIDE TO EMPLOYMENT LAW AND PERSONNEL MANAGEMENT IN SCHOOLS (Mark Paige and Adam Ross Nelson, eds., 2018)

Naomi Schoenbaum, *Intimacy and Equality in the Sharing Economy*, in THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY (Nestor Davidson, John Infranca, & Michele Finck, eds. 2018).

Sandra Sperino, *Disbelief Doctrines*, 39 BERK. J. EMP. & LAB. L. 101 (2018).

E. Gary Spitko, *A Structural-Purposive Interpretation of "Employment" in the Platform Economy*, 70 FLA. L. REV. 409-446 (2018).

Suja Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 FORDHAM L. REV. 2241 (2018).

## Upcoming Conferences

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As always, the annual meeting of the Law & Society Association (Washington DC, May 30-June 2, 2019) will have significant labor/employment/employment discrimination programming. If you are not a member of the LSA labor section (otherwise known as “CRN 8”) and you would like to be, contact co-chairs Rebecca Zietlow (Toledo), Manoj Dias-Abey (Bristol), or Deepa Das Acevedo (Alabama).

## Recent Legal Developments

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### **Arbitration:**

*Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). In *Epic Systems*, the Supreme Court held that neither the Norris-LaGuardia Act nor the NLRA was inconsistent with individual arbitration clauses imposed by employers on employees. In an opinion by Justice Gorsuch, the five-Justice Court majority adopted Judge Sutton’s understanding of what the NLRA protects: “things employees ‘just do’ for themselves in the course of exercising their right to free association in the workplace,” which Sutton contrasted to the “highly regulated courtroom-bound ‘activities’ of class and joint litigation.”

Criticizing the decision, Professor Katherine Stone (UCLA) [wrote in SCOTUSblog’s symposium on the case that](#) the decision would enable employer lawbreaking:

*The Epic Systems decision not only closes the courthouse door to workers, it effectively bars them from any tribunal where they can vindicate their rights. Empirical evidence establishes that when courts compel workers to take their disputes to arbitration on an individual basis, workers are unlikely to prevail.*

And at OnLabor, [Ben Sachs \(Harvard\) and Sharon Block \(Harvard\) wrote](#) that while the decision could have been even worse, the “things employees just do for themselves” formulation could spell trouble for other NLRB rules:

*To be sure, the opinion doesn’t make the definition of “self-organizing” clear, and the courts and the Board have long viewed the term expansively. But the risk is that the invocation of ejusdem generis is an invitation for a narrower interpretation, one that might exclude, for example, the use of social media to air complaints.*

*New Prime Inc. v. Oliveria* (pending before SCOTUS). *New Prime* concerns whether the Federal Arbitration Act’s exception for “contracts of employment” for “workers engaged in . . . interstate commerce” applies to truckers who are defined by their employers as independent contractors.

One might assume, given the current composition of the Court, that this case would be a slam-dunk for the employer. Not so, wrote Professor Ronald Mann (Columbia), [for SCOTUSblog](#):

*“There can’t be much doubt about the outcome in a case like this one, involving a dispute between a business and its workers in which Roberts and Gorsuch seem so strongly predisposed to side with the worker. So, notwithstanding the long line of cases reading the Federal Arbitration Act broadly, this one has all the indications of a victory for the worker seeking a day in court.”*

***Lamps Plus Inc. v. Varela*** (pending before SCOTUS). *Lamps Plus* is the latest salvo in the cold war between SCOTUS and California over arbitration. This case involves an arbitration agreement that was arguably ambiguous about whether it allowed for class-wide arbitration. Accordingly, the district court applied the California rule that ambiguous contracts of adhesion should be construed against the drafter, and dismissed the case so that class-wide arbitration could proceed. Nested within this case are tricky issues about whether the Ninth Circuit has appellate jurisdiction; the case against jurisdiction was most thoroughly developed in an [amicus brief](#) filed by the American Association for Justice.

I (Charlotte) wrote up the case for SCOTUSblog – after argument I [wrote that](#) “it appears that the Supreme Court is divided on this question, but likely to hold that the language in the Lamps Plus arbitration contract was not clear enough to give rise to an obligation to arbitrate on a class basis.” If anything, the Court might adopt a presumption against reading arbitration clauses to allow class-wide arbitration – during argument, Chief Justice Roberts paraphrased Justice Jackson to observe [T]he FAA is not a suicide pact. So, if the FAA says enforce the contract according to its terms, but one of the terms ... is fundamentally inconsistent with arbitration itself, then, presumably, the FAA would preclude that term.”

***Henry Schein Inc. v. Archer and White Sales Inc.*** (pending before SCOTUS). In the Supreme Court’s third arbitration case of the Term, the issue is the Fifth Circuit’s rule against allowing arbitrators to make arbitrability determinations where the case for arbitration is wholly groundless – even though the parties have committed all arbitrability determinations to the arbitrator. (Say that five times fast.)

For more, see Professor Ronald Mann’s (Columbia) [argument analysis for SCOTUSblog](#):

*“It is awfully hard for an advocate opposing arbitration to find five votes in support of his position when Breyer, Ginsburg, Kagan and Sotomayor all seem to disagree with him. The outcome may not be everything that [Archer and White] could want – we can expect, for example, that the opinion will include a discussion (echoing Breyer’s comments) suggesting that the case does not include a “clear” and “unmistakable” agreement. But on the question presented, the justices seem to have little interest in validating the “wholly groundless” exception that brought the case to them.”*

## **Employment Discrimination:**

***Mount Lemmon Fire District v. Guido***, 139 S.Ct. 22 (2018). In *Mount Lemmon*, the Court held unanimously that the ADEA covers state and local employers of any size, rejecting the employer’s argument that the 20-employee threshold that applies to private employers should be read into the public sector as well.

One of us (Charlotte) wrote up an [opinion analysis for SCOTUSblog](#). Probably unsurprisingly, I don’t predict that *Mount Lemmon* represents the beginning of a pro-employee turn in anti-discrimination law:

*“This outcome seemed likely following oral argument, and the court’s unanimity can probably be explained by the fact that both textual and purposive approaches to statutory interpretation pointed toward the same result. Still, for those looking for a more counter-intuitive headline, perhaps it is notable that the Supreme Court just unanimously sided with employees and the U.S. Court of Appeals for the 9th Circuit, which was alone among the circuit courts in holding that the ADEA applies to small public employers.”*

Incidentally, anyone teaching *Mount Lemmon* might also use it as an object lesson on the perils of what one might call over-confident briefing. Justice Gorsuch pointedly observed to the employer’s counsel during argument that “[y]our reply brief . . . accuses the other side of illusions, distortions, disastrous and preposterous results, contradictions and anomalies, pretty strong language, and also contortionist. That’s in the first page and a half of the reply brief.” Apparently, those accusations did not convince the Court.

***R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission***, 884 F.3d 560 (6th Cir. 2018) (cert. petition pending). *Funeral Homes* presents the question of whether Title VII protects transgender employees from workplace discrimination; the Sixth Circuit held that it does. *Funeral Homes* also involves a RFRA defense, providing an opportunity for the post-Kavanaugh Court to weigh in on how to reconcile competing statutory commitments to non-discrimination and employer religious freedom. A cert. petition in this case has been repeatedly relisted; the same is true of multiple petitions in cases presenting the question of whether Title VII protects against sexual orientation discrimination. The Court could act on all of these petitions as soon as Jan. 4. See, e.g., ***Zarda v. Altitude Express, Inc.***, 883 F.3d 100 (2d Cir. 2018). (Incidentally, the cert. petition in ***Rizo v. Yovino***, in which the Ninth Circuit held that reliance on employees’ prior salaries cannot justify a wage differential between men and women, has been relisted once, and is also up for discussion at the Court’s Jan. 4 conference.)

For more on *Funeral Homes*, see Professor Katie Eyer (Rutgers) [writing for ACSblog](#):

*“Funeral Homes illustrates the critical nature of correcting this misunderstanding of what the “to the person” analysis entails under RFRA—especially in the context of religious defenses to anti-discrimination law claims. Prior cases in which the Supreme Court has found an exemption warranted based on “to the person” analysis have involved circumstances where the government’s generally compelling interest was not meaningfully implicated in the context of the particular religious adherent. The point that the Court was making through its “to the person” admonition was thus only that the government must show its generally compelling interest to be implicated in some*

*significant way by the case at hand. But in anti-discrimination cases, the very harm the government is trying to prevent—its compelling interest in protecting individuals against discrimination—is directly implicated in each and every individual case. Because the government’s interest is in preventing harm to third parties—an exemption allowing such harm would inevitably significantly implicate that interest.”*

### **Fair Labor Standards Act:**

*Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134 (2018). *Encino Motorcars* has now completed its second trip to the Supreme Court, which held that car dealership service advisors (employees who sell customers “servicing solutions”) were included in the FLSA overtime exemption covering “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles.” Significantly, the Court held that FLSA exemptions should not be read narrowly.

For more on what the future might hold for FLSA interpretation, see Professor Ruben Garcia’s (UNLV) [analysis for ACSblog](#):

*“The United States Supreme Court’s April 2 decision in Encino Motorcars LLC. v. Navarro was certainly a setback for employees at car dealerships who work as service advisors. The Court ruled that service advisors were not eligible for overtime under the Fair Labor Standards Act of 1938 (FLSA) under an exemption that does not mention “service advisors” at all. But a dictum in the Court’s opinion represents an even greater blow for more than 70 years of interpretations under the FLSA and is a bad harbinger for enforcement of the Act in years to come.”*

### **Labor Law:**

*Janus v. AFSCME*, 138 S.Ct. 2448 (2018). In *Janus*, the Court finished the project that Justice Alito began in *Knox v. SEIU Local 1000*, and held that mandatory public sector union agency fees violate the First Amendment. The Court also held that union-represented workers had to opt in to paying fees, and that their consent to pay “must be freely given and shown by ‘clear and compelling’ evidence.”

*Janus* has its share of detractors among labor law professors, many of whom echoed Justice Kagan’s warning of a newly “weaponized” First Amendment that might be brought to bear in new contexts. For example, writing for a mini-symposium on the deregulatory First Amendment hosted by Take Care Blog, one of us (Charlotte) [wrote that](#):

*The problem of figuring out what union speech Janus’s \$535 really bought reflects the larger conceptual difficulty of equating compelled speech with the compelled subsidization of an entity that goes on to engage in speech. By sidestepping that difficulty, the Court makes it more difficult for legislatures to solve collective action problems with collective solutions. It may yet turn out that the Court intends Janus to apply only in the union context, but its reasoning threatens a range of other arrangements – public pensions; university activity fees; unified bar associations; maybe even taxes.*

On the other hand, Professor Sophia Lee (Penn) had a more optimistic (pre-decision) take about the potential for unions to raise their own First Amendment arguments at [The Regulatory Review](#):

*Constitutional claims in general, and First Amendment claims in particular, have long been off limits for unions because of the right-to-work threat. Resolving that threat against the unions in Janus will open the door for them to reclaim the freedoms of association and speech that once buoyed the labor movement. Outside the courts, those claims may prove a potent tool for organizing as well as for making the case for worker organization and concerted action to the public. As the history that led to Janus demonstrates, integrating public education, popular mobilization, and legislative campaigning with litigation can fundamentally change constitutional law within the courts as well.*

Post-*Janus*, union opponents have filed a large number of cases challenging other aspects of public sector unionism. Justice Alito invited challenges to exclusive representation in *Janus* (“Designating a union as the employees’ exclusive representative substantially restricts the rights of individual employees”), and many of these cases argue that exclusive representation violates the First Amendment either under any circumstances, or when unions limit internal decision-making to members. Litigants in other cases argue that unions must allow employees to resign from union membership on demand; that union members must “recommit” to their unions post-*Janus* in order for their consent to pay dues to qualify under *Janus*’s “clear and compelling” standard; that laws designed to give unions an opportunity to meet with new employees violate the First Amendment; and that public-sector collective bargaining violates the Sherman Act.

Of the pending post-*Janus* issues, the most important is probably whether unions are liable for refunding years of back dues to objectors. Answering that question in the negative, Professor Catherine Fisk (Berkeley) and Dean Erwin Chemerinsky (Berkeley) [argue in the Harvard Law Review Forum that](#):

*First, the unions are private entities; they are not state actors bound by the First Amendment, were not acting “under color of law,” and therefore are not liable under § 1983. Second, if they are deemed to have acted under “color of law,” the unions are protected by qualified immunity under *Filarsky v. Delia*, the Supreme Court’s most recent decision concerning the liability of private actors sued under § 1983. Third, even if the unions are not protected by qualified immunity, they still have a “good faith” defense; they were acting in good faith following *Abood* until it was overruled. Finally, we explain why the plaintiffs may not recover from the unions on state law claims . . .*

***Browning-Ferris Industries of CA v. NLRB***, -- F.3d -- 2018 WL 6816542 (DC Cir. 2018).

The Obama NLRB’s joint employer rule seems to have nine lives, and it just received a boost from the DC Circuit. The Court affirmed the Board’s rule that an enterprise’s reserved or indirect authority weighs in favor of a finding that the enterprise is a joint employer of a group of

employees. The DC Circuit relied on “longstanding common-law meanings” of the terms “employer” and “employee,” and declined to defer to the Board’s view of those definitions. The DC Circuit’s decision that it will review *de novo* NLRB decisions about the scope of employer status is a blow to the Board’s ability to respond to emerging patterns of work – especially the “fissured workplace.” For now, though, this outcome will likely make it more difficult for the Trump Board to reverse the Obama Board’s rule in a pending rulemaking. As Professor Jeff Hirsch (UNC) put it in a [post on Workplace Prof Blog](#):

*What next? . . . One option is that the Board will press an extreme position during its rulemaking and thumb its nose at the court's admonition that reserved and indirect control is relevant (which could then lead to the Board's nonacquiescence policy, possible circuit split, and cert. petition). But my guess--and I stress guess--is that the Republican majority of the Board will go as far as it can without directly conflicting with the court's decision. In other words, as it did in Hy-Brand, the Board could acknowledge that evidence of reserved or indirect control can be relevant. And, then, it can answer the questions that the court expressly left open: whether only indirect and/or reserved control is enough to find joint employment. The current Board will obviously say "no," which will leave us with basically the same test we had before Browning-Ferris. The Board could still lose when the D.C. Circuit or another court takes up that question, but this seems to be a lower risk strategy than going the extreme route. The "relevant-but-not-sufficient" strategy still leaves plenty of room for a narrow joint employer test, especially when a Trump Board is applying it, while avoiding the time-consuming litigation that would result from defying the D.C. Circuit and seeking a circuit split.*

### **Whistleblower Protections:**

*Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767 (2018). The Court unanimously held that Dodd-Frank’s protections for whistleblowers do not cover individuals who have reported wrongdoing only to their employers, and not to the SEC.

For more, see Professor Theresa Gabaldo’s (George Washington) [analysis for SCOTUSblog](#):

*“Most folks who followed the oral argument in this case concluded that Somers’ position was DOA, so the outcome was hardly a surprise. The most interesting aspect of the decision was the court’s handling of Chevron, which does seem to signal that the majority believes deference to an agency determination still could be appropriate in a case in which the statute is ambiguous. Although Thomas, Alito and Gorsuch did not take this on directly, they specifically stated in their concurrence that they did not join “the portions of the Court’s opinion that venture beyond the statutory text.” They objected explicitly only to the majority’s use of legislative history, but arguably took a quiet swipe at Chevron as well.”*