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Ruben J. Garcia

University of Nevada, Las Vegas – William S. Boyd School of Law

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“AN EQUALLY DIVIDED COURT”: WORKPLACE LAW IN
THE U.S. SUPREME COURT 2015-2016

BY
RUBEN J. GARCIA *

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* Professor of Law, University of Nevada, Las Vegas, Boyd School of Law.

I. INTRODUCTION

The death of Justice Antonin Scalia on February 13, 2016 led to the biggest workplace law “non-event” of the United States Supreme Court’s October Term 2015 – the nine-word judgment handed down on March 29, 2016, in *Friedrichs v. California Teachers Association*: “The judgment is affirmed by an equally divided court.”¹

The tie-vote without an opinion meant that the Ninth Circuit Court of Appeals’s adherence to existing Supreme Court precedent on the constitutionality of agency fee statutes ended the *Friedrichs* case. As discussed below, the summary affirmance did not settle the debate or the litigation about agency fee that has been going for decades, but it did ensure that the issue will not return to the Court until a ninth Justice is confirmed by the Senate.

Although the *Friedrichs* case was the most noted of the Term, there were several others that were important to the development of workplace law in cases involving constitutional, statutory, and procedural issues. This article will also focus on unresolved myths that will persist after the Court’s deadlocked decision in *Friedrichs*.

Many other workplace law cases decided during the past Term, however, lacked sharp divisions, with some approaching near unanimity. Workplace law cases are unlikely to be accepted until the Court has nine members. Even though four justices can vote to accept a case, they are less likely to do so when the chances of a four to four deadlock are greater. According to statistics compiled by SCOTUSblog, the pace of cases granted certiorari in October Term 2016 is below average both for recent terms and the minimum distribution required for a full calendar.² Workplace law cases already represent a relatively small portion of the Court’s docket; they are at most 10 percent of the cases heard each term.³ Thus the current vacancy on the Court will further stunt the development of the doctrine in an area of life most important to millions of Americans –

1. *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083, 1083 (2016).

2. *Statistics*, SCOTUSBLOG, <<http://www.scotusblog.com/statistics/>> (last visited Dec. 3, 2016) (scroll down to “Pace of Grants” table).

3. In October Term 2015, the Court heard 81 cases on the merits with 8 of those being labor and employment law cases. *October Term 2015: The Statistics*, 130 HARV. L. REV. 507 n.a (2016). There were two Title VII cases, two ERISA cases, and two First Amendment cases (*Friedrichs* and *Heffernan*). Once case involved the interpretation of the Fair Labor Standards Act (FLSA) (*Encino Motor Cars*), and another involved a class action brought under the FLSA (*Tyson Foods*). *Id.* at 518-520.

the workplace.

The October 2015 Term of the United States Supreme Court will likely be most remembered for the passing of Justice Antonin Scalia and the gridlock on the Court that it created, rather than workplace law cases. But there were several consequential workplace law decisions, and, of course, projections about the impact on the law of work of a new Justice and a new President of the United States. But the issues and debates that produced right-to-work litigation will not go away with the Court's split decision in *Friedrichs*. Even with an eight-member court, there were only three other cases where the court was "equally divided" and the court judgment below was affirmed with a nine-word judgment.⁴ The most impactful of these three was the Court's decision to let stand the Fifth Circuit's judgment in *Texas v. United States*, thereby continuing the nationwide injunction freezing President Obama's plan to regularize the status of the parents of undocumented children.⁵ This has an impact on the millions of undocumented workers present in the country until there is political movement in Washington for immigration reform.

Then, there were the consequential merits decisions upholding the University of Texas's affirmative action policy, and the Texas abortion case *Whole Women's Health v. Hellerstadt* –which will both impact workplace dynamics in different ways.⁶ In *Fisher v. Texas*, the Court reaffirmed its holding in *Grutter v. University of Michigan* and upheld the University of Texas's diversity admissions program.⁷ The *Whole Women's Health* case invigorated the undue burden standard which prevented abortion regulations that have the purpose or effect of preventing women from obtaining legal abortion.⁸ Both of these cases will have an impact on the place of women and minorities in the workforce.

With the changes coming at the Court now that Donald Trump has been elected President, most of the popular debate is focused on what is ahead – both for the Court and the administrative agencies

4. *United States v. Texas*, 136 S. Ct. 2271 (2016), *Dollar General Corp. v. Miss. Band Choctaw Tribe Indians*, 136 S. Ct. 2159 (2016), *Hawkins v. Community Bank of Raymore*, 136 S. Ct. 1072 (2016) (affirming by an equally divided court the Eighth Circuit holding that Equal Credit Opportunity Act did not apply to spouses of applicants for loans who were not a part of the credit transaction).

5. See *Texas v. United States*, 809 F.3d 134, 146-49, 177-86 (5th Cir. 2015).

6. *Fisher v. The University of Texas at Austin*, 136 S. Ct. 2198 (2016); *Whole Women's Health v Hellersteadt*, 136 S. Ct. 2292 (2016).

7. 136 S. Ct. at 2207.

8. 136 S. Ct. at 2300.

that make up the bulk of its workload. But there are important statutory cases from the 2015-16 Term to review. As with last Term, there were statutory cases involving Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act of 1938 (FLSA). As discussed below, the relationship between the administrative agencies and the courts continued to be a major theme of the term. These cases involved the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC). In this past Term, there again was no case involving the National Labor Relations Board (NLRB) – displaying the relative lack of collective bargaining in the private sector economy.

For those who think the personnel on the Supreme Court matter more than who is in the White House or Congress, this Term provided a reminder of the Senate’s “advice and consent” role.⁹ The President nominated to the Court Merrick Brian Garland, the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. Judge Garland’s nomination has stalled for more than 150 days – a new record.¹⁰ This stalemate sharply highlights the connections between the Court and politics.

Before he passed away on February 13, 2016, Justice Scalia had been on the Court since 1986 and had participated in dozens of cases involving workplace law. In this Term, he had participated in oral arguments in six of the nine workplace law cases that this Article will discuss, but he was only part of the decision in two of them. I will leave others to discuss the legacy of Justice Scalia in his thirty years of workplace law cases. Although I primarily discuss below Scalia’s impact on the cases this term, both before and after his death, in the conclusion, I will discuss the ramifications of the new Supreme Court on the future of workplace law.

II. WORKPLACE CONSTITUTION CASES

A. *Friedrichs v. CTA: Union Dues and the First Amendment*

By nature of the Court’s limited jurisdiction and review, Supreme Court cases often involve the “workplace constitution” – and this Term was no exception. I will start with the most anticipated case of October Term 2015 – the tie decision in *Friedrichs v.*

9. U.S. CONST. art II, § 2, cl. 2.

10. Ruben J. Garcia, Editorial, *Founders Gave No Veto to the Senate*, RENO GAZETTE-J., Mar. 20, 2016, at E4.

California Teachers Association (CTA). If the plaintiffs and the organizations backing them had been successful, the decision would have used the Constitution to make the entire nation “right to work” in the public sector.

Rebecca Friedrichs is a teacher in Orange County California who objected to having to pay an agency fee to the California Teachers Association (CTA) for representation services.¹¹ She withdrew from membership but was still required to pay the costs of grievance administration and collective bargaining. She argued that despite not having to pay for political organizing, she was still forced to subsidize the union’s bargaining demands, which she also believed were political. She and nine other teachers filed suit against the CTA alleging that their First Amendment rights of freedom of speech and association had been violated for having to pay the agency fee.¹²

The District Court and the Ninth Circuit ruled against the plaintiffs, citing the binding U.S. Supreme Court decision in *Abood v. Detroit Board of Education*, which had held that it was not a First Amendment violation to require public school teachers to pay an agency fee to the union that represents them.¹³ Since 1977, the *Abood* precedent has served as the constitutional basis for the agency fee statutes in more than twenty-one states, including California.¹⁴ The statutes allow the union to charge nonmembers an agency fee for the cost of grievance processing and collective bargaining. Nonmembers are never charged for supporting political candidates, but expenses related to grievance processing and collective bargaining are chargeable.¹⁵

Although the decision was a four to four tie after the death of Justice Scalia, the prospects did not look good for the CTA at the argument before the Supreme Court in January 2016. There were several questions at argument that foreshadowed the expected battles in the years to come as *Friedrichs*-type litigation percolates up the chain. The following misconceptions voiced by various justices at the

11. Complaint at 4, *Friedrichs v. Cal. Teachers Ass’n*, No. SACV 13-676-JLS, 2013 WL 9825479 (C. D. Cal. Dec. 5, 2013).

12. *Id.* at 1-7.

13. *Friedrichs*, No. SACV 12-676-JLS, 2013 WL 9825749, at **2-3 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *aff’d*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014)).

14. Mike Antonucci, *Teachers Unions at Risk of Losing “Agency Fees”*, EDUC. NEXT, Winter 2016, at 23, 24, 27, available at <http://educationnext.org/files/ednext_XVI_1_antonucci.pdf>.

15. *Abood*, 431 U.S. at 220-32, 234.

oral argument suggest myths that will continue to cloud the litigation on these issues.¹⁶

1. “Everything Government Unions Do Is Political”

Justice Scalia’s statement went straight to the heart of the plaintiffs’ argument: “The problem is that everything that is collectively bargained with the government is within the political sphere, almost by definition.”¹⁷ The premise that everything a government union does is political does not apply to the many mundane things that the plaintiffs are asked to pay for in collective bargaining agreements that were presented to the court in appendices to the briefs. Justice Anthony Kennedy at one point in the argument read a laundry list of items that had public policy implications – merit pay, seniority, grievance procedures – but neglected to mention a multitude of noncontroversial items, such as breaks, mileage reimbursement, and professional development that are also subjects of bargaining.¹⁸

This new emphasis on the political aspects of bargaining would seem a strange departure from the Court’s prior precedents. In *Smith v. Arkansas State Highway Employees Local 1315*, the Court held that collective bargaining with the state was not speech under the First Amendment, and thus the State’s decision not to entertain bargaining with certain employees (in that case, state highway employees) was not a constitutional problem.¹⁹ Further, in *Borough of Duryea v. Guarnieri*, authored by Justice Kennedy, the Court held that a town police chief’s grievance was not a matter of speech but instead implicated the Petition Clause of the First Amendment, and even then was not a matter of public concern.²⁰ How can bargaining not be a matter of constitutional concern in those cases brought by unions and union members, and suddenly implicate major constitutional concerns when the speech claim is brought by those who dissent from the union? Is it, as Justice Stephen Breyer asked during oral

16. I previously discussed these misconceptions at the blog HAMILTON AND GRIFFIN ON RIGHTS. Ruben J. Garcia, *Five Myths from the Oral Argument in Friedrichs v. California Teachers Association*, HAMILTON & GRIFFIN ON RIGHTS (Jan. 12, 2016), <<https://hamilton-griffin.com/2016/01/12/five-myths-from-the-oral-argument-in-friedrichs-v-california-teachers-association-by-ruben-j-garcia/>>.

17. Transcript of Oral Argument at 45, *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016).

18. *Id.* at 66.

19. 441 U.S. 463, 465 (1979).

20. 564 U.S. 379, 387, 389-99 (2011).

argument, essentially, whether a special constitutional rule was being created just to harm labor unions?²¹ Clearly, this misconception had taken hold among five of the Justices, clouding prospects for CTA to prevail.

2. “Private Sector Exclusive Representation Is Not at Issue”

The federalism implications of a decision striking down agency fees nationwide when twenty-one states have found them to be a positive and efficient way of organizing labor relations received less attention than the possible implications for the private sector, at least during the argument.²² Federal labor laws have been upheld against constitutional challenges by groups such as the National Right to Work Legal Defense Foundation (NRTW) numerous times over the years, even when the only state action involved is the government statute allowing agency shop, and the court or administrative action needed to enforce it.²³ In arguing the case for petitioners, attorney Michael Carvin dismissed the possible success of a constitutional challenge to the statutes permitting agency shop – the National Labor Relations Act and the Railway Labor Act.²⁴ The NRTW, however, has several challenges based on the theories of *Friedrichs* and *Harris v. Quinn*.²⁵ *Harris* was the challenge to the Illinois agency fee law the NRTW brought to the Supreme Court in 2014 where the Court first refused the invitation to overturn the 1977 case upholding the constitutionality of agency fees in the public sector, *Abood v Detroit Board of Education*.²⁶ *Abood* represents the accommodation between exclusive representation and the rights of dissenters to pay on the costs of collective bargaining.²⁷

Even after the continued existence of *Abood*, there are several

21. See Transcript of Oral Argument, *supra* note 17, at 19.

22. See *id.* at 70-72 (raising the issue of disruption to the states but not getting any follow-up questions on that).

23. See generally SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT (2015); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982).

24. Transcript of Oral Argument, *supra* note 17, at 6-7.

25. E.g., Complaint, *Berman v. Brown*, No. 6:16-cv-02108 (D. Ore. Nov. 2, 2016); Notice of Appeal, *Janus v. Am. Fed’n of State Cty. & Munic. Emps.*, No. 16-3638 (7th Cir. Oct. 11, 2016); see also *Homecare Workers File Federal Class Action Lawsuit Against the State of Washington*, NAT’L RIGHT TO WORK LEGAL DEFENSE FOUND. (Oct. 24, 2016), <<http://www.nrtw.org/news/homecare-workers-file-federal-class-action-lawsuit-against-the-state-of-washington10242016/>> (describing the case brought by the NRTW and stating that it was one of several brought in Minnesota, Illinois, New York, Oregon and Washington state).

26. *Harris v. Quinn*, 134 S. Ct. 2618, 2627, 2638 (2014).

27. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977).

challenges to exclusive representation still in the pipeline.²⁸ Although the court has tried to cabin the constitutional implications of its labor law decisions in private sector cases like *Communication Workers of America v. Beck*²⁹ and *International Association of Machinists v. Street*,³⁰ an older precedent under the Railway Labor Act would likely cause the court to reexamine the constitutional implications of government mandated exclusive representation.³¹ In *Steele v. Louisville and Nashville Railroad*, the Court dealt with the constitutional concerns of state-aided railroad unions discriminating on the basis of race by finding a duty of fair representation implicit in the union's role as exclusive bargaining representative.³² That duty continues to be the quid pro quo for exclusive representation and agency fees to the union in the private and public sectors, and it would be at risk if the constitutional basis for agency fees was struck down by the Court in *Friedrichs*.

3. "Inability to Collect Agency Fees Does Not Lead to Weaker Unions"

Much discussion during the argument involved whether public employee unions would "collapse" if *Friedrichs* won, as Chief Justice John Roberts put it.³³ "I see no connection whatever between – what the city is willing [to] give in collective bargaining and whether you have agency fees," said Justice Scalia during the argument.³⁴ Labor advocates know that the question is not whether public employee unions will be extinct, but whether they will be effective without having the ability to collect dues on the front end and entertain request rebates, versus having to pursue reimbursement for their costs of grievance administration and collective bargaining after nonmembers have already received the benefits of bargaining. While there are certainly examples of unions that have thrived in right to work states (one example being the Culinary Workers Union in Nevada), the overwhelming weight of the evidence is that unions are

28. Charlotte Garden, *Friedrichs v. California Teachers Association and Why We Need Nine*, AM. CONSTITUTION SOC'Y (Mar. 30, 2016), <<http://www.acslaw.org/acsblog/friedrichs-v-california-teachers-association-why-we-need-nine>>.

29. 487 U.S. 735 (1988).

30. 367 U.S. 740 (1961).

31. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

32. *Id.* at 202-03.

33. Transcript of Oral Argument, *supra* note 17, at 57.

34. *Id.* at 60.

weaker in states where they must chase members for dues, not just in the political arena but also at the bargaining table.³⁵

4. “Opt-out Is Not as Easy as It Seems”

Justice Alito questioned how easy opt-out is,³⁶ recalling the need to send a certified letter from *Knox v. SEIU Local 1000*, an opinion he authored, where the Court held that the union was required to get affirmative permission for a “political fight back fund” rather than simply rebating the amounts with which bargaining unit employees disagreed.³⁷ It seemed inapposite to being able to opt-in or out of bargaining.

Public employees like Ms. Friedrichs, who have refused to join the union have already opted out – the remaining questions simply concern what is chargeable and what is not chargeable. They have opted out from all union activities except paying for the cost of grievance administration and collective bargaining, for which they are seeking reimbursement in this case. It seems a minimal burden to place on employees who wish to uphold the “right to work,” or as I prefer, the “right to free ride.”

5. “A Whole Class of Persons Whose Speech Has Been Silenced”

In one exchange with CTA attorney David Frederick, who argued on behalf of the Union Respondents, Justice Kennedy expressed concern that a “whole class of persons [was having their] speech . . . silenced, not just one person.”³⁸ The question misunderstands the majoritarian nature of a union. Most members have no quarrel with smaller class sizes, layoffs based on seniority, and higher wages (90 percent of CTA covered teachers are full members of the union).³⁹ Indeed, minorities should have democratic dissenting rights within the union, but agency fee statutes and the Court’s cases already allow dissenters to refuse to subsidize views that they do not agree with in everything from unions to bar associations to student organizations.⁴⁰

Further, during this exchange, Justice Kennedy turned his back

35. On the Culinary Union in right to work Nevada, see, for example, Ruben J. Garcia, *Politics at Work After Citizens United*, 49 LOY. L.A. L. REV. 1 (2015).

36. Transcript of Oral Argument, *supra* note 17, at 68.

37. *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2297 (2012).

38. Transcript of Oral Argument, *supra* note 17, at 66.

39. *See id.* at 67-68.

40. *See id.* at 28.

on case precedents, some that he authored, which allowed the government greater latitude to balance First Amendment rights to provide for the efficient role of government as employer. Kennedy tried to distinguish these cases on the ground that they only dealt with one person – the deputy district attorney in *Garcetti v. Ceballos*⁴¹ or the school teacher in *Pickering v Board of Education*⁴² – whereas agency fee statutes deal with a large number of dissenters.⁴³ In fact, relatively few of those in the CTA’s bargaining unit eligible to resign actually do.⁴⁴ Perhaps they recognize the value of collective bargaining agreements and of participation in the union’s governance structures, or perhaps they are unaware of their right to withdraw, even though agency fee statutes require notice of that right be given.⁴⁵

Justice Kennedy elided the large number of union members whose speech is silenced. If bargaining with the government is found to be constitutionally protected political speech, perhaps the Court will revisit its holdings in *Smith* and *Guarnieri*, discussed above, where the Court held respectively that 1) excluding certain workers from bargaining did not raise First Amendment concerns;⁴⁶ and 2) that a town police chief’s grievance for overtime pay was not a matter of public concern under the petition clause.⁴⁷ Or, perhaps as discussed above, it would overturn *Steele* which imposed a duty to represent nonmembers fairly,⁴⁸ since there would no longer be “state compulsion” for the members to be represented. All of those would be a worse and more disruptive outcome than what might have occurred, but these issues will again be on the table the next time the issue comes before the Court, after a ninth justice is seated.

B. *Heffernan v. City of Paterson: Political Retaliation*

Friedrichs was not the only constitutional case involving public employment this Term. The *Heffernan* case involved a Paterson, New Jersey police officer who went to pick up a lawn sign for his mother in

41. 547 U.S. 410 (2006).

42. 391 U.S. 568 (1968).

43. Transcript of Oral Argument, *supra* note 17, at 56.

44. *See id.* at 67-68.

45. *See Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 304-08 (1986) (analyzing procedures to give notice to objecting members of the bargaining unit and allow for funds not to be collected for objected-to activities).

46. *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 466 (1979).

47. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 399 (2011).

48. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202-03 (1944).

the local mayoral election. When other officers saw Heffernan with the sign and told his supervisors, they allegedly put him on an undesirable beat.⁴⁹

Justice Scalia was on the bench when *Heffernan v. City of Paterson* was argued on January 19, 2016.⁵⁰ The oral argument looked bad for the employee, but ended as a six to two victory for the employee, so Scalia's vote would not have been determinative.⁵¹ At oral argument, Justice Scalia was skeptical of the idea that Heffernan could bring a First Amendment retaliation claim since he had not supported the candidate who opposed the mayor in the election.⁵² Justice Scalia asked how it was possible that an employee who did not oppose the mayor's election could be retaliated against for opposing the mayor in the election.⁵³ Of course, the case turned on whether the City could be liable for retaliation against the police officer based on the Mayor's mistaken belief that officer Heffernan had supported his opponent. As a result, Heffernan was placed on a less-desirable beat. He sued, alleging that the change in working conditions had been because of his perceived support for the Mayor's opponent.⁵⁴ The District Court and the Third Circuit held that the dismissal of the claim was proper, and Heffernan appealed to the U.S. Supreme Court. The Supreme Court granted certiorari on October 1, 2015.⁵⁵

The Court, in an opinion authored by Justice Stephen Breyer, ruled that Heffernan did indeed state a retaliation claim under the First Amendment.⁵⁶ The fact that Heffernan himself did not support the mayor's opponent did not change the fact that the mayor aimed to chill political activity against him in the City of Paterson.⁵⁷

The rule announced by the Court broadens the possibility of retaliation claims:

When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects – that employee is entitled to challenge that

49. *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016).

50. Transcript of Oral Argument at 1, *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016).

51. *See* 136 S. Ct. at 1415.

52. *See* Transcript of Oral Argument, *supra* note 50, at 5-7.

53. *See id.* at 5.

54. *Heffernan*, 136 S. Ct. at 1416.

55. *Id.* at 1416-17; *Heffernan v. City of Paterson*, 136 S. Ct. 29 (2015).

56. *Heffernan*, 136 S. Ct. at 1418-19.

57. *Id.* at 1419; *see* Paul Secunda & Alexander Hertel-Fernandez, *Citizens Coerced: A Legislative Fix for Workplace Political Intimidation Post-Citizens United*, 64 UCLA L. REV. 1 (2016).

unlawful action under the First Amendment and 42 U.S.C. § 1983 – even if, as here, the employer makes a factual mistake about the employee’s behavior.⁵⁸

The *Heffernan* case is one of a string of Supreme Court cases in recent years about workplace retaliation. It remains to be seen how useful it will be as an anti-retaliation protection for political activities in government employment, or if it is just an odd situation unlikely to be repeated very often in the future. In most election years, most of the potentially retaliatory actions exist in the private sector.⁵⁹ Thus, we must wait and see if there are any future workplace law cases arising out of this election where this precedent might be of use.

III. THE ROLE OF AGENCIES IN THE TWILIGHT OF THE OBAMA ADMINISTRATION: STATUTORY CASES, THE DOL AND EEOC

The next set of cases have a common theme in workplace law cases – the role of administrative agencies in drawing the boundaries of the law enacted by the legislative branch. Many of these issues have accelerated with the approaching end of the Obama Administration, but the President’s authority to engage on many of the issues must be tested in future terms.

A. Title VII Cases: *Green and CRST Van Expedited Inc.*

The issue in *Green v. Brennan* involved when the clock begins ticking for the purposes of Title VII for federal employees to bring a constructive discharge discrimination claim – when the employee signs an agreement to retire or accept another position in a remote location, or when the employee actually resigns.⁶⁰ The Tenth Circuit Court of Appeals held that the claim was untimely based on the date of the agreement rather than the actual resignation date.⁶¹

The standard rule for limitation periods requires the court to determine when is the “complete and present cause of action.”⁶² The Court held that the employee’s constructive discharge claim was a discriminatory act that started the clock ticking when the employee gives notice of his resignation. The Court ruled this way for two

58. *Heffernan*, 136 S. Ct. at 1418.

59. See, e.g., Alexander Hertel-Fernandez & Paul M. Secunda, *Citizens Coerced: A Legislative Fix for Political Intimidation During Elections Post-Citizens United*, 64 UCLA L. REV. 1, 5-7 (2016) (citing examples at Cintas & Georgia Pacific).

60. 136 S. Ct. 1769, 1774 (2016).

61. *Id.* at 1775.

62. *Id.* at 1776.

reasons. First, in a constructive discharge, the resignation is part of the complete cause of action for wrongful termination. Second, nothing in the regulation providing for the cause of action precluded the counting of the resignation for purposes of statute of limitations.⁶³

Justice Alito concurred in the judgment, and interestingly used the Court's controversial decision in *Ledbetter v Goodyear Tire* to help explain why the resignation date should start the tolling of the clock.⁶⁴ The Court's *Ledbetter* opinion was legislatively reversed by the Lily Ledbetter Fair Pay Act,⁶⁵ but in this case, Alito seems to say that the precedent can help plaintiffs, like Green.⁶⁶

Justice Thomas was the sole dissenter, focusing on the need to utilize the counseling service of the EEOC.⁶⁷ This theme of utilizing pre-dispute resolution services has recurred in several recent Supreme Court cases.⁶⁸ In this case, however, the lack of pre-dispute counseling was not fatal.

In *CRST Van Expedited v. EEOC*, the defendant *CRST Van Expedited Lines* prevailed in an EEOC enforcement action and obtained a dismissal for failure to conciliate.⁶⁹ In that case, CRST obtained a dismissal of a Title VII case brought against it and sought attorneys' fees going to a prevailing "party." The Eighth Circuit held that CRST was not entitled to attorney's fees because there was not a judgment on the merits.⁷⁰

The Supreme Court reversed, in a unanimous opinion written by Justice Kennedy. Here again, although the argument and the decision occurred after the death of Justice Scalia, the Court was still unanimous in its decision.⁷¹ CRST is an example of a decision that did not have an ideological split that was affected by the death of Justice Scalia. But its effects are still decidedly pro-defendant.

Both Title VII cases this term dealt with fairly technical issues that were not affected by the absence of Justice Scalia. However, as

63. *Id.*

64. *Id.* at 1782-83 (Alito, J., concurring) (citing among other authorities *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)).

65. Pub. L. No. 111-2, 123 Stat. 5 (2009).

66. *Green*, 136 S. Ct. at 1783 (Alito, J., concurring).

67. *Id.* at 1780-81 (Thomas, J., dissenting).

68. *E.g.* *CRST Van Expedited v. EEOC*, 136 S. Ct. 1642 (2016); *Mach Mining v. EEOC*, 135 S. Ct. 1645 (2015) (concerning the EEOC's obligation to attempt to conciliate before filing an action).

69. *CRST*, 136 S. Ct. at 1649.

70. *Id.* at 1650.

71. *Id.* at 1645.

with all Title VII cases, the Court's decisions will delineate the boundaries of administrative action in the absence of congressional action on civil rights law until the stalemate in Washington is changed.

B. Encino Motor Cars LLC v. Navarro: Overtime Exemption

One of the more contested terrains in the Court recently is the actions of the Department of Labor. In *Encino Motor Cars LLC v. Navarro*, the authority of the Department of Labor to interpret one of the exemptions to the overtime requirements of the Fair Labor Standards Act was at issue.⁷² The plaintiffs in this case were “service writers” – the helpful employees of the auto dealerships who check in cars and write down the service needs for the car.⁷³ The case dealt with whether service advisors are exempt from the overtime provisions of the Fair Labor Standards Act.⁷⁴ In the backdrop of the case, the new overtime exemption rules were being finalized that will affect many more millions of workers, and which might also come back to the Court in the years to come.⁷⁵ As with many of the DOL initiatives, they have been challenged in the courts and in public opinion. But this is the consequence when Congress abdicates its responsibility to modernize the FLSA and other labor statutes.

The *Navarro* case is one of several Fair Labor Standards Act cases that have come before the Court in recent years. Other recent cases have dealt with the definition of time worked and class actions.⁷⁶ Going back further, the Court in *Christopher v. SmithKline Beecham*

72. 136 S. Ct. 2117, 2121 (2016). I wrote about this case for HAMILTON AND GRIFFIN ON RIGHTS. Ruben J. Garcia, *Argument Preview: SCOTUS Decision Will Be the Tip of the FLSA Iceberg this Summer*, HAMILTON & GRIFFIN ON RIGHTS (Apr. 21, 2016), <<http://hamilton-griffin.com/argument-preview-scotus-decision-will-be-the-tip-of-the-flsa-iceberg-this-summer-by-ruben-j-garcia/>>; Ruben J. Garcia, *Encino Motorcars LLC v. Navarro: The Regulatory Pendulum Swings Back to the Department of Labor*, HAMILTON & GRIFFIN ON RIGHTS (June 23, 2016), <http://hamilton-griffin.com/encino-motorcars-llc-v-navarro-the-regulatory-pendulum-swings-back-to-the-department-of-labor-by-ruben-j-garcia/>.

73. *Navarro v. Mercedes Benz of Encino*, 780 F.3d 1267, 1269-70 (9th Cir. 2015).

74. *Encino Motorcars, LLC*, 136 S. Ct. at 2121.

75. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541). The rule was to go into effect December 1, 2016, but it has been enjoined by the United States District Court for the Eastern District of Texas. *Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-00731 (Nov. 2, 2016). The Department has filed an appeal with the Fifth Circuit. *Important Information Regarding Recent Overtime Litigation in the U.S. District Court of the Eastern District of Texas*, U.S. DEP'T OF LABOR, <<https://www.dol.gov/whd/overtime/final2016/litigation.htm>> (last visited Dec. 4, 2016).

76. *E.g.* *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513 (2014).

was more divided, partly because it dealt with the Department of Labor's authority to exempt pharmaceutical "detailers" – those who promote products to doctors but lack legal authority to make a sale.⁷⁷ Justice Breyer wrote a strong dissent from that five to four opinion about why the Department of Labor's view should receive deference.⁷⁸

Navarro concerned a narrow part of the existing exemptions from overtime, but took place in the context of the looming final DOL rule on the executive, administrative, and professional exemptions, which will be discussed below.⁷⁹ The Fair Labor Standards Act (FLSA) exempts from minimum wage and overtime requirements those employed in a bona fide "executive, administrative or professional capacity, "outside salesmen" or "any salesman, partsman or mechanic primarily engaged in the selling or servicing of automobiles."⁸⁰ The issue in *Navarro* was whether "service advisors", usually those friendly employees who greet you, check you in, and sometimes try to "sell" services, are not required to be paid time and half their regular rate for hours over forty worked in a week.⁸¹

A panel of the Ninth Circuit unanimously held that the service advisors were not exempt from overtime.⁸² On January 15, 2016, the Court agreed to hear the case.⁸³ Whether this case would have been granted after Justice Scalia's death on February 12 is anyone's guess, but my guess is that Scalia would have had a field day with the plain language of the Act: Do the service advisors "sell" anything in the traditional sense of that word? Do they provide any "parts"? Can they be considered mechanics if they don't have the certification required to fix cars? Or, were there four justices who thought that the Ninth Circuit was insufficiently attuned to the "whole context" of the service process and thus agreed to hear the case? The U.S. Courts of Appeals for the Fourth and Fifth Circuits had found that the service advisors were exempt from overtime.⁸⁴

77. 132 S. Ct. 2156, 2170-73 (2012).

78. *Id.* at 2174 (Breyer, J., dissenting).

79. See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541).

80. 29 U.S.C. § 213(a)(1) (2012).

81. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2121 (2016).

82. *Id.* at 2124.

83. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 890 (2016).

84. *Encino Motorcars, LLC*, 136 S. Ct. at 2124 (citing *Walton v. Greenbriar Ford, Inc.*, 370

The FLSA issue was whether “service advisors,” were “primarily engaged in the selling and servicing of automobiles” and thus exempt from overtime pay.⁸⁵ In other words, the key textual question was whether they were primarily engaged in the servicing of automobiles – even though they never actually get under the hood or get “their hands dirty, by “work[ing] as a mechanic’s right hand man or woman,” as the brief for the service advisors asserted.⁸⁶

In the briefing and at the oral argument, most of the attention focused on the linguistic gymnastics and the dueling canons of statutory construction that each side believed would win the case. The case focused on the DOL’s pendulum swings since 1970, first holding in an interpretive regulation that service advisors are not exempt, and then finding that the courts rejected their position.⁸⁷ Then, in the waning days of the George W. Bush Administration, a rulemaking proposing that service advisors be exempt from overtime was started, but soon scuttled as the Obama Administration began.⁸⁸ In the meantime, current and former service advisors filed suit in federal court in Los Angeles against the Encino Motor Cars Group alleging that the dealership owed them unpaid overtime wages.⁸⁹

The Court, in an opinion by Justice Anthony Kennedy, held that the DOL’s justification for the new rule was lacking, since there was little justification at all due to what was apparently “an inadvertent mistake in drafting.”⁹⁰ The Court remanded the case to the Ninth Circuit to interpret the statute without giving “controlling weight” to the DOL’s interpretation.⁹¹ Justice Ginsburg, joined by Justice Sotomayor, wrote a concurring opinion to emphasize that the DOL should not be expected to provide a heightened justification for its conclusions.⁹² “[I]t suffices,” according to Justice Ginsburg, “that the new policy is permissible under the statute, that there are good reasons for it, and the agency *believes* it to be better, which the

F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973)).

85. 29 U.S.C. § 213(b).

86. *Encino Motorcars, LLC*, 136 S. Ct. at 2127 n.1 (Ginsburg, J., concurring) (quoting Respondents’ Brief, 32-35).

87. *Id.* at 2122-23 (majority opinion).

88. *Id.* at 2123 (citing Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43654 (July 28, 2008) and Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18832, 18833 (Apr. 5, 2011)).

89. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1270 (2015).

90. *Encino Motorcars, LLC*, 136 S. Ct. at 2124, 2126-27.

91. *Id.* at 2127.

92. *Id.* at 2128 (Ginsburg, J., concurring).

conscious change of course adequately indicates.”⁹³

Justice Clarence Thomas, joined by Justice Samuel Alito, wrote a dissenting opinion, arguing that there was no need to remand to the lower court, and the Court should enter judgment for the dealerships since the FLSA exemption clearly includes service advisors, even though the words “service advisors” do not appear in the statute.⁹⁴ In doing so, the dissent mocked both the distributive canon of construction favored by the plaintiffs, and the canon that the FLSA should be construed broadly because it is a remedial statute. Quoting the late Justice Antonin Scalia, Justice Thomas wrote that this view of the FLSA rests on an “elemental misunderstanding of the legislative process.”⁹⁵ On the other hand, numerous FLSA opinions by courts over the last eighty years favoring a broad construction of the statute suggests that if a canon for broad construction of the FLSA does not exist in name, it surely exists in practice.

The Court’s decision in *Encino Motorcars, LLC v. Navarro*, dealing with service advisors at automobile dealerships, reminds us that there are many exemptions in the statute that do not depend on the salary level of the employee, such as being an “outside salesperson,” a “computer employee” or, as in this case, one who is “primarily engaged in the selling or servicing of automobiles.”⁹⁶ Unfortunately for the service advisor plaintiffs in the case, six justices voted to swing the regulatory pendulum back to the DOL to get more detail about why the DOL currently holds that service advisors should not be exempt from the coverage of overtime pay, and two justices voted to end the case and enter judgment for the defendants.

The reason that this case is just the tip of the overtime iceberg is that President Obama’s Department of Labor has raised the annual salary threshold for all white-collar exemptions workers to \$47,460.⁹⁷ Under the new regulations, workers who earn below that will be presumptively entitled to overtime pay for hours worked over forty in a week. The *Navarro* case is also a challenge to the Department of Labor’s authority, and a similar challenge has already been brought

93. *Id.* (quoting *FCC v. Fox Television Stations*, 556 U.S. 502 (2009)) (emphasis in original).

94. *Id.* at 2128 (Thomas, J., dissenting).

95. *Id.* at 2130-31.

96. 29 U.S.C. § 213 (2012).

97. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541).

by several states challenging the new salary threshold.⁹⁸

On remand, the Ninth Circuit of Appeals again decided that the service advisors were not exempt from overtime rules, this time without relying on the Department of Labor's guidance, as instructed by the Supreme Court. The Ninth Circuit applied an analysis of the text and purposes of the exemption of sales, parts and mechanic employees in 1974 to conclude that Congress did not intend to exempt service advisors. As the Trump Administration begins, the Supreme Court, or Congress, will soon have a chance to revisit the mater.

IV. PROCEDURAL CASES IMPACTING WORKPLACE LAW

A. DIRECTV v Imburgia: *California Class Arbitration*

There were other cases that were procedural, but which will have an impact on substantive workplace law. Such procedural cases often have a greater impact on workplace law than many of the substantive cases. This Term was no exception, with the Court hearing the Federal Arbitration Act case *DIRECTV v. Imburgia*. In this case, the Court granted certiorari to the California court system, which again had limited the reach of the FAA.⁹⁹

On December 14, 2015, the Court, in a six to three opinion, reversed the California Court of Appeal's judgment.¹⁰⁰ The argument and the opinion included Justice Scalia, but the majority opinion was authored by Justice Breyer, in what appears to be a nod to *stare decisis*, as will be discussed below.

DIRECTV had a consumer contract in California that banned class action arbitration.¹⁰¹ Several cases over the last decade have dealt with the issue of class arbitrations, most famously (or infamously) *AT&T Mobility, LLC v. Concepcion*, generally disfavoring employees and attorneys bringing consumer and employment class actions.¹⁰² Even when state law purported to

98. The rule was to go into effect December 1, 2016, but it has been enjoined by the United States District Court for the Eastern District of Texas. *Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-00731 (Nov. 2, 2016). The Department has filed an appeal with the Fifth Circuit. *Important Information Regarding Recent Overtime Litigation in the U.S. District Court of the Eastern District of Texas*, *supra* note 75.

99. *DIRECTV v. Imburgia*, 136 S. Ct. 463, 465-66 (2016).

100. *Id.* at 466.

101. *Id.*

102. 563 U.S. 333 (2011); *see, e.g.*, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *see also* Jean R. Sternlight, *Disarming Employees: How American Employers Are*

preserve the ability to bring an action, the Court has used the FAA to preempt contrary state laws.¹⁰³

The contract at issue in *DIRECTV* between the consumer and the company provided that if “the law of your state would find this agreement to dispense with class arbitration procedures unenforceable” then the entire arbitration provision was unenforceable, California held class action waivers unconscionable.¹⁰⁴ But the *Concepcion* case, decided five years earlier, made clear that the FAA preempted California law. When the California court interpreted “law of your state” to mean California law but not *Concepcion*, *DIRECTV* appealed first to the California Supreme Court, which denied review, and then to the U.S. Supreme Court.¹⁰⁵

Justice Breyer, who authored the dissenting opinion in *Concepcion*, wrote for the six justices in the majority that although the law of California did apply, that law could not include California law, which had been invalidated by the U.S. Supreme Court’s subsequent decision in *Concepcion*.¹⁰⁶ Thus, according to Justice Breyer, the Court of Appeal’s interpretation adhering to California’s unconscionability ruling was preempted by the Federal Arbitration Act.¹⁰⁷

Justice Thomas filed a dissenting opinion maintaining, as he has done for nearly twenty years, that the FAA does not apply in state court.¹⁰⁸ Justice Ginsburg, joined by Justice Sonia Sotomayor, believed that the decision would continue the trend of disempowering consumers and favoring corporations.¹⁰⁹ Justice Ginsburg seemed generally to fault her colleagues for going further than *Concepcion* required: “Today’s decision steps beyond *Concepcion* and *Italian Colors*. There, as here, the Court misread the FAA to deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts.”¹¹⁰

Although not specifically a case about *stare decisis*, i.e., the judicial doctrine of letting precedent stand to not disrupt the

Using Mandatory Arbitration to Deprive Workers of Legal Protection, 80 BROOK L. REV. 1309 (2015).

103. See *AT & T*, 563 U.S. at 351.

104. *DIRECTV*, 136 S. Ct. at 466-68.

105. *Id.*

106. *Id.* at 461-71.

107. *Id.* at 471.

108. *Id.* (Thomas, J., dissenting).

109. *Id.* (Ginsburg, J., dissenting).

110. *Id.* at 476.

expectations of those who rely on stability in the Court's doctrine, the arbitration cases have certainly been predictably hostile to class arbitration. It remains to be seen whether four justices, plus the new justice to be seated, will have a case that presents a clear opportunity to reverse the tide toward mandatory arbitration.

B. Campbell-Ewald Co. v. Gomez: Settlement Offer in an FLSA Case

Campbell-Ewald Co. v Gomez involved an issue underlying the Telephone Consumer Protection Act, but came to the Supreme Court as an Article III mootness case under the Constitution.¹¹¹ Under Rule 68, a defendant might make an offer of judgment of “complete relief” to a plaintiff.¹¹² If the plaintiff does not accept, the argument goes, the plaintiff does not have a live action anymore. That issue was left open in a prior case where the Court had assumed without deciding that the offer of judgment mooted the plaintiff's claim and held that the particular class claim at issue, without a plaintiff with a live individual case, was also moot.¹¹³ The issue before the Court in *Campbell-Ewald* was whether an offer of “complete relief,” that is not accepted actually does moot the plaintiff's claim.¹¹⁴

There were two questions before the Court on writ of certiorari from the Ninth Circuit Court of Appeals. One issue was whether a government contractor – in this case Campbell Ewald Co - would have the sovereign immunity of the federal government. The Court of Appeals said no, and the Supreme Court agreed.¹¹⁵

The second issue, and the one that occupied more of the Court's attention, was the Article III mootness issue. Justice Ginsburg, adopting Justice Kagan's view voiced in dissent to the earlier case, made the holding clear – the case is not mooted by an unaccepted settlement offer – and five other Justices joined in that result.¹¹⁶ Justice Thomas wrote a separate opinion concurring in the judgment, pinning the result on the defendant's improper tender under state law.¹¹⁷ His views on the mootness question suggest that he might be open to mooting a case where the tender was properly done, but that

111. 136 S. Ct. 663, 669 (2016).

112. FED. R. CIV. P. 68.

113. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013).

114. *Campbell-Ewald*, 136 S. Ct. at 669.

115. *Id.* at 668.

116. *Id.* at 670-72.

117. *Id.* at 674 (Thomas, J., concurring).

would still leave five justices committed to Justice Kagan's view.

Although his was a dissenting opinion, Chief Justice Roberts (as dissenting judges often do) was quick to point out the limitations of the Court's opinion in *Campbell-Ewald v Gomez*.¹¹⁸ In a standard opt-in class action, defense counsel would determine what "complete relief" would be for the named plaintiff or plaintiffs and then either deposit a check with the trial court to act as an escrow "in an account payable to plaintiff" to try to defeat the class action.¹¹⁹ There is some question as to when the court would be divested of jurisdiction (e.g., is it when the escrow expires, when the certified check is received by the plaintiff, when the plaintiff cashes the check, or when the funds are actually in the plaintiff's account). But, because in *Gomez v. Campbell Ewald*, the defendant did not do this, this question was not decided.

Faced with a check made payable to the named plaintiff presumably for complete relief, plaintiffs' counsel would argue that Chief Justice Roberts's dissent is just that – a dissent – and might ignore the tendered check, but, with a fair amount of risk. First, dissents can sometimes become majority opinions, as it happened with Justice Elena Kagan's dissent three years earlier in *Genesis HealthCare Corp. v. Symczyk*.¹²⁰ There, Justice Kagan in her dissent opined that an unaccepted settlement offer of judgment does not moot a plaintiff's case, which *Campbell-Ewald* has now made the law of the land. Second, the plaintiff's lawyers face the risk that what they see as not being complete relief (because it doesn't include attorney's fees or injunctive relief) may be considered complete relief by the court, and that a properly tendered offer of complete relief disposes of the case. In other words, the court might agree with Justice Clarence Thomas's concurrence that so long as complete relief is properly tendered, that should be enough to moot the case.

The risk with any decision like this is that federal courts may be quite inclined to see the step of placing the funds in an escrow account, whether with them or a third party, as a further step by the defendant to try to settle the case and be very hard on named plaintiffs who do not accept what they deem complete relief. In other words, it might be a convenient way to clear complex litigation from their dockets. There should probably be a hearing on why the

118. *Id.* at 677 (Roberts, C.J., dissenting).

119. *Id.* at 680.

120. 133 S. Ct. 1523 (2013).

tendered funds are not complete relief, but some district courts may feel they can decide what complete relief should be without a hearing, as was arguably the case in *Campbell-Ewald* (fixed treble statutory damages under the Telephone Consumer Protection Act).¹²¹

All of this tends to be more of a problem for uncertified opt-out classes than ones that either have gone through the certification process or which are opt-in collective actions like those under the FLSA. If the class has been certified, and all named plaintiffs are offered complete relief, plaintiffs' counsel will be able to get other plaintiffs to step in the shoes of those who have been offered complete relief and to keep the court's jurisdiction. If it is an opt-in collective action under the FLSA, then other plaintiffs who have not been offered complete relief can keep the case alive after class certification. This will tend to be less of an issue in FLSA cases, but also a reason for plaintiffs' lawyers to move as quickly as possible for class certification. In the end, though, the majority opinion in *Campbell-Ewald v Gomez* should serve for some time to cast doubt on this strategy by defense counsel to defeat class actions.

C. *Tyson Foods v Bouaphakeo*: Definition of an FLSA Class

Justice Scalia participated in the oral argument in *Tyson Foods v. Bouaphakeo*, but not in the final decision. Peg Bouaphakeo, the representative of pork processing workers in Storm Lake, Iowa at Tyson Foods, sought compensation for the time workers spent donning and doffing their gear.¹²² The issue of working and walking time under the FLSA has been an active topic of litigation, arising in the recent cases of *IBP v. Alvarez*,¹²³ and *Sandifer v. U.S. Steel Corp.*¹²⁴ In this case the threshold issue was whether the group of workers was too disparate to have been in class under Rule 23 of the Federal Rules of Civil Procedure.¹²⁵ The plaintiffs won a \$2.9 million verdict before a jury in federal court for the overtime due to them for donning and doffing safety equipment. Tyson Foods challenged that verdict on grounds that the class should never have been certified

121. *See id.* at 677, 682-83.

122. *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1042 (2016).

123. 546 U.S. 21 (2005) (holding that the Portal-to-Portal Act does not exclude walking time between preliminary and postliminary activities from compensable hours worked under the FLSA).

124. 134 S.Ct. 870, 878 (2014) (holding that the uniforms at issue are "clothes" – the changing of which can be excluded from hours worked under the FLSA).

125. *Tyson Foods*, 136 S. Ct. at 1042.

because of disparate damages each employee suffered, and because some employees who were not damaged at all might receive compensation.¹²⁶ The Court granted certiorari and heard the case with Justice Scalia on the bench.¹²⁷

Justice Scalia seemed skeptical of the cohesiveness of the class at oral argument.¹²⁸ He was, after all, the author of *Wal-Mart v. Dukes*, a decision which placed greater scrutiny on the uniformity of discrimination class actions.¹²⁹ But the opinion in *Bouaphakeo* was issued after Justice Scalia's death, and his vote would not have affected the outcome of this six to two decision upholding the workers' jury verdict.¹³⁰

The primary argument of Tyson Foods rested on the lack of exactitude in the definition of the class. The defendants argued against the kind of averaging and calculations that are often done in "gang-time" shifts that Justice Kennedy in his opinion labeled as "grueling and dangerous."¹³¹ Because the employer did not believe that this gang time should be counted as hours worked, it did not keep records of the time, and thus was left to challenge the plaintiff's expert's calculations.¹³²

The uncertainty of the calculation itself, Tyson Food argued, meant that the class should not have been certified.¹³³ Justice Kennedy, joined by five other justices, disagreed in an opinion issued March 22, 2016¹³⁴ – over four months after the Court heard argument, which many suggested was closely divided, and which may have been due to Justice Scalia's presence on the bench. The Court held that inferring the liability from expert testimony is permissible under the FLSA and in accord with *Wal-Mart v. Dukes*, since the employees here worked at the same facility, did similar work, and were paid under the same policy.¹³⁵

Chief Justice Roberts filed a concurring opinion, which Justice Alito joined in part. Roberts agreed that the class was valid, but

126. *Id.* at 1043.

127. *See* *Tyson Foods, Inc. v. Bouaphakeo*, 135 S. Ct. 2806 (2015).

128. *See* Transcript of Oral Argument at 19, 47, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

129. *See* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359-60 (2011).

130. *See* *Tyson Foods*, 136 S. Ct. at 1041.

131. *Id.* at 1042-43, 1046.

132. *See id.* at 1047.

133. *Id.* at 1046.

134. *Id.* at 1047.

135. *Id.* at 1048.

remained concerned as to the District Court's difficulty of individual damage (or lack thereof) determinations.¹³⁶ Given the inability of the District Court to award damages with certainty, part II of the Chief Justice's opinion, expressed Article III standing concerns about the many plaintiffs that were undisputedly not damaged.¹³⁷ Since standing issues were not properly before the Court, the Chief Justice concurred in the result, since "[a]s the Court properly concludes, the problem is not presently ripe for our review."¹³⁸

Justice Thomas, joined by Justice Alito, was so troubled by both issues that he would have reversed the Eighth Circuit and remanded the case to the district court for further proceedings. Justice Thomas wrote that the majority redefined class action law (as interpreted by the Court in *Wal-Mart v. Dukes*) and the defendants were thereby prejudiced with an "unsound special evidentiary rule for cases under the Fair Labor Standards Act of 1938."¹³⁹ On the possibility of uninjured class members being part of the judgment, Justice Thomas did not believe the defendant's failure to bifurcate the class between injured and uninjured class members could excuse the deficiencies in the verdict both as a class action *and* as a collective, opt-in action under the FLSA.¹⁴⁰

Apart from the plaintiffs' holding on to the \$2.9 million verdict they won before a federal court jury, the *Bouaphakeo* case is significant to blunt the possible impact of *Wal-Mart v. Dukes* in FLSA cases. Many of the presumptions used in wage cases reflect the importance of minimum wage and overtime protections in the courts, and the Court recognized the special difficulties in the calculation of work time while adhering to the due process and Rule 23 concerns that defendants might have. Obviously, two dissenting justices believed those concerns were given short shrift. Nevertheless, those concerns are likely to be raised again in the Court in the future, as wage and hour class and collective actions continue to proceed apace.

V. ISSUES ON THE FRONT BURNER IN THE NEAR TERM

The most important issues as of this writing are the identities of the next justices of the United States Supreme Court which will be

136. *Id.* at 1050 (Roberts, J., concurring).

137. *Id.* at 1052-53.

138. *Id.* at 1053.

139. *Id.* at 1053-54 (Thomas, J., dissenting) (citation omitted).

140. *See id.* at 1054 n.1.

chosen by President Trump. The inaction of the Senate majority on President Obama's nomination of the well-qualified Merrick Garland, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, was unprecedented in modern times. The Senate has at least engaged in the vetting process with all nominees who had not first been withdrawn over more than the past 100 years, rather than waiting for the election results. It remains to be seen whether the Senate Democrats will now mount a similar logjam.

The Court, however, has attempted to continue with its even number as before, granting certiorari in a small number of cases that will inevitably increase now that October Term 2016 is underway. Some of these grants already include cases which will impact workplace law. The Court granted a petition involving the NLRB, but not on a close interpretive question about the NLRA, but another case involving the politics of the last eight years – the constitutionality of the appointment of Lafe Solomon, the former acting general counsel of the agency.¹⁴¹ The case recalls the congressional battles over NLRB recess appointments that wound up in the Supreme Court and resulted in the invalidation of hundreds of decisions rendered by a two-person Board in *New Process Steel v. NLRB*.¹⁴² It will have no effect, though, on the eighty-plus year old NLRA doctrine.

There are two cases in the pipeline that might have seismic impacts on traditional labor law doctrine – both emanating from the Seventh Circuit. The above-discussed prevention of class actions through mandatory arbitration clauses has for several years been alleged to violate the concerted activity protections of NLRA Section 7, which allows for the redress of working conditions through mutual aid and protection, such as the joining together of employees in a class action. This theory has made its way through the NLRB process only to be stunted by the Fifth Circuit Court of Appeals' decision in *D.R. Horton, Inc. v. NLRB*.¹⁴³

Now the Seventh Circuit has addressed the issue, and found that there is indeed a Section 7 problem with mandatory arbitration clauses that limit the right of employees to be in class or collective actions. In *Lewis v. Epic Systems, Inc.*, Chief Judge Diane Wood

141. *NLRB v. SW Gen., Inc.*, 136 S. Ct. 2489 (2016) (granting cert for *SW Gen., Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015)).

142. 560 U.S. 674 (2010).

143. 737 F.3d 344 (5th Cir. 2013).

wrote a unanimous panel decision striking down the defendant's attempt to limit class arbitration because of the freezing of employee's Section 7 rights to engage in concerted activities.¹⁴⁴ The Supreme Court has granted certiorari in *Lewis* as well in *Morris v. Ernst & Young LLP*,¹⁴⁵ where the Ninth Circuit agreed with the Seventh Circuit and in *Murphy Oil USA, Inc. v. NLRB*,¹⁴⁶ where the Fifth Circuit reiterated its contrary position.

Seventh Circuit Chief Judge Wood also gave purchase to another theory that may be a counter to the union dues issues that were undecided in *Freidrichs*, discussed above. Although in a dissenting opinion in the rejected challenge to the newly-minted Indiana "right to work" law in *Sweeney v Pence*, Judge Wood argued that right to work laws create Fifth Amendment takings clause problems when union members are required to represent nonmembers but not compensated at all for that service.¹⁴⁷ Although the argument did not win the day in Indiana, it recently resurfaced in a state trial court in West Virginia¹⁴⁸ and will ultimately be litigated higher, possibly in the Supreme Court, given the recent rapid pace of new right-to-work laws. Thus, the Supreme Court may next see constitutional challenges brought by unions, rather than just dissenting employees.

As the Obama Administration nears its end, the DOL has engaged in several initiatives recently to modernize the statute, including new regulations on the overtime exemptions to the FLSA, for executive, administrative and professional employees who earn above a certain salary threshold.¹⁴⁹ The divided nature of government in Washington has meant that many of the initiatives of the Department of Labor in the waning years of the Obama Administrations will be challenged as beyond the power of the Executive Branch. The overtime regulations which go into effect December 1, 2016, have been challenged in court¹⁵⁰ and may be

144. 823 F.3d 1147, 1161 (7th Cir. 2016), *cert granted*, No. 16-285, 2017 WL 125664.

145. 534 F.3d 975 (9th Cir. 2016), *cert granted*, No. 16-300, 2017 WL 125665 (Jan. 13, 2017).

146. 808 F.3d 1013 (5th Cir. 2015), *cert granted*, No. 16-307, 2017 WL 125666 (Jan. 13, 2017).

147. 767 F.3d 654, 674-75, 683-85 (7th Cir. 2014) (Wood, J. dissenting).

148. Phil Kabler, *Right-to-Work Law Blocked; Kanawha Circuit Judge Oks Injunction Brought by Unions*, CHARLESTON GAZETTE-MAIL, Aug. 11, 2016, at 1A.

149. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541).

150. Nevada v. U.S. Dep't of Labor, No. 4:16-CV-00731 (Nov. 2, 2016). The Department has filed an appeal with the Fifth Circuit. *Important Information Regarding Recent Overtime Litigation in the U.S. District Court of the Eastern District of Texas*, *supra* note 75.

challenged in Congress in the new session. This is reminiscent of past rollbacks of agency action on everything from ergonomics standards to notice posting in workplaces.¹⁵¹ Now that the Trump Administration has takeover, the only thing that is clear is that there will be many fewer regulations emanating from the Department of Labor.

One DOL initiative that has already been challenged is the Administration's update to the disclosures required by the Labor-Management Reporting and Disclosure Act (LMRDA) of 1959 for activities designed to persuade employees in their choice of a bargaining representative. Business groups, consultants, and management law firms that do not want to disclose the full scope of their "union-busting" activities challenged the law in three different federal courts in spring of 2016.¹⁵² They obtained a nationwide injunction in the Northern District of Texas on the grounds that the revised Persuader Rule violated the First Amendment, congressional intent, and a host of attorney client privilege and ethics rules.¹⁵³ Although revisions to the Persuader Rule are on hold while the appellate process plays out, as with many other issues, the fact that Republicans now control the White House and Congress will determine the direction of the regulatory policy, more than the legal arguments of attorneys and law professors.¹⁵⁴

VI. CONCLUSION

As discussed above, there will be many other analyses of the impact of the late Justice Antonin Scalia on workplace law, and the law generally. Perhaps the greatest impact of his death on workplace

151. Chamber of Commerce of the U.S. v. NLRB, 721 F.3d 152 (4th Cir. 2013); *see also* Joint Resolution, Pub. L. No. 107-5, 115 Stat. 7 (2001) (disapproving the Department of Labor's ergonomics rule).

152. Complaint, Nat'l Fed'n of Indep. Bus. v. Perez, No. 5:16-cv-00066-C, 2016 WL 3766121 (Mar. 31, 2016); Complaint, Labnet, Inc. v. U.S. Dep't of Labor, No. 16-CV-0844 (PJS/KMM), 2016 WL 3512143 (D. Minn. Mar. 31, 2016); Complaint, Nat'l Ass'n of Mfrs. v. Perez, No. 4:16CV00169 (E.D. Ark. Mar. 30, 2016).

153. *Nat'l Fed'n of Indep. Bus.*, No. 5:16-cv-00066-C, 2016 WL 3766121 (N.D. Tex. June 27, 2016). The Minnesota district court declined to issue such an injunction. *Labnet, Inc.*, No. 16-CV-0844 (PJS/KMM), 2016 WL 3512143 (D. Minn. June 22, 2016).

154. I should note my own opinion that the challenges to the DOL's revisions to the Persuader Rule lack merit and that I am participating as *amicus curiae* in efforts to lift the injunction. *See also* Letter of Law Professors Submitted to the House Education and Workforce Committee (Mar. 17, 2016) (on file with author) (legal ethics and labor law professors explaining why the Persuader rules can coexist comfortably with established legal ethics principles.).

law over 2015-16 was the continued debate over union dues and public sector labor rights occasioned by the tie vote in *Friedrichs v. CTA*. I have endeavored to look ahead at the debates that loom by looking at the competing realities that mark so much of the public discussion of union dues. As shown by the decisions involving arbitration, class actions, and settlement, procedural concerns continue to impact strongly the direction of the substantive law. And as the stalemate between the branches of government shows, the substantive law will be affected by politics, just as workplace law has always been.