ADDENDUM

2024'S LATEST ON ECONOMIC JUSTICE AND LABOR LAW

JUDGES: MEET THE JUDGES BRINGING ECONOMIC JUSTICE

Alliance for Justice champions, defends, and defines the promise of our multiracial, constitutional democracy. Through our work, we remind Americans of the power courts have over all our lives from day to day. Our more than 150 organizations represent a broad array of groups committed to progressive values. We build the strength of the movement to which we all belong by training and educating nonprofit organizations on advocacy and harnessing their collective power to transform our state and federal courts.

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INTRODUCTION

Many of the most important decisions shaping workers' rights across the United States take place with little fanfare. That's because the law is made not just by Congress and not just at the Supreme Court, but by the network of federal district and appellate courts beneath the Supreme Court that decide the vast majority of federal cases. In 2023, United States district courts heard **more than 350,000 cases**. Courts of appeal hear **more than 50,000 cases per year**. Ten percent or less of the cases heard by appellate courts make it to the Supreme Court, which hears fewer than 100 cases each year. Lower federal courts' decisions have enormous importance for people's economic well-being, quality of life, and ability to build a future for themselves and their families.

When Alliance for Justice published "**Economic Justices, Judges, and the Law**" in 2022, the first-of-its-kind report made waves. **It was referenced by The American Prospect** as recently as February 2024. AFJ is updating our vital assessment of the judiciary's capacity — and qualifications — to decide economic justice and workers' rights cases against an increasingly dire backdrop. The good news is that President Biden has nominated some outstanding judges with a background in economic justice and labor law to the federal bench. The bad news is that the Supreme Court's uber-conservative supermajority lacks that grounding and regularly takes aim at consumers' and workers' rights.

There is a great deal of work ahead to achieve professional diversity in the federal judiciary, particularly when it comes to securing judges who have represented or advocated for labor unions. **One in 10** American workers belongs to a union. Put another way, 14.4 million people in the United States are union members. Yet, unless the administration changes tack, Biden may end his first term with just two judges with such experience on federal appeals courts — representing 1% of the **179 total appellate judgeships**.

Courts have enormous influence over the enforcement of the occupational safety and health rules that exist to protect workers from injury, illness, and death on the job. How important are these regulations? Even with these rules on the books, according to the **AFL-CIO's Death on the Job report**, 344 workers died each day from hazardous working conditions in 2022 — meaning the job fatality rate ***increased***. In total, employers reported nearly 3.5 million work-related injuries and illnesses, also marking an increase from the previous year.

When courts fail to honor their responsibility to Americans by refusing to enforce protective laws, it falls on consumers and workers to stand up for themselves. And taking a stand, whether it's a consumer challenging a policy or workers engaging in collective action, often lands people back before these same courts, where judges call the shots.

Currently, conservatives are working hard to make sure that federal judges can decide whether consumers and workers whose rights have been violated by corporations and employers, no matter how egregiously, get a fair shot at justice. Anti-labor forces' top preferred alternatives to

letting the justice system work the way it's supposed to are (1) forcing individuals out of courts and into arbitration and (2) bypassing the National Labor Relations Board (NLRB) — the body that has the expertise and, more than that, the congressional mandate to investigate labor relations conflicts.

In forced arbitration, corporations enjoy tremendous advantages. It is not just that companies are repeat players who enjoy the advantages that come with being on familiar legal terrain with experienced legal teams. In most cases of forced arbitration, the proceedings — and outcomes — are also kept secret. That means that while corporations enjoy the benefits of having arbitrated the same issues multiple times, consumers and workers — no matter how similarly situated — cannot share their experiences and do not have access to prior proceedings and precedent that might guide them.

The NLRB was created by the National Labor Relations Act of 1935 (NLRA) to conduct the expertise-intensive fact-finding and decision-making necessary to adjudicating labor disputes. In the words of that body, the NLRA created the NLRB to "protect workplace democracy by providing employees at private-sector workplaces the fundamental right to seek better working conditions and designation of representation without fear of retaliation." When disputes go to the NLRB, they are heard by a panel of five members appointed to five-year terms by the president with Senate consent, one expiring each year. By contrast, labor cases directed to federal courts may be decided by a single judge with no background in employment or labor law.

As AFJ noted in 2022, judges' impact on Americans' rights, health, and safety in the marketplace and the workplace extends well beyond the cases that present related questions directly. Other critical cases govern issues such as whether the government must protect Americans from climate change; how employees can challenge discrimination based on race, sex, or other characteristics; and what reproductive health care people can access and how — fundamental questions with profound economic implications for individuals and their families.

Since the advent of the Roberts Court and especially following the presidency of Donald Trump, who appointed 234 lifetime judges to our federal bench, our courts have ruled consistently for the wealthy and powerful and against the interests of working people and communities. These decisions are doing nothing less than imperiling our nation's foundations by eroding or even eradicating the laws and precedents fundamental to protecting workers and their rights to organize and advocate for themselves in not just the workplace but also in our constitutional democracy.

AFJ's 2022 report found that just seven Supreme Court decisions caused economic harm to at least 74 million people from 2011 to 2022, including workers, renters, consumers, and low-income people without health insurance. This includes an estimated 250,000 hospitalizations and 6,500 deaths in just 6 months from COVID-19. The vanishingly small number of federal judges with backgrounds in employment law, labor, or economic justice is one factor contributing to this tilt against working and middle-class people and families.

Our 2024 addendum provides an update on the number of active federal appeals court judges with experience related to economic justice and labor as well as Biden administration district court appointees who bring this experience. In 2022, 11 out of the 171 court of appeals judges on active status as of July 1, 2022, had a background in a field related to economic justice. That number was down from 14 in 2021 because of judges taking senior status, a form of semi-retirement. Since 2022, four of these courts of appeal judges have taken senior status or retired but three new judges with relevant experience joined the appellate bench, bringing our new total to 10 appellate judges with some form of economic justice background.

The paucity of judges with consumer protection, employment law, labor, and economic justice backgrounds is part of a larger lack of professional and demographic diversity among federal judges — this includes the underrepresentation of people of color, LGBTQ+ individuals, people living with HIV/AIDS or a disability, and attorneys who have practiced civil rights law or have a background in climate justice or reproductive rights. Most attorneys nominated to the federal bench have spent the bulk of their careers representing private-sector clients or serving as prosecutors. As a class, they are overwhelmingly white, heterosexual, cisgender men who come from affluent backgrounds.

Demographic and professional diversity among judges improves public confidence in the courts by ensuring that our courts, a pillar of our democracy, are representative of the people they serve. Most critically, diversity improves judicial decision-making by both directly and indirectly promoting the expansion of perspectives and life experiences applied by federal courts to the cases before them. Studies confirm that judges' personal and professional backgrounds inform their ability to fully consider the legal issues before them and reach fair-minded and well-reasoned outcomes.

Diversity matters — deeply. As we noted in 2022, former prosecutors and corporate lawyers are **more likely** to rule against workers in employment cases than judges with other backgrounds. And white judges are **more likely** to rule against plaintiffs in racial discrimination cases than Black judges while male judges are **more likely** to rule against plaintiffs in sex discrimination, **sexual harassment**, and **LGBTQ+ discrimination** cases.

Unquestionably, judges from any variety of backgrounds can reach fair-minded decisions; so, too,

they may learn and evolve during their time on the bench. But the claims that a lack of demographic and professional diversity is relatively unimportant and that the abundance of judges from extremely similar backgrounds has no meaningful implications for the U.S. justice system amount to popular fallacies.

It is a persistent, pernicious idea that the most qualified candidates for the federal bench are most likely to be white men, that whatever their personal or professional backgrounds, they can recognize and set aside bias to act as neutral and objective. The ugly and unsubstantiated flipside to this this set of assumptions is the belief that nominees who are women, people of color, LGBTQ+, living with HIV/AIDS or a disability, or who have represented marginalized people and communities in their legal career are inherently biased, unable or unwilling to set aside that bias, and altogether less qualified. The tremendous progress toward diversifying the federal judiciary under the Biden administration represents a sea change.

To date confirmed, there have been:

48 PUBLIC DEFENDERS

26 CIVIL RIGHTS LAWYERS

5 ECONOMIC JUSTICE LAWYERS

18 PLAINTIFF-SIDE LAWYERS

57 BLACK JUDGES, INCLUDING 36 BLACK WOMEN

32 AAPI JUDGES, INCLUDING 23 AAPI WOMEN

34 LATINX JUDGES, INCLUDING 19 LATINAS

PART 1: TOO FEW LABOR AND ECONOMIC JUSTICE JUDGES

Alliance for Justice is proud to feature brief biographies for the five judges confirmed under the Biden administration that have enriched the ranks of the federal judiciary from a consumer, labor, and economic justice perspective as well as that of a pending nominee who would do the same.

Judge Jennifer Sung

Confirmed to the United States Court of Appeals for the Ninth Circuit on December 21, 2021.

Judge Sung is President Biden's first Asian-American appointee to a federal appellate court, the first judge from the Asian American Pacific Islander (AAPI) community to serve on the Ninth Circuit from Oregon, and only the third AAPI woman to serve on any federal circuit court. Judge Sung spent her legal career tirelessly advocating for the rights of workers as a union organizer and attorney. In her time as an advocate, Judge Sung represented low-wage factory and grocery store workers, taxi drivers, restaurant servers, nursing home and home health workers, hospital nurses, teachers, and labor unions.

Judge Casey Pitts

Confirmed to the United States District Court for the Northern District of California on June 14, 2022.

Prior to his confirmation, Pitts was a partner at the law firm Altshuler Berzon LLP, where he spent most of his career litigating complex labor law cases. Judge Pitts focused on representing workers, local and international labor unions, consumers, government entities, and public interest organizations in complex impact and appellate litigation. Upon confirmation, Judge Pitts became the only openly LGBTQ+ federal judge actively serving on the U.S. District Court for the Northern District of California.

Judge Nancy Maldonado

Confirmed to the United States District Court for the Northern District of Illinois on July 19, 2023.

Judge Maldonado spent the bulk of her legal career at civil rights firm Miner, Barnhill & Galland, P.C. At Miner, Maldonado litigated federal labor and employment, civil rights, and fraud cases. Initially, she predominantly represented farmworkers in wage and hour cases, as well as employees facing harassment and discrimination. Over the years, her practice broadened. By the time Judge Maldonado joined the federal bench, she had represented plaintiffs from pipefitters to doctors to bricklayers. On February 21, 2024, President Biden nominated Judge Maldonado to the United States Circuit Court for the Seventh Circuit. Upon confirmation, she will be the first Latina judge to sit on that court. She awaits a vote by the full Senate.

Judge Ana de Alba

Confirmed to the United States Circuit Court of Appeals for the Ninth Circuit on November 13, 2023.

Throughout her 11 years in private practice at Lang, Richert & Patch, Judge de Alba performed an average of 300 pro bono hours annually. Notably, she established a monthly Workers' Rights Clinic, a collaboration among Legal Aid at Work, the consulate of Mexico in Fresno, Central California Legal Services, Inc., and her then-firm. Prior to joining the bench, Judge de Alba assisted more than 300 workers, including successfully representing a recently widowed mother in suing her supervisor and employer for sexual harassment, retaliation, meal and rest break violations, assault, battery, and intentional infliction of emotional distress after she was publicly sexually assaulted by her supervisor at work. Judge de Alba is a first-generation Mexican American.

Judge Nicole Berner

Confirmed to the United States Court of Appeals for the Fourth Circuit on March 18, 2024.

After law school, Judge Berner clerked first for Judge Thelton E. Henderson of the U.S. District Court for the Northern District of California and then for Judge Betty B. Fletcher of the U.S. Court of Appeals for the Ninth Circuit. In 2002, Judge Berner began her career in public service, joining the Planned Parenthood Federation of America as a staff attorney. There, Berner focused on access to medication abortion and reviewed various state and federal policy proposals aimed at expanding reproductive health care access. In 2006, Berner joined the Service Employee International Union (SEIU), where she litigated a broad array of cases, covering everything from National Labor Relations Act challenges to constitutional law. She spent almost two decades at SEIU before joining the bench, including seven years as their general counsel. Judge Berner is the first openly LGBTQ+ judge to sit on the Fourth Circuit.

Judge Mustafa Kasubhai

Nominated to the United States District Court for the District of Oregon on September 6, 2023.

Presently a United States magistrate judge, Kasubhai has extensive experience representing plaintiffs in labor law litigation and was just the third Muslim confirmed as a federal judge in the United States. Judge Kasubhai began his legal career in plaintiff-side labor law at the law offices of Rasmussen, Tyler & Mundorff. He then co-founded a firm, Kasubhai & Sánchez, where he continued that work. In 2000, Kasubhai went into solo, private practice, focusing on Oregon workers with employment discrimination, workers' compensation, and tort law grievances. Judge Kasubhai went on to serve on the Oregon Workers' Compensation Board. Four years later, he was nominated by Governor Ted Kulongoski to serve on the Oregon State Circuit Court.

On a special note, AFJ highlights the unfortunate and telling treatment of **Judge Todd Edelman**, twice nominated to the U.S. District Court for the District of Columbia, as indicative of the barriers to confirmation even the most experienced candidates who fall outside the 'default' mold of federal judge face. Eminently qualified, Edelman currently serves as the deputy presiding judge, civil division, of the Superior Court of the District of Columbia. Prior to joining the bench, he worked as a public defender, clinical law professor, and labor lawyer. Edelman spent five years working in labor law in a senior role at Bredhoff & Kaiser PLLC. There, he represented labor unions, pension funds, and individual employees in complex civil litigation in state and federal courts nationwide. In 2010, Judge Edelman was appointed to the Superior Court of the District of Columbia by President Barack Obama and was confirmed by the United States Senate. In 2016, Judge Edelman was nominated to the U.S. District Court for the District of Columbia by President Obama. However, his confirmation process stalled in the Senate Judiciary Committee and he never received a hearing. In 2022, Congresswoman Eleanor Holmes Norton again recommended Edelman for the federal bench and President Biden renominated him on July 28, 2022, but Judge Edelman ultimately withdrew from consideration in early 2024 following vicious attacks by right-wing extremists.

Senior Status and Retirement

Judges J. Ann Wilson Rogers of the United States Court of Appeals for the District of Columbia, O. Rogeriee Thompson of the First Circuit, and Judge Susan Carney of the Second Circuit have taken senior status since Alliance for Justice's 2022 report and Judge Bernice B. Donald of the Sixth Circuit has retired. Meanwhile, Judge Jane Stranch, also of the Sixth Circuit, **will take senior status** pending confirmation of a successor.

PART II. FEDERAL COURT RULINGS SHAPING (AND RESHAPING) WORKERS' RIGHTS

Glacier Northwest, Inc. v. International Brotherhood of Teamsters

A 2023 case, *Glacier Northwest, Inc. v. International Brotherhood of Teamsters,* involved a labor disagreement between employees represented by Teamsters Local 174 and employer Glacier Northwest, a concrete manufacturer. After contract negotiations stalled, workers went on strike while some trucks were filled with concrete, which can spoil. Glacier Northwest sued the union in state court, alleging that workers intentionally timed the strike to damage property. The National Labor Relations Act establishes that workers have the legal right to strike, with exceptions for situations involving intentional property destruction and violence. This law places most workplace disputes beyond the jurisdiction of state courts and under the authority of the National Labor Relations Board (NLRB). The state court ruled that the case fell under the jurisdiction of the NLRB.

At the Supreme Court, arguments centered on whether the workers' strike, which resulted in the spoilage of some concrete and potential harm to trucks, was protected under labor laws. The union argued that the workers were exercising their legal right to strike. The justices debated the balance between protecting workers' rights and an obligation to avert harm to employers' property.

The uber-conservative supermajority ruled for *Glacier Northwest*. Justice Amy Coney Barrett delivered the opinion of the court while Justice Ketanji Brown Jackson issued her first dissent, warning that the majority opinion bulldozed a path for employers to sue workers and unions for striking.

The *Glacier Northwest* ruling violated jurisdictional norms by bypassing the well-established process for adjudicating labor disputes through the NLRB, which has the expertise to balance employers' interests against workers' rights to engage in collective action without facing retaliation or infringements on their bargaining power. Disregarding the NLRB and ruling in favor of Glacier Northwest, the majority departed from long-standing federal labor law preemption principles.

The *Glacier Northwest* decision sets concerning precedent. While it does not change labor law or workers' right to strike — one **feared possible outcome** — it will have a chilling effect on workers who are weighing exercising their rights to organize, bargain, and strike. Giving federal courts a green light to interfere in labor disputes rather than respect the role of the investigative and decision-making body Congress created to address such situations, the NLRB, disrupts labor law in a big way. It is the NLRB's role — not that of a federal judge — to assess whether striking workers' conduct falls under the NLRA. The standard for that determination dates to ***San Diego Building Trades Council v. Garmon***, decided in 1959: If workers' conduct even arguably falls under the NLRA, as Justice Jackson emphasized, the NLRB is the correct forum for adjudication.

Glacier Northwest was argued on January 10, 2023, and the Supreme Court issued its 8-1 ruling on June 1, 2023.

Of concern going forward: *Glacier Northwest* may have been a bellwether. On April 23, 2024, the Supreme Court heard ***Starbucks Corp. v. McKinney***, a case that presents this Court with the opportunity to further undermine the NLRA and NLRB. In just the last two years, the NLRB has had to request 12 federal injunctions against the corporation through the courts as a result of Starbucks's mistreatment of workers attempting to organize and unionize. The suit at hand is Starbucks's bid to make it more difficult for the NLRB to obtain injunctions to protect workers' rights and shield them from retaliation for organizing.

Muldrow v. City of St. Louis, Missouri

In ***Muldrow v. City of St. Louis, Missouri***, police sergeant Jatonya Muldrow sued the City of St. Louis for employment discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964. Muldrow was removed, over her objections, from the St. Louis Police Department's Intelligence Division, where she served as a plainclothes officer for nine years, and placed back in uniform — all so she could be replaced with a male officer. Before the United States Court of Appeals for the Eighth Circuit, Muldrow lost. That court found the transfer did not constitute "significant employment disadvantage." Muldrow appealed.

The Supreme Court examined how the transfer affected Muldrow's job duties, benefits, schedule, and salary as well as her day-to-day job responsibilities and opportunities in determining whether the transfer constituted a harm that could be redressed under Title VII. The Court ruled unanimously in Muldrow's favor. The justices found that a person raising a discrimination claim surrounding a transfer only need show "some harm respecting an identifiable term or condition of employment." A complainant does not, as St. Louis would have liked, "have to show…that the harm incurred was 'significant' or otherwise exceeded some heightened bar."

The Court's ruling in *Muldrow* is encouraging for employees facing discrimination, clarifying the conditions under which they may bring legal claims against employers and the standard for success. One concern, however, given the present composition of the Supreme Court, is that opponents of diversity, equity, and inclusion (DEI) initiatives, for example, will attempt to capitalize on *Muldrow's* "some harm" versus "significant harm" standard. Such activists **might claim** that DEI trainings inflict harm on non-minorities or even attempt to bring so-called "reverse-discrimination" claims under Title VII. As an example, male employees might argue that mentorship programs focused on women unfairly advantage participants and that men's exclusion constitutes a harm.

Muldrow was argued on December 6, 2023, and the Supreme Court issued its 9-0 ruling, authored by Justice Elena Kagan, on April 17, 2024.

Consumer Financial Protection Bureau v. Community Financial Services Association of America

Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in response to the 2008 financial crisis, precipitated by bad and outright illegal dealings by major U.S. financial actors. Dodd-Frank, as it is commonly known, created the Consumer Financial Protection Bureau (CFPB), an independent agency within the Federal Reserve. The CFPB exists to protect consumers from predatory lending practices. The agency focuses on the consumers most vulnerable to misconduct and misleading practices by the financial industry, such as Americans who struggle to make ends meet and people who belong to marginalized communities historically either excluded from or exploited by the financial industry.

The CFPB adopted a rule that prohibited lenders from continuing to attempt to withdraw funds from borrowers' bank accounts after two consecutive attempts fail for lack of funds. A group of lenders **sued the CFPB** over that rule, arguing that the agency's funding scheme was unconstitutional because the CFPB receives funding directly from the Federal Reserve rather than congressional allocations. The Supreme Court could use this case as a vehicle to undermine CFPB regulations protecting borrowers and consumers or even dismantle the CFPB. Such a result would have significant implications for other independent agencies, a favorite target of right-wing, anti-government activists.

The case was argued on October 3, 2023, and a decision is forthcoming.

Moore v. United States

Nominally about a one-time "transition" tax on offshore corporate profits enacted as part of the 2017 Trump-GOP tax cuts, *Moore* presents the Court with the opportunity to raze decades of tax law precedent to extend the ample benefits millionaires and billionaires — and the corporations they own — already enjoy, further shielding them from taxation.

Specifically, conservatives are gunning to pre-empt taxation of the ultra-wealthy's largest source of income: growth in their investments. The plaintiffs claim that under the 16th Amendment, Congress cannot tax "unrealized gains," like gains from investments that have yet to be sold. For context, more than a dozen well-established taxes, representing trillions of dollars to the United States government, do just that. These provisions are vital to mitigating legal-but-dodgy accounting and investment maneuvers that investors and big corporations use to claim income is non-taxable — at average taxpayers' expense.

Relevant here is the fact that the billionaires behind the most high-profile of the Supreme Court

Moore v. United States (continued)

conservatives' ethics scandals would almost certainly profit directly from a ruling in the Moores' favor — as could many of those same justices.

The case was argued on December 5, 2023, and a decision is forthcoming.

Loper Bright Enterprises v. Raimondo

Decades of administrative law are at stake in this case surrounding a National Marine Fisheries Service (NMFS) rule requiring firms to include third-party observers on some fishing boats. Fishing companies sued NMFS, arguing that the agency lacked the power to implement such a rule. At the heart of the dispute is a principle called the *Chevron* doctrine, established in 1984, which directs courts to defer to agency expertise whenever legislation is unclear.

An example of *Chevron* in action? The FDA has the responsibility to determine whether new drugs and medical devices are safe and effective. To do so, the agency relies on thousands of experts — like public health specialists, research scientists, and physicians — who work together to make this complex decision. *Chevron* keeps consumers safe by ensuring these experts are the ones who make the call on what is safe and effective. If the Supreme Court overturns *Chevron*, a single judge could usurp entire agencies, transforming the way legislation and regulations are implemented nationwide.

The case was argued on January 17, 2024, and a decision is forthcoming.

CONCLUSION

We have made progress in adding judges with labor and economic justice experience to the federal bench, but these gains have been too small and too slow. At a time when **union organizing is surging**, our courts are out of touch and unrepresentative — primed to side with the wealthy and corporations and to limit the ability of workers and consumers to advocate for themselves.

We must ensure there are pathways to the bench for those who work on behalf of everyday Americans. Just as the Biden administration has made a point of adding public defenders to the bench to balance out the disproportionate number of prosecutors, so too must the administration and the Senate shift the judiciary away from the control of corporate lawyers and toward judges with a background in economic justice.

Alliance for Justice remains committed to tracking the impact of our courts on workers, consumers, and everyday Americans and advocating for the confirmation of judges who understand their experiences and will uphold the laws designed to protect them. Only then will our courts be capable of serving all people fairly and justly. Our jobs and our wallets depend on it.