

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, EAST BAY
AUTOMOTIVE MACHINISTS
LODGE NO. 1546, DISTRICT
LODGE 190,

Petitioner,

and

NATIONAL LABOR RELATIONS
BOARD,

Respondent,

SJK, INC. d/b/a FREMONT FORD,

Intervenor.

CASE NO. 16-74025

Board Case No. 32-CA-151443

SJK, INC. d/b/a FREMONT FORD,

Petitioner,

and

NATIONAL LABOR RELATIONS
BOARD,

Respondent,

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, EAST BAY
AUTOMOTIVE MACHINISTS
LODGE NO. 1546, DISTRICT
LODGE 190,

Intervenor.

Case No. 17-71210

Board Case No. 32-CA-151443

NATIONAL LABOR RELATIONS
BOARD,

Petitioner,

and

SJK, INC., d/b/a FREMONT FORD,

Respondent.

Case No. 17-81337

Board Case No. 32-CA-151443

STATUS REPORT

1. This is the status report filed by the Petitioner in Case No. 16-74025 and the Intervenor in Case No. 17-71210. This Court issued an Order on May 15, 2018, requiring the employer to file a Status Report within seven (7) days of the issuance of a decision by the United States Supreme Court in three cases then pending. DktEntry 34. The Union, which is involved in this case, files this Status Report in light of the decision of the Supreme Court in the referenced cases.

2. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, No. 16-285, together with its decisions in *Ernst & Young LLP v. Morris*, No. 16-300 and *National Labor Relations Board v. Murphy Oil USA, Inc.*, No. 16-307, cited as 584 U.S. ____ (2018). The Court held, contrary to the decision of the National Labor Relations Board and two courts below, that the National Labor Relations Act did not prohibit collective or class action waivers in arbitration agreements. The Court relied on the arbitration policy contained in the Federal Arbitration Act, 9 U.S.C. §§ 2, 3 and 4.

3. Had the Court ruled otherwise, this would have ended the dispute in this case for the employer's arbitration agreement would have been plainly unlawful under the National Labor Relations Act. The Court, however, addressed this issue under narrow circumstances. In each of those cases, at issue was whether the employees could be prohibited from bringing a collective action under

the Federal Fair Labor Standards Act, 29 U.S.C. § 216(b). The Supreme Court did not address the myriad other issues that can arise under the circumstances where the employer maintains an arbitration provision which purports to limit the right of employees to bring actions *in fora* other than courts, actions which are not collective or class actions or many other circumstances. For example, it is not conceded in this case that the Federal Arbitration Act even applies. It does not address waivers of actions which are not preempted by the FAA. See, *Sakkab v. Luxottica Retail N. AM., Inc.*, 803 F. 3d 425 (9th Cir 2015).

4. This case presents many of the issues which the Supreme Court did not touch upon or resolve in *Epic Systems*. Those issues were all addressed in the Joinder in Motion for Summary Judgment which was filed by the Union with the National Labor Relations Board. A copy of that Joinder is attached as Exhibit A.

5. The Labor Board did not address these issues because it relied upon the sole argument which the Supreme Court rejected, that all class or collective action waivers are invalid. The issues raised by the Union are now ripe for decision by this Court in light of the decision of the Supreme Court in *Epic Systems*.

6. It should be clear from a review of the issues raised by the Union that this Court must now address many of those issues. For example, in *Epic Systems*, all parties assumed that the Federal Arbitration Act applied because what was at issue was a federal claim under the federal Fair Labor Standards Act. Here, to the contrary there is no claim; in fact, there is no dispute which has arisen. What is at issue is the maintenance of an overbroad rule before a dispute had arisen. Thus, there are significant questions whether the Federal Arbitration Act applies or whether it can even apply because the lack of a transaction does not affect commerce.

7. This Court should therefore set a briefing schedule so these issues may be addressed in light of the Court's decision in *Epic Systems*. *Epic Systems* does not and cannot resolve all of these issues, although how they are presented to this Court may be changed in light of the Court's decision in *Epic Systems*.

8. Counsel is aware that there are two other cases pending before this Court in which the many of the same issues are presented. Each does present some unique issues not arising in the other cases. See, *Munoz v Tarlton and Son, Inc.*, No. 16-17915 consolidated with Nos. 17-70532 and 17-70632 and *Automotive Machinists Lodge No. 1173 v. N.L.R.B.*, No. 16-70637 consolidated with Nos. 16-70694 and 16-71955. All cases involve enforcement of orders of the National Labor Relations Board. The Court should consolidate or otherwise coordinate these cases which involve many of the same issues and the NLRB.

9. For the reasons suggested above, this Court should set a briefing schedule and coordinate the cases so that it may address the issues which remain in this case and the other cases.

Dated: May 25, 2018

Respectfully submitted,

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15 UNITED STATES OF AMERICA
16 NATIONAL LABOR RELATIONS BOARD

17 INTERNATIONAL ASSOCIATION OF
18 MACHINISTS AND AEROSPACE
19 WORKERS, AFL-CIO, EAST BAY
20 AUTOMOTIVE MACHINISTS LODGE NO.
21 1546, DISTRICT LODGE 190,

Case No. 32-CA-151443

22 Charging Party,

**JOINDER IN MOTION FOR
SUMMARY JUDGMENT**

23 And

24 SJK, INC. D/B/A FREMONT FORD,

25 Respondent.

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I. INTRODUCTION

The Charging Party hereby joins in the motion for summary judgment filed by the Counsel for General Counsel. The Charging Party submits that the “Employee Agreement and Acknowledgment” more accurately described as a Forced Unilateral Arbitration Procedure (hereinafter “FUAP”) violates the Act.

This Brief is intended to supplement the prior “Joinder in Motion for Summary Judgment” filed by the Charging Party. The brief contains some modifications, amplifications and corrections from the prior filing. Charging Party joins in the Motion for Summary Judgment and files this in response to the Board’s Order of February 10.

II. THE FUAP IS GOVERNED BY THE BOARD’S DECISION IN MURPHY OIL

The Board’s decision in *Murphy Oil*, 361 NLRB No. 72 (2014), enforcement denied in relevant part 808 F. 3d 1013 (5th Cir 2013) governs. See many more recent cases such as *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016) and *AT&T Mobility Servs., LLC*, 363 NLRB No. 99 (2016). For reasons discussed below, however, there are additional and related reasons why the FUAP is unlawful. We address those issues below. We particularly address the application of the Federal Arbitration Act which we assume will be the Respondent’s argument.¹ All of the issues arise from the allegations of the Complaint and the Answer.

III. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT OF EMPLOYMENT

The FAA applies only where there is “a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract.” 9 U.S.C. § 2. Under the FAA, there must be some other “contract involving commerce.”

The Supreme Court’s seminal decision applying the FAA is expressly conditioned upon the existence of an employment contract:

Respondent, at the outset, contends that we need not address the meaning of the § 1 exclusion provision to decide the case in his favor. In his view, an employment contract is not a “contract evidencing a transaction involving interstate commerce” at all,

¹ Respondent has recycled arguments made in other cases and already rejected by the Board. It has not responded to the new arguments made in this case. .

1 since the word “transaction” in § 2 extends only to commercial
2 contracts. See *Craft*, 177 F.3d, at 1085 (concluding that § 2 covers
3 only “commercial deal[s] or merchant’s sale [s]”). This line of
4 reasoning proves too much, for it would make the § 1 exclusion
5 provision superfluous. If all contracts of employment are beyond
6 the scope of the Act under the § 2 coverage provision, the separate
7 exemption for “contracts of employment of seamen, railroad
8 employees, or any other class of workers engaged in ... interstate
9 commerce” would be pointless. See, e.g., *Pennsylvania Dept. of
10 Public Welfare v. Davenport*, 495 U.S. 552, 562, 110 S.Ct. 2126,
11 109 L.Ed.2d 588 (1990) (“Our cases express a deep reluctance to
12 interpret a statutory provision so as to render superfluous other
13 provisions in the same enactment”). The proffered interpretation of
14 “evidencing a transaction involving commerce,” furthermore,
15 would be inconsistent with *Gilmer v. Interstate/Johnson Lane
16 Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), where
17 we held that § 2 required the arbitration of an age discrimination
18 claim based on an agreement in a securities registration application,
19 a dispute that did not arise from a “commercial deal or merchant’s
20 sale.” Nor could respondent’s construction of § 2 be reconciled with
21 the expansive reading of those words adopted in *Allied–Bruce*, 513
22 U.S., at 277, 279–280, 115 S.Ct. 834. If, then, there is an argument
23 to be made that arbitration agreements in employment contracts are
24 not covered by the Act, it must be premised on the language of the
25 § 1 exclusion provision itself.

26 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-14 (2001); See also *Buckeye Check
27 Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (an arbitration provision is severable from
28 the remainder of the contract). See also *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S.
265, 277 (1995) (finding “a contract evidencing a transaction involving commerce” as a
prerequisite to the application of the FAA).

There is no contract. The FUAP creates no contract. The Respondent has offered no
evidence that it creates any contract of employment with any employee. The FUAP in fact recites
that it is “the entire Agreement between the Company and I regarding dispute resolution, the
length of my employment and the reasons for termination of my employment...” Thus the only
alleged agreement is the FUAP, nothing else.

Assuming that the FUAP standing alone is a contract, that contract of employment does
not affect commerce. See, *infra*. The FAA applies to “a contract evidencing a transaction
involving commerce to settle by arbitration a controversy thereafter arising out of such contract or
transaction.” There is no transaction here affecting commerce by the FUAP, assuming it is the
only contract. There is no evidence in the record of how such contract can affect commerce.

1 The FAA does not apply absent proof of a contract. Respondent has failed to establish the
2 existence of a contract.

3 Below we show there is no transaction and no controversy. The reason of course is that
4 no employee has presented a claim or transaction since the FUAP prevents the vindication of any
5 right and the employees have been thoroughly intimidated so that they have not exercised their
6 section 7 rights under the FUAP. It is just like any employer who maintains an invalid no
7 solicitation rule, there is no solicitation which the Act protects because employees are afraid of
8 losing their jobs if they violate company rules.

9 Below we address the question of whether the FAA can apply to activity which does not
10 affect commerce. The Board must address this issue. *Ex parte McCardle*, 74 U.S. 506, 514
11 (1868) and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-102 (1998),

12 **IV. THE BOARD MUST USE THIS CASE TO ADDRESS THE CONSTITUTIONAL**
13 **ISSUE OF WHETHER THE FAA CAN BE APPLIED TO ACTIVITY WHICH**
14 **DOES NOT AFFECT COMMERCE**

14 **A. INTRODUCTION**

15 The Board has never addressed the question of whether the FAA may be applied to a
16 FUAP without constitutional concerns under the Commerce Clause.² We address those issues
17 below.

18 First, assuming there were an individual contract, there is no showing that such a contract
19 that includes the FUAP, affects commerce. Second, we agree that an employment dispute itself is
20 an activity, and the employer must show that activity affects commerce. Third, the employer
21 must show that the dispute resolution activity of individual arbitration or group arbitration affects
22 commerce.³ Fourth, there is no “transaction” triggering the FAA. Here, the employer cannot
23 establish any constitutional basis to apply the FAA.

24
25 ² In Case 20-CA-139745, the Administrative Law Judge agreed that the Federal Arbitration Act
26 does not apply finding that there is a constitutional problem under the Commerce clause. as
27 argued in this brief. This issue is thoroughly briefed in this case as well as that case. The
28 Board cannot duck it because it cannot reach the merits without deciding whether the FAA
applies either as an interpretation of the statute or as a matter of Commerce clause application.

³ The dispute itself will not affect commerce, that is the claim by one party against the other. It
is the process of resolving that dispute then that has to affect commerce.

1 There is no inconsistency in the regulation of activity encompassed within the National
 2 Labor Relations Act and finding no commerce activity regulated by the FAA. The Act regulates
 3 the employer; the activity regulated is activity of employees and employers and labor
 4 organizations. In contrast, the FAA regulates only a targeted activity: arbitration. It does not
 5 purport to apply to employees, unions or employers and their “concerted activity for mutual aid or
 6 protection.” Thus, there is no inconsistency. Here, the commerce clause issue is squarely placed.
 7 The commerce allegation in the complaint which was admitted by the Respondent is only that
 8 “Respondent purchased and received goods or services valued in excess of \$5,000 which
 9 originated outside of the state of California.” That allegation is a minimal commerce allegation.
 10 There is no allegation that that purchase had anything to do with any employment dispute. With
 11 that very little commerce allegation, we proceed to analyze whether the FAA can apply.⁴

12 **B. THE FAA DOES NOT APPLY SINCE THERE IS NO CONTRACT INVOLVING**
 13 **INTERSTATE COMMERCE**

14 By its own terms, the FAA applies only to arbitration provisions that appear in a “contract
 15 evidencing a transaction involving commerce” (9 U.S.C. § 2), where commerce is defined as
 16 “commerce among the several States or with foreign nations.” 9 U.S.C. § 1. The Supreme Court
 17 has held that under this language, “the transaction (that the contract evidences) must turn out, *in*
 18 *fact*, to have involved interstate commerce.” *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513
 19 U.S. 265, 277 (1995) (emphasis in original).⁵

20 Thus, the FAA cannot be applied unless there is proof that the contract containing the
 21 arbitration provision involved a transaction that in fact affects interstate commerce. *Garrison v.*
 22 *Palmas Del Mar Homeowners Ass’n, Inc.*, 538 F. Supp. 2d 468, 473 (D.P.R. 2008) (“[T]he FAA .
 23 . . . only applies when the parties allege and prove that the transaction at issue involved interstate
 24 commerce”) (citing *Medina Betancourt et al. v. Cruz Azul de P.R.*, 155 D.P.R. 735, 742–43

25 ⁴ The allegation that “Respondent derived gross revenues in excess of \$500,000” has nothing to
 26 do with commerce allegation because there is no allegation that any of that amount was
 27 derived from interstate commerce. It is solely to meet the Board’s own self-imposed
 28 jurisdictional standards. *Siemons Mailing Service*, 122 NLRB 81 (1958). Robert Gorman and
 Matthew Finkin, *Labor Law Analysis and Advocacy*, (JURIS 2013), Section 3.2

⁵ The Court in *Allied-Bruce* also clarified that “the word ‘involving’ is . . . the functional
 equivalent of the word ‘affecting.’” 513 U.S. at 273–74.

1 (2001)); *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 106 (N.D. Ill. 1980), *aff'd.*, 653
2 F.2d 310 (7th Cir. 1981) (“Interstate commerce is a necessary basis for application of the
3 [FAA]”).

4 In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Supreme Court
5 found that the FAA did not apply to an employment contract between *Polygraphic*
6 *Co.*, an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of
7 the company’s lithograph plant in Vermont. The Court found that the contract did not “evidence
8 a transaction involving commerce within the meaning of section 2 of the Act” because there was
9 “no showing that petitioner while performing his duties under the employment contract was
10 working ‘in’ commerce, was producing goods for commerce, or was engaging in activity that
11 affected commerce.” *Bernhardt*, 350 U.S. at 200-01.

12 Similarly, in *Slaughter v. Stewart Enterprises, Inc.*, No. C 07-01157MHP, 2007 WL
13 2255221 (N.D. Cal. Aug. 3, 2007), the court found that an “employment contract [did] not
14 involve interstate commerce as required by the [FAA]” where an employee “was employed at a
15 single location,” “his employment did not require interstate travel,” and “his activities while
16 employed with defendants as well as the events at issue in the underlying suit were confined to
17 California.” See also *Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507 (Tex. App. 2003) (holding
18 FAA not applicable where services performed were confined to Texas).

19 There is no evidence that the transaction between the parties here involves interstate
20 commerce. Employees who perform work in only one state are not engaged in activity that
21 affects interstate commerce. Here, moreover, the sole allegation is that the Respondent maintains
22 “an office and business in Newark, California.” There is no claim that its business extends
23 beyond Newark, California and thus there is no evidence of any impact whatsoever on interstate
24 commerce. Disputes that arise between any of its employees and Fremont Ford may be simple,
25 local disputes governed only by state law, like one missed meal period or rest break. Labor Code
26 227.3. Some disputes might not even be economic, but just claims seeking to resolve personality
27 issues or shift assignments or workplace duties. Whether this kind of local dispute is submitted to
28 individual or group arbitration in its final stages will not make any difference for interstate

1 commerce.⁶ Yet the FUAP purports to govern all this activity, no matter how trivial or local.
 2 Such a private arbitration agreement with an individual who does not perform work across state
 3 lines, does not transport goods across state lines, and is not seeking to enforce anything other than
 4 state law is not a contract evidencing a transaction involving interstate commerce.

5 The character of Fremont Ford's automobile business does not alter this conclusion.⁷ The
 6 relevant question here is whether the transaction *between the parties* has an effect on interstate
 7 commerce. The fact that one of the parties to the transaction is *independently* involved in
 8 interstate commerce does not bring every contract that party enters, no matter how trivial or local,
 9 within the reach of the FAA. Even though *Polygraphic Co.* was an employer that engaged in
 10 interstate commerce and operated lithograph plants in multiple states, the Supreme Court still
 11 determined that the arbitration agreement in the employment contract between *Polygraphic Co.*
 12 and *Bernhardt* did not involve interstate commerce. *Bernhardt*, 350 U.S. at 200-01. Even though
 13 Fremont Ford is engaged in the automobile business that may impact interstate commerce, an
 14 arbitration agreement between Fremont Ford and an individual employee who does not perform
 15 work across state lines is still an agreement about how to resolve generally local disputes that
 16 does not involve interstate commerce. As the court observed in *Slaughter*, “[t]he existence of
 17 national companies . . . does not undermine the conclusion that the activity is confined to local
 18 markets. Techniques of modern finance may result in conglomerations of businesses. . . . [but]
 19 the reaches of the Commerce Clause are not defined by the accidents of ownership.” *Slaughter v.*
 20 *Stewart Enters., Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *7 (N.D. Cal. Aug. 3, 2007).

21 Similarly, the purchase of \$5,000 worth of product from out of state does not transform
 22 the local nature of the agreement to arbitrate, since those purchases are not part of the arbitration
 23 agreement but are merely incidental to the transaction. They are not subject to the FUAP. See
 24 *Bruner v. Timberlane Manor Ltd. P’ship*, 155 P.3d 16, 31 (Okla. 2006) (“The facts that the
 25 nursing home buys supplies from out-of-state vendors . . . are insufficient to impress interstate

26
 27 ⁶ For an example of a dispute where no party asserted the FAA applied, see *Carmona v.*
Lincoln Millennium Car Wash, Inc., *supra*.

28 ⁷ The record does not establish that Fremont Ford is in the new automobile business. The
 Complaint only alleges it is “engaged in the sale and serving of automobiles.”

1 commerce regulation upon the admission contract for residential care between the Oklahoma
2 nursing home and the Oklahoma resident patient.”); *Saneii v. Robards*, 289 F.Supp.2d 855, 860
3 (W.D. Ky. 2003) (The sale of residential real estate to an out-of-state purchaser had “no
4 substantial or direct connection to interstate commerce,” since any movements across state lines
5 were “not part of the transaction itself” but merely “incidental to the real estate transaction”); *City*
6 *of Cut Bank v. Tom Patrick Constr., Inc.*, 963 P.2d 1283, 1287 (Mont. 1998) (The purchase of
7 insurance and materials from out of state did not impact court’s decision that construction
8 contract was a local transaction, not involving interstate commerce).

9 *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), does not change the analysis. In that
10 case, the Supreme Court held that the FAA could be applied in cases where there was no showing
11 that the individual transaction had a specific effect upon interstate commerce, so long as “in the
12 aggregate the economic activity in question would represent a general practice subject to federal
13 control” and “that general practice bear[s] on interstate commerce in a substantial way.”
14 *Alafabco*, 539 U.S. at 56–57 (internal citations omitted). Under this standard, the Court found
15 that the application of the FAA to certain debt-restructuring contracts was justified given the
16 “broad impact of commercial lending on the national economy” and the facts that the restructured
17 debt was secured by inventory assembled from out-of-state parts and that it was used to engage in
18 interstate business. *Alafabco*, 539 U.S. at 57–58.⁸ As other courts have observed, the logic used
19 by the *Alafabco* court to justify the application of the FAA to a large financial transaction
20 between a bank and a multistate manufacturer is not readily applicable to a private arbitration
21 agreement covering claims that a local employment contract has been breached. *Slaughter v.*
22 *Stewart Enters., Inc.*, No. C 07-01157MHP, 2007 WL 2255221, at *4 (N.D. Cal. Aug. 3, 2007)
23 (distinguishing the “debt-restructuring contracts involving a manufacturer” at issue in *Alafabco*
24 from a contract “for service type employment that occurred solely within the state”); see also
25 *Bridas v. Int’l Standard Elec. Corp.*, 490 N.Y.S.2d 711, 717 n.3 (N.Y. Sup. Ct. 1985) (contrasting
26

27 ⁸ Notably, private arbitration agreements on their own were not held to constitute a “general
28 practice” that “bear[s] on interstate commerce in a substantial way.” Instead, the Court relied
on other characteristics of the transaction at issue to find the required connection to interstate
commerce.

1 “an agreement based upon a multimillion dollar transfer of stock between an American and
2 Argentine corporation” and the simple allegation of breach of an employment contract at issue in
3 *Bernhardt*). Private arbitration agreements with employees who do not perform work across state
4 lines, do not transport goods across state lines, and are not seeking to enforce anything other than
5 state law are not contracts that involve interstate commerce in the way major debt-restructuring
6 contracts did.

7 The FAA cannot be stretched so far as to apply to any arbitration agreement between an
8 individual and their employer just because the employer is, for other purposes, engaged in
9 interstate commerce. Such a reading of the FAA would contravene the Supreme Court’s decision
10 in *Bernhardt*⁹ and raise serious constitutional concerns.

11 **C. THIS CASE IS BEYOND THE CONSTITUTIONAL REACH OF THE FAA SINCE**
12 **THERE IS NO SHOWING THAT THE DISPUTES COVERED BY THE FUAP**
13 **AFFECT INTERSTATE COMMERCE OR THAT THE ACTIVITY OF**
14 **RESOLVING THOSE DISPUTES AFFECTS INTERSTATE COMMERCE**

15 Under the Commerce Clause, Congress may only regulate “the channels of interstate
16 commerce,’ ‘persons or things in interstate commerce,’ and ‘those activities that substantially
17 affect interstate commerce.’” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2578 (2012)
18 (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). Because the FAA was enacted
19 pursuant to the Commerce Clause (*Perry v. Thomas*, 482 U.S. 483, 490 (1987)), it cannot
20 constitutionally be applied here unless the regulated activity has this connection to interstate
21 commerce.

22 The fact that the employer in this case is independently engaged in interstate commerce
23 cannot supply the necessary connection to commerce, because the FAA is not a regulation of the
24 employer or the employer’s business. In *Sebelius*, the Supreme Court made it clear that Congress
25 may only use its authority under the Commerce Clause “to regulate classes of *activities*,” “not
26 classes of *individuals*, apart from any activity in which they are engaged.” *Sebelius*, 132 S.Ct. at

27 ⁹ In *Bernhardt*, the Court explained that the FAA should be construed narrowly, so as not apply
28 to an arbitration agreement between a multistate lithograph company and an employee who
did not work across state lines. The Court warned that allowing the FAA to reach such
transactions that did not affect interstate commerce would impermissibly “invade the local
law field.” *Bernhardt*, 350 U.S. at 202.

1 2591 (emphasis in original). Thus, in determining whether a regulation is permissible under the
 2 Commerce Clause, the court must not look at the class of individuals affected by the law, but at
 3 the actual activities that are being targeted by the law. Following this analysis, the Court ruled
 4 that the individual mandate could not be characterized as a regulation of individuals who would
 5 eventually consume healthcare, because that is just a class of individuals and not the actual
 6 activity regulated by the ACA. *Id.* at 2590-91. Similarly here, the FAA cannot be characterized
 7 as a regulation of employers engaged in interstate commerce, because that is just a class of
 8 corporate individuals and not the actual activity regulated by the FAA.

9 The actual activity regulated by the FAA is the resolution of disputes between private
 10 individuals. The FAA does not seek to regulate how the employer conducts its business or carries
 11 out its commercial activities. The FAA does not purport to regulate any activity other than the
 12 narrow aspect of dispute resolution in arbitration.¹⁰ This is the actual activity Congress sought to
 13 regulate in the FAA, and such a law passed pursuant to the Commerce Clause cannot be
 14 constitutionally applied to the dispute resolution activity here unless this activity is connected to
 15 interstate commerce. See *Sebelius*, 132 S.Ct. at 2578.

16 The activity of resolving disputes between private individuals is not a “channel of
 17 interstate commerce,” it is not a person or thing “in” interstate commerce, and whether the
 18 disputes covered by the FUAP here are resolved in individual or group arbitration does not
 19 “substantially affect interstate commerce.” *Sebelius*, 132 S.Ct. at 2578 (quoting *Morrison*, 529
 20 U.S. at 609). Many of the disputes covered by the FUAP do not implicate interstate commerce or
 21 have any substantial effect on interstate commerce. The FUAP is drafted in a way that would
 22 extend to any employment dispute. It could encompass a claim for one hour’s pay, one missed
 23 meal period or rest break, or any other claim that has no impact whatsoever on interstate
 24 commerce. It would encompass a claim that was not economic at all, but just an effort to resolve
 25 personality issues or shift assignments or workplace duties. See JX 2I p. 12-13 and JX 2J p. 13.
 26 If two employees had a “conflict” that was not economic and asked for joint collective arbitration,
 27 that dispute would not have any impact on interstate commerce. All non-economic disputes that

28 ¹⁰ In contrast the NLRA regulates dispute resolution through strikes and boycotts.

1 would have no impact on commerce are covered. Such local disputes governed by state contract
2 law or state labor law lack any substantial connection to interstate commerce. If the dispute does
3 not affect interstate commerce, regulation of the resolution of the dispute is not within the scope
4 of the Commerce Clause, and the FAA cannot constitutionally apply. Whether a dispute between
5 Fremont Ford and any of its employees is ultimately resolved in individual or group arbitration
6 does not have an impact on any issue of interstate commerce. Because the employer has not
7 shown that the disputes covered by the FUAP would affect interstate commerce or that the
8 activity of resolving those disputes in individual or group arbitration would affect interstate
9 commerce, the FAA cannot constitutionally be applied here.

10 Even though the FAA cannot constitutionally target the dispute resolution activity here,¹¹
11 the NLRA can constitutionally regulate dispute resolution activity between employers and their
12 employees. This is not anomalous. The NLRA was passed pursuant to explicit Congressional
13 findings that “[t]he inequality of bargaining power between employees who do not possess full
14 freedom of association or actual liberty of contract and employers who are organized in the
15 corporate or other forms of ownership association substantially burdens and affects the flow of
16 commerce.” 29 U.S.C. § 151. The Supreme Court has explained that Section 7 of the NLRA
17 embodies the effort of Congress to remedy this problem. *NLRB v. City Disposal Sys. Inc.*, 465
18 U.S. 822, 835 (1984) (“[I]t is evident that, in enacting §7 of the NLRA, Congress sought
19 generally to equalize the bargaining power of the employee with that of his employer by allowing
20 employees to band together in confronting an employer regarding the terms and conditions of
21 their employment.”). The NLRA can thus reach dispute resolution as a necessary part of its
22 regulation of the employment relationship, designed to address the inequality in bargaining power
23 that burdens interstate commerce. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37
24 (1937) (recognizing that regulation of local, intrastate activity is permissible as a necessary part of
25 a larger regulatory scheme). Unlike the NLRA, the FAA is not a larger regulation of employment

26 ¹¹ The courts in *Stampolis v. Provident Auto Leasing Co.*, 586 F.Supp.2d 88 (E.D.N.Y. 2008),
27 and *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), recognized that litigation is
28 different from the activity of the entity involved in the litigation. See also *Rodriguez v. Testa*,
296 Conn. 1, 26, 993 A.2d 955, 969 (2010) (finding statute constitutional under Commerce
Clause because it regulates industry, not litigation).

1 and does not seek to change the fundamental ways employers and workers relate to each other in
2 order to confront the labor strife that impedes interstate commerce. It seeks to regulate the private
3 dispute resolution activity of individuals apart from its content or context and this is
4 impermissible.

5 Congress may not focus on the intrastate dispute resolution activities of private
6 individuals apart from a larger regulation of economic activity. See *United States v. Lopez*, 514
7 U.S. 549, 558 (1995) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)) (The Court has
8 never declared that “‘Congress may use a relatively trivial impact on commerce as an excuse for
9 broad general regulation of state or private activities.’ Rather, ‘the Court has said only that *where*
10 *a general regulatory statute bears a substantial relation to commerce*, the de minimis character of
11 individual instances arising under that statute is of no consequence.” (emphasis in original)).

12 The Supreme Court has said that regulation of intrastate activity is permissible where it is one of
13 the “essential parts of a larger regulation of economic activity” and the “regulatory scheme could
14 be undercut unless the intrastate activity were regulated.” *Lopez*, 514 U.S. at 561. The relevant
15 statutory regime here is the FAA. By its terms, the FAA addresses only individual transactions.
16 9 U.S.C. § 2 (applying the terms of the act to “a written provision in any maritime transaction or
17 contract evidencing a transaction involving commerce”). Therefore, the regulatory scheme does
18 not encompass wide sectors of economic activity in a general fashion but rather applies to
19 individual transactions or contracts. Regulation of a local dispute that does not itself have any
20 effect on interstate commerce is not a necessary part of the regulatory scheme. Similarly, failure
21 to enforce arbitration provisions in purely intrastate contracts would not subvert the entire
22 statutory scheme in the same way as the failure to regulate purely intrastate marijuana production
23 would undercut regulation of interstate marijuana trafficking. *Gonzales v. Raich*, 545 U.S. 1, 26
24 (2005). Because regulation of the intrastate activity here is “not an essential part of a larger
25 regulation of economic activity, in which the regulatory scheme could be undercut unless the
26 intrastate activity were regulated,” it “cannot . . . be sustained under our cases upholding
27 regulations of activities that arise out of or are connected with a commercial transaction, which
28 viewed in the aggregate, substantially affects interstate commerce.” *Lopez*, 514 U.S. at 561. As a

1 result, there are no constitutional grounds for applying the FAA to intrastate dispute resolution
2 activity that bears only a trivial effect on interstate commerce.¹²

3 Because the application of the FAA depends on the Commerce Clause, and because the
4 forum in which this employment dispute is resolved does not have a substantial effect on
5 interstate commerce, the FAA cannot be used to prohibit or interfere with protected concerted
6 activity under the NLRA.

7 **D. THERE IS NO “CONTROVERSY” SUBJECT TO THE FAA**

8 The FAA applies to “a contract evidencing a transaction involving commerce to settle by
9 arbitration a controversy thereafter arising out of such contract or transaction.” There is no
10 controversy here. No employee has asserted any claim.¹³ No employee has asserted any claim
11 because the FUAP is not an effective means of resolving individual claims. Group or class claims
12 are prohibited. The FAA is only triggered by its terms when there is a “controversy.” None
13 exists here except whether the provision violates the Act. The absence of any such claim proves
14 the chilling effect of the FUAP. None exists precisely because it is illegal. Like any unlawful
15 employer maintained rule, the rule serves its purpose to prevent the lawful conduct. Such rules
16 effectively chill employees’ rights and thus serve their intended purpose. Thus, until a concrete
17 controversy develops, the FAA cannot be applied.

18 **E. FREMONT FORD’S ANALYSIS, IF ANY, SHOULD BE REJECTED**

19 Fremont Ford may rely on *Alafabco, supra*. We have discussed it above. When the
20 Supreme Court addressed the Commerce Clause question in *Alafabco*, it notably did not find that
21 private arbitration agreements on their own were a “general practice” that “bear[s] on interstate
22 commerce in a substantial way.” The Court instead relied on other characteristics of the
23 transaction at issue—a multimillion dollar debt restructuring contract between a bank and a

24 ¹² Respondent may argue that the language of the FUAP establishes commerce jurisdiction.
25 First the parties cannot confer federal jurisdiction by their agreement. *Insurance Corp. v*
26 *Compagnie des Bauxites*, 456 U.S. 694, 702 (1982). Second the language of the FUAP states
27 “that the Company’s business and the nature of my employment in that business affect
interstate commerce.” That does not establish the factual basis that a dispute affects
commerce, that a transaction affects commerce, that a controversy affects commerce or that
any arbitration affects commerce.

28 ¹³ The dispute over whether the FUAP violates the NLRA is excluded from the FUAP and
cannot be the basis to establish a controversy.

1 multistate manufacturer—to find the necessary connection to interstate commerce. Here, there is
 2 no evidence that individual or group “disputes” affect commerce. Fremont Ford’s potential
 3 argument may be that as long as its nationwide retail business affects commerce, any employment
 4 dispute must also affect commerce.¹⁴ That statement of Fremont Ford’s potential position
 5 demonstrates that it is not logical.

6 F. SUMMARY

7 In summary, the National Labor Relations Act may regulate the activities of this employer
 8 because of the impact on commerce. No one disputes that. The Federal Arbitration Act,
 9 however, regulates the specific activity of dispute resolution in the form of arbitration, and that
 10 activity does not affect commerce within the Commerce Clause. Alternatively, the FAA regulates
 11 only employment disputes that affect commerce. Further, there is no contract subject to the FAA
 12 nor is there any controversy subject to the FAA.

13 The Board must address this constitutional issue. It cannot do so by applying the doctrine
 14 of constitutional avoidance. Here, Fremont Ford will rely for its core argument on the FAA.
 15 Either it applies or it doesn’t. The Board cannot duck and weave and avoid.¹⁵

16 V. THE APPLICATION OF THE FEDERAL ARBITRATION ACT CANNOT 17 OVERRIDE THE IMPORTANT PURPOSES OF OTHER FEDERAL STATUTES 18 THAT ALLOW EMPLOYEES TO SEEK RELIEF FROM THE FEDERAL 19 GOVERNMENT FOR THE BENEFIT OF THEMSELVES AND OTHER 20 WORKERS

21 The Board must address directly the question of whether the Federal Arbitration Act may
 22 trump the application of the National Labor Relations Act as to other federal statutes that allow
 23 whistle-blowing or independent administrative remedies. As the Board correctly found in *Murphy*
 24 *Oil USA, Inc., supra*, there are important purposes underpinning Section 7 that are not addressed
 25 by the Federal Arbitration Act. That equally applies to claims that employees can make under

26 ¹⁴ Thus the aggregation argument based on *Circuit City Stores v. Adams*, 532 U.S. 105 (2001),
 27 and *E.E.O.C. v. Waffle House*, 534 U.S. 279 (2002), is inapposite. Neither of these cases
 28 involved challenges based on the reach of the commerce power, and so the Supreme Court did
 not address the statutory question of whether the arbitration agreements in these cases were
 part of contracts evidencing transactions involving commerce or the constitutional question of
 whether the FAA could constitutionally be applied in such situations.

¹⁵ This issue has been presented to the Board in three other cases by Counsel for Charging Party
 in this case. See Motion to Allow Oral Argument filed in *Hobby Lobby*, Case No. 20-CA-
 139745.

1 other federal statutes regarding workplace issues.¹⁶ Here, we point out that the FUAP provision
 2 effectively undermines those other federal statutes. Thus, the restriction found in the FUAP, that
 3 any the worker may only have “my individual claims” heard, would interfere with other federal
 4 statutory schemes, which envision and, in some cases, require remedies that will affect a group.
 5 The Board has been admonished by the Supreme Court in *Hoffman Plastic Compounds v. NLRB*,
 6 535 U.S. 137 (2002), that it must respect other federal enactments.¹⁷ Here, the Board should
 7 recognize that there are many federal statutes that allow group, collective or class claims or even
 8 individual claims that affect a group. The FAA cannot be used to defeat the purposes of those
 9 statutes.

10 Employees have the right to bring to various federal agencies all kinds of issues that affect
 11 them and other workers. Under these statutes, they have the right to seek relief from those
 12 agencies for their own benefit as well as for the benefit of other workers or employees of the
 13 employer. Those remedies can involve government investigations, injunctive relief, and federal
 14 court actions by those agencies, and debarment from federal contracts, workplace monitoring and
 15 many other remedies that would be collective and concerted in nature.

16 In effect, the FUAP would prohibit an employee from invoking on his/her behalf, as well
 17 as on behalf of other employees, protections of these various federal statutes. It would prohibit
 18 the agency or the court from remedying violations of the law that the agency or court would be
 19 empowered, if not required, to remedy.

20 The Congressional Research Service has identified forty different federal laws that contain
 21 anti-retaliation and whistleblower protection. See Jon O. Shimabukuro et al., Cong. Research
 22 Serv. Report No. R43045, *Survey of Federal Whistleblower and Anti-Retaliation Laws* (April 22,

23 ¹⁶ We emphasize that what is not at issue is the individual right of employees to file claims of
 24 any kind with federal agencies or in federal court. Where the action is not concerted and not
 25 for mutual aid or protection, the NLRA is not implicated. It is only when the action is
 26 concerted and for mutual aid or protection that NLRA Section 7 protection is triggered. This
 27 discussion assumes that an employee may invoke these other federal laws to benefit herself
 28 and other employees. Thus the resort to the court or agencies or arbitration must satisfy the
 Board’s application of *Meyers Industries, Inc.* 281 NLRB 882 (1986). We do not however
 believe *Meyers Industries* survives recent board cases and the board should return to the
 doctrine of *Alleluia Cushion Co.*, 221 NLRB 999 (1975). *Meyers* is fundamentally inconsistent
 with *Fresh & Easy Neighborhood Market*, 361 NLRB No 12 (2014).

¹⁷ Any assertion by Fremont Ford that the FAA trumps the NLRA is another example.

1 2013), *available at* <http://fas.org/sgp/crs/misc/R43045.pdf>. These are all laws that relate directly
2 to workplace issues. Nothing in the Federal Arbitration Act preempts the application of other
3 federal laws. Some examples are mentioned below.

4 The federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, allows for the District
5 Courts to grant injunctive relief to “restrain violations of [the Act].” See 29 U.S.C. § 217¹⁸. The
6 application of the FUAP would prevent an individual or a group of individuals from seeking
7 injunctive relief that would apply to all employees or apply in the future to themselves and other
8 employees. It would undermine the purposes behind the FLSA to allow for such injunctive
9 relief.¹⁹

10 The same is true with respect to ERISA, 29 U.S.C. § 1001, *et seq.* The FUAP would
11 prohibit an employee from going to court with respect to a claim involving a benefit covered by
12 ERISA, even though the statute expressly allows for equitable relief. 29 U.S.C. § 1132(a)(1) and
13 (3). And as noted below by extending this expressly to “its employee benefit and health plans”
14 the FUAP violates ERISA.

15 The FUAP would prevent employees from bringing a complaint to OSHA seeking
16 investigation and correction of worksite problems affecting all employees where action after the
17 investigation would be necessary.

18 The FUAP would prevent an employee from filing an EEOC charge that could lead to
19 EEOC court action seeking systemic or class wide relief. It would prevent the employees from
20 participating in systemic charge investigations. 42 U.S. C. section 2000e-8(a).). Commissioners
21 may file charges on their own. 42 U.S. C. section 2000e-5(b) which the FUAP would prohibit.

22 The FUAP would prevent employees from bringing unlawful immigration practices to the
23 attention of the Office of Special Counsel. ([http://www.justice.gov/crt/about/osc/.](http://www.justice.gov/crt/about/osc/))

24 ¹⁸ It is not contradictory to refer to the rights under federal statutes and raise the question of
25 commerce jurisdiction with respect to the FAA. The difference is that the FAA regulates
26 dispute resolution or the employment dispute, not the business or commerce activity of the
27 employer

28 ¹⁹ Even a claim by an employee that she was not paid for overtime after 40 hours, as required by
the FLSA, would not affect commerce. The claim could be based on the promise in the
handbook to pay overtime. And because the worker was prohibited from bringing the claim
in court, the advancement of that claim for a few dollars of overtime would not affect
commerce for FAA purposes.

1 It would prohibit anonymous actions which are permitted under some circumstances.

2 Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir.2000).

3 The FUAP would prohibit actions under the federal False Claims Act.

4 (<http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C->

5 FRAUDS_FCA_Primer.pdf.) An employee could not, for example, claim that on a federal Davis-

6 Bacon project, the employer made false claims for payment while not paying the prevailing wage.

7 An employee could not claim, along with others, that the employer is overcharging on a

8 government contract. See *United States v. Circle C Constr.*, 697 F.3d 345 (6th Cir. 2012). This

9 kind of litigation serves an important public purpose but would be foreclosed by the FUAP. This

10 kind of claim is necessarily brought as a group action, since the relief sought includes a remedy

11 for the underpayment of a group of workers.

12 The FUAP allows the filing of individual claims with certain agencies but does not allow
13 group claims with those agencies.

14 The FUAP would prohibit an employee from bringing a claim to the Department of Labor
15 that the employer violates the provisions of the Fair Labor Standards Act regarding employment
16 of minors unless the individual were herself an under-aged minor.

17 The FUAP, by its terms, undermines the enforcement of these federal statutes, which
18 envision private efforts to enforce their purposes for all employees and for the public interest.

19 There is no escaping the conclusion that there are a multitude of federal laws that govern
20 the workplace. The FUAP prohibits an employee acting collectively or to benefit others²⁰ from
21 seeking assistance before those agencies and in court to effectuate the purposes of those statutes.

22 The FUAP would prohibit the employee from doing so for the benefit of employees acting
23 collectively. The purposes of those statutes would include not only individual relief for the

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²⁰ The FUAP would prevent an employee from seeking assistance of others to proceed collectively. An employee could be disciplined for seeking to invoke a collective action on the theory that this would violate the company policy contained in the FUAP.

1 employee himself or herself, but also relief that would protect the public interest in enforcement
2 of those statutes.²¹

3 For these reasons, the FUAP itself is invalid, not only because it would prohibit an
4 employee from seeking concerted relief with respect to other federal statutes, but also because it
5 would prohibit the employee from seeking relief that would benefit other employees. The FAA
6 cannot serve to interfere with the enforcement of other federal statutes. As we show, this conflict
7 is particularly heightened with the RFRA, which expressly overrides other federal statutes. The
8 Board should expressly rule that the application of the FAA interferes with important policies
9 under other federal statutes.

10 **VI. THE FUAP WOULD PROHIBIT COLLECTIVE ACTIONS THAT ARE NOT**
11 **PREEMPTED BY FAA UNDER STATE LAW**

12 This issue arises because the FUAP applies in California.²² The California Supreme
13 Court has ruled that an arbitration agreement cannot foreclose application of the Private Attorney
14 General Act, Labor Code § 2699 and 2699.3. See *Iskanian v. C.L.S. Transp.*, 59 Cal.4th 348
15 (2014), *cert. denied* __ U.S. __ (2014). See also *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d
16 425 (9th Cir. 2015).

17 There are numerous other provisions in the Labor Code that permit concerted action. See,
18 e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), *cert. denied*, 134 S.Ct. 2724
19 (2014) (arbitration policy cannot categorically prohibit a worker from taking claims to Labor
20 Commissioner, although state law is also preempted from categorically allowing all claims to
21 proceed before the Labor Commissioner in the face of an arbitration policy).

22 The FUAP would interfere with the substantive right of the California Labor
23 Commissioner to enforce the wage provisions of the Labor Code. See, e.g., Cal. Lab. Code §
24 217.

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26 ²¹ The U.S. Supreme Court has not addressed this issue in any employment arbitration cases
27 since each case has been an individual claim without the argument that the claim serves any
28 public purpose. *Iskanian, supra*, is based on that principle.

²² The burden is on the employer to show that there is no other state law that would apply in the
same way.

1 There are, additionally, various provisions in the California Labor Code that allow only
2 the Labor Commissioner to award penalties or grant other relief. The enforcement of the FUAP
3 would prevent employees from collectively going to the Labor Commissioner seeking these
4 penalties for themselves or other employees. It would foreclose an employee from asking the
5 Labor Commissioner to seek remedies for a group of employees. See, e.g., Cal. Lab. Code §
6 210(b) (allowing only the Labor Commissioner to impose specified penalties); Cal. Lab. Code §
7 218 (authority of district attorney to bring action); Cal. Lab. Code § 225.5(b) (penalty recovered
8 by Labor Commissioner). IWC Order 16, Section 18(A)(3), *available at*
9 <https://www.dir.ca.gov/iwc/IWCArticle16.pdf>. Employees could not collectively seek
10 enforcement of these remedies because the FUAP prohibits them from bringing claims
11 collectively to that agency.

12 The recently enacted sick pay law may only be enforceable by the Labor Commissioner.
13 See Cal. Lab. Code § 245 (effective July 1, 2015). The FUAP would foreclose enforcement of
14 this new law. Individuals or groups of individuals do not have the right to enforce the law in
15 court or before an arbitrator. For purposes of this case, it would foreclose concerted enforcement
16 of the new law since the arbitration process would not be authorized to enforce a law given
17 exclusively to the Labor Commissioner. It would prevent other public officers from enforcing
18 state law for a class or group upon complaint by employees. Cal. Bus. & Prof. Code § 17204.

19 Additionally, under state law, there are a number of whistleblower statutes just as there
20 are under federal law. The FUAP would prohibit employees from invoking those statutes for
21 relief that would affect them as well as others. The Labor Commissioner lists thirty-three
22 separate statutes that contain anti-retaliation procedures. See
23 <http://www.dir.ca.gov/dlse/FilingADiscriminationComplaint1.pdf>.

24 California has strong statutory protection for whistleblowers. See Cal. Lab. Code § 1101
25 and 1102. The FUAP defeats the purposes of those statutes that allow groups to bring claims
26 forward to vindicate the public purpose animating those provisions.

27 Just as the California Supreme Court held in *Iskanian*, there are important public purposes
28 animating these statutes that allow employees to seek assistance from either state agencies or the

1 court system. To prevent employees from seeking relief for other employees in the workplace
2 would effectively deprive them of substantive rights guaranteed by state law. The FAA does not
3 preempt such state laws. See *Iskanian, supra*.

4 The Board must address the question of the application of *Iskanian* and similar doctrines.
5 The FUAP is invalid because it prohibits the exercise of this important state law right, which
6 serves an important public purpose. Once again, the burden is on the employer to prove that the
7 FUAP does not interfere with other non-preempted state law.

8 **VII. THE FUAP UNLAWFULLY PROHIBITS GROUP CLAIMS THAT ARE NOT**
9 **CLASS ACTIONS, REPRESENTATIVE ACTIONS, COLLECTIVE ACTIONS OR**
10 **OTHER PROCEDURAL DEVICES AVAILABLE IN COURT OR OTHER FORA**

11 The cases focus on the rights of employees to use collective procedures in courts and other
12 adjudicatory fora. Here, we make the point that employees have the right to bring their collective
13 disputes together as a group. Or a group or individual can represent others to bring a group
14 complaint. The FUAP prohibits such group claims or consolidation.²³ It expressly prohibits an
15 "award [of] relief to a group of employees." It expressly states "the arbitrator is prohibited from
16 consolidating the claims of others into one proceeding."

17 This is an essential point here. It responds to the repeated dissents of Member Miscimarra
18 and former Member Johnson. This point responds to arguments likely to be made by the
19 employer. These are claims brought by two or more employees. There is no need to invoke class
20 action, collective action or any procedural form of collective actions. It is just two or more
21 employees bringing the same claim and assisting each other. Alternatively, it can be two or more
22 employees bringing a complaint that would require the participation of other employees and
23 would affect them. The Board needs to make it clear that such group claims stand apart from
24 class actions, collective actions, and representative actions that invoke court adopted procedures.

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27 ²³ As to this theory, the Board does not have to address the argument made in those dissents that
28 employees do not have the right to invoke the formalized procedures available in court such
as class actions or collective actions.

1 **VIII. THE FUAP IS INVALID AND INTERFERES WITH SECTION 7 RIGHTS TO**
2 **RESOLVE DISPUTES BY CONCERTED ACTIVITY OF BOYCOTTS,**
3 **BANNERS, STRIKES, WALKOUTS AND OTHER ACTIVITIES**

4 The FUAP is invalid because it makes it clear that the employees are limited to the
5 arbitration procedure to resolve disputes. It applies to all disputes, not just disputes that could be
6 brought in a court or before any agency. It governs “all disputes which may arise out of the
7 employment context.” This would foreclose the employees from engaging in strikes or
8 boycotting activity, expressive activity or other public pressure campaigns. This is a yellow dog
9 contract. Here, employees are forced to agree that they shall use only the arbitration procedure to
10 resolve disputes with the employer, and thus they would be violating the arbitration procedure if
11 they were to use another more effective forum, such as a public protest or a strike. It prohibits all
12 forms of concerted activity because it requires that employees use the arbitration procedure. Any
13 employee who violates this rule would be subject to discipline just as he/she would be for
14 violating any other employer rule. This is a fundamentally illegal forced waiver of the Section 7
15 right to engage in lawful economic activity, including boycotting, picketing, striking, leafleting,
16 bannering and other expressive activity. That language is contained in the FUAP.²⁴

17 That concerted activity could certainly include seeking a Union’s assistance in negotiating
18 a better arbitration provision or in invoking the FUAP. Fundamentally, it also would make it
19 unlawful to engage in Union activities such as a strike, picketing, bannering or other concerted
20 activity. The Board’s recognition that the FUAP is an unlawful yellow dog contract under the
21 Norris-LaGuardia Act, reaffirms that but does not go far enough. If the FUAP is unlawful under
22 the Norris-LaGuardia Act and Section 7, it is unlawful because it prohibits other concerted means
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25 ²⁴ The language in the FUAP that an employee “will not be disciplined, discharged, or otherwise
26 retaliated against for exercising my rights under Section 7 of the National Labor Relations Act,
27 including but not limited to challenging the limitation on a class, collective, representative or
28 joint action” does not save the FUAP. The Board has ruled that such exculpatory clauses do
not explain to a worker what she can do under the Act. Moreover this is ambiguous as to
whether it is limited to “challenging” the FUAP or taking direct economic action to resolve the
controversy between the employees and the Respondent.

1 of resolving disputes. Employees are not limited to bringing claims concertedly before courts or
2 agencies.²⁵ They can do so by direct action.²⁶

3 The FUAP is an unlawfully imposed no-strike, no boycott, no bannering, no leafleting and
4 no concerted activity ban. It is the worst form of a yellow dog contract.

5 **IX. THE FUAP UNLAWFULLY PROHIBITS JOINT ACTION**

6 This FUAP has the specific reference to prohibiting “joint action.” This undefined
7 ambiguous term would prohibit even one employee from acting jointly with another employee to
8 help each other bring individual claims. It would prohibit them from referring to other claims or
9 invoking the doctrine of *res judicata* or *collateral estoppel*. To the extent it is ambiguous; it must
10 be construed against the employer.

11 **X. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT SALTING AND**
12 **APPLIES AFTER EMPLOYMENT ENDS**

13 The FUAP would extend to someone who became employed for the purpose of salting,
14 improving working conditions and organizing since it would restrict his/her right to engage in
15 concerted activity and organize. It would prohibit the salt from assisting other employees in
16 pursuing collective claims. Moreover, the FUAP purports to govern even after an employee quits
17 or is fired. If the employee chooses to quit because of miserable working conditions or to
18 organize, she is barred from acting collectively. Respondent cannot bar an employee who has
19 terminated any employment agreement from acting collectively on behalf of either current
20 employees or other former employees.²⁷

24 ²⁵ Surely every employer would rather force employees to resolve disputes in the least friendly
25 fora: the courts and arbitration. The Norris-LaGuardia Act and the NLRA protect the right of
26 employees to settle disputes in the most effective manner: collective action in the streets. .
See, *On Assignment Staffing Services*, 362 NLRB No 189 (2015).

27 ²⁶ See below where we address the need to overrule *Lutheran Heritage-Village Livonia*, 343
NLRB 824 (1998). Under current Board law however this ambiguity should be construed
28 against the employer. See *Murphy Oil*, supra, at *26 and other cases cited below.

²⁷ California prohibits non-compete clauses. This would conflict with such provisions.

1 **XI. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS**
2 **BECAUSE IT FORECLOSES GROUP CLAIMS BROUGHT BY A UNION AS A**
3 **REPRESENTATIVE OF AN EMPLOYEE OR EMPLOYEES**

4 The FUAP prohibits a union that represents an unrepresented employee from representing
5 that employee in the arbitration procedure. That is, it would prohibit a union from acting on
6 behalf of an employee, not as the collective representative of the group, but rather as the
7 representative of the individual employee. It would also prevent a union from acting as the
8 minority representative or members-only representative of an employee or group of employees.
9 Such activity is protected. It would prevent a union from acting on behalf of a group of
10 employees.

11 The FUAP prohibits a union that is recognized or certified from representing employees.

12 The FUAP would prevent a union, as the representative of its members, or non-labor
13 organization worker center from representing its members where authorized under state or federal
14 law. See *Soc. Servs. Union, Local 535 v. Santa Clara Cty.*, 609 F.2d 944 (9th Cir. 1979) (Union
15 may act as representative of its members in class action); *United Food & Commercial Workers*
16 *Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996) (union has associational standing on
17 behalf of its members); *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102
18 F.R.D. 457 (N.D. Cal. 1983); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of*
19 *Am. v. Brock*, 477 U.S. 274 (1986).²⁸ See *Brotherhood of Teamsters v Unemployment Insurance*
20 *Appeals Board*, 190 Cal. App 3d 1517 (1987)(California law allows union to have standing on
21 behalf of its members).²⁹

22 **XII. THE FUAP IS UNLAWFUL BECAUSE IT IMPOSES ADDITIONAL COSTS ON**
23 **EMPLOYEES TO BRING EMPLOYMENT RELATED DISPUTES**

24 This FUAP contains a fundamental flaw in that it would require an employee to pay
25 arbitration costs. Thus, it necessarily increases the costs of employees who bring claims

26 ²⁸ It would prohibit an employee from joining a non-labor organization that brought litigation
27 against the employer on issues affecting working conditions. An employee could not join a
28 worker center, for example, that brought claims by other employees.

29 ²⁹ The California Labor expressly allows representatives such as union to raise claims. See Labor
Code Section, 1198.5(b)(1). It would foreclose a union from bring a claim as a person under
any federal statute or state statute which allows any person to bring a charge or complaint
before an agency.

1 concerning working conditions. This is particularly a flaw in California, where the Berman
2 Hearing process is free to an employee. Thus if one employee sought to bring an issue to the
3 Labor Commissioner on behalf of others, that employee would incur no costs. The same claim
4 bright in arbitration would incur the arbitration costs of at least the arbitrator and other associated
5 costs. See Labor Code § 98. In effect, a penalty is imposed on the employee because he or she
6 has to pay the arbitration costs where there is a free procedure under the Labor Commissioner
7 system under Labor Code § 98. The Act does not permit an employer from forcing employees to
8 pay anything, not one cent, to exercise their section 7 rights. Because employees can bring
9 concerted claims without cost to the Labor Commissioner, the FUAP is unlawful.

10 Furthermore, employees cannot share expert witness fees, deposition costs, copying costs,
11 attorney's fees and many other costs associated with bringing and pursuing claims. Bringing
12 them as a group includes sharing those costs. Sharing costs is concerted activity. Thus, the
13 FUAP expressly penalizes workers by increasing their costs in violation of Section 7.

14 The FUAP would prevent a federally recognized Joint Labor Management Committee
15 from pursuing claims. See 29 U.S.C. § 175a.³⁰

16 On all these grounds, the FUAP is unlawful.

17 **XIII. THE FUAP IS UNLAWFUL BECAUSE IT WOULD PROHIBIT AN EMPLOYEE**
18 **OF ANOTHER EMPLOYER FROM ASSISTING A FREMONT FORD**
19 **EMPLOYEE OR JOINING WITH A FREMONT FORD EMPLOYEE TO BRING**
20 **A CLAIM**

21 Separately, an employee of any other employer is also an employee within the meaning of
22 the Act. *Eastex v. NLRB*, 437 U.S. 556 (1978). Such other employee could assist an employee of
23 Fremont Ford or join with a claim brought by a Fremont Ford employee. The rights of all other
24 employees of other employers are violated by the FUAP independently of whether it violates just
25 the Section 7 rights of Fremont Ford employees. The FUAP cannot apply to an employee of
26 another employer, nor can it prohibit a Fremont Ford employee from joining with an employee of
27 another employer.

28 ³⁰ It is not contradictory to refer to the rights under federal statutes and raise the question of
commerce jurisdiction with respect to the FAA. The difference is that the FAA regulates
dispute resolution or the employment dispute, not the business or commerce activity of the
employer

1 Furthermore, it would prohibit employees of Fremont Ford from bring group complaints
 2 with employees of “owners, directors, officers, managers, employees, agents, and parties
 3 affiliated with its employee benefit and health plans.” As described in the FUAP even though
 4 those other persons are not parties to the FUAP.³¹

5 **XIV. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS**
 6 **BECAUSE IT APPLIES TO PARTIES WHO ARE NOT THE EMPLOYER BUT**
 7 **MAY BE AGENTS OF THE EMPLOYER OR EMPLOYERS OF OTHER**
 8 **EMPLOYEES UNDER THE ACT**

9 The FUAP is invalid because it applies to other employers. The FUAP extends to
 10 disputes with the Company, its “owners, directors, officers, managers, employees, agents and
 11 parties affiliated with its employee benefit and health plans.” None of them is bound to arbitrate
 12 claims against the employee except the Company itself. It does not bind its “owners, directors,
 13 officers, managers, employees, agents and parties affiliated with its employee benefit and health
 14 plans” and so on. Each of these persons could be an employer or joint employer within the
 15 meaning of the Act. Yet, the employee is bound to arbitrate claims against those individuals
 16 where those claims arise out of wages, hours and working conditions to the extent they are the
 17 employer.

18 There are many wage and hour statutes, including the Fair Labor Standards Act, the
 19 California Fair Employment and Housing Act and provisions of the Labor Code, that can impose
 20 joint liability.³² Thus, the FUAP prohibits Section 7 activity against parties who are not the
 21 employer and thus is overbroad and invalid. This would affect the employees’ right to bring
 22 claims against joint employer relationships. See *Browning-Ferris Indus.*, 362 NLRB No. 186
 23 (2015).

24 Moreover, there is no contract between any employee and these third parties. So the FAA
 25 cannot apply. The FUAP cannot apply to non-parties to any agreement with the employees. *First*
 26 *Options v. Kaplan*, 514 U.S. 938 (1995).

27 ³¹ It is not “mutual” and is invalid for this reason.

28 ³² In addition, this effort to limit claims against benefit plans is prohibited by ERISA, 29 U.S.C.
 § 1140, since it interferes with the rights of employees to bring claims against benefit plans.

1 **XV. THE FUAP VIOLATES ERISA**

2 The FUAP violates ERISA. Because it extends to benefit plans, it runs contrary to the
3 Department of Labor regulation prohibiting mandatory arbitration. See 29 C.F.R. § 2560.503-
4 1(c)(4); see *Snyder v. Federal Insurance Co.*, 2009 WL 700708 (S.D. Ohio 2009) (denying
5 arbitration relying on the DOL regulation). We recognize that a plan may require exhaustion of
6 its remedies including arbitration, but that's only a function of exhausting the plan arbitration
7 clause prior to bring a court action. See *Chappell v. Laboratory Corporation America*, 232 F.3d
8 719 (2000); see also *Engleson v. Unum Life Insurance Co.*, 723 F.3d 611 (6th Cir. 2003); see also
9 29 U.S.C. § 1133.

10 Additionally, this language violates the right of employees to invoke procedures under the
11 employee benefit plans, rather than under this FUAP.³³ ERISA requires that there be an
12 arbitration procedure to bring claims against benefit plans. This effectively preempts ERISA by
13 requiring employees to use this procedure rather than the procedure adopted by the benefit plans.
14 See 29 U.S.C. § 1133.

15 **XVI. THE FUAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS**
16 **BECAUSE IT RESTRICTS THE RIGHT OF WORKERS TO ACT TOGETHER**
17 **TO DEFEND CLAIMS BY THE EMPLOYER AGAINST THEM**

18 Employees have the right to band together to defend against claims made by the Employer
19 or other employees. Although an employee might choose to refrain from concerted activity
20 against the employer, that employee may wish to engage in joint activity where there are joint or
21 related claims against several employees.

22 The FUAP imposes a very heavy burden on employees who may be jointly the subject of
23 a claim by the company against them. Under the FUAP, they could not jointly defend themselves
24 but would have to defend themselves individually in separate actions. The employer may have
25 claims against multiple employees, such as overpayments for wages or breach of confidentiality
26 provisions. There may be cross-claims, counter-claims, interpleader or claims for
27 indemnification. There may be claims for declaratory relief against the employer or other

28 ³³ Fremont Ford by imposing this arbitration requirement has become the administrator of the plans and a fiduciary to the plans.

1 employees. The employees are entitled to defend such claims or pursue such claims jointly and
 2 concertedly.³⁴ The FUAP is facially invalid since it prohibits group action to defend against
 3 claims jointly.³⁵

4 **XVII. THE FUAP IS UNLAWFUL UNDER THE NORRIS-LAGUARDIA ACT**

5 The Norris-LaGuardia Act, 29 U.S.C. § 101 et seq., states that, as a matter of public
 6 policy, employees “shall be free from the interference, restraint, or coercion of employers of
 7 labor, or their agents, in the designation of . . . representatives [of their own choosing] or in self-
 8 organization or in other concerted activities for the purpose of collective bargaining or other
 9 mutual aid or protection.”³⁶ 29 U.S.C. § 102 (emphasis added). The Act declares that any
 10 “undertaking or promise in conflict with the public policy declared in section 102 . . . shall not be
 11 enforceable in any court of the United States.” 29 U.S.C. § 103. The FUAP plainly interferes
 12 with the rights guaranteed by this federal law. The FAA does not eliminate the rights guaranteed
 13 by the Norris-LaGuardia Act. This argument is fully explored in the law review article written by
 14 Professor Matthew Finkin, “The Meaning and Contemporary Vitality of the Norris-LaGuardia
 15 Act,” 93 Neb L. Rev 1 (2014). He forcefully argues that an agreement to waive collective actions
 16 is a quintessential yellow dog contract prohibited by the Norris-LaGuardia Act. . We repeat this
 17 here to reinforce our arguments. See *On Assignment Staffing, supra*

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 24 ³⁴ The FUAP specifically prohibits “consolidating the claims.” This would be a useful
 procedure for employees to concertedly defend claims.

25 ³⁵ For example, employees would have to hire lawyers who would cost more for individual
 26 representation. Employees could not share the costs of expert witnesses, document
 production, depositions etc. The simple fact that individual actions increase the costs on the
 workers makes it a penalty and violates Section 7.

27 ³⁶ The Commerce standard for the Norris-LaGuardia Act is much broader than the
 28 “transactional” standard of the FAA. See 29 U.S. C. Section 113 (defining broadly labor
 dispute)

1 **XVIII. THE FUAP IS INVALID BECAUSE IT IS UNCLEAR AS TO WHAT IT COVERS,**
2 **AND THEREFORE IT IS OVERBROAD; THE DECISION IN *LUTHERAN***
3 ***HERITAGE VILLAGE-LIVONIA* SHOULD BE OVERRULED; THE BOARD HAS**
4 **NOW EFFECTIVELY OVERRULED *LUTHERAN HERITAGE VILLAGE-***
5 ***LIVONIA* AND SHOULD EXPRESSLY DO SO**

4 **A. INTRODUCTION**

5 The FUAP is ambiguous as to what it covers. For example, one disputed area is whether
6 this would encompass claims before the Labor Commissioner under California Labor Code § 98.
7 Although the FUAP does not preclude an employee “from filing any administrative charge . . .” it
8 forecloses such claims in court. This is exactly the question faced by the California Supreme
9 Court in *Sonic-Calabassas, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), *cert denied* 134 S. Ct 2724
10 (2014). It is not clear whether that important procedure under California law is included or
11 excluded. It is not clear what rights are asserted protected under Section 7. It is not clear who
12 pays the costs. It is not clear whether other persons may initiate court or administrative claims. It
13 is not clear whether employees can strike or have to use the FUAP.

14 Recently, the Board has reemphasized that, where language “creates an ambiguity,” that
15 ambiguity “must be construed against the Respondent as the drafter of the [rule].” *Murphy Oil*
16 *U.S.A., Inc.*, 361 NLRB No. 72 at *26 (2014). *Professional Janitorial Serv., supra*, at n. 8, and
17 *Caesars Entertainment*, 362 NLRB No. 190 at *1 (2015). The Board relied upon its prior
18 decision in *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir.
19 1999) in reaching this conclusion. Thus, since the FUAP is unclear, it should be construed
20 against the company to prohibit all forms of concerted activity and thus is overbroad.
21 Additionally, this case illustrates precisely why the Board’s decision in *Lutheran Heritage*
22 *Village-Livonia*, 343 NLRB 646 (2004), should be overruled.

23 **B. THE BOARD SHOULD DISCARD *LUTHERAN HERITAGE VILLAGE-***
24 ***LIVONIA* TO THE TRASH HEAP OF DISCREDITED DECISIONS**

25 The Board should return to the rule established in *Lafayette Park Hotel*, 326 NLRB 824
26 (1998). The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an
27 unworkable and unreasonable doctrine for evaluating when employer-maintained rules are
28 unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB

1 824 (1998). See also *Ark Las Vegas Rest. Corp.*, 343 NLRB 1281, 1283 (2004) (any ambiguity in
2 a rule that restricts concerted activity can be construed against the employer).

3 The Board's application of the *Lutheran Heritage Village-Livonia* rule ignores the basic
4 concept that if some employees can read the language as interfering with Section 7 rights, then
5 there is a violation because some employees have had their rights unlawfully interfered with or
6 restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity
7 allows employers to chill the Section 7 rights of those who reasonably read the rule as reaching
8 Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest
9 in such activity. They may assert their right to "refrain from such activity." But those who
10 choose to engage in such activity have their conduct chilled, if not prohibited. The Board's rule
11 is a form of tyranny of some or a few over the rights of those who want to engage in Section 7
12 activity. If an employer's action interferes with the Section 7 rights of one employee, the
13 conduct violates the Act. The *Lutheran Heritage Village-Livonia* rule assumes that conduct
14 violates the Act only if many, and probably a majority, would have their rights violated. Such a
15 rule should be discarded and thrown into the trash pile of discredited doctrines.

16 In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

17 Where, as here, the rule does not refer to Section 7 activity, we will
18 not conclude that a reasonable employee would read the rule to
19 apply to such activity simply because the rule *could* be interpreted
20 that way. To take a different analytical approach would require the
Board to find a violation whenever the rule could conceivably be
read to cover Section 7 activity, even though that reading is
unreasonable. We decline to take that approach.

21 *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

22 This doctrine has created confusion and uncertainty in the application of rules. Moreover,
23 it is an illogical statement. If the "rule could be interpreted that way [to prohibit Section 7
24 activity]," the rule should be unlawful. We are not suggesting that if that "reading is
25 unreasonable," it should violate the Act. Only if the rule can be reasonably read to interfere with
26 Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is
27 ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity,
28 it should be unlawful. Here, this is heightened by the fact that, as illustrated above, the

1 Employer's Chief Executive Officer cannot explain the scope of the FUAP. If he can't do so, no
2 employee can easily construe it. In fact, we believe that in most cases, if you ask the president of
3 the company to explain their corporate rules, they can't explain how they would apply in most
4 common circumstances where Section 7 rights are at issue. This case incisively illustrates why
5 *Lutheran Heritage Village-Livonia* should be overruled.

6 The Board's prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity
7 against the employer. This has been the consistent application in many areas of law, including
8 the Board's application of employer-created rules. After all, the employer has control over what
9 it says, and it can implement language that is not vague or ambiguous. This is inherently true of
10 most employer rules, but quite clear in this case. Only the employer benefits from chilling and
11 restricting Section 7 activity. Recently, the Board seemed to have made it plain in *Murphy Oil*,
12 *supra*, where there is an ambiguity it would be construed against the Employer.

13 A worker is not at fault if the employer makes a statement that is ambiguous and could
14 affect or chill Section 7 rights. The employer statement should be construed against the
15 employer. Where there is any reasonable interpretation of the rule that could interfere with
16 Section 7 activity, the rule should be deemed unlawful. Employers will necessarily make rules
17 ambiguous to chill such activity unless required to make them clear. Ambiguity gives them wider
18 discretion and more power. Such ambiguities necessarily coerce some employees.

19 This interpretation has become one by which the Board ignores the illegal yet reasonable
20 interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has
21 turned the law on its head; where there is a reasonable interpretation that the rule does not affect
22 Section 7 rights, which only a few employees may apply, it makes no difference that most or
23 many of the employees would apply a reasonable interpretation that the rule prohibits Section 7
24 activity.

25 Put in other words, the burden should be on the drafter and maintainer of a rule to prove
26 that "no employee," not a single one, "would reasonably construe" the rule in a way to cover or
27 limit Section 7 activity. If any employee could reasonably construe the rule as limiting Section 7
28 activity, it would be unlawful.

1 This is further illustrated by the Board’s recent decision in *Three D, LLC d/b/a Triple Play*
2 *Sports Bar & Grille*, 361 NLRB No. 31 (2014). The majority found the “term ‘inappropriate’ to
3 be ‘sufficiently imprecise’ that employees would reasonably understand it to encompass
4 ‘discussion and interactions protected by Section 7.’” Slip Opinion p. 7. This is almost a
5 formulation that where there is an ambiguity in a phrase or rule it should be construed against the
6 drafter and enforcer of the rule, namely the employer. This contradicts, to some degree, the later
7 statement that “many Board decisions [] have found a rule unlawful if employees would
8 reasonably interpret it to prohibit protected activities.” Slip Opinion p. 8. The word “would”
9 should be replaced with the word “could.” This would shift the burden to the employer to clarify
10 its rules to eliminate interference with Section 7 rights.

11 Recently, the Board has also made it clear that where language “creates an ambiguity,”
12 that ambiguity “must be construed against the Respondent as the drafter of the [rule].” *Murphy*
13 *Oil U.S.A., Inc.*, 361 NLRB No. 72 at *19 (2014). The Board relied upon its prior decision in
14 *Lafayette Park Hotel*, 326 NLRB No. 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).
15 Here, there are patent ambiguities in the FUAP and the policies governing the FUAP. Thus, there
16 is an ambiguity created that must be construed in light of *Murphy Oil* against the drafter of the
17 rules, namely the employer. Under these circumstances, this is the perfect case in which to
18 overrule *Lutheran Heritage Village-Livonia*. It is particularly an appropriate case in which to
19 overrule that doctrine because the employer couldn’t explain the rules. If the employer can’t
20 explain the rules, no employee could be expected to understand what position or conduct is
21 prohibited or permitted.

22 The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of
23 employer rules to be created from the employer perspective rather than from the view of a
24 worker. Where the worker could read any reasonable interpretation into the rule that would
25 prohibit Section 7 activity, it is overbroad as to that worker or a group of workers. The fact that
26 some workers might reasonably construe it not to prohibit such Section 7 activity does not
27 invalidate the fact that at least some employees could reasonably read the rule to prohibit Section
28 7 activity, and thus the rule would chill those activities. Where one employee understands the

1 rule to prohibit Section 7 protected activity, at least an interference with Section 7 activity has
2 been created.

3 We quote at length the dissent, and we will ask this Board to return to the view of the
4 dissent:

5 In *Lafayette Park Hotel*, *supra* at 825, the Board recognized that
6 determining the lawfulness of an employer's work rules requires
7 balancing competing interests. The Board thus relied upon the
8 Supreme Court's view, as stated in *Republic Aviation v. NLRB*, 324
9 U.S. 793, 797-798 (1945), that the inquiry involves “working out an
10 adjustment between the undisputed right of self-organization
11 assured to employees under the Wagner Act and the equally
12 undisputed right of employers to maintain discipline in their
13 establishments.” 326 NLRB at 825. While purporting to apply the
14 Board's test in *Lafayette Park Hotel*, the majority loses sight of this
15 fundamental precept. Ignoring the employees' side of the balance,
16 the majority concludes that the rules challenged here are lawful
17 solely because it finds that they are clearly intended to maintain
18 order in the workplace and avoid employer liability. The majority's
19 incomplete analysis belies the objective nature of the appropriate
20 inquiry: “whether the rules would reasonably tend to chill
21 employees in the exercise of their Section 7 rights.”

22 Our colleagues properly acknowledge that even if a “rule does not
23 explicitly restrict activity protected by Section 7,” it will still violate
24 Section 8(a)(1) if—among other, alternative possibilities—
25 “employees would reasonably construe the language to prohibit
26 Section 7 activity.” On this point, of course, the established test
27 does not require that the only reasonable interpretation of the rule is
28 that it prohibits Section 7 activity. To the extent that the majority
implies otherwise, it errs. Such an approach would permit Section
7 rights to be chilled, as long as an employer's rule could
reasonably be read as lawful. This is not how the Board applies
Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339
NLRB 303, 304 (2003) (“The test of whether a statement is
unlawful is whether the words could reasonably be construed as
coercive, whether or not that is the only reasonable construction”).

The majority asserts that it has considered the employees' side of
the balance, in that it has found that the purpose behind the
Respondent's rules—to maintain order and protect itself from
liability—is so clear that it will be apparent to employees and thus
could not reasonably be misunderstood as interfering with Section 7
activity. Although the Respondent's asserted pure motive in
creating such rules may be crystal clear to our colleagues, it may
not be as obvious to the Respondent's employees, especially in light
of the other unlawful rules maintained by the Respondent. Rather,
for reasons explained below, we find that the challenged rules are
facially ambiguous. The Board construes such ambiguity against
the promulgator. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992),
quoting *Paceco*, 237 NLRB 299 fn. 8 (1978).

28 *Id.* at 650 (footnote omitted).

1 This reasoning was correct then and governs now.

2 **C. THE BOARD HAS EFFECTIVELY OVERRULED LUTHERAN HERITAGE**
3 **VILLAGE-LIVONIA BY APPLYING THE RULE OF CONSTRUING**
4 **AMBIGUITIES AGAINST THE EMPLOYER**

5 The Board has already effectively overruled *Lutheran Heritage Village-Livonia*. It has in
6 recent cases made it clear that “[w]here employees would reasonably read an ambiguous rule to
7 restrict their Section 7 rights, the Board construes the ambiguity in the rule against the rule’s
8 promulgator. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.*, 203 F.3d 52 (D.C.
9 Cir. 1999). *Professional Janitorial Serv.*, 363 NLRB No. 35, n.8 (2015), *Murphy Oil USA, supra*,
10 and *Caesars Entertainment, supra*. *Lutheran Heritage Village-Livonia* cannot survive the logic.
11 Once there is an ambiguity, some employees will construe the rule to prohibit Section 7 activity.
12 It is then inconsistent to hold that when the hypothetical employee who is deemed reasonable
13 (meaning the NLRB) reads it one way, the Board ignores the other reasonable employees who
14 read the rule to proscribe Section 7 activity. In effect, the Board has overruled *Lutheran Heritage*
15 *Village-Livonia*, and it should now so state.

16 **D. CONCLUSION**

17 In summary, *Lutheran Heritage Village-Livonia* should be expressly overruled.
18 Alternatively the Board should concede that it has effectively done so.

19 **XIX. THE RELIGIOUS FREEDOM RESTORATION ACT EXTENDS TO THE CORE**
20 **RELIGIOUS ACTIVITY OF HELPING OTHER WORKERS, AND THE FAA,**
21 **NLRA AND NORRIS-LAGUARDIA ACT HAVE TO BE APPLIED TO PROTECT**
22 **THIS RELIGIOUS RIGHT**

23 Section 7 protects the right of employees to engage in concerted protected activity. That
24 extends to asking for help in work place issues from other employees. *Fresh & Easy*
25 *Neighborhood Market*, 361 NLRB No 12 (2014). Such concerted activity is a central principle of
26 religion, including any brand of religion that the employer professes in the work place. Section 7
27 activity is a core religious activity. The solidarity principle drawn from this case is the essence of
28 religion. Protected concerted activity for mutual aid and protection is core religious activity.

In 1993, Congress enacted the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb–
2000bb-4. It was enacted in response to a Supreme Court decision, *Employment Division v.*
Smith, 494 U.S. 872 (1990), which many saw as restricting the exercise of religion.

1 The Act in relevant part provides:

2 (a) In general

3 Government shall not substantially burden a person's exercise of
4 religion even if the burden results from a rule of general
applicability, except as provided in subsection (b) of this section.

5 (b) Exception

6 Government may substantially burden a person's exercise of
7 religion only if it demonstrates that application of the burden to the
person--

8 (1) is in furtherance of a compelling governmental interest; and

9 (2) is the least restrictive means of furthering that compelling
10 governmental interest.

11 (c) Judicial relief

12 A person whose religious exercise has been burdened in violation
13 of this section may assert that violation as a claim or defense in a
14 judicial proceeding and obtain appropriate relief against a
government. Standing to assert a claim or defense under this section
shall be governed by the general rules of standing under article III
of the Constitution.

15 The statute does not apply to state government. See, *City of Boerne v. P. F. Flores*, 521
16 U.S. 507 (1997).³⁷

17 The RFRA has been the subject of litigation. It, however, came boldly to the attention of
18 the public in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

19 Hobby Lobby operates according to “Christian” principles;
20 Hobby Lobby's statement of purpose commits the Greens to
21 “[h]onoring the Lord in all [they] do by operating the company in a
22 manner consistent with Biblical principles.” App. in No. 13–354,
23 pp. 134–135 (complaint). Each family member has signed a pledge
24 to run the businesses in accordance with the family's religious
beliefs and to use the family assets to support Christian ministries.
723 F.3d, at 1122. In accordance with those commitments, Hobby
Lobby and Mardel stores close on Sundays, even though the Greens
calculate that they lose millions in sales annually by doing so. *Id.*, at
1122; App. in No. 13–354, at 136–137.

25 *Burwell v. Hobby Lobby Stores, Inc.*, *supra*, 134 S.Ct. at 2766.

26 Moreover, the Court noted:

27
28 ³⁷ Congress subsequently amended the RFRA to apply, in part, to certain state actions. See
Religious Land Use and Institutionalized Persons Act of 2000, 42. U.S.C. § 2000cc, *et seq.*

1 Even if we were to reach this argument, we would find it
2 unpersuasive. As an initial matter, it entirely ignores the fact that
3 the Hahns and Greens[owners of Hobby Lobby] and their
4 companies have religious reasons for providing health-insurance
5 coverage for their employees. Before the advent of ACA, they were
6 not legally compelled to provide insurance, but they nevertheless
7 did so—in part, no doubt, for conventional business reasons, but
8 also in part because their religious beliefs govern their relations
9 with their employees. See, App. to Pet. for Cert. in No. 13–356, p.
10 11g; App. in No. 13–354, at 139.

11 *Id.*

12 The Supreme Court in *Burwell* held that the application of a portion of the Affordable
13 Care Act imposes substantial burden on the religious beliefs of the owners of Hobby Lobby. It
14 did so because there was a regulation requiring that contraceptives be provided over the religious
15 objections of the owners. The Court held that this “contraceptive mandate imposes a substantial
16 burden on the exercise of religion.” *Id.* at 2779.

17 The Court then went on to state:

18 The Religious Freedom Restoration Act of 1993 (RFRA) prohibits
19 the “Government [from] substantially burden[ing] a person’s
20 exercise of religion even if the burden results from a rule of general
21 applicability” unless the Government “demonstrates that
22 application of the burden to the person—(1) is in furtherance of a
23 compelling governmental interest; and (2) is the least restrictive
24 means of furthering that compelling governmental interest.” 42
25 U.S.C. §§ 2000bb–1(a), (b). As amended by the Religious Land
26 Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA
27 covers “any exercise of religion, whether or not compelled by, or
28 central to, a system of religious belief.” § 2000cc–5(7)(A).

Id. at 2754.

Recently, the Tenth Circuit described the application of the RFRA:

Most religious liberty claimants allege that a generally applicable
law or policy without a religious exception burdens religious
exercise, and they ask courts to strike down the law or policy or
excuse them from compliance. Our circuit’s three most recent
RFRA cases fall into this category. In *Hobby Lobby Stores, Inc. v.*
Sebelius, 723 F.3d 1114 (10th Cir.2013) (en banc), *aff’d sub nom.*
Hobby Lobby, — U.S. —, 134 S.Ct. 2751, 189 L.Ed.2d 675, the
ACA required the plaintiffs to provide their employees with health
insurance coverage of contraceptives against their religious beliefs.
In *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir.2014), a prison
policy denied the plaintiff access to a sweat lodge, where he wished
to exercise his Native American religion. In *Abdulhaseeb v.*
Calbone, 600 F.3d 1301 (10th Cir.2010), a prison policy denied the
plaintiff a halal diet, which is necessary to his Muslim religious

1 exercise. In each instance, the law or policy failed to provide an
2 exemption or accommodation to the plaintiff(s).

3 The Supreme Court's recent ruling in *Holt v. Hobbs*, 135 S.Ct. 853,
4 2015 WL 232143 (2015), which concerned a prison ban on inmates'
5 growing beards, is another recent example of the more common
6 RFRA claim. The plaintiff in *Holt* sought to grow a beard in
7 accordance with his Muslim faith. In *Holt*, like in *Hobby Lobby*, the
8 government defendants insisted on a complete restriction and did
9 not attempt to accommodate the plaintiff's religious exercise. The
10 plaintiff in *Holt* proposed a compromise—he would be allowed to
11 grow only a half-inch beard—which the prison refused. 135 S.Ct. at
12 861. The Court ultimately approved this compromise in its ruling.
13 *Id.* at 867.

14 *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151,
15 1170-1171 (10th Cir.) cert. granted sub nom. *S. Nazarene Univ. v. Burwell*, 136 S. Ct. 445 (2015)
16 and cert. granted in part sub nom. *Little Sisters of the Poor Home for the Aged, Denver,*
17 *Colorado v. Burwell*, 136 S. Ct. 446 (2015).

18 That Court when on to explain in some detail the RFRA application:

19 RFRA was enacted in 1993 in response to *Employment Division,*
20 *Department of Human Resources of Oregon v. Smith*, 494 U.S. 872,
21 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), in which the Supreme
22 Court held that burdens on religious exercise are constitutional
23 under the Free Exercise Clause if they result from a neutral law of
24 general application and have a rational basis. *Id.* at 878–80; *United*
25 *States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir.2002). Congress
26 enacted RFRA to restore the pre-*Smith* standard, which permitted
27 legal burdens on an individual's religious exercise only if the
28 government could show a compelling need to apply the law to that
person and that the law did so in the least restrictive way. *Smith*,
494 U.S. at 882–84; see also *Hobby Lobby*, 134 S.Ct. at 2792–93
(Ginsburg, J., dissenting). Congress specified the purpose of RFRA
was to restore this compelling interest test as it had been recognized
in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965
(1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32
L.Ed.2d 15 (1972). See 42 U.S.C. § 2000bb(b)(1).

By restoring the pre-*Smith* compelling interest standard, Congress
did not express any intent to alter other aspects of Free Exercise
jurisprudence. See *id.*; *Hobby Lobby*, 723 F.3d at 1133 (“Congress,
through RFRA, intended to bring Free Exercise jurisprudence back
to the test established before *Smith*. There is no indication Congress
meant to alter any other aspect of pre-*Smith* jurisprudence....”).
Notably, pre-*Smith* jurisprudence allowed the government “wide
latitude” to administer large administrative programs, and rejected
the imposition of strict scrutiny in that context. As the Supreme
Court indicated in *Bowen v. Roy*,

“In the enforcement of a facially neutral and uniformly applicable
requirement for the administration of welfare programs reaching

1 many millions of people, the Government is entitled to wide
 2 latitude. The Government should not be put to the strict test applied
 3 by the District Court; that standard required the Government to
 4 justify enforcement of the use of Social Security number
 5 requirement as the least restrictive means of accomplishing a
 6 compelling state interest”.

476 U.S. 693, 707, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986).

As we discuss at greater length below, the pre-*Smith* standards
 restored by RFRA permitted the Government to impose *de minimis*
 administrative burdens on religious actors without running afoul of
 religious liberty guarantees.

3. Elements of RFRA Analysis

RFRA analysis follows a burden-shifting framework. “[A] plaintiff
 establishes a prima facie claim under RFRA by proving the
 following three elements: (1) a substantial burden imposed by the
 federal government on a(2) sincere (3) exercise of religion.”
Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir.2001); see 42
 U.S.C. § 2000bb–1(a). The burden then shifts to the government to
 demonstrate its law or policy advances “a compelling interest
 implemented through the least restrictive means available.” *Hobby*
Lobby, 723 F.3d at 1142–43. The government must show that the
 “compelling interest test is satisfied through application of the
 challenged law ‘to the person’—the particular claimant whose
 sincere exercise of religion is being substantially burdened.” *Id.* at
 1126 (quotations and citation omitted). “This burden-shifting
 approach applies even at the preliminary injunction stage.” *Id.*

We have previously stated “a government act imposes a
 ‘substantial burden’ on religious exercise if it: (1) requires
 participation in an activity prohibited by a sincerely held religious
 belief, (2) prevents participation in conduct motivated by a
 sincerely held religious belief, or (3) places substantial pressure on
 an adherent to engage in conduct contrary to a sincerely held
 religious belief.” *Hobby Lobby*, 723 F.3d at 1125–26 (quotations
 and alterations omitted); see also *Yellowbear*, 741 F.3d at 55
 (applying this framework to RLUIPA); *Abdulhaseeb*, 600 F.3d at
 1315 (same). As we discuss in the next section, whether a law
 substantially burdens religious exercise in one or more of these
 ways is a matter for courts—not plaintiffs—to decide.

4. Courts Determine Substantial Burden

To determine whether plaintiffs have made a prima facie RFRA
 claim, courts do not question “whether the petitioner ... correctly
 perceived the commands of [his or her] faith.” *Thomas v. Review*
Bd. of Ind. Emp’t Sec. Div., 450 U.S. 707, 716, 101 S.Ct. 1425, 67
 L.Ed.2d 624 (1981); see *Hobby Lobby*, 723 F.3d at 1138–40. But
 courts do determine whether a challenged law or policy
 substantially burdens plaintiffs’ religious exercise. RFRA’s statutory
 text and religious liberty case law demonstrate that courts—not
 plaintiffs—must determine if a law or policy substantially burdens
 religious exercise.

1 RFRA states the federal government “shall not substantially burden
2 a person’s exercise of religion.” 42 U.S.C. § 2000bb–1(a). We must
3 “give effect ... to every clause and word” of a statute when possible.
4 *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99
5 L.Ed. 615 (1955). Drafts of RFRA prohibited the government from
6 placing a “burden” on religious exercise. Congress added the word
7 “substantially” before passage to clarify that only some burdens
8 would violate the act. 139 Cong. Rec. S14352 (daily ed. Oct. 26,
9 1993) (statements of Sen. Kennedy and Sen. Hatch).

6 We therefore consider not only whether a law or policy burdens
7 religious exercise, but whether that burden is substantial. If
8 plaintiffs could assert and establish that a burden is “substantial”
9 without any possibility of judicial scrutiny, the word “substantial”
10 would become wholly devoid of independent meaning. *See*
11 *Menasche*, 348 U.S. at 538–39. Furthermore, accepting any burden
12 alleged by Plaintiffs as “substantial” would improperly conflate the
13 determination that a religious belief is sincerely held with the
14 determination that a law or policy substantially burdens religious
15 exercise.

12 *Id* at 1175– 1177..(fn omitted)

13 To the extent that the FAA enforces a prohibition against collective activity, it not only
14 burdens but prohibits such collective activity, which is a core religious activity. Here, there is
15 clear tension: the right to help the fellow worker protected by the NLRA and the Norris
16 LaGuardia Act against the limitation imposed by the application of the FAA. The RFRA teaches
17 that the FAA must give way to the religious right to help fellow workers.

18 Nor is there any governmental interest. The NLRA and Norris-LaGuardia Act defeat the
19 argument that there is any governmental interest in forbidding or burdening group action. They
20 serve to protect such activity.

21 Finally the application of the FAA cannot comply with the RFRA by disallowing all
22 group actions, because it does not reflect a “least restrictive” means of accomplishing any
23 compelling governmental interest in preserving and protecting arbitration in general.

24 The least-restrictive-means standard is exceptionally demanding,
25 see *City of Boerne*, 521 U.S., at 532, 117 S.Ct. 2157, and it is not
26 satisfied here. HHS has not shown that it lacks other means of
27 achieving its desired goal without imposing a substantial burden on
28 the exercise of religion by the objecting parties in these cases. See
§§ 2000bb–1(a), (b) (requiring the Government to “demonstrat[e]
that application of [a substantial] burden to the person ... is the least

1 restrictive means of furthering [a] compelling governmental
2 interest” (emphasis added)).

3 *Burwell v. Hobby Lobby Stores, Inc.*, *supra* at, 2780,

4 The FAA could be applied to contracts in all its aspects with this one exception of
5 application to concerted claims in arbitration by employees governed by the NLRA. Carving out
6 this exception, which is limited, would be the “least restrictive” means of achieving the goals of
7 the FAA without interfering with the religious rights of employees.³⁸ Thus, the FAA would
8 apply in the *AT&T v. Concepcion*, 563 U.S. 321 (2011) context because no employee religious
9 rights were at issue. This would not affect any other policies that animate the FAA doctrines.

10 The question then is whether, when workers get together to benefit themselves in the
11 workplace, is this a religious exercise? That question is easily answered in the affirmative.

12 Religions are replete with references to the workplace. The religious exercise to help their
13 fellow worker is a fundamental tenet of every religion. Whether we use the phrase “brotherly
14 love” or otherwise, every religion encourages workers to help each other to make themselves and
15 the workplace better.³⁹ The central religious act of helping other workers is a core principle of
16 Christianity and all religions.

17 Hobby Lobby brought its lawsuit to challenge a portion of the Affordable Care Act
18 because it claimed that statute burdened its religious exercise. The Court found, against the
19 government’s arguments, that the Affordable Care imposed a substantial burden on religious
20 activity and found that the government could not establish that it imposed the least restrictive
21 means of establishing any governmental interest.

22 Here, we have three federal laws at issue:

- 23 • The National Labor Relations Act, 29 U.S.C. § 151, *et seq.*;
- 24 • The Norris-LaGuardia Act, 29 U.S.C. § 11, *et seq.*; and

25 ³⁸ The FAA already carves out maritime transactions and contracts of employment for
26 employees involved in transportation.

27 ³⁹ This is just a religious version of the solidarity principle explained by the Board in *Fresh and*
28 *Easy, supra*. This is the application of the most fundamental religious principle: the Golden
Rule. See https://en.wikipedia.org/wiki/Golden_Rule. If some fellow employees ask for help
regarding a workplace issue, the other employee should help the first. The employer directly
contradicts the Golden Rule.

- The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

The RFRA supersedes any governmental restriction on the free exercise of such religious activity. To the extent that those laws are interpreted in any way to burden the religious exercise of helping fellow workers, the Religious Freedom Restoration Act requires that super strict scrutiny be applied.

Here, the National Labor Relations Act governs the right of employees to engage in concerted activities. It is nothing more than workers getting together to help themselves and their families. Thus, there is nothing inconsistent with the application of Section 7, but any limitation on the application of Section 7 would be contrary to the religious views of those who want to help fellow workers.⁴⁰

The Norris-LaGuardia Act is to the same effect.

Here, the employer will argue that the Federal Arbitration Act forecloses the application of the National Labor Relations Act and the Norris-LaGuardia Act. The problem, however, with the employer's argument is that the Religious Freedom Restoration Act must be interpreted and applied in a way that protects the religious right of employees to engage in concerted activity. In this case, the concerted activity would be to present group claims in order to benefit workers as a group. This is nothing more than concerted activity.⁴¹

There is no doubt that the Federal Arbitration Act, if applied to foreclose concerted activity, would substantially burden the exercise of religion by those employees who wanted to work together to help their brothers and sisters in the workplace. It would also burden those employees of other employers. See, David B Schwartz, "The NLRA's Religious Exemption in a Post Hobby Lobby World: Current Status, Future Difficulties, and A Proposed Solution," 30 A.B.A. J. Lab. & Emp. L. 227 (2015)(explaining that the RFRA does apply to the NLRA).

The burden shifts at that point under the RFRA for the government to establish that that substantial burden "is in the furtherance of compelling government interest." Here, there is no

⁴⁰ Respondent may argue the RFRA cannot apply. But that is contrary to its argument that the FAA applies. The Board must consider the impact of all relevant federal statutes.

⁴¹ These principles would not apply to most of the situations addressed by *AT&T v. Conception*, 563 U.S. 321 (2011), which involved commercial disputes.

1 governmental interest.⁴² The government can simply allow, consistent with the government
 2 interest established by National Labor Relations Act and the Norris-LaGuardia Act, employees to
 3 present their claims concertedly in some forum. Nothing in this case requires that that forum be
 4 arbitration. That forum can be arbitration or in court. This is the central thrust of *Murphy Oil*.
 5 What an employer cannot do, consistent with the National Labor Relations Act, the Norris-
 6 LaGuardia Act and the Religious Freedom Restoration Act, is entirely foreclose workers working
 7 together to make their workplace a better circumstance.

8 For these reasons, the Religious Freedom Restoration Act applies to this case.⁴³ The
 9 Federal Arbitration Act cannot be applied to interfere with the religious right of employees to
 10 help other employees by prohibiting employees from jointly working together to improve the
 11 workplace and to help fellow workers with respect to wages, hours and working conditions.⁴⁴

12 **XX. THE REMEDY**

13 The remedy should include the following.

14 The employer should be required to post permanently the Board's ill-fated employee
 15 rights notice. <https://www.nlr.gov/poster> The Courts that invalidated the rule noted that such a
 16 notice could be part of a remedy for specific unfair labor practices. It is time for the Board to
 17 impose the requirement for a lengthy posting of that notice as a remedy for unfair labor practices.

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 19
 20 ⁴² It is clear that this is not "the least restrictive means of further compelling the governmental
 interest."

21 ⁴³ The religious exemption principles which we derive from the RFRA are already in place and
 22 have been long recognized for those who have some religious objection to joining a
 23 supporting union. See 29 U.S.C. § 159. There are some religions which have the basic tenet
 24 that adherents should not join or support unions. Title 7 also recognizes that an
 25 accommodation is sometimes necessary. See *EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th
 26 Cir. 1990) (because employee's religious objection was to union itself, reasonable
 27 accommodation was required allowing him to make charitable donation equivalent to amount
 of union dues, instead of paying dues). Religious principles often govern and require an
 28 accommodation. *EEOC v. Abercrombie & Fitch Stores Inc.*, 135 S.Ct. 2028, 2015 WL
 2464053 (2015). This case represents this principle: there are those who believe that it is a
 basic religious tenet to help fellow workers. Title VII thus requires an accommodation,
 workers who believe it is a religious exercise to help their fellow workers must be
 accommodated.

⁴⁴ The Board must address the application of the RFRA because it contains a statutory fee
 requirement. Charging Party is entitled to its fees if it prevails on this ground.

1 Additionally, any notice that is posted should be posted for the period of time from when
2 the violation began until the notice is posted. The short period of 60 days only encourages
3 employers to delay proceedings, because the notice posting will be so short and so far in the
4 future.

5 The Notice should be included with any payroll statements. See California Labor Code
6 Section 226.

7 The Board's Notice and the Decision of the Board should be mailed to all employees.
8 Simply posting the notice without further explanation of what occurred in the proceedings is not
9 adequate notice for employees. The Board Decision should be mailed to former employees and
10 provided to current employees.

11 Notice reading should be required in this matter. That Notice reading should require that
12 a Board Agent read the Notice and allow employees to inquire as to the scope of the remedy and
13 the effect of the remedy. Simply reading a Notice without explanation is inadequate.
14 Behavioralists have noted that, "[t]aken by itself, face-to-face communication has a greater
15 impact than any other single medium." Research suggests that this opportunity for face-to-face,
16 two-way communication is vital to effective transmission of the intended message, as it "clarifies
17 ambiguities, and increases the probability that the sender and the receiver are connecting
18 appropriately." Accordingly, a case study of over five hundred NLRB cases, commissioned by
19 the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending
20 "providing an opportunity on company time and property for a Board Agent to read the Board
21 Notice to all employees and to answer their questions..." The employer should not be present.
22 The Union should be notified and allowed to be present. This should be on work time and paid. If
23 the employees are working piece rate the rate of pay should be equal to their highest rate of pay to
24 avoid any disincentive to attend the reading.

25 The employer should not be allowed to implement a new FUAP. The Board does not
26 possess that power. A new FUAP can only occur after there has been a complete remedy of the
27 violations found in this case. In other words, the Employer may not implement any new policy
28 until after it has completely remedied this case by rescinding all the unlawful policies, posting an

1 appropriate notice allowing employees to take appropriate legal action without the
2 implementation of any purported forced arbitration wavier.

3 The traditional notice is also inadequate. The standard Board notice should contain an
4 affirmative statement of the unlawful conduct. We suggest the following:

5 We have been found to have violated the National Labor Relations
6 Act. We illegally maintained a Employee Acknowledgment and
7 Agreement which contained an unlawful arbitration policy.. We
8 have rescinded that unlawful policy. We have agreed to toll the
9 statute of limitation for any claims which employees may have.

10 Absent some affirmative statement of the unlawful conduct, the employees will not
11 understand the arcane language of the notice. Nor is the notice sufficient without such an
12 admission. In effect, the way the notice is framed is the equivalent of a statement that the
13 employer will not do specified conduct, not an admission or recognition that it did anything
14 wrong to begin with.

15 The Notice should require that the person signing the notice have his or her name on the
16 notice. This avoids the common practice where someone scrawls a name to avoid being
17 identified with the notice, and the employees have no idea who signed it.

18 The employees should be allowed work time to read the Board's Decision and Notice.

19 The employer should be required to toll the statute of limitations for any claims for the
20 period during which the FUAP has been in place until a reasonable time after employees received
21 the notice so that they may assert any collective or group claims that they have. Otherwise, the
22 Employer would have had the advantage of forestalling and foreclosing group claims. This
23 would give employees an opportunity to learn that the FUAP has been rescinded and that they
24 may bring group or collective claims. Interest should be awarded on any claims which are tolled.

25 The employees should be allowed work time to read the Board's Decision and Notice. To
26 require that they read the Notice whether by email, on the wall or at home on their own time is to
27 punish them for their employer's misdeeds.

28 The Notice should be read to employees by a Board agent outside the presence of
management. Representatives of the Charging Party should be present. Employees should be
allowed to ask questions.

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XXI. CONCLUSION

Fremont Ford's FUAP is unlawful. The Board should find it is unlawful and order the remedies sought in this case by the Charging Party. The Board must squarely face the application of the Federal Arbitration Act under the Commerce clause. The FAA may not be constitutionally applied save this FUAP.

Dated: February 24, 2016

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ DAVID A. ROSENFELD
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138613/851726

**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 24, 2016, I served the following documents in the manner described below:

JOINDER IN MOTION FOR SUMMARY JUDGMENT

- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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VIA E-FILING

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 24, 2016, at Alameda, California.

/s/ Katrina Shaw

Katrina Shaw

