

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

**OPPOSITION TO MOTION OF NATIONAL LABOR RELATIONS  
BOARD TO REMOVE THIS CASE FROM ABEYANCE, SUMMARILY  
GRANT THE COMPANY'S PETITION FOR REVIEW, AND  
SUMMARILY DENY THE UNION'S PETITION FOR REVIEW AND THE  
BOARD'S CROSS-APPLICATION FOR ENFORCEMENT**

1. The Court should reject the Motion of the National Labor Relations Board ("Board"), which has been joined in by the Respondent employer. The issue raised by the Board must be referred to the Merits Panel. This Court has no record before it on which it can decide the issues in this case, other than the bare assertions of the Board in its four-page Motion.

2. The Charging Party Union briefly addressed the issues raised by the Board in its Status Report filed with this Court on May 25, 2018. *See* DktEntry 35. We address those issues more completely in this Opposition.

3. The Board relies wholly on the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444, 584 U.S. \_\_\_\_ (May 21, 2018), to assert that there is nothing left of this case. *See also Ernst & Young LLP v. Morris*, No. 16-300, and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307. Those three cases, however, are based upon a narrow ruling by the Supreme Court, based on the particular procedural and factual posture of those cases. In each of those cases, there were pending statutory collective actions under the Fair Labor Standards Act and, in particular, collective actions as permitted by the provision in 29 U.S.C. § 216(b). The Supreme Court, relying on the arbitration policy

contained in the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 2, 3 and 4, held that the FAA prevailed over the terms of the National Labor Relations Act (“NLRA”), that the statutory collective action in that case created by the statute would be waived under the Federal Arbitration Act and that the National Labor Relations Act did not override that provision. Although that was not a “class action,” the Court was clear that the same principle would apply to a class action brought under Federal Rule of Civil Procedure 23. That is the limited holding of the Court. It addressed nothing else. The Court, for example, did not address the right of two or more employees to bring the same claims to the Department of Labor to investigate or to file a joint lawsuit that did not seek statutory collective actin status.

In this case, however, the Federal Arbitration Act does not apply. There has been no federal claim raised. There is no evidence that any particular transaction that would be governed by the arbitration policy affects commerce or falls within the definition of a transaction affecting commerce within the meaning of the Federal Arbitration Act.<sup>1</sup> Whether the Federal Arbitration Act applies or not is a central issue in this case. If it does not, *Epic Systems* and its two companion cases have no relevance to the issues in this case.

The Charging Party in this case extensively argued the application of the FAA to the Board. This was only one of the issues that the Charging Party presented to the Board in its Joinder in the Motion for Summary Judgment filed by the General Counsel. These issues are stated in the brief in support of the Motion for Summary Judgment, a copy of which is attached as Exhibit A to this Opposition. *See* Part III and IV, page 1-13 of Exhibit A.

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<sup>1</sup> The Administrative Law Judge in *Hobby Lobby Stores, Inc.*, 363 N.L.R.B. No. 195 (May 18, 2016), *petition for review filed*, No. 16-3162 (7th Cir. 2016), agreed that the FAA did not govern arbitration agreements where there was facial challenge, such as in this case. In that case, the Board did not reject the Administrative Law Judge’s finding, but rather found the arbitration policy unlawful, assuming that the FAA applied.

This Court is presented with the issue of whether an arbitration agreement which is not governed by the Federal Arbitration Act is invalid under the National Labor Relations Act. As noted, the Supreme Court never even mentioned this issue and it could not be presented in any of those three cases since they were all actions brought under the Federal Labor Standards Act and no party contested the application of the Federal Arbitration Act.

4. The application of the Federal Arbitration is not the only issue that is presented to this Court. See the remainder of the issues presented in the brief, pages 13-40 of Exhibit A. Indeed, among those issues is whether the Religious Freedom Restoration Act requires that the National Labor Relations Act be interpreted in a way to protect the religious right of employees to act together. *See* 42 U.S.C. § 2000bb-2000bb-4. *See* pages 32-40 of Exhibit A.

5. There are also state law claims, which are not preempted or affected by the Federal Arbitration Act. *See Iskanian v. C.L.S. Transp.*, 59 Cal.4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015), and *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015). The Supreme Court in *Epic Systems* was not called upon and did not address that issue of whether group, representative, *qui tam*, collective, class actions or other concerted claims under state law rights which are not preempted were subject to a waiver of an employer-imposed arbitration agreement.

6. There are other issues raised by the Charging Party that were not addressed by the Board. The Charging Party does not intend to raise all of the issues addressed in its Opening Brief, but we have cataloged enough of them above, and the Court should recognize that there are enough issues left to be addressed that none of these issues were addressed by the Supreme Court and could not have been addressed under the limited factual circumstances of claims brought under the specific provisions created by statute in 29 U.S.C. § 216(b).

7. These issues must be left to the Merits Panel. They cannot be addressed by a Motions Panel in this Motion because the Board hasn't briefed them and the Respondent hasn't briefed any of them. Nor has the Charging Party done anything more than alert the Court of the existence of these issues to resist this Motion for Summary Denial of the Union's Petition for Review.

8. The Board, in its Motion, retreats to the argument that none of these arguments can be raised, citing footnote 1 of the Board's Decision. The Board's Decision, which is not attached to the Motion of the Board, is, however, attached to our Response. *See* Exhibit B. Footnote 1 was the bare statement that "a charging party cannot enlarge upon or change the General Counsel's theory of a case." To the contrary, the Charging Party did not enlarge upon the General Counsel's theory.

The Charging Party addressed these issues in a Motion for Reconsideration filed with the Board. *See* Exhibit C. Without restating all of those arguments, we address them briefly.

9. First, the General Counsel's theory was consistent with the Charging Party's theory that the maintenance of the arbitration provision violated section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). There was no divergence or dispute there. The only divergence was that the Charging Party asserted that the employer's affirmative defense of the application of the Federal Arbitration Act was not applicable. The General Counsel did not take that position, nor did the General Counsel oppose it. The General Counsel seems to have assumed that the Federal Arbitration Act applied. In any case, there is no change in the General Counsel's theory of the case that the arbitration agreement violated section 7 of the NLRA, 29 U.S.C. § 157, but only a different attack on the employer's affirmative defense of the application of the Federal Arbitration Act.

In fact, much of the Charging Party's theory in this case was an attack upon the Respondent's defense of the application of the Federal Arbitration Act. In addition to whether the Federal Arbitration Act even applied by its statutory terms, the Charging Party raised the question of whether the Federal Arbitration Act could even be applied on a constitutional basis since the transaction involved did not affect interstate commerce. The Charging Party also raised the question of whether the Federal Arbitration Act would even govern those claims that were not preempted or affected by the Federal Arbitration Act. The Charging Party also raised the question of whether the Religious Freedom Restoration Act, which is a coordinate statute, protected the right of employees to engage in concerted activity by bringing group claims.

10. In addition to these issues, the Charging Party raised a number of other issues, none of which were inconsistent with the General Counsel's theory, but rather wholly supported the General Counsel's theory that all forms of group or collective claims are protected by the National Labor Relations Act. Thus, the Supreme Court's ruling in *Epic Systems* is narrowly limited to only claims brought under 29 U.S.C. § 216(b) or class actions brought under Federal Rule of Civil Procedure 23.

11. The Board cited only one case in support of its ruling. That case is *Kimtruss Corp.*, 305 N.L.R.B. 710 (1991). As pointed out in our Motion for Reconsideration, the Charging Party in that case took a theory that was inconsistent with the General Counsel's theory and that was opposed by the General Counsel. The Union took the position that a unilateral change had occurred which would violate the Act; the General Counsel's complaint did not allege a unilateral change and the General Counsel took the position that there was no unilateral change. *Id.* at 711. Here, as the briefing and record will ultimately show, the Charging Party's theories were wholly consistent with the General Counsel's theory. Indeed, many



simply vacate the Board's Decision, deny the Petition for Review and end this matter based upon this abbreviated Motion.

Dated: June 14, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), Petitioner certifies that its Opposition to Motion of National Labor Relations Board to Remove This Case From Abeyance, Summarily Grant the Company's Petition for Review, and Summarily Deny the Union's Petition For Review and The Board's Cross-Application for Enforcement contains 1,811 words of proportionally spaced, 14 point type, the word processing system used was Microsoft Word 2010.

Dated: June 14, 2018

Respectfully Submitted,

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# **EXHIBIT A**

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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,

22 Charging Party,

23 And

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

25 Respondent.

Case No. 32-CA-151443

**JOINDER IN MOTION FOR  
SUMMARY JUDGMENT**

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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.<sup>1</sup> 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,

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> Fourth, there is no “transaction” triggering the FAA. Here, the employer cannot  
23 establish any constitutional basis to apply the FAA.

24  
25 <sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

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).<sup>5</sup>

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 <sup>4</sup> 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  
 jurisdictional standards. *Siemons Mailing Service*, 122 NLRB 81 (1958). Robert Gorman and  
 Matthew Finkin, *Labor Law Analysis and Advocacy*, (JURIS 2013), Section 3.2

28 <sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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 <sup>6</sup> For an example of a dispute where no party asserted the FAA applied, see *Carmona v.*  
*Lincoln Millennium Car Wash, Inc.*, *supra*.

28 <sup>7</sup> 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.<sup>8</sup> 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 <sup>8</sup> 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*<sup>9</sup> 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 <sup>9</sup> 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.<sup>10</sup> 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 <sup>10</sup> 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,<sup>11</sup>  
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 <sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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 <sup>12</sup> 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 <sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

#### 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

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

<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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 <sup>16</sup> 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).

<sup>17</sup> 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. § 217<sup>18</sup>. 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.<sup>19</sup>

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 <sup>18</sup> 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 <sup>19</sup> 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 others<sup>20</sup> 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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<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.

25  
26 <sup>21</sup> 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.

<sup>22</sup> 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.<sup>23</sup> 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.

25  
26  
27 <sup>23</sup> 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 bannerling and other expressive activity. That language is contained in the FUAP.<sup>24</sup>

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, bannerling 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  
 23  
 24

25 <sup>24</sup> 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.<sup>25</sup> They can do so by direct action.<sup>26</sup>

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.<sup>27</sup>

24 <sup>25</sup> 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 <sup>26</sup> 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  
against the employer. See *Murphy Oil*, supra, at \*26 and other cases cited below.

28 <sup>27</sup> 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).<sup>28</sup> 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).<sup>29</sup>

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       <sup>28</sup> 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       <sup>29</sup> 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.<sup>30</sup>

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 <sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> 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 <sup>31</sup> It is not “mutual” and is invalid for this reason.

28 <sup>32</sup> 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.<sup>33</sup> 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 <sup>33</sup> 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.<sup>34</sup> The FUAP is facially invalid since it prohibits group action to defend against  
 3 claims jointly.<sup>35</sup>

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.”<sup>36</sup> 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*

18  
 19  
 20  
 21  
 22  
 23  
 24 <sup>34</sup> The FUAP specifically prohibits “consolidating the claims.” This would be a useful  
 procedure for employees to concertedly defend claims.

25 <sup>35</sup> 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 <sup>36</sup> 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.

15 **D. CONCLUSION**

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

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

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

28 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  
5 applicability, except as provided in subsection (b) of this section.

6 (b) Exception

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

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

11 (2) is the least restrictive means of furthering that compelling  
12 governmental interest.

13 (c) Judicial relief

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

20 The statute does not apply to state government. See, *City of Boerne v. P. F. Flores*, 521  
21 U.S. 507 (1997).<sup>37</sup>

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

24 Hobby Lobby operates according to "Christian" principles;  
25 Hobby Lobby's statement of purpose commits the Greens to  
26 "[h]onoring the Lord in all [they] do by operating the company in a  
27 manner consistent with Biblical principles." App. in No. 13-354,  
28 pp. 134-135 (complaint). Each family member has signed a pledge  
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.

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

Moreover, the Court noted:

<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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 <sup>38</sup> The FAA already carves out maritime transactions and contracts of employment for  
26 employees involved in transportation.

27 <sup>39</sup> 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](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.<sup>40</sup>

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.<sup>41</sup>

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

<sup>40</sup> 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.

<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

## 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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20 <sup>42</sup> It is clear that this is not "the least restrictive means of further compelling the governmental  
interest."

21 <sup>43</sup> 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.

<sup>44</sup> 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  
DAVID A. ROSENFELD  
CAREN P. SENCER  
Attorneys for Charging Party, INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS, AFL-CIO, EAST BAY  
AUTOMOTIVE MACHINISTS LODGE NO.  
1546, DISTRICT LODGE 190

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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National Labor Relations Board  
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Washington, DC 20570-0001  
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

# **EXHIBIT B**

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**SJK, Inc. d/b/a Fremont Ford and International Association of Machinists and Aerospace Workers, AFL-CIO, East Bay Automotive Machinists Lodge No. 1546, District Lodge 190.** Case 32-CA-151443

June 16, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND MCFERRAN

The General Counsel seeks summary judgment in this case on the grounds that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent violated Section 8(a)(1) by maintaining an agreement that prohibits its employees from participating in collective or class litigation in all forums.

Pursuant to a charge filed on May 4, 2015, by the International Association of Machinists and Aerospace Workers, AFL-CIO, East Bay Automotive Machinists Lodge No. 1546, District Lodge 190 (Charging Party), the General Counsel issued a complaint on November 24, 2015, and an amended complaint on December 4, 2015. The amended complaint alleges that at all material times since at least November 4, 2014, the Respondent has maintained an Employee Acknowledgement and Agreement (Arbitration Agreement) that employees are required to sign at the time of their hire. In addition, the amended complaint alleges that the Arbitration Agreement specifically informs employees that they are bound to the agreement as a condition of their employment. The relevant portions of the Arbitration Agreement read as follows:

I . . . acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. . . . I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on . . . Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company . . . arising from, related to, or having any relationship or connection what-

soever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board. . .) shall be submitted to and determined exclusively by binding arbitration. . . . [T]he arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective, representative, or joint action lawsuit or arbitration (collectively “class claims”). I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on class, collective, representative, or joint action. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that [I] must pursue any such claims through this binding arbitration procedure.

The amended complaint alleges that the Arbitration Agreement interferes with employees’ Section 7 rights to engage in collective legal action by binding employees to a waiver of their rights to participate in collective and class litigation and that, by this conduct, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

On December 9, 2015, the Respondent filed an answer to the complaint. On December 18, 2015, the Respondent filed an answer to the amended complaint admitting all of the factual allegations in the amended complaint, but denying the legal conclusions in the amended complaint and asserting two affirmative defenses.

On January 11, 2016, the General Counsel filed a Motion for Summary Judgment. On February 1, 2016, the Charging Party filed a Joinder in Motion for Summary Judgment. On February 10, 2016, the Board issued an

order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 23, 2016, the Respondent filed an Opposition to the Motion for Summary Judgment, and on February 24, 2016, the Charging Party refiled its Joinder in Motion for Summary Judgment.<sup>1</sup> On March 8, 2016, the General Counsel filed a response to the Respondent's Opposition, and the Charging Party filed a Partial Joinder in the General Counsel's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

#### Ruling on Motion for Summary Judgment

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and found unlawful the maintenance and enforcement of a mandatory arbitration agreement requiring employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. As stated, the Respondent admits in its amended answer that it has maintained the Arbitration Agreement and required employees to sign it as a condition of employment since at least November 4, 2014. By its terms, the Arbitration Agreement requires that all employment-based claims be resolved through individual, binding arbitration. In its response to the Board's Notice to Show Cause, the Respondent raises no material issues of fact or any other issues warranting a hearing. The Respondent's arguments largely focus on the assertion that *Murphy Oil* and *D. R. Horton* were wrongly decided.<sup>2</sup> We disagree for

<sup>1</sup> The Charging Party's Joinder in Motion for Summary Judgment raises substantive arguments that are wholly outside the scope of the General Counsel's amended complaint. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. *Kimtruss Corp.*, 305 NLRB 710 (1991). We also decline to award the additional remedies requested by the Charging Party. We find that the standard remedies requested by the General Counsel are sufficient to remedy the unfair labor practice found. See, e.g., *AT&T*, 362 NLRB No. 105, slip op. at 1 fn. 3 (2015).

<sup>2</sup> The Respondent also asserts that the Arbitration Agreement is lawful because it does not prevent employees from filing charges with the Board or with other administrative agencies and assures employees that they will not be disciplined, discharged, or otherwise retaliated against for exercising their Sec. 7 rights. We reject these arguments for the reasons stated in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

The Respondent further asserts that the filing of a class action on behalf of potential class members, without action by each employee to affirmatively associate with the filing of the lawsuit, is not concerted activity under Sec. 7. Contrary to the Respondent's assertion, as the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce, or to prepare for group action

the reasons given in those decisions. See also *Lewis v. Epic Systems Corp.*, \_\_\_ F.3d \_\_\_, No. 15-2997 (7th Cir., May 26, 2016) (holding mandatory individual arbitration agreement that did not permit collective action in any forum violates the Act and is also unenforceable under the Federal Arbitration Act, 9 U.S.C. §§1, et seq.). Accordingly, we apply those cases here and find that the Respondent violated Section 8(a)(1) by maintaining an agreement requiring employees to waive their right to pursue class or collective claims in any forum.<sup>3</sup>

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent, a California corporation with an office and place of business in Newark, California, has been engaged in the sale and servicing of automobiles.

During the 12-month period ending October 31, 2015, the Respondent, in conducting its operations described above, derived gross revenues in excess of \$500,000 and purchased and received goods or services valued in ex-

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and is therefore conduct protected by Sec. 7." *Id.*, slip op. at 2. See also *D. R. Horton*, 357 NLRB at 2279.

In addition, the Respondent asserts that employees would not reasonably construe the Arbitration Agreement to restrict employees from filing charges with the Board or from accessing the Board's processes. The amended complaint does not allege the agreement to be unlawful on this basis. In addition, in his Motion for Summary Judgment, the General Counsel focuses exclusively on whether the agreement infringes on employees' rights to engage in collective action and does not argue that the agreement is also unlawful because employees would construe it to restrict their right to file charges with the Board or otherwise interfere with their access to the Board's processes. In these circumstances, we find that the issue raised by the Respondent is not before us for our consideration.

<sup>3</sup> Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22-35 (2014), would find that the Respondent's Arbitration Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's Arbitration Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Arbitration Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 2. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17-18; *Bristol Farms*, above, slip op. at 2.

cess of \$5000 which originated outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

Since at least November 4, 2014, the Respondent has maintained the Arbitration Agreement that employees are required to sign as a condition of employment. As described above, the Arbitration Agreement requires employees to bring all employment-related disputes to individual binding arbitration, thereby interfering with employees' Section 7 right to engage in collective legal activity.

## CONCLUSIONS OF LAW

1. The Respondent, SJK, Inc. d/b/a Fremont Ford, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement under which employees are required, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to rescind or revise the Arbitration Agreement; notify all current and former employees who were required to sign or otherwise become bound to the Arbitration Agreement about the rescission or revision and, if revised, provide them a copy of the revised agreement; and post a notice at its Newark, California location where the agreement was in effect. See *D. R. Horton*, above at 2289.

## ORDER

The National Labor Relations Board orders that the Respondent, SJK, Inc. d/b/a Fremont Ford, Newark, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that require employees, as a condition of employment, to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear to employees that the agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory Arbitration Agreement in any form that it has been rescinded or revised, and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Newark, California facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since November 4, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 16, 2016

\_\_\_\_\_  
Mark Gaston Pearce,

\_\_\_\_\_  
Chairman

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues grant the General Counsel's motion for summary judgment and find that the Respondent's Employee Acknowledgment and Agreement (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this ruling and finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*<sup>1</sup> Although I agree that there are no genuine issues of material fact warranting a hearing, I believe the General Counsel is not entitled to judgment as a matter of law on this complaint allegation. To the contrary, the Respondent is entitled to judgment as a matter of law. Accordingly, I would enter summary judgment for the Respondent and against the General Counsel and dismiss the complaint.<sup>2</sup>

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.<sup>3</sup> However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive

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<sup>1</sup> 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

<sup>2</sup> It is well settled that summary judgment may be entered in favor of the party against whom the motion is filed even though that party has not filed a cross-motion for summary judgment. See 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2720, at 347 (3d ed. 1998) ("The weight of authority . . . is that summary judgment may be rendered in favor of the opposing party even though the opponent has made no formal cross-motion under [Federal] Rule [of Civil Procedure] 56.") (citing cases).

<sup>3</sup> I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."<sup>4</sup> This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;<sup>5</sup> (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;<sup>6</sup> and (iii)

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<sup>4</sup> *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

<sup>5</sup> When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

<sup>6</sup> The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See, e.g., *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); *Cellular Sales of Missouri, LLC v. NLRB*, \_\_\_ F.3d \_\_\_ (8th Cir. 2016); see also *Patterson v. Raymours Furniture Co.*, 96 F.Supp.3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F.Supp.3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services*, No. 1:12-CV-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); *Bell v. Ryan Transportation Service*, No. 15-9857-JWL, 2016 WL 1298083 (D. Kan. Mar. 31, 2016); but see *Lewis v. Epic Systems Corp.*, \_\_\_ F.3d \_\_\_, No. 15-2997 (7th Cir. May 26, 2016); *Tot-*

enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).<sup>7</sup> Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.<sup>8</sup>

Accordingly, I respectfully dissent.

Dated, Washington, D.C. June 16, 2016

Philip A. Miscimarra Member

NATIONAL LABOR RELATIONS BOARD  
APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain employment-

*ten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

<sup>7</sup> For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49-58 (Member Johnson, dissenting).

<sup>8</sup> Because I disagree with the Board's decisions in *Murphy Oil*, above, and *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), *enf. denied* in part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, *supra* at 2288, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

related class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Employee Acknowledgment and Agreement Arbitration Agreement (the Arbitration Agreement) in all of its forms, or revise it in all of its forms to make clear that the agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory Arbitration Agreement in all of its forms that the agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

SJK, INC. D/B/A FREMONT FORD

The Board's decision can be found at [www.nlr.gov/case/32-CA-51443](http://www.nlr.gov/case/32-CA-51443) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



# **EXHIBIT C**

1 DAVID A. ROSENFELD, Bar No. 058163  
2 CAREN P. SENCER, Bar No. 233488  
3 WEINBERG, ROGER & ROSENFELD  
4 A Professional Corporation  
5 1001 Marina Village Parkway, Suite 200  
6 Alameda, California 94501  
7 Telephone (510) 337-1001  
8 Fax (510) 337-1023  
9 E-Mail: drosenfeld@unioncounsel.net  
10 csencer@unioncounsel.net

11 Attorneys for Charging Party, INTERNATIONAL ASSOCIATION  
12 OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,  
13 EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546,  
14 DISTRICT LODGE 190,

15 UNITED STATES OF AMERICA  
16 NATIONAL LABOR RELATIONS BOARD  
17 REGION 32

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

No. 32-CA-151443

**MOTION FOR RECONSIDERATION**

23 Charging Party,

24 and

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

26 Respondent.

27 1. The Charging Party hereby moves for reconsideration of a portion of the Board's  
28 Decision in this matter. In particular, the Charging Party addresses footnote 1, in which the  
Board erroneously concludes the Charging Party's arguments improperly "enlarge upon or  
change the General Counsel's theory of the case."

2. The Board's cryptic statement, citing one case, offers no explanation of the  
Board's rationale. The Board has recently been slapped down by the D.C. Circuit for this kind of  
unhelpful decision-making. See, e.g., *NLRB v. Southwest Reg'l Council of Carpenters*, No. 11-

1 1212 (June 2016); *Aggregate Indus. v. NLRB*, No. 14-1252 (June 2016); and *HTH Indus. v.*  
2 *NLRB*, No. 14-1222 (May 2016). Charging Party certainly appreciates many of the Board’s  
3 decisions, but has no hesitancy seeking the same treatment of a rational explanation for the  
4 Board’s reasoning. Here, the Board offers no explanation other than a generic statement citing  
5 one case which, as we describe below, doesn’t support the Board’s Decision.

6 3. There was only one issue in this case, and that is whether the Employer’s forced  
7 unilateral arbitration procedure (“FUAP”) violates Section 8(a)(1) of the Act. The Complaint and  
8 the relevant paragraph 4(d) states: “The arbitration Agreement [FUAP] interferes with  
9 employees’ Section 7 to engage in collective legal activity by binding employees to a waiver of  
10 their rights to participate in collective and class litigation.” Nothing in the Charging Party’s  
11 Joinder expanded the focus of the General Counsel’s Complaint. Indeed, the Joinder supported  
12 wholly the General Counsel’s theory that the FUAP interfered with the Section 7 rights of the  
13 employees in violation of Section 8(a)(1).

14 4. Each of the arguments made by the Joinder supported the General Counsel’s  
15 theory:

- 16 • The argument that the Federal Arbitration Act does not apply is consistent with the  
17 General Counsel’s theory and the Board’s Decision that the Federal Arbitration  
18 Act does not trump the National Labor Relations Act. See Points III, and IV. In  
19 addition, even though the Charging Party has presented this, in part, as a  
20 constitutional issue concerning the application of the Federal Arbitration Act,  
21 nothing undermines the General Counsel’s theory because the General Counsel did  
22 not take a position adverse to the Charging Party’s position and argue that the  
23 application of the Federal Arbitration Act is constitutional.
- 24 • The argument that the Federal Arbitration Act interferes with other federal laws  
25 does nothing to undermine the General Counsel’s theory because it is consistent  
26 with the General Counsel’s theory that the application of the Federal Arbitration  
27 Act (a coordinate federal law) would undermine the National Labor Relations Act.  
28 See Point V. The Board must consider constitutional issues in interpreting the

1 Act. See, e.g., *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58 (1964).

- 2 • The Respondent is in California. The Charging Party's argument that, under  
3 California law, the Federal Arbitration Act cannot apply because of *Iskanian v.*  
4 *C.L.S. Transportation*, 59 Cal.4th 348 (2014), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_ (2014),  
5 is wholly consistent with the General Counsel's theory that the Federal Arbitration  
6 Act does not legitimize the Employer's conduct. See Point VI.
- 7 • Point VIII is consistent that the FUAP interferes with Section 7 rights. The fact  
8 that the Charging Party pointed to other forms of concerted activity doesn't  
9 undermine the fact that, on its face, the FUAP interferes with all sorts of Section 7  
10 rights, including the right to bring collective claims.
- 11 • Point IX, X and XI are consistent with the interference with Section 7 rights as  
12 alleged in the Complaint.
- 13 • Point XII supports the General Counsel's Complaint because it points out that the  
14 FUAP imposes a barrier to the exercise of Section 7 rights, namely, it imposes a  
15 financial cost.
- 16 • Point XIII is just basic Section 7 law that the FUAP interferes not only with  
17 employees of the Respondent, but also with the rights of other employees.
- 18 • Point XV is just another argument, consistent with the Complaint, that the FUAP  
19 is inconsistent with another federal law, the same point addressed by the General  
20 Counsel and the Board with respect to the FAA.
- 21 • Point XVI is another version of Section 7 rights, in this case, the right to engage in  
22 Section 7 rights to defend claims by the Employer.
- 23 • Point XVII is nothing more than an incorporation of the Norris-LaGuardia Act  
24 argument, which is addressed by the Board.
- 25 • Point XVIII addresses *Lutheran Heritage Village-Livonia*. This relates to breadth  
26 of the FUAP.
- 27 • Point XIX is again the application of a coordinate federal law. While the Board  
28 may wish to avoid these issues, the Supreme Court has made it clear that the Board

1 must take into account other federal laws. See, e.g., *Hoffman Plastic Compounds,*  
2 *Inc. v. NLRB*, 535 U.S. 137 (2002).

3 5. As we have demonstrated, the arguments made by the Charging Party are  
4 consistent with and encompassed within the allegations of the Complaint. Moreover, although  
5 the Counsel for the General Counsel had the right to file an objection to the Joinder filed by the  
6 Charging Party, he failed to do so. The Board cannot read into the General Counsel's Motion for  
7 Summary Judgment and failure to object to the arguments made by the Charging Party as a  
8 rejection by Counsel for the General Counsel of the arguments made.

9 6. The Respondent did not object to the arguments made by the Charging Party on  
10 the theory adopted by the Board.

11 7. The Board has often considered legal arguments contrary to those made by the  
12 General Counsel. See most recently, e.g., *Browning-Ferris*, 362 NLRB No. 186 at note 68  
13 (2015). Moreover, the Board has often considered legal arguments made by all parties to a  
14 proceeding. This often includes the arguments made by *amici curiae*. See, e.g., *Purple*  
15 *Communications, Inc.*, 361 NLRB No. 126 (2014).

16 8. The Board has ignored the well established doctrine that it will find a violation if a  
17 matter was litigated and the employer was put on notice of the issue. *Graymont PA, Inc.*, 364  
18 NLRB No. 37 at p. 5-6 (2016). The Respondent did not raise any objection to the Joinder filed by  
19 the Charging Party.

20 9. Here, the Respondent admitted all of the factual assertions. All that was left was  
21 the legal conclusions from those facts. See Decision page 1. Thus, Charging Party was free to  
22 make legal arguments based on those stipulated facts (or lack of facts) so long as they supported  
23 the allegation that Respondent violated Section 8(a)(1).

24 10. The Board's reliance on *Kimtruss Corporation*, 305 NLRB 710 (1999), illustrates  
25 the error of the Board's Decision. In that case, the Charging Party took a position inconsistent  
26 with the General Counsel's case regarding a theory of the violation. The General Counsel alleged  
27 that the posting of a notice violated the Act. The Charging Party took the position that the  
28 Employer also implemented something different from what was on the posted notice. The Board

1 held that “the judge improperly considered the Union’s theory as at variance from the General  
2 Counsel’s.” Thus, the Charging Party’s theory was inconsistent with the General Counsel’s  
3 theory, which was that there had not been any change in the Employer’s implementation.

4 That is a far cry from the case here, where the Charging Party’s arguments are consistent  
5 with the General Counsel’s theory that the FUAP violates Section 8(a)(1). Additionally, it is a far  
6 cry from where the Charging Party argues the relevance of other coordinate federal laws.

7 11. The Board could simply have said that it has considered the arguments of  
8 Charging Party and doesn’t find it necessary to reach them. That would, of course, preserve those  
9 arguments should the Court of Appeal reject the Board’s insistence on relying solely on its  
10 adherence to *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enf. denied in relevant part*,  
11 808 F.3d 1013 (5th Cir. 2015). Although we appreciate the Board’s insistence on maintaining its  
12 position enunciated in *Murphy Oil USA* (and predecessor and successor cases), there is no reason  
13 the Board shouldn’t consider additional, alternative arguments or broader arguments with respect  
14 to Section 8(a)(1) and the illegality of the FUAP.

15 12. One additional point. The Remedy is limited to “class or collective actions....”  
16 California and other states recognize “representative” actions, *qui tam* and other forms of group  
17 actions. The Order should include such types of actions, including all group actions.

18 13. This Motion for Reconsideration should be granted. Charging Party will ask a  
19 Court to address these issues, and the Board’s Counsel can explain to the Court why the Board  
20 relied upon *Kimtruss Corporation*, which is wholly inapposite.

21 Dated: July 5, 2016

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

22  
23  
24 By: /s/ David A. Rosenfeld  
DAVID A. ROSENFELD

25  
26 Attorneys for Charging Party, INTERNATIONAL  
27 ASSOCIATION OF MACHINISTS AND  
28 AEROSPACE WORKERS, AFL-CIO, EAST BAY  
AUTOMOTIVE MACHINISTS LODGE NO.  
1546, DISTRICT LODGE 190,

**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 July 5, 2016, I served the following documents in the manner described below:

**MOTION FOR RECONSIDERATION**

- (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 FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
- BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld’s electronic mail system from [kkempler@unioncounsel.net](mailto:kkempler@unioncounsel.net) to the email addresses set forth below.
- (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

Mr. George Velastegui National Labor Relations Board, Region 32 Regional Director 1301 Clay Street, Room 300N Oakland, CA 94612 <a href="mailto:George.Velastegui@nlrb.gov">George.Velastegui@nlrb.gov</a>	Mr. John P. Boggs, Esq. <a href="mailto:jboggs@employerlawyers.com">jboggs@employerlawyers.com</a> David J. Reese, Esq. <a href="mailto:dreese@employerlawyers.com">dreese@employerlawyers.com</a> Fine, Boggs & Perkins LLP 80 Stone Pine Rd., Suite 210 Half Moon Bay, California 94019 (650) 712-1712 Fax
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 5, 2016, at Alameda, California.

/s/ Karen Kempler  
Karen Kempler

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