No. 20-

IN THE

Supreme Court of the United States

GOOGLE, INC., ALPHABET, INC., AND ADECCO USA, INC.,

Petitioners,

v.

JOHN DOE, DAVID GUDEMAN, AND PAOLA CORREA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA (FIRST APPELLATE DISTRICT)

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where plaintiff has sought and obtained relief under the National Labor Relations Act, does the Act preempt plaintiff's state-law claim for penalties for the same conduct?

PARTIES TO THE PROCEEDING

Google LLC (formerly Google Inc.), Alphabet Inc., and Adecco USA, Inc. are the defendants in the trial court and the petitioners here. John Doe, David Gudeman, and Paola Correa are the plaintiffs in the trial court and the respondents here. John Doe, who is using a fictitious name in this case, is presently employed by Google; David Gudeman was formerly employed by Google; and Paola Correa alleged that she was formerly employed jointly by Adecco and Google. Google LLC and Alphabet Inc. are collectively referenced herein as "Google."

STATEMENT PURSUANT TO RULE 29.6

Google LLC (formerly Google Inc.) is a limited liability company that is wholly owned by Alphabet Inc., which issues shares to the public.

ADO Staffing, Inc. and Adecco, S.A. have an ownership interest of 10 percent or more in Adecco USA, Inc.

STATEMENT PURSUANT TO RULE 14.1(B)(III)

The following proceedings are the subject of the present petition for certiorari:

- *John Doe et al. v. Google, Inc., et al.*, No. S265288 (Cal.) (order denying discretionary review; entered Jan. 13, 2021);

- *John Doe et al. v. Google, Inc., et al.*, No. A157097 (Cal. Ct. App.) (order reversing trial court's orders sustaining Google's and Adecco's demurrers; entered Sept. 21, 2020); and

- *John Doe et al. v. Google, Inc., et al.*, No. CGC-16-556034 (Cal. Super. Ct.) (orders sustaining Google's and Adecco's demurrers; entered June 27, 2017 and Nov. 7, 2017, respectively).

The following proceedings are also related to this case:

- *John Doe et al. v. Superior Court of California, San Francisco County; Google, Inc., et al.*, No. S268568 (Cal.) (Plaintiffs' petition seeking review of trial court's order denying their peremptory challenge to trial court judge; pending);

- *John Doe et al. v. Superior Court of California, San Francisco County; Google, Inc., et al.*, No. A162337 (Cal. Ct. App.) (order denying Plaintiffs' petition seeking review of trial court's order denying their peremptory challenge to trial court judge; entered Apr. 21, 2021);

- *John Doe et al. v. Google, Inc., et al.*, No. A158826 (Cal. Ct. App.) (order dismissing Plaintiffs' petition seeking review of trial court's order denying their catalyst fees and costs motion; entered June 4, 2021); and

- *John Doe et al. v. Superior Court of California, San Francisco County; Google, Inc., et al.*, No. A153726 (Cal. Ct. App.) (order denying Plaintiffs' petition seeking interlocutory review of trial court's orders sustaining Google's and Adecco's demurrers; entered Mar. 29, 2018).

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PETITION FOR A WRIT OF CERTIORARI

Google and Adecco respectfully petition this Court for a writ of certiorari to review a decision of the California Court of Appeal, following the California Supreme Court's denial of discretionary review.

OPINIONS BELOW

The decision of the California Court of Appeal, reversing the trial court's judgment for Google and Adecco, is reported at 54 Cal. App. 5th 948 (2020). It is reproduced in the Appendix at Pet. App. 2a-60a.

The decision of the California Supreme Court denying discretionary review is not officially reported. It is reproduced in the Appendix at Pet. App. 1a and reported unofficially at 2021 Cal. LEXIS 227 (Jan. 13, 2021).

The decisions of the trial court sustaining Google's and Adecco's demurrers are not officially or unofficially reported. They are reproduced in the Appendix at Pet. App. 61a-82a and 83a-90a, respectively.

STATEMENT OF JURISDICTION

Google and Adecco timely petition this Court within 150 days of the California Supreme Court's order denying discretionary review. Sup. Ct. R. 13.1, as modified by this Court's March 19, 2020, Order.

This Court has jurisdiction under 28 U.S.C. section 1257(a) to resolve whether the National Labor Relations Act ("NLRA" or "Act") preempts the state-court action.

The state-court judgment "is final within the meaning of 28 U.S.C. [section] 1257: it finally disposed of the federal preemption issue; a reversal here would terminate the state court action; and to permit the proceedings to go forward in the state court without resolving the preemption issue would involve a serious risk of eroding the federal statutory policy of 'requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts.'" *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983) (citations omitted, second alteration in original); *accord International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 390-91 (1986) (explicating *Construction Laborers v. Curry*, 371 U.S. 542 (1963), which had held that state-court assertion of jurisdiction over NLRA-preempted claim, even to the extent of granting a temporary injunction only, is final for purposes of Supreme Court review).

STATUTORY PROVISIONS INVOLVED

The NLRA, as amended, is codified at 29 U.S.C. sections 151-169. The relevant provisions of the Act, Sections 7 and 8, are reproduced at Pet. App. 91a-105a.

The California Labor Code Private Attorneys General Act ("PAGA"), Labor Code section 2698 *et seq.*, provides civil penalties for violations of other Labor Code provisions. The statutory predicates upon which Plaintiffs base their PAGA claims against Google and Adecco are Labor Code sections 432.5, 1102.5(a), 232.5, 232, 1197.5(j) and (k), 98.6, and 96(k). Plaintiffs also alleged one claim against Adecco under California Business & Professions Code section 17200 *et seq.* ("Section 17200"). The relevant provisions of these California statutes are reproduced at Pet. App. 106a-163a.

STATEMENT OF THE CASE

1. On May 17, 2016, Respondent John Doe filed an unfair labor practice charge against Google with the National Labor Relations Board ("NLRB" or "Board"). Pet. App. 9a. In his charge, Doe alleged, *inter alia*, that Google's confidentiality policies unlawfully prevented Google's workforce from discussing their wages and working conditions outside the company. *Id.*

After investigating Doe's charge, the NLRB's Regional Director issued a complaint on Doe's allegations. *Id.* 10a. The NLRB complaint, as amended, alleged that Google's policies prohibited employees from discussing and sharing information related to their performance, compensation, benefits, and records of training, misconduct, and discipline. *Id.* It also alleged that Google's policies violated the Act by prohibiting employees from speaking with the press. *Id.*

On or around September 9, 2019, Google and the NLRB's Regional Director settled all claims alleged in the NLRB complaint. *Id.* As part of the settlement remedies, Google notified its employees that the confidentiality policies at issue had been rescinded and informed them that they had the right to discuss their wages and working conditions among themselves and with others, including the media. *Id.*; *see also* NLRB Notice of Approval of Settlement Agreement, Pet. App. 164a-180a.

2. While Doe's charge was pending before the NLRB, Doe sued Google for penalties under PAGA. Pet. App. 4a-7a. Doe's Second Amended Complaint added Plaintiffs Paola Correa and David Gudeman to the action and alleged certain confidentiality claims against newly added Defendant Adecco USA, Inc. *Id.* 4a. The Third Amended

Complaint, which became the operative complaint, alleged fifteen PAGA claims against Google, based on the same policies the NLRB was considering.[1] *Id.* 4a-7a.

3. Google demurred, demonstrating that the NLRA preempted the policy-based claims under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Pet. App. 2a-3a. The trial court sustained Google's demurrer without leave to amend. *Id.* The trial court reasoned that "the NLRB is actively pursuing a case on the policies [that are] the subject of this suit" and "here we have an NLRB complaint which attacks the same policies at issue in the state case." *Id.* 77a, 80a.

4. After the trial court sustained Adecco's demurrer to the Third Amended Complaint on the ground of *Garmon* preemption with leave to amend, Plaintiffs filed a Fourth Amended Complaint asserting eight claims against Adecco,[2] including allegations that Google and Adecco were joint employers and that Adecco required its employees to comply with Google's challenged policies. *Id.* 8a-9a, 86a-89a. The trial court sustained Adecco's demurrer on the ground of *Garmon* preemption without leave to amend, reasoning that Plaintiffs' claims "are the same issues that the NLRB will address on Google's alleged policies" in connection with the then-pending NLRB Complaint. *Id.* 83a-90a.[3]

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1. The Third Amended Complaint also added an unrelated cause of action that the parties later settled. Pet. App. 7a.

2. The eight claims against Adecco comprised seven PAGA claims and one Section 17200 claim. *Id.* 8a-9a, 86a-89a.

3. Plaintiffs' Fifth Amended Complaint alleged against Adecco the same unrelated cause of action that the Third Amended Complaint had alleged against Google, which all parties later settled. *Id.* 7a-8a.

5. The California Court of Appeal reversed the trial court's orders sustaining Google's and Adecco's demurrers in a 2-1 decision. Pet. App. 2a-60a. Addressing "[t]he first step of a *Garmon* analysis"—which is "whether the conduct at issue is arguably protected or prohibited by the NLRA"—the panel majority said, "We do not doubt that some of the conduct at issue at least arguably falls within the NLRA." *Id.* 15a-16a. The court proceeded to hold, however, that none of the PAGA claims was preempted, because the "local interest exception" to *Garmon* preemption applied. *Id.* 3a, 17a-32a.

6. Justice Tracie L. Brown dissented. She called the majority to task for "fashioning [its] own test" rather than "follow[ing] the analytical path the Supreme Court has set forth for the local interest exception[.]" *Id.* 43a. "By defining the local interest exception so broadly," said Justice Brown, "the majority opinion allows it to swallow the intentionally wide rule of *Garmon* preemption and defeat its purpose." *Id.* 49a. Justice Brown particularly stressed that the majority opinion conflicts with this Court's teaching that "states may not impose additional penalties for conduct the NLRA prohibits." *Id.* 59a (citing *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 287 (1986)).

7. The California Supreme Court denied Google's and Adecco's petition for discretionary review on January 13, 2021. Justice Goodwin H. Liu stated that the petition should have been granted. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

Google and Adecco respectfully suggest that this Court should grant certiorari and summarily reverse, or, in the alternative, set the case for plenary briefing and argument.

I. BY PERMITTING STATE-LAW PENALTIES TO BE PILED ON TOP OF THE NLRB'S REMEDIES, THE DECISION BELOW CONFLICTS WITH THIS COURT'S TEACHING IN *GOULD*.

A. This Court In *Gould* Held That The NLRA Preempted State Penalties Imposed On Top Of NLRA Remedies.

In *Wisconsin Dep't of Indus. v. Gould*, 475 U.S. 282 (1986), this Court unanimously held that the NLRA preempted a Wisconsin statute debarring repeat labor law violators from doing business with the state. This Court applied the "[c]entral" principle of *Garmon* preemption that the states "may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Id.* at 286 (citing *Garmon*). "Because 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,' . . . the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* (quoting *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953), and citing *Garmon*, 359 U.S. at 247). The *Garmon* rule is "designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated federal scheme of law, remedy, and administration.'" *Id.* (quoting *Garmon*, 359 U.S. at 243).

Gould explained that "[t]he conflict between the challenged . . . statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of Wisconsin's supplemental remedy." *Id.* at 288 n.5. Because the NLRA is a remedial statute, and the Board is not authorized to impose penalties, "[p]unitive sanctions are inconsistent . . . with the remedial philosophy of the NLRA[.]" *Id.*

B. The Decision Below Squarely Conflicts With *Gould*.

Plaintiffs' PAGA lawsuit is a quest for penalties, and nothing but penalties. Citing this Court's holding in *Gould* that "states may not impose additional penalties for conduct the NLRA prohibits," dissenting Justice Brown concluded: "Because it could allow plaintiffs to impose monetary penalties for practices the Board decided to remedy via settlement, plaintiffs' PAGA suit poses a substantial risk of interfering with the NLRB's jurisdiction." Pet. App. 58a-59a.

The majority sought to distinguish *Gould* on the ground that "none of plaintiffs' claims requires proof of an NLRA violation," while "the California laws that plaintiffs seek to enforce make no reference to the NLRA, the NLRB, or the rights of workers to organize." *Id.* 21a-22a. Dissenting Justice Brown observed, however, that the majority's test "would allow virtually any state law claim to proceed, regardless of its effects on the Board's jurisdiction, so long as it does not refer to the NLRA by name or duplicate its elements." *Id.* 49a.

The majority's test is not the law, as this Court made clear in *Motor Coach Employees v. Lockridge*, 403 U.S.

274 (1971)—a case the California Court of Appeal did not cite. Plaintiff Lockridge contended that, because the elements of breach of contract are different from those of an unfair labor practice, the NLRA did not preempt his contract claim. This Court rejected as "not tenable" the contention "that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice[.]" *Id.* at 292. The Court continued: "Pre-emption[] . . . is designed to shield the system from conflicting regulation of conduct. *It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.*" *Id.* (emphasis added).

Gould reiterated *Lockridge*'s teaching, quoting the very sentence highlighted above. *Gould*, 475 U.S. at 289; *see also Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 203-04 (5th Cir. 2001) (quoting same *Lockridge* language, and holding preempted state-law claims of tortious interference with contract).

Here, the "conduct being regulated" is Google's and Adecco's past maintenance of certain employment policies pertaining to employee communications. The decision below would subject the very same conduct to penalties under state law, above and beyond the remedies already provided by the NLRA. That the "formal description of governing legal standards" differs between state law and the NLRA does not insulate state law from NLRA preemption, as *Lockridge*, *Gould*, and *Garner* explained. The conflict arises because NLRB remedies and state-law penalties "'are brought to bear on the same activity.'" *Gould*, 475 U.S. at 289 (quoting *Garner*, 346 U.S. at 498-99).

The majority below not only ignored that teaching, it stated that "the availability of a remedy in state court that is unavailable under the NLRA may be a reason *not* to find a case preempted." Pet. App. 22a (emphasis in original). For this surprising proposition, the majority cited *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 63-64 (1966), which—as Justice Brown pointed out in her dissent—says no such thing. *Id.* 46a n.2. Indeed, this Court has held the very opposite. In *Operating Engineers Local 926 v. Jones*, 460 U.S. 669, 684 (1983), the plaintiff argued that he "should be permitted to go forward in the state court because he could be awarded punitive damages and attorney's fees, whereas he would be limited to backpay if his complaint had gone forward before the Board." *Jones* responded that *Garmon* had "squarely rejected" this argument. *Id.* (citing *Garmon*, 359 U.S. at 246-47). *Gould* reaffirmed this Court's rejection of this argument, quoting *Garmon*: "'[T]o allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board *only accentuates the danger of conflict*.'" *Gould*, 475 U.S. at 287 (quoting *Garmon*, 359 U.S. at 247) (alteration in original, emphasis added).

In its NLRB settlement, Google agreed not to maintain the policies that Plaintiff Doe challenged in his unfair labor practice charge, and for which he now seeks penalties in his state-court action. Pet. App. 10a, 164a-180a. Justice Brown stressed, "[T]he regional director's settlement *has already caused Google to change the same policies about which plaintiffs now complain*." *Id.* 58a (emphasis in original). By allowing penalties to be imposed "for practices the Board decided to remedy via settlement, plaintiffs' PAGA suit poses a substantial risk of interfering with the NLRB's jurisdiction." *Id.* 58a-59a (citing *Gould*, 475 U.S. at 287).

In sum, the majority opinion below cannot be reconciled with *Gould*.

II. THE CALIFORNIA COURT'S RADICAL EXPANSION OF THE "LOCAL INTEREST" EXCEPTION CONFLICTS WITH SETTLED PRINCIPLES OF *GARMON* PREEMPTION.

According to the majority, the claims against Google and Adecco vindicated interests "of traditional local concern[.]" Pet. App. 19a. As Justice Brown noted, the majority's asserted local interest is "substantially different on its face" from any this Court has ever recognized, such as addressing violence or trespass. *Id.* 44a. Perhaps for this reason, the majority's discussion of the local interest issue focused more on denigrating the *federal* interest than demonstrating a *local* interest compelling enough to avoid preemption.

It is not for the California Court of Appeal—or indeed any state—to decide that a federal interest is slight. Yet, as Justice Brown aptly observed, "[B]y defining the local interest exception so broadly, the majority opinion allows it to swallow the intentionally wide rule of *Garmon* preemption and defeat its purpose." *Id.* 49a. The majority opinion thereby "flips the *Garmon* framework on its head." *Id.* These observations by Justice Brown were correct, as shown below.[4]

4. Justice Brown also concluded, however, that some of Plaintiffs' claims are not preempted. Pet. App. 39a-40a. She reasoned that the Act does not protect certain activities that Google's and Adecco's policies arguably precluded, such as "writing novels based on experiences at Google[.]" *Id.* 40a. Petitioners respectfully submit, however, that the trial court was correct in finding *all* Plaintiffs'

A. The Majority's Assertion That An NLRB Settlement Clears The Way For State-Court Action Is Contrary to *Garmon* And Multiple Circuit Court Decisions.

The majority concluded that the Board's settlement of Plaintiff Doe's charge, far from rendering the local interest exception unavailable, cleared the way for the state court to act. Since "the NLRB has settled its claim with no admission of wrongdoing by Google and no findings of fact by the Board[,]" the majority asserted, "[n]othing the state court does at this juncture could interfere with the NLRB's exercise of its primary jurisdiction." Pet. App. 20a. Preemption, however, depends on *what* the state court purports to do, not *when* the state court does it. *Garmon* teaches that preemption applies even where the Board declines to act at all.

The Board in *Garmon* had declined to assert jurisdiction because its discretionary interstate commerce standards were not met. *Garmon*, 359 U.S. at 238. Nevertheless, said the Court, "the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act." *Id.* at 246. Declaring "the case before us is clear" in light of applicable preemption principles, *Garmon* held the state-law claims preempted: "Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a

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claims preempted. Whether the policies would deter an employee from writing a novel, complaining about working conditions, or both, is not determinative of preemption. As the trial court correctly found, the "NLRB complaint . . . attacks the same policies at issue in the state case." *Id.* 80a.

remedy in damages, and since such activity is arguably within the compass of [Section] 7 or [Section] 8 of the Act, the State's jurisdiction is displaced." *Id.*

Here, the Board did not decline to act; to the contrary, it found merit in Plaintiff Doe's unfair labor practice charge. In issuing a complaint and then obtaining from Google a settlement of it (Pet. App. 164a-180a), the Regional Director enforced the NLRB's position that Google had violated the Act. Therefore, the majority opinion below conflicts squarely with *Garmon*'s teaching that, once the Board decides that an unfair labor practice has been committed, "then the matter is at an end, and the States are ousted of all jurisdiction." *Garmon*, 359 U.S. at 245.

Where, as here, the Board not only has asserted its jurisdiction, but has issued a complaint and then settled the case, the need to protect the Board's jurisdiction is particularly acute. The First Circuit so held in *Chaulk Services, Inc. v. Massachusetts Commission Against Discrimination*, 70 F.3d 1361, 1366 (1st Cir. 1995), a case in which the Board "moved aggressively to acquire . . . jurisdiction and bring the matter to a full and speedy resolution." *Chaulk* held that an employer that had settled with the NLRB was entitled to enjoin a state administrative agency's prosecution of a sex discrimination claim based upon the same conduct. Finding the local interest exception inapplicable, the First Circuit observed that there was a "very real danger of interference with the NLRB's jurisdiction, as it was precisely the Board's timely intervention which in this case led to the agreement through which [the employer] pledged, among other things, not to engage in the challenged conduct[.]" *Id.* Here, too,

the Board insisted, and Google agreed "not to engage in the challenged conduct." *See* Pet. App. 164a-180a.

Moreover, as several circuit courts have held, the risk of interference with the Board's jurisdiction is heightened where, as here, the plaintiff has first sought relief from the NLRB. In *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1517 (11th Cir. 1988), for example, the Eleventh Circuit held state-law fraud claims preempted, where the plaintiffs initially sought (and were denied) relief from the NLRB. The court held that "the Supreme Court's primary jurisdiction rationale" has "the greatest validity" when a party first seeks redress from the NLRB, and then proceeds to repackage the claims as state-law claims. *Id.* "By initially pursuing relief with the NLRB the employees have implicitly recognized the Board's jurisdiction over their claims." *Id.* Rejecting application of the local interest exception, the court added, "[T]he state's interest in protecting its citizens from fraud and misrepresentations does not outweigh our concern in protecting the NLRB's jurisdiction from erosion through state regulation." *Id.* at 1518.

Similarly, in *Platt v. Jack Cooper Transport Co., Inc.*, 959 F.2d 91, 95 (8th Cir. 1992), the Eighth Circuit found it "highly relevant" that the plaintiff had first unsuccessfully sought relief from the NLRB. "'The risk of interference with the Board's jurisdiction is . . . obvious and substantial' when an unsuccessful charge to the Board is recast as a state law claim." *Id.* (quoting *Jones*, 460 U.S. at 683) (alteration in original); *accord Casumpang v. Hawaiian Commercial & Sugar Co.*, 712 F. App'x 709, 710 (9th Cir. 2018) (local interest exception unavailable where plaintiff's "state law claim was substantially the same as his unfair labor practice charge").

Thus, by treating the Board's settlement with Google as clearing the field for Plaintiffs' PAGA lawsuit, the decision below squarely conflicts not only with *Garmon* itself, but also with circuit court decisions applying *Garmon* preemption.

B. Contrary To The Decision Below, Employees' Right To Discuss Wages And Working Conditions Is Central To The NLRA, Not "Peripheral."

The majority's application of the local interest exception also hinged upon its assertion that the interests advanced in the state case are "peripheral to the NLRA." Pet. App. 19a. Far from being "peripheral," these interests are at the core of the NLRA's protections. The gravamen of Plaintiffs' claims against Google and Adecco is that Google's and Adecco's policies prohibited employees from discussing their wages and terms and conditions of employment among themselves and with others. The Regional Director's issuing a complaint on this very issue demonstrates, *ipso facto*, that employees' right to discuss their wages and working conditions is by no means "peripheral" to the Act.

Far from being "peripheral," employees' right to discuss their wages and working conditions is fundamental to the Act. The NLRB categorizes as *per se* unlawful the maintenance of "a rule that prohibits employees from discussing wages or benefits with one another." *Boeing Co.*, 365 NLRB No. 154, 2017 NLRB LEXIS 634, at *14, *63 (2017). "'It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity.'" *Union Tank Car Co.*, 369 NLRB No. 120, 2020 NLRB LEXIS 373, at *8

(2020) (quoting *St. Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 205 (2007), *enf'd*, 519 F.3d 373 (7th Cir. 2008), and striking down employer's rule restricting such discussions).

The Board protects not only internal discussions among coworkers, but also disclosures to outsiders. In *Kinder-Care Learning Ctrs., Inc.*, 299 NLRB 1171, 1172 (1990), for example, the Board held that a child care center's rule restricting employees' communications with parents "unlawfully interferes with the statutory right of employees to communicate their employment-related complaints to persons and entities other than the [employer], including a union or the Board." The Board reiterated that it had "found employees' communications about their working conditions to be protected when directed to other employees, an employer's customers, its advertisers, its parent company, a news reporter, and the public in general." *Id.* at 1171 (footnotes omitted, citations omitted).

The circuit courts have consistently upheld the Board's position that the Act protects employees' rights to discuss their wages and working conditions. *See, e.g.*, *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007) (recognizing employees' right to discuss terms and conditions of employment with other employees and with nonemployees); *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 684-85 (8th Cir. 1996) (enforcing NLRB's order against rules prohibiting discussion of working conditions among employees and with employer's clients); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919-20 (3d Cir. 1976) (employer's rule prohibiting discussion of wages among employees was "invalid on its face"); *see also Sharp ex rel. NLRB v. Koronis Parts, Inc.*, 927 F. Supp. 1208, 1213-14 (D. Minn.

1996) (upon application of the NLRB, enjoining employer's rules against discussion of wages).

In short, the majority opinion's assertion that the state-court claims advance interests "peripheral to the NLRA" is simply wrong. For this additional reason, the majority opinion's sweeping expansion of the local interest exception is contrary to settled law.

C. The California Court's Disparagement Of The NLRB Settlement Process Cannot Sustain The Local Interest Exception.

The majority opinion below acknowledged that, if there were a "serious concern" about the state case interfering with the NLRB's jurisdiction, "it would render the local interest exception unavailable." Pet. App. 20a. The majority argued that the state-court action could not interfere with the NLRB's jurisdiction, however, because "[t]he settlement agreement between the Board and Google is informal and of limited scope." *Id.* 21a.

According to the majority, the agreement is "limited" because it provides for a 60-day posting of employees' rights under federal law, and no further action by the NLRB "if Google upholds its end of the bargain[.]" *Id.* The reference to rights under *federal* law, the majority said, is "a signal" that the issues under California law are "completely different" from those before the NLRB. *Id.* Furthermore, the majority quoted boilerplate language from the settlement agreement, to the effect that the settlement does not prevent the Board and the courts from finding violations with respect to matters occurring before the agreement was approved, or making findings

of fact and conclusions of law regarding evidence obtained in the case. *Id.* "With this provision," says the majority, "the Board itself has given courts license to proceed with claims addressing the same or similar facts." *Id.*

The majority is profoundly mistaken in believing that the NLRB, through its well-established informal settlement process, has invited state courts to impose remedies (let alone, as here, penalties) for the same conduct that the NLRB has already remedied. Notably, the court cites no authority for its professed belief, and to Petitioners' knowledge, there is none.

First, the majority's disparagement of "informal" settlements squarely conflicts with this Court's teaching. Noting that almost one-third of unfair labor practice charges in 1983 had been resolved through informal settlement following the issuance of a complaint but before a hearing—which is exactly what happened here—this Court has called informal settlement the "lifeblood" of the Board's administrative process. *NLRB v. UFCW, Local 23*, 484 U.S. 112, 132 (1987). The NLRB General Counsel's decision to enter into an informal settlement agreement is not even subject to federal-court judicial review under the Administrative Procedure Act. *Id.* at 132-33. Otherwise "the willingness of charged parties to resolve unfair labor practice charges quickly and expeditiously by way of an informal settlement after a complaint is filed would be severely constrained[.]" *Id.* at 132. "The resulting consequences for the agency and the enforcement of the Act could be most serious." *Id.*

Second, contrary to the majority opinion, Google's settlement agreement is not "limited" in any way that is

relevant to preemption analysis. The majority excerpted language from two sentences in the scope-of-agreement paragraph, contending that the Board "license[d]" state-court action. Pet. App. 21a. This selective quotation obscures the essential context. Here are the two sentences in full: "It [the Agreement] does not prevent persons from filing charges, *the General Counsel from prosecuting complaints*, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved *regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence* obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law *with respect to that evidence*." *Id*. 172a-173a (emphasis added).

This language is required in every NLRB informal settlement agreement to allow the NLRB's General Counsel to prosecute (and the Board and reviewing federal circuit courts to adjudicate) unfair labor practice cases that a settlement otherwise would bar. *See* NLRB Casehandling Manual, § 10146.3 (available at https://www.nlrb.gov/guidance/key-reference-materials/manuals-and-guides). The language upon which the majority relied is designed to protect the NLRB's jurisdiction and that of federal courts reviewing NLRB decisions, not to license state-court intervention. As dissenting Justice Brown pointed out, the language is part of the Board's "standard template" and does not affect the reach of *Garmon* preemption. Pet. App. 60a.

In sum, contrary to the majority's conclusion, there is indeed a serious risk of interference with the NLRB's jurisdiction that "render[s] the local interest exception unavailable." *Id.* 20a.

III. IF ALLOWED TO STAND, THE DECISION BELOW RISKS SUBSTANTIAL INTERFERENCE WITH THE NLRB'S JURISDICTION.

Allowing the decision below to stand as precedent would likely have serious consequences for the NLRB's jurisdiction. In shielding California's PAGA law from NLRA preemption based upon supposedly paramount "local interest," the court acknowledged no limiting principle, and the court's reasoning could apply equally to statutes of various sorts throughout the country.

The majority asserted, "Defendants do not deny that plaintiffs' claims grow from deeply rooted local interests. This is no surprise, as plaintiffs bring this case under PAGA, which means plaintiffs are serving 'as the proxy or agent of the state's labor law enforcement agencies.'" Pet. App. 18a (citation omitted). Putting aside the majority's misstatement of Petitioners' position,[5] it is striking that the majority categorically treated PAGA as vindicating "deeply rooted local interests." Since *all* PAGA claimants are deemed proxies for "the state's labor law enforcement agencies," the court's decision strongly suggests that *any* PAGA claim would qualify for the local interest exception. Certainly the court identified no limiting principle. If

5. Petitioners have consistently *denied* that any state interests here are "deeply rooted" or otherwise qualify for the local interest exception.

penalties under California law can be awarded in this case, where the lead plaintiff himself invoked the NLRB's jurisdiction and succeeded in obtaining NLRB remedies, it is hard to imagine circumstances under which *any* PAGA claim (or a similar claim in other states) would be held preempted.

California Labor Code section 2699.5 alone lists 151 different types of Labor Code violations for which PAGA penalties are available. Given this precedent, the availability of at least 151 potential PAGA claims is a powerful incentive for lawsuits intruding upon the Board's jurisdiction. In Justice Brown's words, the majority's approach "make[s] preemption easily avoidable by all but the most inept of complaint-drafters." Pet. App. 49a.

IV. THIS CASE IS APPROPRIATE FOR SUMMARY REVERSAL.

This case warrants consideration for summary reversal.[6]

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6. Sup. Ct. R. 16.1. The Court has used summary reversal to decide cases that involve (i) well-settled law; (ii) undisputed facts; and/or (iii) a clearly erroneous lower court decision. *See, e.g.*, *CNH Indus. N.V. v. Reese*, __ U.S. __, 138 S. Ct. 761, 766 (2018) (summarily reversing where decision below "is not consistent with" applicable Supreme Court precedent); *Presley v. Georgia*, 558 U.S. 209, 209 (2010) (summarily reversing where state court's decision "contravened this Court's clear precedents"); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (summarily reversing where opinion below "cannot remotely" be reconciled with what "[the Court's] cases require"); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505, 510 (2001) (summarily reversing where decision below was "baffling" and "conflict[ed] with [this Court's] cases"); *Ohio v. Reiner*, 532 U.S. 17, 18 (2001) (summarily reversing where the facts were clear and the Court's "precedents dictate" reversal).

There is no substantial doubt that the California Court of Appeal's decision was wrong. As shown above, the decision would allow the imposition of state-law penalties on top of remedies the NLRB imposed. Google has rescinded the allegedly overbroad policies that are the subject of both the state-law case and the NLRB case. But the decision below asserts that adding state-law penalties to the NLRB's remedies could not possibly interfere with the NLRB's primary jurisdiction because (a) the California statutes don't mention the NLRA or recite its elements; (b) the NLRB case has already been settled; and (c) employees' right to discuss their wages and working conditions among themselves and with others is "peripheral" to the Act. On each of these points, the decision contradicts the teachings of this Court and the circuit courts.

This Court can summarily reverse the California Court of Appeal's decision, reinstate the trial court's orders sustaining Google's and Adecco's demurrers without leave to amend, and thereby terminate the entire action.[7] Alternatively, the Court could summarily

7. Ruling on Google's and Adecco's demurrers prior to the NLRB settlement, the trial judge drew upon this Court's decision in *Operating Engineers Local 926 v. Jones*, 460 U.S. 669 (1983), to frame the issue as "whether a crucial element of the state claims would be material to an NLRB case." Pet. App. 81a. The judge found the question "far simpler to address in this case than in others, because here we have an NLRB complaint which attacks *the same policies at issue* in the state case. . . . The NLRB will doubtless address *exactly the same issues*." *Id.* (emphasis added). Given that the trial court correctly found the same policies to be at issue in the state case and before the NLRB, the state case is properly preempted under any formulation of the preemption test. The question whether

reverse and remand for the correct application of *Garmon* preemption principles.

CONCLUSION

The Court should grant the petition for certiorari and consider summary reversal of the California Court of Appeal's decision.

DATED: June 11, 2021

Respectfully submitted,

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there is tension between the articulations of the legal test in *Jones* and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), need not be resolved here.

APPENDIX

APPENDIX A — ORDER DENYING REVIEW IN THE SUPREME COURT OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR, FILED JANUARY 13, 2021

IN THE SUPREME COURT OF CALIFORNIA
En Banc

First Appellate District,
Division Four - No. A157097

No. S268568

JOHN DOE *et al.*,

Plaintiffs and Appellants,

v.

GOOGLE, INC., *et al.*,

Defendants and Respondents.

SUPREME COURT FILED:
January 13, 2021
Jorge Navarrete, Clerk

The petition for review is denied.

Liu, J., is of the opinion the petition should be granted.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B — OPINION IN THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR, FILED SEPTEMBER 21, 2020

IN THE COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION FOUR

A157097

JOHN DOE *et al.*,

Plaintiffs and Appellants,

v.

GOOGLE, INC., *et al.*,

Defendants and Respondents.

September 21, 2020, Opinion Filed

City & County of San Francisco Super. Ct. No. CGC-16-556034, JCCP No. 4939

Opinion by: Tucher, J.

OPINION

Google, Inc., and Alphabet, Inc. (collectively, Google), and Adecco USA, Inc. (Adecco), require their employees to comply with various confidentiality policies. John Doe, David Gudeman, and Paola Correa, who are current and former Google and Adecco employees, sued Google and

Adecco under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.), alleging the employers' confidentiality policies restricted their employees' speech in violation of California law. The trial court sustained defendants' demurrers without leave to amend, concluding plaintiffs' claims were preempted by the National Labor Relations Act (NLRA or Act) (29 U.S.C. § 151 et seq.) under *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 244–245 [3 L. Ed. 2d 775, 79 S. Ct. 773] (*Garmon*). Plaintiffs contend the trial court erred in finding the NLRA preempted their PAGA claims. They further challenge the trial court's denial of a petition to coordinate this case with another case pending in a different trial court.

We conclude that, although many of plaintiffs' claims relate to conduct that is arguably within the scope of the NLRA, the claims fall within the local interest exception to *Garmon* preemption and may therefore go forward. We also conclude that plaintiffs' challenge to the trial court's coordination petition is not properly before us. We will therefore reverse the trial court's orders sustaining defendants' demurrers without leave to amend and remand for further proceedings.

BACKGROUND

Because this appeal comes to us on demurrer, the following facts are based on the allegations in plaintiffs' pleadings and the requests for judicial notice.[1]

1. Google and plaintiffs have requested judicial notice of various submissions to and rulings by the NLRB's regional director and general counsel. The requests are unopposed. With one exception,

Appendix B

Litigation Regarding Confidentiality Policies

Doe works as a product manager in a supervisory capacity at Google. He began work at Google in July 2014, had his employment terminated in April 2016, and was reinstated in June 2016. After being terminated and before being reinstated, Doe sent notice under PAGA to the California Labor and Workforce Development Agency that he intended to file this suit on behalf of himself and other current and former Google employees. Doe alleged that Google required employees to sign a confidentiality agreement and imposed certain related confidentiality policies on its employees, and that these policies violated the Labor Code. Six months later, Doe filed this case in San Francisco Superior Court. (*John Doe v. Google, Inc.* (Super. Ct. S.F. City & County, 2019, No. CGC-16-556034) (*Doe*).)

Gudeman is a former Google employee, and Correa is a former Google employee who also worked for Adecco as a temporary employee placed at Google. Doe's second amended complaint included them as named plaintiffs, and added claims against Adecco based on Correa's experience there.

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we grant the requests for notice of these documents as official acts or records of the executive department or a court of record of the United States. (Evid. Code, §§ 452, subds. (c)–(d), 459; *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1220, fn. 38 [13 Cal. Rptr. 3d 630] [taking judicial notice of briefs filed before administrative agency]; *Heston v. Farmers Ins. Group* (1984) 160 Cal.App.3d 402, 413 [206 Cal. Rptr. 585] [approving of judicial notice of brief filed with the NLRB as court record].) We deny Google's request for notice of Doe's unfair labor practice charge as unnecessary, because that document is already in the record.

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Shortly after plaintiffs filed their second amended complaint, Rachel Moniz filed a complaint against Adecco in San Mateo Superior Court alleging claims based on Adecco's confidentiality policies. (*Moniz v. Adecco* (Super. Ct. San Mateo County, 2019, No. 17-CIV-01736) (*Moniz*).) Ten days later, plaintiffs filed their third amended complaint against Google and Adecco.

The Harms Alleged

Plaintiffs' third amended complaint alleges 17 causes of action under PAGA based on defendants' confidentiality policies. Plaintiffs' confidentiality claims fall into three subcategories; restraints of competition, whistleblowing, and freedom of speech.

In their competition causes of action plaintiffs allege that Google's confidentiality rules violate state statutes by preventing employees from using or disclosing the skills, knowledge, and experience they obtained at Google for purposes of competing with Google. For example, the policies prevent Googlers from disclosing their wages in negotiating a new job with a prospective employer, and from disclosing who else works at Google and under what circumstances such that they might be receptive to an offer from a rival employer. The complaint grounds these PAGA claims on alleged violations of Business and Professions Code sections 17200, 16600, and 16700[2] and various provisions of the Labor Code (see Lab. Code, §§ 232, 232.5, 1197.5, subd. (k)).

2. The fifth amended complaint expressly grounds the Business and Professions Code section 17200 allegation on violation of Business and Professions Code sections 16600 and 16700.

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Plaintiffs' whistleblowing causes of action allege that Google's confidentiality rules prevent employees from disclosing violations of state and federal law, either within Google to their managers or outside Google to private attorneys or government officials. (See Bus. & Prof. Code, § 17200 et seq.; Lab. Code, § 1102.5.) They also allege the policies unlawfully prevent employees from disclosing information about unsafe or discriminatory working conditions, or about wage and hour violations. (See Lab. Code, §§ 232, 232.5.)

In their freedom of speech claims, plaintiffs allege that defendants' confidentiality rules prevent employees from engaging in lawful conduct during nonwork hours and violate state statutes entitling employees to disclose wages, working conditions, and illegal conduct. (See Lab. Code, §§ 96, subd. (k), 98.6, 232, 232.5, 1197.5, subd. (k).) This lawful conduct includes the exercise of an employee's constitutional rights of freedom of speech and economic liberty. As a practical matter, plaintiffs argue, they are forbidden even to write a novel about working in Silicon Valley or to reassure their parents they are making enough money to pay their bills, matters untethered to any legitimate need for confidentiality.

Google's confidentiality rules contain a savings clause stating that the company's rules were not intended to limit employees' right to discuss wages, terms, or conditions of employment with other employees, or their right to communicate with government agencies regarding violations of law. However, plaintiffs allege these clauses are meaningless and contrary to Google's policies and

practices of enforcement, which threaten employees for disclosing any information at all.

Plaintiffs allege Adecco was liable for both its own confidentiality policies and Google's because Adecco was Correa's joint employer when she was placed at Google. Adecco admits that in ruling on the demurrers "there is no meaningful difference between [the] claims against Google and those against Adecco."

Demurrers

Google demurred to the entire complaint. As relevant here, Google argued the NLRA preempted plaintiffs' confidentiality claims. The trial court sustained Google's demurrer to the confidentiality claims without leave to amend. It overruled the demurrer only as to a single remaining cause of action—alleging defendants required employees to sign illegal releases of potential claims as a condition of being hired—and the parties eventually settled that claim.

Adecco demurred to the third amended complaint as well, shortly after it filed a similar demurrer in *Moniz*. The *Moniz* court overruled the demurrer, but the *Doe* court sustained Adecco's demurrer to the confidentiality claims, with leave to amend, for the same reasons that it sustained Google's demurrer.

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Proceedings Specific to Adecco

Plaintiffs tried to cure the defects identified by the *Doe* court as to their claims against Adecco by filing a fourth amended complaint. This complaint retains the allegation that Adecco is jointly liable under PAGA for Google's confidentiality rules, but adds separate claims on behalf of Adecco employees statewide based on Adecco's own confidentiality rules. The new causes of action against Adecco fall into the same competition, whistleblowing, and free speech categories as the claims against Google in the third amended complaint. Plaintiffs also allege Adecco had an unlawful policy prohibiting temporary employees placed at Google from working directly for Google without Adecco's consent.

Adecco again demurred, and the trial court sustained the demurrer, this time without leave to amend. Plaintiffs then amended their *Doe* complaint a final time to add an illegal release claim against Adecco, a claim the parties subsequently settled.

Before Adecco filed its demurrer to the third amended complaint, it filed with the Judicial Council a petition to coordinate the action with *Moniz*. After plaintiffs filed their fourth amended complaint and shortly before Adecco demurred to it, the coordination judge continued proceedings on Adecco's petition until after the ruling on Adecco's forthcoming demurrer. Then, after the *Doe* court sustained Adecco's demurrer to the fourth amended complaint without leave to amend, the coordination judge denied the petition to coordinate, explaining that the sole

then-remaining cause of action in *Doe* (the illegal release claim) was not at issue in *Moniz*, the claims in *Moniz* covered more employees than the claim in *Doe*, and the *Moniz* litigation had advanced further.

Adecco filed a petition for writ of mandate in this court seeking review of the coordination judge's denial of its coordination petition. Plaintiffs likewise filed a petition for writ of mandate, seeking review of the *Doe* court's orders sustaining Google's and Adecco's demurrers. This court summarily denied Adecco's writ and denied plaintiffs' writ as untimely. (*Adecco USA, Inc. v. Superior Court for the City and County of San Francisco* (Feb. 6, 2018, A153470) [nonpub. opn.]; *Doe v. Superior Court for the City and County of San Francisco* (Mar. 29, 2018, A153726) [nonpub. opn.].)

The trial court in *Doe* entered final judgment, and plaintiffs timely appealed.

NLRB Files Then Settles Complaint Against Google

At the same time as Doe sent the PAGA notices anticipating this case, he also filed an unfair labor practice charge against Google with the National Labor Relations Board (NLRB or Board). Doe alleged Google's confidentiality rules violated section 8 of the NLRA by prohibiting employees from exercising their rights under section 7 of the Act, which entitles employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.) Doe alleged that Google violated section 8 by terminating him because he exercised his section 7 rights.

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On the same day that plaintiffs filed their third amended complaint in *Doe*, the regional director of the NLRB issued a complaint against Google based on Doe's unfair labor practice charge. However, the regional director's complaint did not include certain allegations from Doe's charge, including the allegation relating to Doe's termination, because the regional director determined Doe had been a supervisor and therefore was not protected by the NLRA. Doe appealed that decision, but the NLRB's general counsel denied the appeal.

After plaintiffs filed their opening brief in this court, the NLRB's regional director and Google reached an informal settlement on the NLRB's complaint.[3] As part of that settlement, Google agreed to post a notice for 60 days informing employees that they had the right "to discuss wages, hours, and working conditions with other employees, the press/media, and other third parties, and [Google] WILL NOT do anything to interfere with [employees'] exercise of those rights." The notice further stated that Google would "NOT prohibit [employees] from discussing or sharing information relating to [their] performance, salaries, benefits, discipline, training, or any other terms and conditions of [their] employment and" had rescinded any such limitations in its confidentiality rules. In exchange, the NLRB regional director would withdraw her complaint, but this would not prevent the courts or the Board from proceeding with other cases.

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3. We discuss the proceedings on the regional director's complaint that transpired after the trial court entered judgment because they are not in dispute and come to us by way of judicial notice. (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813 [180 Cal. Rptr. 628, 640 P.2d 764].)

Appendix B

DISCUSSION

I. The NLRA and *Garmon* Preemption

Plaintiffs contend the trial court erred in finding the NLRA preempts their confidentiality claims. We review this question de novo. (*Wal-Mart Stores, Inc. v. United Food & Commercial Workers Internat. Union* (2016) 4 Cal.App.5th 194, 201 [208 Cal. Rptr. 3d 542] (*Wal-Mart*).) Likewise, de novo review applies to a trial court's decision sustaining a demurrer. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43 [112 Cal. Rptr. 2d 677].) As we shall explain, we conclude that these causes of action fall within the local interest exception to preemption.

A. Legal Principles

Congress intended the NLRA to serve as a comprehensive law governing labor relations; accordingly, "the NLRB has exclusive jurisdiction over disputes involving unfair labor practices, and 'state jurisdiction must yield' when state action would regulate conduct governed by the NLRA. (*Garmon*, [*supra*, 359 U.S.] at pp. 244–245.)" (*Wal-Mart, supra*, 4 Cal.App.5th at pp. 200–201.) Because it is for the NLRB to determine, in the first instance, whether conduct is in fact governed by the NLRA, the Act's preemptive effect may extend beyond conduct that the NLRA directly governs to "activities which 'arguably' constitute unfair labor practices under the Act." (*Balog v. LRJV, Inc.* (1988) 204 Cal.App.3d 1295, 1303 [250 Cal. Rptr. 766] (*Balog*); see *Garmon*, at pp.

244–245.) Such conduct is "presumptively pre-empted." (*Belknap, Inc. v. Hale* (1983) 463 U.S. 491, 498 [77 L. Ed. 2d 798, 103 S. Ct. 3172] (*Belknap*).)

But *Garmon* preemption must not be applied in a "'literal, mechanical fashion'" (*Operating Engineers v. Jones* (1983) 460 U.S. 669, 676 [75 L. Ed. 2d 368, 103 S. Ct. 1453] (*Jones*)), and it is subject to exceptions where the activity in question is a "merely peripheral concern" of the NLRA, or where "the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (*Garmon, supra*, 359 U.S. at pp. 243–244.) Although framed as separate exceptions, these two factors are often analyzed together, as we will do here. (See, e.g., *Linn v. Plant Guard Workers* (1966) 383 U.S. 53, 61 [15 L. Ed. 2d 582, 86 S. Ct. 657] (*Linn*); *Balog, supra*, 204 Cal.App.3d at p. 1304.)

B. Federal and State Interests at Stake

Garmon preemption "has its greatest force when applied to state laws regulating the relations between employees, their union, and their employer." (*Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 193 [56 L. Ed. 2d 209, 98 S. Ct. 1745] (*Sears*).) However, "the general applicability of a state cause of action is not sufficient to exempt it from pre-emption." (*Farmer v. Carpenters* (1977) 430 U.S. 290, 300 [51 L. Ed. 2d 338, 97 S. Ct. 1056] (*Farmer*).) Rather, we conduct a "balanced inquiry" into the federal and state interests at stake and the potential

to interfere with the NLRB's jurisdiction. (*Ibid.*) With this in mind, we consider the interests at stake in this action.

The NLRA "was designed to 'eliminate the causes of certain substantial obstructions to the free flow of commerce … by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.'" (*Balog, supra*, 204 Cal.App.3d at p. 1301, quoting 29 U.S.C. § 151.) To this end, section 7 of the NLRA gives nonexempt employees the right to self-organize, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.) The NLRA also defines certain actions as unfair labor practices. (*Balog*, at p. 1302, citing 29 U.S.C. §§ 158, 160.) As pertinent here, section 8 of the NLRA declares it an "unfair labor practice for an employer … [¶] to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" section 7. (29 U.S.C. § 158.) The focus of these provisions is on workers joining together for *mutual* benefit.

By contrast here, plaintiffs seek to enforce Labor Code provisions that protect their activities as *individuals*. For example, one provision prohibits employers from preventing an employee "from disclosing the amount of his or her wages" (Lab. Code, § 232), a statute that was enacted at the urging of women's groups to protect employees sharing information necessary to the

enforcement of laws against sex discrimination. (See, e.g., Sen. Com. on Industrial Relations Staff Analysis of Assem. Bill No. 3193 (1983–1984 Reg. Sess.) as amended Mar. 21, 1984.) Another provision provides analogous protection for an employee disclosing "information about the employer's working conditions" (Lab. Code, § 232.5), manifesting California's public policy to "prohibit[] employer restrictions on, or punishment for, speech regarding conditions of employment" (*Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623, 633 [215 Cal. Rptr. 3d 395]). A third protects the rights of any employee to disclose information about a violation of state or federal law to someone with the power to address the problem—"to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct" the violation. (Lab. Code, § 1102.5.) A fourth provision protects employees who complain about underpayment of wages to the Labor Commissioner. (Lab. Code, § 98.6; see also Lab. Code, § 1102.5 [protecting right to disclose information to state agencies].) And a fifth protects an employee from retaliation for his or her "lawful conduct occurring during nonworking hours away from the employer's premises" (Lab. Code, § 96, subd. (k)), so employers do not seek to control nonwork aspects of their employees' lives. Plaintiffs allege that defendants' confidentiality policies violate these provisions of California law.

Plaintiffs also allege violations of section 16600 of the Business and Professions Code, which prohibits any contract that would improperly restrain an employee from securing new employment with a competitor. This

statute "evinces a settled legislative policy in favor of open competition and employee mobility" (*Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937, 946 [81 Cal. Rptr.3d 282, 189 P.3d 285]), a policy that has been seen as instrumental in the success of California's technology industry (see Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete* (1999) 74 N.Y.U.L. Rev. 575, 609 ["Silicon Valley's legal infrastructure, in the form of Business and Profession[s] Code section 16600's prohibition of covenants not to compete, provided a pole around which Silicon Valley's characteristic business culture and structure precipitated"]; see also Saxenian, Regional Advantage: Culture and Competition in Silicon Valley and Route 128 (1994) pp. 34–37).

Keeping these very different federal and state interests in mind, we now analyze *Garmon* preemption in this case.

C. Arguably Protected or Prohibited Activity

The first step of a *Garmon* analysis asks whether the conduct at issue is arguably protected or prohibited by the NLRA. (*Jones, supra*, 460 U.S. at p. 676.) The trial court concluded all of plaintiffs' confidentiality claims are presumptively preempted in their entirety because they involve policies against disclosure of wages and working conditions (in the case of the competition claims and some freedom of speech claims) or against disclosures intended to affect the terms or conditions of employment (in the case of the whistleblowing and some freedom of speech

claims). We do not doubt that some of the conduct at issue at least arguably falls within the NLRA. (See *Luke v. Collotype Labels USA, Inc.* (2008) 159 Cal.App.4th 1463, 1470 [72 Cal. Rptr. 3d 440] [discussions among workers about working conditions are protected activity under NLRA].) Indeed, the fact that the regional director brought a complaint challenging Google's confidentiality policies indicates that she so concluded.

However, plaintiffs also allege conduct that clearly falls outside the scope of the NLRA. For instance, plaintiffs' competition claims allege defendants' confidentiality rules inhibit an employee seeking new employment elsewhere and competing with defendants. They also allege Adecco prevents its employees from working with companies where Adecco has placed them, unless Adecco consents. These matters are, on their face, unrelated to "mutual aid or protection" (29 U.S.C. § 157) of fellow employees at Google or Adecco. Similarly, some of plaintiffs' whistleblowing causes of action allege defendants' confidentiality policies prevent them from discussing with the government legal violations unconnected to working conditions, such as an employer's violations of securities laws, false claims laws, the federal Foreign Corrupt Practices Act of 1977 (Pub.L No. 95-213 (Dec. 19, 1977) 91 Stat. 1494), and other laws unrelated to employees' terms and conditions of employment. The NLRB has authoritatively rejected the argument that whistleblowing about employer conduct unrelated to working conditions is protected activity, so the NLRA does not protect an employee reporting concerns about patient care in a nursing home. (*Orchard Park Health Care Center, Inc.* (2004) 341 NLRB 642, 645.)

But we need not belabor this point because, as we shall next discuss, regardless of whether the challenged policies reach employee conduct that the NLRA arguably protects or prohibits, plaintiffs' state law causes of action fall within the local interest exception to *Garmon* preemption.

D. The Local Interest Exception

The local interest exception vindicates interests "'deeply rooted in local feeling and responsibility.'" (*Sears, supra*, 436 U.S. at p. 195.) Two factors relevant to the application of this exception, in a case where an employer's policies are arguably prohibited by the NLRA, are: (1) whether there is "a significant state interest in protecting the citizen from the challenged conduct" and (2) whether "the exercise of state jurisdiction over the tort claim [for trespass] entailed little risk of interference with the regulatory jurisdiction of the Labor Board." (*Sears,* at pp. 196–197.)

The local interest exception has been applied in a range of circumstances. As explained in *Inter-Modal Rail Employees Assn. v. Burlington Northern & Santa Fe Ry. Co.* (1999) 73 Cal.App.4th 918 [87 Cal. Rptr. 2d 60] (*Inter-Modal*), "'the Supreme Court has declined to preempt a variety of state law claims even though they arose in a labor law context [involving, for example,] trespass by peaceful picking … intentional infliction of emotional distress … [and] defamation …'" (*Id.* at p. 925; see *Sears, supra*, 436 U.S. at p. 198 [trespass by picketing]; *Farmer, supra*, 430 U.S. at pp. 299–300 [intentional infliction of emotional distress]; *Linn, supra*, 383 U.S. at pp. 61–62

[defamation].) The local interest exception has also been applied to a cause of action challenging an employer's retaliation against employees for raising concerns about workplace safety (*Inter-Modal*, at pp. 922–923, 925, citing *Balog, supra*, 204 Cal.App.3d at p. 1304), and to controversies where the NLRB could not have provided relief to the plaintiffs because their injury was not relevant to its functions (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1815–1816 [52 Cal. Rptr. 2d 650] (*Clorox*) [service provider's contract negotiations with company took place against "backdrop" of union campaign]).

Defendants do not deny that plaintiffs' claims grow from deeply rooted local interests. This is no surprise, as plaintiffs bring this case under PAGA, which means plaintiffs are serving "'as the proxy or agent of the state's labor law enforcement agencies.'" (*Kim v. Reins Internat. California, Inc.* (2020) 9 Cal.5th 73, 81 [259 Cal. Rptr. 3d 769, 459 P.3d 1123] , italics omitted.) Courts have long recognized the importance of state labor regulation that "provides protections to individual union and nonunion workers alike, and thus 'neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA.'" (*Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 20–21 [96 L. Ed. 2d 1, 107 S. Ct. 2211].) "[P]re-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." (*Id.* at p. 21; accord, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 388 [173 Cal. Rptr. 3d 289, 327 P.3d 129] ["enactment and enforcement of laws concerning

wages, hours, and other terms of employment is within the state's historic police power"—powers that """courts should assume … are not superseded 'unless that was the clear and manifest purpose of Congress'"""].) The state statutes plaintiffs seek to enforce are all labor standards of this sort, statutes that preserve the freedom of all employees to practice their profession or trade (Bus. & Prof. Code, § 16600), to report wage-and-hour violations or unsafe working conditions to government agencies (Lab. Code, § 1102.5), and to speak as they choose about their work lives (Lab. Code, §§ 232, 232.5, 96, subd. (k)). In sum, these statutes establish as a minimum employment standard an employee antigag rule.

Not only are the interests protected by these statutes matters of traditional local concern, but they may reasonably be seen as peripheral to the NLRA. Nothing about the NLRA manifests a purpose to displace state labor laws regulating wages, hours, and other terms of employment, as the NLRA is "aimed at 'safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining.'" (*Epic Systems Corp. v. Lewis* (2018) 584 U.S. ___ [200 L. Ed. 2d 889, 138 S.Ct. 1612, 1630] (*Epic*); see also *Inter-Modal, supra*, 73 Cal.App.4th at p. 926 [focus of NLRA is "'an equitable bargaining process[;] … Congress did not intend to preempt all local regulations that touch or concern the employment relationship'" (italics omitted)].) It is thus well established that a state may set minimum employment standards without running afoul of the NLRA. (*Castillo v. Toll Bros., Inc.* (2011) 197 Cal.App.4th 1172, 1207 [130 Cal. Rptr. 3d 150] ["state wage-and-hour statutes … raise no

Garmon preemption concerns"].) The state laws plaintiffs assert here govern matters similarly far afield from the concerns underlying the NLRA.

Unable to refute the local interests at stake, defendants instead argue that because the NLRB issued a complaint at Doe's behest, to allow this case to proceed in state court would risk interfering with the jurisdiction of the NLRB. Were this a serious concern, it would render the local interest exception unavailable. (See *Sears, supra*, 436 U.S. at pp. 196–197; *Hillhaven Oakland Nursing etc. Center v. Health Care Workers Union* (1996) 41 Cal.App.4th 846, 855 [49 Cal. Rptr. 2d 11] (*Hillhaven*); *Rodriguez v. Yellow Cab Cooperative, Inc.* (1988) 206 Cal.App.3d 668, 678–679 [253 Cal. Rptr. 779].) But the NLRB has settled its claim with no admission of wrongdoing by Google and no findings of fact by the Board. Nothing the state court does at this juncture could interfere with the NLRB's exercise of its primary jurisdiction.

Asked about this point at oral argument, counsel for Google responded with two concerns: (1) that the state court could reach "a different finding on the merits," in that "the NLRB … issued a complaint and [Google] entered into a settlement on it, so there could be a different result in state court on liability," and (2) that state courts cannot impose "a different remedial scheme for NLRA violations," especially a scheme of punitive remedies as was found preempted in *Wisconsin Dept. of Industry v. Gould Inc.* (1986) 475 U.S. 282 [89 L. Ed. 2d 223, 106 S. Ct. 1057] (*Wisconsin Department of Industry*). Responding to these concerns in turn, neither is substantial.

First, it would be impossible for the state court to reach "a different result … on liability," since the NLRB settled its case without resolving liability issues. The settlement agreement between the Board and Google is informal and of limited scope. It requires Google to post for 60 days a notice informing its employees of their rights under "FEDERAL LAW," and if Google upholds its end of the bargain then the NLRB promises to take no further action in the case. The reference to federal law is a signal that the question on liability that underlay the NLRB case (i.e., whether defendants violated the NLRA) is completely different from the liability questions in this case (i.e., whether defendants violated California labor laws). Moreover, the agreement expressly "does not prevent … the Board and the courts from finding violations with respect to matters" occurring before the agreement was approved, or from "mak[ing] findings of fact and/or conclusions of law with respect to" evidence obtained in the case. With this provision, the Board itself has given courts license to proceed with claims addressing the same or similar facts. The terms of the agreement itself suggest that, whatever California courts would ultimately decide on plaintiffs' claims, the Board sees in plaintiffs' case no threat to its own jurisdiction.

As for Google's second concern—duplicative and punitive remedies for an NLRA violation—this argument founders at the outset because none of plaintiffs' claims requires proof of an NLRA violation. The difference between this case and *Wisconsin Department of Industry* illustrates the point. There, the state of Wisconsin had adopted a law debarring from state contracting any

company "found by judicially enforced orders of the National Labor Relations Board to have violated the NLRA" three times in five years. (*Wisconsin Dept. of Industry, supra*, 475 U.S. at pp. 283–284.) The NLRA preempts this statute "[b]ecause Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA." (*Wisconsin Dept. of Industry,* at p. 288.) By contrast, the California laws that plaintiffs seek to enforce make no reference to the NLRA, the NLRB, or the rights of workers to organize. They do not supplement sanctions for a violation of the NLRA, but instead extend unrelated protections to conduct that may, or may not, also be addressed by the NLRA. In such circumstances, the availability of a remedy in state court that is unavailable under the NLRA may be a reason *not* to find a case preempted. (*Linn, supra*, 383 U.S. at pp. 63–64; *Clorox, supra*, 44 Cal.App.4th at p. 1816.)

In sum, analyzing the two factors the United States Supreme Court has identified as dispositive—the significance of the local interest and the risk of interference with the jurisdiction of the Board—we see no basis for preemption here. (See *Sears, supra*, 436 U.S. at pp. 196–197; *Farmer, supra*, 430 U.S. at p. 300.) But the parties have argued, citing competing precedents and legal tests ostensibly derived from them, for alternative ways of analyzing the local interest exception, so we now turn to consider these alternatives.

1. Sears, Linn, *and the "Critical Inquiry"*

In *Sears*, after the Supreme Court set forth the two relevant factors we have just examined, it synthesized

them into a single "critical inquiry" for preemption of claims based on arguably prohibited conduct. That inquiry is "whether the controversy presented to the state court is identical to … or different from" a controversy that could have been presented to the NLRB. (*Sears, supra*, 436 U.S. at p. 197.) Answering that question in *Sears* meant an employer's state-court trespass case against a union was not preempted—even though the picketing in question might have been protected or prohibited by the NLRA—because the issues involved in the trespass case were "different from" the issues the NLRB would have considered in assessing the legality of the same picketing under federal law. (*Sears,* at pp. 197–198; see also *Wal-Mart, supra*, 4 Cal.App.5th 194 [same].) By contrast, a controversy "'identical to'" one that could have been presented to the NLRB was an attempt to enforce the Pennsylvania Labor Relations Act, whose relevant language was "'almost identical to'" language in the NLRA. (*Sears*, at pp. 192, 197, discussing *Garner v. Teamsters Union* (1953) 346 U.S. 485, 487–489, fns. 3 & 5 [98 L.Ed. 228, 74 S.Ct. 161] [employer's attempt to enforce Pennsylvania Labor Relations Act against peaceful union picketing is preempted].)

Sears's focus on whether the legal issue in the two controversies is the same or different also animates the Supreme Court's decision in *Linn*. There, the court held a state-court libel action was not preempted, explaining: "When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief." (*Linn, supra*, 383 U.S. at p. 66.)

Under the formulations of either of these cases, plaintiffs' claims are not preempted. The Board may "frown upon" an employer's confidentiality policy because it interferes with workers' rights to undertake concerted action, but California law disapproves such policies for a different reason: because they interfere with every employee's right to bring workplace issues to the attention of supervisors, state agencies, courts, and the public. (See *Linn, supra*, 383 U.S. at p. 66.) And, although there may be overlap in the operative facts, whether an employer's confidentiality policy constitutes an unfair labor practice under the NLRA is a "different" controversy from the question of whether it violates provisions of the state Labor Code. (See *Sears, supra*, 436 U.S. at p. 197.)

Highlighting that the controversy here is different from the controversy that was, or could have been, placed before the NLRB is the Board's decision in *Boeing Co.* (2017) 2017 NLRB Lexis 634 (*Boeing*), which elucidates how the NLRB would evaluate whether Google's confidentiality policies comply with the NLRA. In *Boeing*, the NLRB announces a new standard for determining whether an employer's adoption of a facially neutral workplace rule that potentially interferes with section 7 rights is an unfair labor practice. The Board concludes it must evaluate and weigh "(i) the nature and extent of the potential impact on NLRA rights," and (ii) an employer's "legitimate justifications associated with" business requirements. (*Boeing,* at pp. *60–*63.) This process could lead the NLRB to uphold confidentiality rules that risk inhibiting NLRA-protected activity, especially if that activity is peripheral, rather than central, to the NLRA's

concerns, or the risk of intruding on NLRA-protected rights is "'comparatively slight.'" (*Boeing,* at p. *66.) Not surprisingly, there is no suggestion that a *state's* interests underlying its own statutes will figure in this weighing process at all. The issues and concerns before the NLRB in deciding a challenge to defendants' confidentiality policies would be wholly different from the state law issues in this case, and by the same token the issues the state court must adjudicate in this case will require no consideration of the section 7 rights that animate the NLRB. Thus, under the "critical inquiry" enunciated in *Sears* (*Sears, supra*, 436 U.S. at p. 197), plaintiffs' claims are not preempted.

2. Jones *and the "Crucial Element"*

Although Google acknowledges *Sears* and *Linn* remain good law, it urges us to focus instead on a subsequent Supreme Court case in which preemption was found, *Jones, supra*, 460 U.S. 669. In that case, Jones filed an NLRB charge against a union representing employees at his former company, where he had been hired as a supervisor but then quickly let go. Jones alleged that because he was not a member of the union, the union "'procured' his discharge, 'and thereby coerced [the Company] in the selection of its supervisors and bargaining representative,'" an unfair labor practice under the NLRA. (*Jones,* at p. 672.) The regional director refused to issue a complaint, concluding "there was insufficient evidence to establish that the Union had caused Jones' discharge"; the union had "merely participated in discussions" about "changes in the Company's supervisory structure." (*Id.* at pp. 672–673.) Rather than appealing this decision to

the general counsel of the NLRB, Jones filed a state-court action alleging the union had interfered with his employment contract. (*Id.* at p. 673.)

The high court held this action was preempted for several reasons, including that Jones was seeking to prove the union coerced his discharge, a claim that was "concededly pre-empted" as an unfair labor practice (*Jones, supra*, 460 U.S. at pp. 681–682); that asking the state court to police the line between a coerced or uncoerced discharge would have required the court to adjudicate issues of federal labor law (*id.* at p. 682); and that if Jones attempted to prove noncoercive interference with his employment there would be two further problems. He would still need to prove the union had caused his ouster—a "crucial element" of the NLRA claim that the regional director had already decided against Jones—and he would be seeking to impose liability for union conduct that the NLRA arguably protects. (*Jones,* at pp. 682–684.)

Relying on *Jones*, defendants argue the local interest exception does not apply in this case because the dispute in this case and a dispute properly before the Board share a "crucial element," namely, whether defendants' policies actually restrict employees from discussing wages and working conditions. But we do not read *Jones* to create a rule that if the state law controversy shares a factual element—"crucial" or otherwise—with a matter properly before the NLRB, then the case is necessarily preempted. Such a rule would eviscerate the local interest and peripheral concern exceptions, since a court only considers these exceptions if some common set of facts gives rise to

both the state law claims and a dispute arguably within the purview of the NLRB, as with the picketing activity in *Sears*.

The *Jones* court does not announce any such revision of settled law. Instead, *Jones* recognizes the continuing force of *Sears* and seeks to distinguish it on the ground that the focus of the unfair labor practice charge in *Sears* was unrelated to that of the trespass action challenging the same picketing activity. (*Jones, supra*, 460 U.S. at pp. 682–683.) Although *Jones* does use the phrase "crucial element" in explaining one of several reasons that together explain the court's preemption finding, the court does not hold the phrase out as any sort of dispositive test, nor attempt to explain how a court would decipher when an "element" is "crucial." (*Id.* at p. 682.) Instead, *Jones* follows *Sears* and *Farmer* in directing courts to undertake "a sensitive balancing" of potential harms to the Congressional scheme for regulating labor-management relations and to a state's power to protect its citizens. (*Jones*, at p. 676.)

Even if we were to attempt application of a "crucial element" test here, we disagree that the "crucial element" in this case is whether defendants' policies restrict employees from discussing their wages and working conditions. This factual question about the scope of the employers' policies may be an area of overlap between this case and a dispute properly before the Board, but the question is antecedent to those questions that bring to bear legal considerations that differ for the two disputes. The crucial elements for the state law confidentiality

claims are whether defendants' policies infringe on an employee's right to practice a profession or trade, disclose wrongdoing, and exercise free speech as protected by California law. The crucial elements in the Board's determination of whether the confidentiality policies are an unfair labor practice are the extent to which the policies interfere with NLRA-protected activity, how central any such protected activity is to the organizing and bargaining activities that are the NLRA's core concerns, and whether the employer's business justifications offset any interference with NLRA rights. (*Boeing, supra*, 2017 NLRB Lexis 634, at pp. *60–*63, *66; 29 U.S.C. § 151.) These elements are not common to the two disputes.

Our case is different from *Jones* in other respects as well. First and foremost, there is in our case no issue of federal labor law that the state court would be required to adjudicate. (Cf. *Jones, supra*, 460 U.S. at p. 682.) California courts can and should decide whether Google and Adecco violated California law without considering whether, in so doing, they also committed unfair labor practices under the Act. Second, the regional director has made no factual determination that is fatal to plaintiffs' claims, as occurred in *Jones*. (*Id.* at p. 682.) Thus, plaintiffs can proceed in state court without ever taking a position inconsistent with one already adopted by the Board or its regional director. Third, neither Google nor Adecco argues that its policies are *protected* by federal labor law, as the union's conduct in *Jones* arguably was. (*Id.* at pp. 672–673.) This factor is important because federal supremacy is "implicated to a greater extent when labor-related activity is protected than when it is prohibited." (*Sears, supra*,

436 U.S. at p. 200; see also *Belknap, supra*, 463 U.S. at pp. 498–499 [courts must balance state's interest against interference with NLRB's jurisdiction and risk that the state will sanction conduct the NLRA protects].) Finally, in this case there is no union. The absence of a union is significant, for the argument in favor of preemption "has its greatest force when applied to state laws regulating the relations between employees, their union, and their employer." (*Sears, supra*, 436 U.S. at p. 193; see also *Epic, supra*, 138 S.Ct. at p. 1630 [NLRA "'safeguard[s] first and foremost, workers' rights to join unions and to engage in collective bargaining'"].)

Because our case differs from *Jones* in all of these substantial ways and because even *Jones* did not offer "crucial element" as a dispositive test,[4] we decline

4. The concurring and dissenting opinion accuses us of "ignor[ing] *Jones*'s reasoning" and "the analytical path the Supreme Court has set forth for the local interest exception." (Conc. & dis. opn., *post*, at pp. 974, 980.) But there is nothing "novel" about our analyzing "competing interests." (Conc. & dis. opn., *post*, at p. 975 .) The Supreme Court *requires* that we conduct a "balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation" (*Farmer, supra*, 430 U.S. at p. 300), give "careful consideration [to] the relative impact … on the various interests affected" (*Sears, supra*, 436 U.S. at p. 188), and, in the language of *Jones*, engage in "a sensitive balancing" of harm to the NLRA's regulatory scheme and to the state's interest in protecting its citizens. (*Jones, supra*, 460 U.S. at p. 676). While in *Sears* the Supreme Court distilled this balancing of competing interests into a single "critical inquiry" (*Sears*, at p. 197), the concurring and dissenting opinion dismisses that analytical approach as "of only academic interest" based on a comment made *in dissent* in *Jones*. (Conc. & dis. opn., *post*, at p. 978.)

defendants' invitation to defeat the local interest exemption on this basis.

3. Hillhaven *and Bright-line Rules*

Google also argues that *Hillhaven, supra*, 41 Cal. App.4th 846, is "the dispositive precedent" defeating the local interest exemption in this case. In *Hillhaven*, another division of our court held that the NLRA preempted state-court action against a union alleged to have overrun a nursing home, disrupting patient care and intimidating workers. (*Hillhaven,* at pp. 850, 862.) The union was "the certified bargaining representative of employees at Hillhaven," and was in the midst of negotiating a new collective bargaining agreement at the time. (*Id.* at pp. 849–850.) In finding preemption, the *Hillhaven* court relied on common factual issues between the state-court suit and a complaint already settled before the NLRB and also, more importantly, two factors with no parallel in the case before us that go to the heart of the NLRB's authority. First was the likelihood "that resolution of some of the state court claims would require … interpretation of the collective bargaining agreement between the parties." (*Id.* at pp. 860–861 [e.g., "number of union representatives allowed to enter the facility, and where those representatives were permitted access" likely turned on interpretation of collective bargaining agreement].) Second was the "real possibility of conflict" between the injunctive relief Hillhaven sought in state

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But no dissenting opinion has the power to overrule precedent, and we have shown that plaintiffs' claims clear the "identical controversy" hurdle *Sears* sets forth. (*Sears, supra*, 436 U.S. at p. 197.)

court and "NLRB rulings on issues such as union access to employees at their place of work." (*Id.* at p. 861.) Obviously, our case involves no collective bargaining agreement, no union, and no risk that the state court will punish or prohibit conduct that NLRB rulings protect.

Defendants extract from the facts of *Hillhaven* a bright-line rule they would have us apply, that where the regional director has filed a complaint addressing conduct that is also the subject of a state-court action, the state-court action is preempted. We think defendants make too much of an observation in *Hillhaven* that the court was unaware of any decision failing to find preemption once the regional director had issued a complaint. (*Hillhaven, supra*, 41 Cal.App.4th at p. 859.) *Hillhaven* itself acknowledges that "simultaneous jurisdiction of the NLRB and state court is possible for conduct arguably prohibited under the" NLRA (*Hillhaven*, at p. 859, italics omitted), and other courts have indeed adjudicated controversies after the NLRB issued and settled a related complaint (see, e.g., *Belknap, supra*, 463 U.S. at 496, 508–509; *United Food & Commercial Workers Internat. Union v. Wal-Mart Stores, Inc.* (2017) 453 Md. 482, 490–491, 508–511 [162 A.3d 909]).

Where the local interest is strong, even the possibility of findings that conflict with an NLRB complaint need not be fatal. In *Linn*, the regional director of the NLRB declined to file a complaint against a union because factual investigation led him to conclude "the union was not responsible for" the offending conduct—there, the distribution of the allegedly libelous leaflets. (*Linn,*

supra, 383 U.S. at p. 57.) Yet, the Supreme Court allowed Linn's libel case against the union to proceed based on the peripheral concern and local interest exceptions, untroubled that the factual issue of the union's responsibility for the leaflets might be decided differently in the state-court case. (*Id.* at pp. 61–62, 67.) Although *Linn* does not, as plaintiffs suggest, create an opposite bright-line rule—that state-court actions may *always* proceed in parallel to NLRB proceedings when an employer's conduct violates both the NLRA and state law—its reasoning does establish that with a strong local interest and a peripheral NLRA concern, the possibility of conflicting findings does not foreclose a state-court action.

4. *Conclusion*

The first step of a *Garmon* preemption analysis sweeps broadly, presumptively preempting conduct that may, in the end, be of only peripheral concern to (or even lie outside the scope of) the NLRA. The local interest exception is vital to protecting workers in such cases. And even where certain aspects of a dispute do, or could, attract the enforcement efforts of the NLRB, "defendants should not be able to escape the jurisdiction of California courts simply because, in addition to allegedly undertaking violations of health and safety regulations which are of compelling local importance and interest, they had the good fortune to also undertake the commission of NLRB-defined unfair labor practices." (*Balog, supra*, 204 Cal. App.3d at p. 1308 [plaintiff may proceed with wrongful termination claim to extent it is based on theories not preempted by NLRA].)

The complaint in this case makes no mention of union organizing or other concerted activity, and it alleges violations of state law that can be proven without considering whether defendants' actions *also* amounted to unfair labor practices under the NLRA.[5] Because the asserted statutes protecting competition, whistleblowing, and free speech fit comfortably within our state's historic police powers and address conduct affecting individual employees, as distinct from the NLRA's focus on concerted activity, and because this state-court action poses no threat to the NLRA's exercise of its own jurisdiction, our courts retain the power to decide these claims.

II. Denial of the Petition To Coordinate

In addition to challenging the trial court's demurrer rulings, plaintiffs argue the coordination judge should not have continued the hearing on Adecco's coordination petition and then denied Adecco's petition to coordinate petitioners' case with *Moniz*. Defendants argue that we may not review the substance of the order on the coordination petition because such orders are reviewable only via writ petition. We agree with defendants that the coordination order is not properly before us.

We begin by examining the procedures for coordination. When an individual wants to coordinate two or more

5. We disagree with the concurring and dissenting opinion that our decision will require California courts to decide issues of federal labor law—specifically, whether plaintiffs' evidence involves concerted activity. (Conc. & dis. opn., *post*, at p. 981.) That question is immaterial to the state law causes of action plaintiffs allege, and we see no reason to litigate it here.

actions pending in different courts, he or she must submit a petition to the Chairperson of the Judicial Council. (Code Civ. Proc., § 404; remaining statutory references are to the Code of Civil Procedure.) The chairperson assigns the petition "a special title and coordination proceeding number." (Cal. Rules of Court, rule 3.550(c).) The chairperson then assigns (or authorizes a presiding judge to assign) a coordination judge to decide whether coordination is appropriate. (§ 404.) If the coordination judge decides coordination is appropriate, he or she selects an appellate court to review decisions from the coordinated proceeding. (§ 404.2.) The chairperson of the Judicial Council then assigns (or authorizes a presiding judge to assign) a judge to hear the coordinated actions. (§ 404.3.) After service of notice of entry of an order relating to coordination, "any party may petition the appropriate reviewing court for a writ of mandate to require the court to make such order as the reviewing court finds appropriate." (§ 404.6.)

This framework demonstrates that coordination petitions are not necessarily decided under the jurisdiction of any one of the courts in which the actions potentially subject to coordination are pending. Rather, the coordination proceeding is its own type of special proceeding, with a separate caption and number. (Cal. Rules of Court, rule 3.550(c).) When the coordination judge grants or denies a petition for coordination, that order is not filed in the trial court on its own; the party that requested coordination must file it in all included actions. (Cal. Rules of Court, rule 3.529(a).) As a result, a coordination order is not part of the bundle of orders

reviewable via appeal from final judgment in any one of the actions for which coordination was sought.

The fact that the judge presiding over the *Doe* action was also assigned to decide the coordination motion here changes nothing. Were the coordination order reviewable after final judgment, as plaintiffs contend, it would be subject to multiple appeals after final judgment in each of the included actions, with the unacceptable potential for inconsistent rulings. Alternatively, if the coordination order were reviewable after final judgment in the included action only if that action is pending in the coordination judge's own court (even though no statute or rule requires the coordination judge to be one of the judges hearing an included action), then the parties in that action alone would be able to appeal the order after final judgment. The parties in the other actions for which coordination was sought would be relegated to the writ review procedure in section 404.6, an unequal and unjust result. Consequently, although plaintiffs are correct that section 404.6 does not explicitly say so, we hold that section 404.6 is the exclusive method for appellate review of coordination orders. (Cf. *Lautrup, Inc. v. Trans-West Discount Corp.* (1976) 64 Cal.App.3d 316, 317–318 [134 Cal. Rptr. 348] [coordination orders are not separately appealable orders under § 904.1; appellate review of such orders is via writ of mandate under § 404.6].)

Plaintiffs having failed timely to file a petition seeking writ relief from the trial court's decision not to coordinate this matter with *Moniz*, they may not take a second bite at the coordination apple on their appeal from the trial court's orders on demurrer.

Appendix B

DISPOSITION

The judgment is reversed, as are the orders sustaining defendants' demurrers without leave to amend. We dismiss as untimely the appeal from the order denying coordination with *Moniz*, and remand the case for further proceedings consistent with this opinion. Plaintiffs are entitled to their costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(3).)

_____
TUCHER, J.

I CONCUR:

_____
POLLAK, P.J.

Appendix B

POLLAK, P. J.—

I concur in the lead opinion. I would add that the line between those state law claims that, while based on conduct arguably protected or prohibited by the National Labor Relations Act (NLRA; 29 U.S.C. § 151 et seq.), are nonetheless exempted from preemption, and those that are preempted, is clarified by the fundamental distinction between such cases as *Linn v. Plant Guard Workers* (1966) 383 U.S. 53, 61 [15 L. Ed. 2d 582, 86 S. Ct. 657] (*Linn*) and *Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 193 [56 L.Ed.2d 209, 98 S. Ct. 1745] (*Sears*) on one hand, and *Operating Engineers v. Jones* (1983) 460 U.S. 669 [75 L. Ed. 2d 368, 103 S. Ct. 1453] (*Jones*) on the other. For the plaintiff in *Jones*, to prove his state law claim he would have to prove the very fact that would necessarily constitute a violation of federal law, namely, that the union coerced the employer to breach its employment contract with him. [1] The National Labor Relations Board (NLRB) and the state court might have reached different conclusions on that common issue, hence the conflict, and preemption.

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1. Although the plaintiff argued that he also asserted a claim for uncoerced interference, which would not violate the NLRA, unlike Justice Brown (Conc. & dis. opn., *post*, at pp. 978–979), I read the court to have treated his claims as the same, asserting "Even on Jones' view of the elements of his state law cause of action, the federal and state claims are thus the same in a fundamental respect." (*Jones, supra*, 460 U.S. at p. 682.) This conflation was questioned by the dissenting opinion (*id.* at p. 688 (dis. opn. of Rehnquist, J.)), but nevertheless the majority opinion treated both claims as requiring a determination of whether the defendant had committed acts that constituted an unfair labor practice.

Appendix B

In *Linn* and *Sears*, it was not necessary to prove a violation of federal law in order to prove the alleged violation of state law. Although the state court claims were based on alleged facts common to potential violations of the NLRA—defamation by union officers in *Linn*, and trespass while picketing in *Sears*—it was not necessary to prove the elements of an unfair labor practice in order to prove the defamation or the trespass.

The case before us is comparable to the situation in *Linn* and *Sears*, rather than the situation in *Jones*. To prove that defendants' nondisclosure policies violate the various provisions of California law on which the complaint is based, it will not be necessary to prove any facts that would constitute an unfair labor practice. Plaintiffs' claims threaten neither duplication nor conflict with any claims within the jurisdiction of the NLRB, nor any interference with the enforcement of the NLRA.

POLLAK, P.J.

Appendix B

BROWN, J., Concurring and Dissenting.

Plaintiff John Doe filed an unfair labor practice charge against Google, Inc., and Alphabet, Inc. (collectively, Google), with the National Labor Relations Board (NLRB or Board), alleging Google's confidentiality policies violated the National Labor Relations Act (29 U.S.C. § 151 et seq.; NLRA or Act). The regional director of the NLRB issued a complaint against Google based on that charge. In a settlement of that complaint, Google agreed to withdraw the portions of its confidentiality policies on which the regional director based her complaint. Based on the same confidentiality policies, Doe, joined by David Gudeman and Paola Correa, nevertheless continues to pursue claims under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.; PAGA), seeking to add significant monetary penalties beyond what the NLRB required of Google. In these circumstances, I conclude that some of plaintiffs' claims pose a substantial risk of interference with the NLRB's jurisdiction. I therefore dissent from the majority opinion's holding that none of plaintiffs' claims are preempted under *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 244–245 [3 L. Ed. 2d 775, 79 S. Ct. 773] (*Garmon*). Based on how the Supreme Court applied *Garmon* preemption in *Operating Engineers v. Jones* (1983) 460 U.S. 669, 676 [75 L. Ed. 2d 368, 103 S. Ct. 1453] (*Jones*), I would instead hold that while many of the theories of liability in plaintiffs' pleadings survive, some theories are preempted.[1]

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1. I join in full the majority opinion's holding that the coordination order is not properly before us.

Appendix B

I. Majority opinion's interests analysis

As the majority opinion states, under the first stage of *Garmon* analysis "there is a presumption of preemption" for state law claims regulating any conduct even arguably covered by the Act. (*Wal-Mart Stores, Inc. v. United Food & Commercial Workers Internat. Union* (2016) 4 Cal. App.5th 194, 202 [208 Cal. Rptr. 3d 542], citing *Belknap, Inc. v. Hale* (1983) 463 U.S. 491, 498 [77 L. Ed. 2d 798, 103 S. Ct. 3172].) A claim can only overcome this presumption if, at the second *Garmon* stage, a court determines "the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act." (*Jones, supra*, 460 U.S. at p. 676.)

I generally agree with the majority opinion's analysis of the first *Garmon* stage. The allegations concerning competition that support plaintiffs' restraint of trade claims are incompatible with the possibility that employees were working together for mutual aid or protection. As these allegations do not even arguably trigger coverage of the Act, I agree that they are not preempted. (*Longshoremen v. Davis* (1986) 476 U.S. 380, 395 [90 L. Ed. 2d 389, 106 S. Ct. 1904] [no preemption where argument for NLRA coverage is "plainly contrary to its language"].) The same rationale extends to plaintiffs' free speech claims. They are not preempted to the extent they allege defendants' policies prevent employees from doing things like writing novels based on experiences at Google, because the Act

does not even arguably reach such conduct. Likewise, plaintiffs' whistleblowing claims based on allegations that defendants' policies prevent employees from raising violations of laws unconnected with working conditions, such as securities laws or the federal Foreign Corrupt Practices Act of 1977 (15 U.S.C. § 78dd-1 et seq.), are not preempted because the Board has definitively ruled that the Act does not protect such activity. (*Davis*, at p. 395 [no preemption where Board has "'authoritatively rejected'" prospect of NLRA coverage of conduct].)

However, as the majority opinion recognizes, other allegations in plaintiffs' pleadings do involve conduct arguably covered by the Act. The allegations in plaintiffs' whistleblowing and free speech claims concerning the disclosure of wages and working conditions intrude into territory the NLRA arguably—indeed, unquestionably—covers. These allegations implicate a long line of Board authority stating that the NLRA prohibits employers from interfering with employees' discussions of wages and working conditions among themselves or with third parties, or whistleblowing about violations of law related to their wages and working conditions. (See, e.g., *Parexel International, LLC* (2011) 356 NLRB 516, 518 ["wage discussions among employees are considered to be at the core of Section 7 rights because wages, 'probably the most critical element in employment,' are 'the grist on which concerted activity feeds'"]; *Victory Casino Cruises II* (Apr. 22, 2016) 363 NLRB No. 167 [2016 NLRB Lexis 300 at p. *11] ["employees have a Section 7 right to discuss their conditions of employment with third parties, such as union representatives, Board agents, and the public in

general, and the Board has invalidated rules prohibiting such third-party communication"]; *Trinity Protection Services, Inc.* (2011) 357 NLRB 1382, 1383 ["employees' concerted communications regarding matters affecting their employment with their employer's customers or with other third parties, such as governmental agencies, are protected by Section 7 and, with some exceptions not applicable here, cannot lawfully be banned"]; see also *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 566 [57 L. Ed. 2d 428, 98 S. Ct. 2505] [Board has held the Act "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums"].)

My disagreement with the majority opinion arises at the second stage of the *Garmon* preemption analysis, concerning the question of whether the local interest exception saves these aspects of plaintiffs' claims. To begin with, I disagree with the majority opinion's analytical approach. The majority opinion first determines that the state interests here are deeply rooted and that those interests are at the periphery of the Act. (Maj. opn. *ante*, at pp. 957–958, 960–961.) Only then does it go on to examine whether the tests "ostensibly derived from" the Supreme Court's most recent applicable *Garmon* precedents lead to the outcome the majority opinion has already reached. (Maj. opn. *ante*, at p. 963.)

The local interest exception analysis is designed to balance competing state and federal interests (see maj. opn. *ante*, at p. 967, fn. 4). But the high court has devised and applied a test focused on the degree of overlap

between the state and federal laws to guide that analysis, rather than trying to assess the relative importance of the interests freehand (and beforehand), as the majority does. (*Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 197 [56 L. Ed. 2d 209, 98 S. Ct. 1745] (*Sears*).) This test is not "ostensibly derived" from precedent. (Maj. opn. *ante*, at p. 963.) It *is* precedent. (*Seminole Tribe of Fla. v. Florida* (1996) 517 U.S. 44, 67 [134 L. Ed. 2d 252, 116 S. Ct. 1114] ["When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound"]; see *Ramos v. Louisiana* (2020) 590 U.S. ___, fns. 84, 85 [206 L. Ed. 2d 583, 140 S.Ct. 1390, 1416, fns. 84, 85] (conc. opn. of Kavanaugh, J.)] ["[T]he state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court." "In the American system of *stare decisis*, the result and the reasoning each independently have precedential force, and courts are therefore bound to follow both the result and the reasoning of a prior decision"].) We are therefore obligated to follow the analytical path the Supreme Court has set forth for the local interest exception rather than fashioning our own test. Moreover, the majority opinion's approach of trying to divine the applicability of the local interest exception by first ranking the significance of the state's interests or categorizing them as lying at the core or periphery of the NLRA will likely lead to unpredictability, as the approach lacks concrete criteria or analytical guideposts and for that reason ends up being entirely subjective.

Not only am I skeptical of the order in which the majority proceeds with its analysis of the competing

state and federal interests, I am unconvinced by the substance of the majority opinion's reasoning in its own right. The majority opinion concludes that the statutes underlying plaintiffs' PAGA claims involve deeply rooted local interests because they involve substantive labor regulation. The state's desire to regulate employees' speech vis à vis their employers may be good public policy, but it is substantially different on its face from the state interests the Supreme Court has so far recognized as supporting the exception, which have included addressing violence, threats of violence, libel, infliction of emotional distress, trespass, obstruction of access to property, and breach of contract actions by laid-off replacement employees. (*Hillhaven Oakland Nursing etc. Center v. Health Care Workers Union* (1996) 41 Cal.App.4th 846, 854 [49 Cal. Rptr. 2d 11].) In my view, these sorts of claims—which involve classic areas of state common law—are qualitatively different from the purely economic regulation underlying the Labor Code statutes at issue here. The majority's citations to *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 20–21 [96 L. Ed. 2d 1, 107 S. Ct. 2211], and *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 388 [173 Cal. Rptr. 3d 289, 327 P.3d 129], to support its contrary view are unpersuasive. The former concerned an entirely different form of NLRA preemption arising under *Machinists v. Wisconsin Emp. Rel. Comm'n* (1976) 427 U.S. 132, 140 [49 L. Ed. 2d 396, 96 S. Ct. 2548]. (*Fort Halifax*, at pp. 19–20.) In the latter, as the trial court recognized, the California Supreme Court held only that PAGA claims are a form of qui tam action that may proceed despite any covered employees' agreement to arbitrate. Neither case demonstrates that

the United States Supreme Court would view the Labor Code provisions here as implicating interests similar to the state's desire to prevent violence or protect property from trespass.

More importantly, the state's interest in establishing minimum labor standards is irrelevant because the Labor Code provisions about which I disagree with the majority opinion are not minimum labor standards and cannot be said to lie at the periphery of the NLRA. The majority opinion summarizes the relevant statutes as "establish[ing] as a minimum employment standard an employee anti-gag rule" and states that "[n]othing about the NLRA manifests a purpose to displace state labor laws regulating wages, hours, and other terms of employment." I would have no difficulty holding that the NLRA does not preempt California's substantive labor standards, such as minimum wage, overtime, or antidiscrimination laws. But the Labor Code provisions on which plaintiffs base their claims are not this sort of law. As the majority opinion's description of plaintiffs' claims demonstrates, the statutes at issue regulate the types of information employees can share with each other and third parties as a means to an end: to allow employees to take action to improve their wages and working conditions. (See maj. opn. *ante*, at pp. 958–959 [noting, e.g., plaintiffs' allegations relating to Labor Code provisions that are intended to protect employees who share information in order to address employer sex discrimination and underpayment of wages].) This distinction matters. The statutes' regulation of the *process* by which employees improve their working conditions (i.e., by sharing information relating to their

wages and working conditions), rather than the *substance* of those working conditions, places plaintiffs' PAGA claims within the territory at least arguably covered by the Act.

II. *Sears* and the identical controversy test

Besides disagreeing with the majority opinion's choice to first engage in a novel analysis of the competing interests before applying the Supreme Court's test for the local interest exception, I am also not convinced that it has accurately stated or applied that test. The Supreme Court announced in *Sears* that the "critical inquiry" for the local interest exception concerning conduct arguably prohibited by the Act is whether the controversy in a state court action is "identical to … or different from" the controversy that could be submitted to the Board. (*Sears, supra*, 436 U.S. at p. 197.) The majority opinion finds the controversies in the regional director's suit and plaintiff's claims different because the laws underlying each have different purposes. (Maj. opn. *ante*, at p. 964.) This distinction is immaterial. The majority cites no apposite authority for the notion that a state law with a purpose different from the NLRA will escape preemption. *Linn v. Plant Guard Workers* (1966) 383 U.S. 53 [15 L. Ed. 2d 582, 86 S. Ct. 657] (*Linn*) stated only that when state libel law prohibits conduct and offers different remedies for different reasons than the NLRA, then parties can be expected to pursue both forms of relief, rather than choosing to pursue relief only in state court. (*Linn,* at p. 66.)[2] *Linn*'s discussion of the different purposes for the two

2. Relying on *Linn*, the majority opinion elsewhere observes that the availability of a remedy in state court that is unavailable

laws is also inapposite because, among other things, there the Board had *already authoritatively rejected* the idea that defamatory statements were covered by the NLRA. (*Linn, supra*, 383 U.S. at pp. 60–61.) This is not the case here, where the regional director has evidently concluded that the Act does cover defendants' policies' restrictions on discussion of wages and working conditions. Google's settlement of the NLRB complaint and rescission of the aspects of the policies at issue further suggest the regional director has at least an arguable case.

Even if the purposes of the laws at issue were relevant, I would conclude the NLRA and the Labor Code statutes supporting plaintiffs' whistleblowing and free speech claims based on allegations concerning wages and working conditions involve the same fundamental controversy. The NLRB regional director's complaint concerns whether Google's confidentiality policies prevented employees from discussing their wages and working conditions with each other or third parties for their mutual aid or protection. The allegations in plaintiffs' PAGA claims that involve conduct arguably covered by the NLRA concern whether defendants' policies prevented employees from discussing

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under the NLRA may be a reason not to find a case preempted. (Maj. opn. *ante*, at pp. 963–964.) But *Linn*'s point was merely that the inability of an NLRA claim to address a particular type of harm "vitiate[d]" the need for preemption. (*Linn, supra*, 383 U.S. at pp. 63–64.) This point has no application here, as the harm plaintiffs seek to remedy with the threat of PAGA penalties is the existence of excessively restrictive confidentiality policies, and the regional director's complaint has already led Google to withdraw the offending policies.

wages and working conditions or blowing the whistle on workplace misconduct in order to improve employees' welfare. For example, several of plaintiffs' causes of action allege defendants' policies unlawfully prevented employees from disclosing defendants' failures to pay overtime and other wage and hour violations. The goal of employees' concerted activity for mutual aid and protection under the NLRA is the same improvement of employee welfare that underlies plaintiffs' PAGA claims based on allegations concerning wages and working conditions.

The majority opinion concludes that "whether an employer's confidentiality policy constitutes an unfair labor practice under the NLRA is a 'different' controversy from the question of whether it violates provisions of the state Labor Code." (Maj. opn. *ante*, at p. 964.) This is tautological: the majority concludes the controversies in plaintiffs' state suit and the regional director's NLRA complaint are different because the question of whether defendants' policy violates state law is different from whether they violate the NLRA. To shore up the tautology, the majority opinion notes that to determine whether a confidentiality policy violates the NLRA, the Board engages in a balancing test that does not take into account a state's interests. (See *The Boeing Co.* (Dec. 14, 2017) 365 NLRB No. 154.) But the *Boeing* balancing test is not a preemption test, so there is no reason for it to consider states' interests. That aside, it is irrelevant that plaintiffs do not need to prove a violation of the NLRA in order to prevail on their PAGA claims or that the Board does not consider state interests. As the trial court here recognized, if a complete overlap of elements were a

prerequisite under *Garmon*, then any state law claim with even a single different element from an NLRA unfair labor practice charge would avoid preemption. The Supreme Court has never taken this sort of formulaic approach to *Garmon* preemption—an approach that would make preemption easily avoidable by all but the most inept of complaint-drafters.

In my view, the breadth of the majority's conclusion underscores the lack of soundness in its reasoning. The structure of *Garmon* preemption sweeps broadly by presumptively preempting any claims based on conduct even arguably covered by the Act. (*Jones, supra*, 460 U.S. at p. 676.) It then excepts certain limited categories of state law claims that will be allowed to proceed. (*Ibid.*) This expansive approach "not only mandates the substantive pre-emption by the federal labor law in the areas to which it applies, but also protects the exclusive jurisdiction of the [NLRB] over matters arguably within the reach of the Act." (*Id.* at p. 680.) By contrast, the majority opinion would allow virtually any state law claim to proceed, regardless of its effects on the Board's jurisdiction, so long as it does not refer to the NLRA by name or duplicate its elements. This flips the *Garmon* framework on its head, transforming it from a doctrine that sweeps widely with a carefully considered exception into a doctrine that allows everything to proceed except for a few, narrowly targeted areas of preemption where a state claim includes all the elements of an NLRA claim. By defining the local interest exception so broadly, the majority opinion allows it to swallow the intentionally wide rule of *Garmon* preemption and defeat its purpose.

III. *Jones* and the crucial element test

In any event, the application of the identical controversy test here is ultimately of only academic interest. Five years after *Sears*, the Supreme Court in *Jones* restated the local interest exception test in what "amount[ed] to a substantial reformulation of the *Sears* requirement that state and federal controversies be identical." (*Jones, supra*, 460 U.S. at p. 688 (dis. opn. of Rehnquist, J.).) Because the facts of *Jones* are the most closely analogous to this case and it is the most recent Supreme Court precedent, it is worth examining *Jones* in detail.

The plaintiff in *Jones* believed that a union had persuaded a company to fire him from his position as a supervisor. (*Jones, supra*, 460 U.S. at p. 672.) The plaintiff filed an unfair labor practice charge with the NLRB, but the NLRB regional director refused to issue a complaint. (*Id.* at p. 672.) The regional director explained in a letter to the plaintiff that the director found insufficient evidence that the union had caused the company to discharge the plaintiff. (*Id.* at pp. 672–673.) The plaintiff then filed a state court suit, alleging the union interfered with his contract with the company. (*Id.* at pp. 673–674.) Before the Supreme Court, the plaintiff argued in part that his state suit was not preempted because his state cause of action was "distinct" from the unfair labor practice charge, like the nonpreempted claims in *Linn* and *Sears*. (*Id.* at p. 681.) The plaintiff's theory was that the NLRA only prohibited a union from coercing an employer's choice of bargaining representative, while his state law claim could succeed if the union coercively or noncoercively caused the company to fire him. (*Ibid.*)

The court rejected this argument for several independent reasons. (*Jones, supra*, 460 U.S. at p. 682.) As relevant here, the court noted the plaintiff conceded that a claim based on coercive conduct would be preempted, and it viewed his complaint as alleging coercive conduct. (*Ibid.*) *Jones* then held that even a claim for *noncoercive* interference with contract could not proceed in state court, because such a claim would require the state court to decide whether the union's conduct was coercive or not and "[d]ecisions on such questions of federal labor law should be resolved by the Board." (*Ibid.*)

Jones further reasoned that a state law claim for noncoercive interference with contract was preempted because one element of such a claim—causation—would overlap with an element of an unfair labor practice charge. (*Jones, supra*, 460 U.S. at p. 682.) The court explained, "[E]ven if the [state] law reaches noncoercive interference with contractual relationships, a fundamental part of such a claim is that the Union *actually caused the discharge* and hence was responsible for the employer's breach of contract. Of course, this *same crucial element* must be proved to make out [an NLRA] case: the discharge must be shown to be the result of Union influence. Even on [the plaintiff's] view of the elements of his state-law cause of action, the federal and state claims are thus the same in a fundamental respect, and here the Regional Director had concluded that the Union was not at fault." (*Ibid.*, italics added.) Because the plaintiff sought to relitigate the question of causation in state court, the court concluded "[t]he risk of interference with the Board's jurisdiction [was] thus obvious and substantial." (*Id.* at p. 683.) The

court noted that the issues in *Sears*, by contrast, were "'completely unrelated'" and that there was "'no realistic risk of interference with the Labor Board's primary jurisdiction'" because the state law trespass claim in *Sears* turned only on the *location* of a union's picketing, while an unfair labor practice charge based on the same picketing would have examined the union's *motives* for the picketing. (*Id.* at pp. 682–683.) The court also stated that its precedents refuted the plaintiff's argument that the availability of punitive damages or attorneys' fees was a reason to allow his tort claim to proceed. (*Id.* at p. 684.)

The majority opinion does not interpret *Jones* to create a crucial element test because such a test would "eviscerate" the local interest exception as set forth in *Sears* and, presumably, *Linn*. But *Jones* compared the crucial elements of the *Jones* plaintiff's claim with the elements of an NLRA claim—rather than the overall controversies or the differing purposes of the laws in question, as the majority does—and found preemption based on an overlap of the single element of causation. (*Jones, supra*, 460 U.S. at p. 682.) *Jones* therefore construed the identical controversy test from *Sears* as turning on whether a "crucial element" of the state and NLRA claims is identical. I do not see how it is possible to read this as doing anything but modifying the local interest exception test. Consistent with this conclusion is Justice Rehnquist's dissent in *Jones*, in which he noted that the court's opinion was a "substantial reformulation" of the *Sears* test. (*Jones*, at p. 688 (dis. opn. of Rehnquist, J.).) Reading *Jones* in this way does not require us to decide that *Sears* and *Linn* are no longer good law. In

fact, precedent prevents us from so deciding, because the Supreme Court has instructed that only the high court itself can declare that a decision has been overruled. (*Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477, 484 [104 L. Ed. 2d 526, 109 S. Ct. 1917].) However, this same principle dictates that it is not our court's role or within our power to interpret the Supreme Court's precedents differently from the court itself, even when we may disagree with those decisions on the merits. We must defer to the Supreme Court's authority to construe its own caselaw. *Sears* and *Linn* now mean what *Jones* says they mean, and we must analyze the local interest exception as *Jones* did.

Applying *Jones*'s construction of the local interest exception here is straightforward. Like the overlap found in *Jones* itself, plaintiffs' claims all share a crucial element with the regional director's NLRA complaint: whether defendants' policies in fact prevent discussion of wages and working conditions with government agencies or other third parties. For example, one of Google's defenses to both plaintiffs' whistleblowing claims and the regional director's complaint would likely be that a savings clause in its confidentiality policies permitted the disclosure of wages and working condition information to the government. The regional director's issuance of an amended complaint implicitly demonstrates that she concluded the savings clause was insufficient, but the trial court could conclude the opposite. If the trial court were to deny plaintiffs' PAGA claims based on the savings clause, such a ruling could undermine public confidence in the regional director's complaint and the resulting

settlement. As in *Jones*, "[t]he risk of interference with the Board's jurisdiction is thus obvious and substantial." (*Jones, supra*, 460 U.S. at p. 683.)

Even if I were to ignore *Jones*'s reasoning, as the majority opinion seems to do, giving precedential effect only to *Jones*'s outcome would lead to the same result. The majority holds that plaintiffs can proceed with their claims without also proving an NLRA violation because the NLRA only applies if defendants infringed on employees' concerted actions and plaintiffs can prove their claims even if defendants infringed on noncollective activity. But this approach is analytically indistinguishable from the *Jones* plaintiff's argument that his tort claim could proceed because the NLRA applied only if the union acted coercively and he could prove his tort claim by showing the union acted noncoercively. (*Jones, supra*, 460 U.S. at p. 682.) *Jones* definitively rejected this type of maneuver. (*Ibid.*) The majority also asserts that nothing the trial court may do with plaintiffs' PAGA claims could interfere with the Board's jurisdiction because the regional director settled her complaint. The same could be said of the *Jones* regional director's decision not to issue a complaint at all, however; yet the court still held the plaintiff's state law claim preempted. (*Jones*, at pp. 673, 680–681.)

Although it finds the crucial element test not to exist, the majority opinion nonetheless goes on to apply the test and finds insignificant the overlap between plaintiffs' and the regional director's complaints on the issue of causation. It concludes causation is merely "antecedent" to different "legal considerations" at issue for each claim—concerted activity for the NLRA and whistleblowing and free speech

for plaintiff's PAGA claims. (Maj. opn. *ante*, at p. 966.) This reasoning, too, founders on *Jones*. If this notion was correct, the Supreme Court would not have held the *Jones* plaintiff's interference with contract claim was preempted. After all, the legal consideration for the state claim in *Jones* was whether the plaintiff had a valid employment contract as a supervisor and the union interfered with it, while the legal consideration for the NLRA claim was whether the union interfered with the employer's selection of its bargaining representative. (*Jones, supra*, 460 U.S. at p. 681.)

I find similarly unconvincing the majority opinion's four additional reasons for distinguishing *Jones*. The majority opinion first says *Jones* is distinguishable because the trial court here would not need to resolve issues of federal law to adjudicate plaintiffs' complaint. (Maj. opn. *ante*, at pp.965–966, 969 & fn. 5.) This is incorrect, as noted above. The majority opinion concludes plaintiffs' complaint is not preempted specifically because it does not mention concerted activity. (Maj. opn. *ante*, at p. 969.) Therefore, to resolve plaintiffs' claims on the merits while avoiding any intrusion into preempted areas, the trial court would need to decide the federal labor law question of whether plaintiffs' evidence supporting their claims involves concerted or collective activity, just as the trial court in *Jones* would have had to rule on the federal issue of coercion to avoid preemption. (*Jones, supra*, 460 U.S. at p. 682.)

The majority opinion next asserts that the regional director here has not made factual findings fatal to the

plaintiffs' claim, as did the regional director in *Jones*. Putting aside the question of whether the regional director's rejection letter in *Jones* actually constituted factual findings (*Jones, supra*, 460 U.S. at pp. 672–673), a conflict in factual findings can arise either from the NLRB rejecting a claim that a state court allows to proceed (as in *Jones*) *or* from the Board accepting a claim that a state court rejects (a possibility here, as discussed above). Moreover, even if the outcome of plaintiffs' suit is ultimately consistent with the regional director's settlement, "the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. [Citation.] The rule is designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated federal scheme of law, remedy, and administration,' [citation], and [the Supreme] Court has recognized that '[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.'" (*Wisconsin Dept. of Industry v. Gould, Inc.* (1986) 475 U.S. 282, 286 [89 L.Ed.2d 223, 106 S. Ct. 1057] (*Gould, Inc.*).)

As a third basis for distinguishing *Jones*, the majority says defendants' conduct here was not protected by the NLRA like the union's conduct in *Jones*, and federal supremacy is implicated to a greater extent when a state court tries to prohibit what federal law protects. *Jones* did note that the Act arguably protected the union's conduct there, but it was a separate basis for finding preemption, not a prerequisite for preemption. (*Jones, supra*, 460

U.S. at pp. 683–684.) Instead, the court's opinion makes clear it would have found preemption based solely on the overlap of the claims on the causation element, regardless of whether the case for preemption were stronger for arguably protected conduct. (*Jones, supra*, 460 U.S. at pp. 682–683.)

Finally, the majority opinion notes the absence of a union in this case and quotes the statement in *Sears* that preemption "has its greatest force when applied to state laws regulating the relations between employees, their union, and their employer." (Maj. opn. *ante*, at p. 967; see *id.*, *ante*, at pp. 957–958, 968.) But the *Sears* remark as to the reasoning behind preemption was intended only to compare labor regulations with "certain laws of general applicability which are occasionally invoked in connection with a labor dispute," not to imply that *Garmon* preemption operates differently in unionized and nonunionized workplaces. (*Sears, supra*, 436 U.S. at p. 193.) The majority opinion cites nothing to support its suggestion that *Garmon* preemption is less necessary when a union is not involved.[3] The regional director's actions in this case unequivocally demonstrate the Act

3. *Epic Systems Corp. v. Lewis* (2018) 584 U.S. ___ [200 L. Ed. 2d 889, 138 S.Ct. 1612, 163], is not on point, as it had nothing to do with preemption. *Epic* sought to reconcile competing interpretations of the NLRA and the Federal Arbitration Act (9 U.S.C. § 1 et seq.). (*Epic Systems,* at pp. 1629–1630.) It did not discuss the Act's protections for nonunionized employees and certainly did not hold that only the Act's provisions applicable to union certification or bargaining can support *Garmon* preemption, as the majority opinion seems to imply. (Maj. opn. *ante*, at pp. 961, 966–967.)

applies to nonunionized employees seeking to improve their working conditions just as it does to unionized employees. (See *Eastex, Inc. v. NLRB, supra*, 437 U.S. at p. 565 [Congress used the phrase "'mutual aid or protection'" in the Act because it "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement"].)

IV. The risk of interference with the NLRB's jurisdiction

I agree with the majority opinion that *Jones* does not provide any bright-line rules for determining what elements qualify as crucial for purposes of the local interest exception test. (Maj. opn. *ante*, at p. 965.) Instead, *Jones* directs us to consider whether a state suit poses a "realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices," with this interference coming "either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules." (*Jones, supra*, 460 U.S. at pp. 676, 683.) When considering the risk of such interference here, it bears emphasizing that Doe himself invited the NLRB to take action against Google and the regional director's settlement *has already caused Google to change the same policies about which plaintiffs now complain*, a point the majority opinion mentions only in passing in its discussion of the factual background of the case. (Maj. opn. *ante*, at p. 956.) By ruling against preemption, then, the majority opinion is allowing plaintiffs to seek additional penalties for the same conduct that the regional director has already remedied. Because it could allow plaintiffs to impose monetary

penalties for practices the Board decided to remedy via settlement, plaintiffs' PAGA suit poses a substantial risk of interfering with the NLRB's jurisdiction. (*Gould, Inc., supra*, 475 U.S. at p. 287 [states may not impose additional penalties for conduct the NLRA prohibits].)

The majority opinion's responses to this risk are unpersuasive. The majority opinion notes that the regional director's settlement with Google was informal and required Google to post a notice of employees' rights under federal law. The settlement required Google to do more than post a notice. The notice stated that Google had rescinded the policies about which the regional director complained—the same policies at issue in plaintiffs' complaint—and the settlement agreement required Google to comply with that statement. That aside, the settlement was informal only in the sense that it did not result in a Board order. There was still a formal settlement agreement and Doe had an opportunity to appeal that settlement to the Board. (29 C.F.R. §§ 101.7, 101.9(b)(2) (2020).) Moreover, any informality would serve only to highlight the risk of interference. The regional director opted for an informal settlement in exchange for Google's withdrawal of the offending sections of its policies and because of the absence of any significant history at Google of unfair labor practices. Whatever one might think of the merits of this decision, the specter of heavy PAGA penalties threatens to thwart the regional director's choice of leniency.

The majority opinion also notes that the settlement stated it would not prevent the Board or courts from

finding violations with respect to matters occurring before the agreement was approved or making findings of fact or conclusions of law regarding evidence obtained in the case. The provision quoted by the majority (on which plaintiffs do not rely) is from a form agreement prepared by the Board, apparently intended to serve as a standard template for all informal settlements. (See 29 C.F.R. §§ 101.7, 101.9(b)(2) (2020).) The provision nowhere states that it was intended to affect the reach of *Garmon* preemption or to allow state claims to proceed that would otherwise be barred. At a minimum, the settlement agreement does not define the scope of the Act's preemptive force "with unclouded legal significance." (*Garmon, supra*, 359 U.S. at p. 246.) In analogous circumstances, the Supreme Court has instructed that a failure "to define the legal significance under the Act of a particular activity does not give the States the power to act." (*Ibid.*) In this case, I see no Board actions of sufficient clarity to permit plaintiffs' state court claims to intrude into areas that threaten to interfere with the reach of the Board's jurisdiction.

For these reasons, I respectfully dissent.

BROWN, J.

APPENDIX C — OPINION OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO, FILED JUNE 27, 2017

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Case No. CGC – 16-556034

JOHN DOE, *et al.*,

Plaintiffs,

v.

GOOGLE, INC., *et al.*,

Defendants.

ORDER SUSTAINING IN PART AND OVERRULING IN PART GOOGLE'S DEMURRERS AND SETTING CASE MANAGEMENT CONFERENCE

On June 23, 2017 I heard argument on defendant Google's demurrer to Doe's third amended complaint (TAC). Also set for a hearing that day was defendant Adecco's motion for a stay. I address that motion in the conclusion to this order.

Appendix C

Background

In 2016, plaintiff John Doe and other workers filed unfair labor practice charges against Google with the National Labor Relations Board, alleging that Google's employment agreement and confidentiality policies unlawfully prevent employees from discussing their wages and working conditions outside of the company. The Board issued a Complaint on those allegations, and the matter is set for trial starting August 28, 2017.

Plaintiffs here are current and former employees of defendants Google and Alphabet (together "Google") and Adecco (a staffing agency that employs contingent workers at Google). Plaintiffs allege the same claims as those asserted in the Complaint before the Board: that Google and Adecco use illegal confidentiality agreements and policies to restrict their current and former employees' freedom of speech and freedom of the press, and to restrain trade. TAC ¶¶ 21–34. Among the illegal agreements and policies that Google allegedly imposes are (1) a Confidentiality Agreement (*id.* ¶¶ 35–43), (2) a Code of Conduct Policy (*id.* ¶¶ 55–57), (3) Data Classification Guidelines (*id.* ¶¶ 58–59), (4) an Employee Communication Policy (*id.* ¶¶ 60–65), and (5) a Harassment Release (*id.* ¶¶ 90–94). Adecco allegedly imposes similarly illegally restrictive (1) Confidentiality Agreement (*id.* ¶¶ 44–53), (2) Social Event Release (*id.* ¶¶ 95–98), and (3) GBike Release (*id.* ¶¶ 99–100). These policies extend to former employees as well, who must sign an Exit Certification upon termination that binds them to the terms of the Confidentiality Agreement. *Id.* ¶¶ 72–73. Plaintiffs allege

that these agreements and policies violate California Unfair Competition Law and various Labor Code sections, and seek PAGA penalties. *Id.* ¶¶ 104–170.

Google contends that counts 1-17 are preempted by the National Labor Relations Act (NLRA). Google contends that count 18 is ambiguous and confusing as it fails to adequately identify the specific allegations of wrongdoing against Google.

Request for Judicial Notice

Plaintiffs request judicial notice of (1) the February 29, 2016 charge against Google filed with the Board, (2) the May 17, 2016 charge against Google filed with the Board (by Doe), and (3) Google and Nest Labs' Answer to the consolidated complaints. Google requests judicial notice of the NLRA Order consolidating the cases. The requests are not opposed. Because these documents help (to a greater and lesser extent) delineate the scope of the NLRB's asserted jurisdiction over issues common with this state court litigation, the requests are granted.

Preemption

Courts must defer to the exclusive jurisdiction of the NLRB if the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibition of § 8 of the NLRA.[1] Section 7 guarantees employees the right

1. *Luke v. Collotype Labels USA, Inc.*, 159 Cal. App. 4th 1463, 1469 (2008); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 makes it an unfair labor practice for an employer to interfere with § 7 rights. *Id.* § 158(a)(1). Parties asserting preemption must establish that the controversy "is one that the NLRB *could* legally decide in the party's favor."[2]

"Employees" and Supervisors

Plaintiffs argue that the NLRB lacks jurisdiction over claims concerning managers, supervisors, and former employees. The TAC, very carefully, does not allege that Doe is a manager or supervisor. Instead it alleges that *Google contends* that Doe has managerial or supervisory responsibilities. TAC ¶ 5. Plaintiffs Gudeman and Correa are both former employees. *Id.* ¶¶ 8–9.

Former employees have had their claims preempted by the NLRA.[3] Gudeman and Correa are not alleged to be former supervisory employees.

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2. Ming W. Chin, et al, California Practice Guide: Employment Litigation ¶ 15:218 (Rutter: 2016) [cited as Employment Litigation].

3. *Luke*, 159 Cal. App. 4th at 1466; *Barnes v. Stone Container Corp.*, 942 F. 2d 689 (9th Cir. 1991); *but see Khanh Dang v. Maruichi American Corp.*, 3 Cal. App. 5th 604, 609 (2016) (noting that NLRA preemption would apply to a former *nonsupervisory* employee).

Appendix C

Supervisors are excluded from the definition of "employee" under the NLRA. 29 U.S.C. § 152(3). "By the exclusion of supervisory employees and the regulation of their collective bargaining rights from the federal act the field as to them was left open to state control."[4]

But the title 'supervisor' may be misleading, and in the end the NLRB decides if one is a covered employee or non-covered supervisor, under criteria specified in the NLRA.[5] The Board routinely makes these determinations (subject to review in the Circuit Courts of Appeals).[6] And actions directed to supervisors may in any event be within the jurisdiction of the Board.[7]

As I have noted the TAC does not actually allege any of the plaintiffs are supervisors. That is likely not a mistake. Doe himself has invoked the jurisdiction of the Board to review the very policies at issue in this state case, and Doe would be hard pressed to square that invocation with a judicial admission here that he was a supervisor.

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4. *Safeway Stores, Inc. v. Retail Clerks International Assn.*, 41 Cal. 2d 567, 572 (1953).

5. *N.L.R.B. v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 574 (1994).

6. E.g., *Allied Aviation Serv. Co. of New Jersey v. Nat'l Labor Relations Bd.*, 854 F.3d 55, 65 (D.C. Cir. 2017); *N.L.R.B. v. Konig*, 79 F.3d 354, 357–58 (3d Cir. 1996); *N.L.R.B. v. Hilliard Dev. Corp.*, 187 F.3d 133, 140 (1st Cir. 1999); *Micro Pac. Dev. Inc. v. N.L.R.B.*, 178 F.3d 1325 (D.C. Cir. 1999).

7. *Khanh Dang v. Maruichi Am. Corp.*, 3 Cal. App. 5th 604, 609 (2016).

This may also explain the terse discussion of the issue on the last page of plaintiffs' opposition, which makes no reference to the TAC nor even suggests which plaintiff qualifies as a supervisor.

The suggestion that someone involved in this case is supervisor does not defeat Google's preemption argument.

"Concerted activities" under the NLRA

"Concerted employee activities are protected when the activities can reasonably be seen as affecting the terms or conditions of employment."[8] The activity need only be "arguably" subject to the protections of § 7 of the NLRA.[9] "If a single employee, acting alone, participates in an integral aspect of a collective process, the activity may nonetheless be considered 'concerted' for purposes of the [NLRA]."[10]

Google maintains that all claims in the TAC relate to concerted activities. Google contends that all claims here derive from defendants' agreements and policies that restrict the right to speak about wages and working conditions, a right central to the NLRA. The claims as phrased, however, do not on their face necessarily implicate concerted activity. The first three causes of

8. *NLRB v. Mike Yurosek & Son, Inc.*, 53 F. 3d 261, 265 (9th Cir. 1995) (internal quotation marks and citation omitted).

9. *Linn v. Plant Guard Workers*, 383 U.S. 53, 60 (1966).

10. *N.L.R.B. v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 264 (9th Cir. 1995) (internal quotation marks and citations omitted).

action, for example, focus on restraints encountered by employees as they might approach future and prospective employers; causes of action 5 and 6, and perhaps 7, 8, 10 and 12 all focus on restrains on communications with the government, such as inhibitions of whistleblower rights. It is at least conceivable that such rights could be resolved without implicating concerted action and communications as among employees.

The Parties' Positions

At argument, I asked the parties to describe the test which I should apply to determine whether a given cause of action was preempted. Google's position seems to reduce to the position that any employee complaint arising out of the workplace is 'arguably' subject to NLRB jurisdiction and so is preempted. It is not clear what sort of claims pressed by employees—such as the great panoply of state Labor Code violations—could be pressed in any court under this view. At argument, Google's counsel suggested it was a case by case determination, but this is not helpful. And Google's suggestion that only claims relating to violence, threats of violence, trespass, health and safety can survive preemption is just not right. There may well be a 'health and safety' exception, at least with respect to claims for termination in violation of public policy,[11] and a trespass exception,[12] but there are other exceptions as well, such as

11. *Luke v. Collotype Labels USA, Inc.*, 159 Cal. App. 4th 1463, 1474 (2008).

12. *Walmart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, 4 Cal. App. 5th 194, 209, 208 (2016).

for picketing, assault and battery, defamation (unless the statements were made with malice), intentional infliction of emotional distress, fraud, expulsion from union membership, unemployment benefits, overtime pay,[13] and for unfair business practices such as wrongful termination for complaints about overcharging customers.[14] It is not simple to extract a general rule from this assortment.

> In the fifty years since Garmon. numerous "exceptions, limitations, refinements, and qualifications" have appeared. Two vague exceptions appeared in Garmon itself. First, state tort and criminal law remedies for violence, mass picketing, or property destruction withstand Garmon preemption for matters "deeply rooted in local feeling and responsibility." The second is for matters of "merely peripheral concern" to the federal labor law. Other exceptions soon appeared: some state laws of "general applicability" escaped preemption, as did others where "properly understood, federal regulatory policy can be narrowly construed and the state policy readily accommodated." Thus, in Supreme Court Garmon jurisprudence alone, state tort claims for malicious defamation in labor disputes, fraud and misrepresentation, trespass, and the intentional infliction of emotional distress all escape the embrace of Garmon preemption.

13. Employment Litigation at 15:225 *et seq.*

14. *Haney v. Aramark Uniform Services, Inc.*, 121 Cal. App.4th 623, 639 (2004).

> For example, in a trespass case against a picketing union, the Court suggested that the "arguably prohibited" prong of Garmon might be limited to cases in which the state and NLRB proceedings address the "identical controversy." Other cases suggested that a "balancing test" superseded the Garmon analysis. As Professor Gregory noted more than twenty years ago. "The litany of exceptions to Garmon, in areas wholly removed from the well-established violence and local concern exceptions, threatens to swallow the doctrine, and has compromised the practicality of its application." Many of the cases announcing exceptions to Garmon, moreover, involve state tort claims against unions, or state laws regulating unions, an ironic twist to Justice Frankfurter's earlier concerns about state court actions hostile to unions. Again, state courts wrestling with preemption questions must apply this complex body of federal law.[15]

Plaintiffs' position is no more helpful. As I indicated at argument, the first 11 pages of their Opposition did little more than outline the claims and press the case

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15. Henry H. Drummonds, "Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy," 19 Cornell J.L. & Pub. Pol'y 83,128–29 (2009) (notes omitted). See also, Harry G. Hutchison, "Protecting Liberty? State Secret Ballot Initiatives in the Shadow of Preemption and Federalism," 6 NYU J.L. & Liberty 409, 496 n.143 (2012) ("*Garmon* has not been consistently applied").

that Google is in the wrong. Plaintiffs' position that *Iskanian*[16] manifests the state's overwhelming (or "deep") concern with PAGA claims (and thus a serious factor in determining whether federal preemption should win a balancing contest) is without merit. That case just decided that PAGA claims are a form of qui tam action as to which the state is the true plaintiff, and as a matter of state law the state is not bound by employees' arbitration agreements.[17]

Nor does it matter that the complaint does not in so many words allege violations of the NLRA—if that were the test, it would be trivial to avoid preemption.[18]

As we determine the test to be applied here, there is indeed language in the seminal *Garmon* case suggesting courts are to balance interests "deeply rooted in local feeling"[19] verses the federal interest in avoiding

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16. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 382 (2014) (qui tam).

17. Plaintiffs (Opposition at 14-15) are doubtless (and tautologically) right that, as suggested by *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 439 (9th Cir. 2015), PAGA reflects the state's view on how to enforce its labor laws.

18. Cases note that "artful pleading" can't save a complaint in these circumstances, e.g., *United Airlines, Inc. v. Superior Court*, 234 Cal. App. 3d 1085, 1089 (1991), but it wouldn't take much art to avoid preemption under plaintiffs' views.

19. *Walmart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, 4 Cal. App. 5th 194, 201 (2016). See also, see also, *Luke v. Collotype Labels USA, Inc.*, 159 Cal. App. 4th 1463, 1471 (2008).

contamination of the jurisdiction of the NLRB,[20] and so it is not absurd for plaintiff to urge me to consider how significant PAGA is to the State. But it is probably futile. Neither I, nor the parties, know how important (or "deeply rooted") it is.[21] And if it were very important, as Google notes it would still be difficult if not impossible to know how to handle all roughly 150 different types of labor claims which PAGA contemplates. Google's Reply at 8. Do all PAGA claims survive federal promotion? That surely proves too much, but plaintiffs offer no principled way to pare the test.

The Test

Appellate authorities seems to have set out this two-step test: first, decide if the conduct at issue is arguably

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20. EMPLOYMENT LITIGATION at ¶ 15:221, citing *Garmon*, 359 U.S. at 245.

21. And as we see in *Rodriguez v. Yellow Cab Coop., Inc.*, 206 Cal. App. 3d 668, 678 (1988), the state may have an interest of very high significance, indeed of *constitutional* dimension, and yet have to accede to federal preemption. Courts do in other contexts [such as choice of law] have to decide if a state's law embodies a fundamental policy, e.g., *Nedlloyd Lines B. V. v. Superior Court*, 3 Cal. 4th 459, 468 (1992). That test too is somewhat open-ended. E.g.,. *Brack v. Omni Loan Co.*, 164 Cal. App. 4th 1312, 1323 (2008) (referring to test that reflects "some fundamental principle of justice, some prevalent conception of morals, some deep-seated tradition of the commonweal"); *ABF Capital Corp. v. Grove Properties Co.*, 126 Cal. App. 4th 204, 217 (2005) (law voiding nonreciprocal attorney's fees in contract is fundamental because it reflects fundamental legislative policy choice; I note this test could apply to many state statutes).

within the purview of NLRA §§ 7, 8.[22] If so, then secondly look to a further two part test (which, as we will see, reduces to one part), i.e. the 'local interest exception' which in effect asks whether

> "[f]irst, [if] there existed a significant state interest in protecting the citizen from the challenged conduct. Second, [whether] … the exercise of state jurisdiction over the tort claim entailed little risk of interference with the regulatory jurisdiction of the Labor Board. Although the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same." (*Id.* at pp. 196–197, 98 S.Ct. 1745, fn.omitted.).[23]

Fortunately, given the severe difficulty of ascertaining whether there is a "significant" state interest, it appears that this latter two part test reduces to this one: "'[W]hether the controversy presented to the state court is identical to … or different from … that which could have been, but was not, presented to the Labor Board.'"[24] We can call this the 'identical controversy' test.

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22. *Walmart Stores*, 4 Cal. App. 5th at 201.

23. *Walmart Stores* 4 Cal. App. 5th at 203, quoting *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180 (1978).

24. *Walmart Stores* 4 Cal. App. 5th at 203–04, quoting *Sears*, 436 U.S. at 197, and relying on *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 953 (9th Cir. 2014). Accord, *Belknap, Inc. v. Hale*, 463 U.S. 491, 510 (1983) (construing *Sears*).

Plaintiffs argue that a controversy is not identical as long as the legal issues (in the state case as compared to those within the jurisdiction of the NLRB) differ. That, too, proves too much.[25] Because the specific elements of state claims will as a group almost always differ from those of the federal claim, almost every state claim would pass this test. For example, the issue whether Google's policies are unlawful restraints of trade (see the TAC's first few causes of action) are not precisely the same as whether the policies interfere with collective action. So too with e.g., the 6th cause of action which invokes Labor Code § 1102.5: inhibiting employees' right to act as whistleblowers may not raise the very same legal issues as restraining communications among employees or their concerted action. At argument plaintiffs also reiterated their position that a difference in remedies might permit the state case to move forward. This position finds support in Supreme Court authority, but it may not have survived subsequent opinions.[26]

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25. There conceivably might be some support for this view. *Gerhardson v. Gopher News Co.*, 698 F.3d 1052, 1060 (8th Cir. 2012) ("*Garmon* preemption applies to Gopher News' claim precisely because the federal and state law causes of action are the same." From this we might infer that preemption does not apply unless all the elements of the causes of action (in the two fora) are the same. But in *Gerhardson*, the employer (who there was pressing for court, not NLRB jurisdiction) made the unfortunate strategic decision to argue the claims *were* the same in its argument—later rejected by the court—that no harm would come of litigating the 'same' claims in court.)

26. *Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290, 301 (1977) considered the difference in

We know that the fact that cognizable claims in two jurisdictions have "shared factual allegations" does not dispose of the issue.[27]

If shared factual allegations are not enough, and the matter cannot be sorted by looking to the congruence of legal issues, what do we examine?

Walmart Stores proves a few different ways to phrase the test to determine if controversies are identical: we might look to the 'key' issues to be determined by the trial court;[28] or to the 'gravamen' of the claims, or perhaps to the ultimate facts (in the complaint) to be determined.[29] Some cases have suggested we look to whether the

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remedy as a relevant factor of the preemption determination. But *Local 926, Int'l Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669 (1983) did not mention this aspect, and it does not appear that California's appellate authorities have used it. See generally, Ellen C. Nachtigall, "Federal Labor Law Preemption of State Claims for Tortious Interference with Contract Against Nonsignatories," 65 S. CAL. L. REV. 1675, 1690 (1992).

27. *Walmart Stores*, 4 Cal. App. 5th at 210.

28. *Walmart Stores*, 4 Cal. App. 5th at 208. See also *id.* at 207 ("*Garner* thus involved a case in which the 'picketing itself' was the controversy of the state court action. (*Sears, supra*, 436 U.S. at pp. 192-194, 98 S.Ct. 1745.) In contrast, in *Sears*, the trespass action asserted the picketing was unlawful because of where it was conducted, without regard to the objective, target, or effect of the picketing").

29. *Walmart Stores*, 4 Cal. App. 5th at 208.

conduct at stake in the two fora is the same,[30] but that is uncomfortably close to a test that looks for shared factual allegations, which we know from *Walmart Stores* is not right.

Both sides have referred me to Presiding Justice Kline's opinion in *Rodriguez*.[31] There, the Court first invoked the Supreme Court's focus on whether the two jurisdictions had the same or "discrete concerns."[32] The Supreme Court's language here is of great assistance in formulating the test.[33] That Court directs us to what

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30. E.g., *Rhode Island Hosp. Ass'n v. City of Providence ex rel. Lombardi*, 667 F.3d 17.37–38 (1st Cir. 2011) ("Imposing a minimum standard for a subject that is a mandatory subject of bargaining is not the same as regulating 'conduct subject to regulation by the [NLRB].' which is the inquiry relevant to Garmon pre-emption. *Id.*: *see also Brown*, 554 U.S. at 69, 128 S.Ct. 2408 ('In NLRA pre-emption cases, 'judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'" (quoting *Golden State Transit*, 475 U.S. at 614 n. 5, 106 S.Ct. 1395)).").

31. *Rodriguez v. Yellow Cab Coop., Inc.*, 206 Cal. App. 3d 668 (1988).

32. *Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290. 304 (1977), quoted by *Rodriguez*, 206 Cal. App. 3d at 677.

33. *Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290. 304-05 (1977) ("Viewed, however, in light of the discrete concerns of the federal scheme and the state tort law. that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting

we might call the ultimate facts to be proved in the two fora, and to borrow *Rodriguez's* language, whether the "findings" in the state court might conflict with the NLRB's findings, and concomitantly whether if plaintiffs prove a state claim they would have in effect proved "what is arguably an unfair labor practice."[34]

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its citizens. If the charges in Hill's complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay Union dues. See n. 11. supra. Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award Hill damages for pain, suffering, or medical expenses. Conversely, the state-court tort action can be adjudicated without resolution of the 'merits' of the underlying labor dispute. Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress. *State Rubbish Collectors Assn. v. Siliznoff*, 38 Cal.2d 330, 240 P.2d 282 (1952);*Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493. 86 Cal.Rptr. 88, 468 P.2d 216 (1970). The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities. To the contrary, the tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context.")

34. *Rodriguez*, 206 Cal. App. 3d at 678. The same test was used in *Kelecheva v. Multivision Cable T.V. Corp.*, 18 Cal. App. 4th 521, 528 (1993) ("defendant's retaliatory conduct, if proven, would constitute a violation by defendant of section 8. subdivision (a)(1). of the NLRA").

But the test appears broader than this suggests, that is, it actually takes *less* to meet the "identical controversy" standard. In reasoning very close to the "key issue" test in *Walmart Stores*, we come to rest on the "crucial element" test. In *Jones*, the crucial element was causation.[35] That was me "fundamental part" of the claims.[36] That is, we need not have congruence of all elements or every ultimate fact of the claims, but of the crucial element or elements of them. As I say, the crucial element test is broad, blocking many state claims.[37] This is consistent with *Rodriguez*, because a finding on such a crucial element will conflict with a potential Board finding.

Application of the Test

A.

First we look to whether the conduct described in the state court complaint is arguably within the purview of the NLRB. We recall "that lawsuits relating to labor matters are generally preempted by section 7."[38] As

35. *Local 926, Int'l Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669, 683 (1983).

36. *Hillhaven Oakland Nursing etc. Ctr. v. Health Care Workers Union*, 41 Cal. App. 4th 846, 856 (1996), construing and quoting *Jones*.

37. Ellen C. Nachtigall, "Federal Labor Law Preemption of State Claims for Tortious Interference with Contract Against Nonsignatories," 65 S. Cal. L. Rev. 1675, 1688 (1992).

38. *Rodriguez v. Yellow Cab Coop., Inc.*, 206 Cal. App. 3d 668, 675–76 (1988). The scope here is broad, shielding employers from

alleged in the TAC, the policies it describes are conditions of employment. E.g., TAC ¶ 144. Here, activity described in the first 17 causes of action are all arguably within the purview of the NLRB. The fact that the NLRB is actively pursuing a case on the policies the subject of this suit support the finding that all these claims are arguably within the purview of the Board.

1. Restraints on trade and non-compete – Counts 1–3

The TAC alleges that the nondisclosure agreements and policies that defendants require employees to agree to in writing unlawfully restrain trade. Defendants do this by prohibiting the use or disclosure of information that is not confidential as a matter of law—information regarding general business practices, readily available customer information, working conditions, wages, and potential violations of the law. TAC ¶¶ 106, 111. As a result, employees are unable to use this information for purposes of competition, or finding new work. *Id.* Adecco also prohibits its employees from working directly for Google without its consent, through the use of a non-compete restrictive covenant. TAC ¶ 115. The polices assertedly

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suit regarding many practices because the NLRB may or may not ever address the practices preempted from court scrutiny. Henry H. Drummonds, "Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy," 70 La. L. Rev. 97, 170 (2009). For what it's worth, the concern that conduct will escape all scrutiny is in great part obviated because here, the Board has filed a complaint on the matters.

block discussions of an employee's own wages, and those of other employees, TAC ¶ 106, 111. These policies "can be reasonably seen as affecting the terms or conditions of employment,"[39] as well as employees' ability to prepare for an engage in concerted action. When it is not clear that a particular activity is governed by the NLRA, "[i]t is essential to the administration of [the NLRA] that these determinations be left in the first instance to the National Labor Relations Board.[40]

2. Whistleblowing – Counts 4–8, 10, 12

The TAC alleges that the confidentiality agreements and policies prohibit employees from disclosing any potential violations of the law, both within Google (e.g. to a Google attorney) and to the government or law enforcement. It is arguable that whistleblowing is a protected concerted activity for purposes of the NLRA. Disclosing information about potential violations of the law clearly affects the conditions of employment, and is a matter of common concern. Whistleblowing as to an employer's unlawful practices or policies, which are at issue here, is arguably on behalf of all employees who are subject to those practices and policies, not just the individual whistleblower. This is arguably related to group action for "mutual aid or protection" of other employees, 29 U.S.C. § 157.

39. *Yurosek*, 53 F. 3d at 265.

40. *Garmon*, 359 U.S. at 244–45.

3. Disclosing or discussing working conditions and wages – Counts 9, 11, 13, 16–17

The TAC alleges that as a condition of employment, employees are prohibited from disclosing information about Google or Adecco working conditions. TAC ¶ 138, 160, 163. "Discussions among employees regarding their working conditions have been held to be protected activity under the NLRA."[41]

The TAC alleges that as a condition of employment, employees are prohibited from disclosing their own wages, or discussing or inquiring about others' wages. TAC ¶¶ 144, 150, 163. The right to discuss wages is a concerted activity protected under the NLRA.[42]

4. Restraint on lawful conduct during non-work hours – Counts 14, 15

The TAC alleges that the confidentiality agreements and policies make it a dischargeable offense for employees to disclose information about their work or any potential violations of the law that occur at work—all of which is lawful conduct. TAC ¶¶ 153, 157. The provisions of section 7 and 8 "prevent discharge or other employer retaliation for engaging in concerted activities for mutual aid or protection."[43] As

41. *Luke* at 1470.

42. *Grant-Burton v. Covenant Care, Inc.*, 99 Cal. App. 4th 1361, 1372 (2002), citing *NLRB v. Brookshire Grocery Co.*, 919 F. 2d 359, 362 (5th Cir. 1990).

43. *NLRB v. Modern Carpet Industries, Inc.*, 611 F. 2d 811, 813 (10th Cir. 1979).

disclosure of business practices, working conditions, wages, and potential violations of law are all arguably concerted activities, employer retaliation or termination of employment for engaging in such activities is prohibited by the NLRA.

B.

Next we turn to whether a crucial element of the state claims would be material to an NLRB case. The issue is far simpler to address in this case than in others, because here we have an NLRB complaint which attacks the same policies at issue in the state case. The most significant allegation in the TAC is that Google has the alleged policies, with the restrictive impact alleged. The NLRB will doubtless address exactly the same issues. To be sure, the Board is primarily concerned with the impact of these policies on the ability of the employees to engage in concerted action, e.g. Complaint at 12 et seq., and the TAC is not. But the inhibiting or restrictive effect of the policies is common, and that effect is a crucial element in this state court litigation.

Count 18

Finally, Google contends that the TAC improperly combines Google and Adecco together as "defendants" without asserting with particularity which allegations are against which entity. MPA at 18. Not so. The TAC clearly separates Google's confidentiality agreements and policies from Adecco's. *Compare* TAC ¶¶ 35–43 *with id.* ¶¶ 44–53. The agreements and policies for Google and Adecco similarly declare everything related to employment to be confidential. *See, e.g.*, *id.* ¶¶ 38, 46.

Appendix C

It is sufficiently clear which allegations pertain to Google and which pertain to Adecco. This claim is not impermissibly vague or confusing.

Conclusion

Google's demurrers to the first 17 causes of action are sustained without leave to amend. The demurrer to the 18^{gth} cause of action is overruled.

Adecco has a motion to stay pending, based on the asserted priority of a similar case in state court in San Mateo. The parties' views on how to proceed against all defendants on the 18^{gth} cause of action, and against Adecco generally, may be impacted by the determination of this order, and thus I set a case management conference (CMC) for **July 19, 2017 at 2:00 p.m.** in order to discuss next steps, and specifically whether Adecco wishes me to rule on its stay motion as is, or some modification of it, and the parties' views on how to handle the 18th cause of action. The parties must present the results of their conference on these issues, including which causes of action plaintiffs wish to pursue against Adecco, in the required joint CMC statement.

Dated: June 27, 2017

/s/_____
Curtis E.A. Karnow
Judge of The Superior Court

APPENDIX D — OPINION OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO, FILED NOVEMBER 7, 2017

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Case No. CGC-16-556034

JOHN DOE, *et al.*,

Plaintiffs,

vs.

GOOGLE, INC., *et al.*,

Defendants.

ORDER SUSTAINING DEMURRERS

Adecco's demurrer to the Third Amended Complaint was sustained on the basis that allegedly unlawful activities found in both Google's and Adecco's policies and agreements were "concerted activities" under the National Labor Relations Act (NLRA) and that plaintiffs' claims were preempted by the NLRA. Order Sustaining in Part with Leave to Amend (Order Re Adecco Demurrer, entered Sep. 14, 2017) at 3. Plaintiffs claimed that they could "untether" plaintiff Paola Correa's (the only plaintiff who worked for Adecco) claims from Google's policies, and focus on Adecco's policies and agreements, and allege them

in such a way that the Court can determine whether those policies and agreements are unlawful without making any decision as to their restrictive impact, which is within the purview of the National Labor Relations Board (NLRB). *Id.* at 4.

Adecco now demurs to the Fourth Amended Complaint (4AC) on the basis that the complaint still does not bring its claims against Adecco outside of the jurisdiction of the NLRB. I heard argument today.

Request For Judicial Notice

Plaintiffs request judicial notice of (1) several court filings in the *Moniz v. Adecco USA, Inc.* matter in San Mateo County (RFJN Ex. 1–6); (2) Correa's PAGA notice to the LWDA, filed on October 10, 2017 *(id.* Ex. 7); (3) various federal documents including SEC Orders, and Executive Order, Department of Labor Order, and an Equal Employment Opportunity Commission plan *(id.* Ex. 8–12); and (4) a redline document comparing the Third Amended Complaint to the 4AC. Adecco objects to all but the redline document.

The *Moniz* documents, PAGA notice, and federal documents are not relevant or helpful to the determination of the demurrer. These requests are denied.

The redline comparison of the complaints helps clarify what new allegations were added as to Adecco, but judicial notice is not appropriate under Evidence Code § 452(c). A mere comparison does not offer "facts and propositions

that are not reasonably subject to dispute and are capable of immediate and accurate determination." However, I have referred to this item as a useful adjunct to the briefs.

"Employee"

The NLRA defines an "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." 29 U.S.C. § 152(3). Plaintiffs indicated that they could amend to allege that Correa was not terminated for any of the above reasons, and therefore her claims would fall outside of the jurisdiction of the NLRB.[1] Order Re Adecco Demurrer at 3.

Despite alleging that Adecco has refused to state why Correa was terminated, the complaint also alleges that Correa was terminated, "[a]mong other things," because she is a Latina woman, and for "inform[ing] someone outside of Google that she worked for Google (which she did) and for disclosing so-called 'confidential information' (which was not confidential) to someone outside of Google." 4AC ¶ 28. Plaintiffs allege that Correa was not terminated in connection with a labor dispute or because of an unfair labor practice. *Id.* ¶ 35. As such, she is "inarguably" outside the coverage of the NLRA. *Id.*

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1. Plaintiffs also attempted to argue again that former employees are outside of the NLRA's jurisdiction. Opposition at 7. I have considered and rejected this. Order Sustaining in Part with Leave to Amend (entered Sep. 14, 2017) at 2–3.

Plaintiffs' allegation that Correa "was not terminated for conduct that was arguably protected or prohibited by the [NLRA] . . . . or as a consequence of, or in connection with, a labor dispute" is conclusory. 4AC ¶ 32. Moreover, such an allegation does not comport with the basic premise of the complaint, which is that defendants subject their current and former employees to policies and agreements that unduly restrict, among other things, freedom of speech and threaten to discharge employees who disclose confidential information. *See id.* ¶¶ 43, 45, 115a. These are all alleged to be unfair labor practices in violation of the California Labor Code. *Id.* ¶ 12. Even if the allegation that Correa was terminated because of her ethnicity and gender were taken as well-pled, the other allegations of unfair labor practices—the heart of the complaint—cannot be ignored. *Blank,* 39 Cal. 3d at 318 ("[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.").

Correa is an "employee" within the definition of the NLRA.

Claims Against Adecco

Plaintiffs indicated they could amend their complaint to untether the Adecco claims from the Google claims. The 4AC alleges eight causes of action against Adecco (counts 16–23). Count 23 is the PAGA claim against all defendants.

Count 16 is patently tethered to the Google claims. It specifically incorporates the claims against Google and applies them to Adecco. 4AC ¶¶ 184–85.

Appendix D

Count 17 alleges that Adecco's confidentiality agreements and policies restrain the constitutional right to free speech during non-work hours and off the employer's premises. 4AC ¶ 186. Counts 18 and 19 allege that Adecco's confidentiality agreements and policies prohibit employees from disclosing and discussing information about wages and working conditions. *Id.* ¶¶ 190, 194. Count 20 alleges that Adecco's confidentiality agreements and policies prohibit employees from reporting any violations of the law. *Id.* ¶ 200. I have previously found all of these constitute activities prohibited by the NLRA. Order Sustaining in Part and Overruling in Part Google's Demurrers (Order Re Google Demurrer) (entered June 27, 2017) at 12-13. Counts 17 through 20 are preempted.

Count 21 alleges that Adecco requires its employees to agree to a confidentiality agreement and other writings that (1) prohibits whistleblowing (*id.* ¶¶ 204b–c), (2) restraints trade and competition (*id.* ¶ 204f–f[sic]), (3) prohibits disclosing or discussing working conditions and wages (*id.* ¶¶ 204g-h), and (4) restrains lawful conduct during non-work hours *(id.* ¶ 204j). The confidentiality agreement and other writings also prohibit employees from seeking full time work with an Adecco client *(id.* ¶ 204d), asking an Adecco client why their assignment ended (*id.* ¶ 204e), or identifying their Adecco client employer on social media (*id.* ¶ 204i).

Activities (1) through (4) above are preempted, as discussed. Seeking future work, finding out why employment was terminated, and publicly disclosing an employer are all arguably concerted activities protected

by the NLRA. Such activities can be "reasonably seen as affecting the terms or conditions of employment." *NLRB v. Mike Yurosek & Son, Inc.*, 53 F. 3d 261, 265 (9th Cir. 1995). An employee who engages in such activities could arguably be seen as acting with or on behalf of other employees. *Id.* at 264 ("To be engaged in 'concerted activity,' an employee must act with or on behalf of other employees, and not solely by and on behalf of the . . . employee himself . . . . If a single employee, acting alone, participates in an integral aspect of a collective process, the activity may nonetheless be considered 'concerted' for purposes of the [NLRA]."). At any rate, when it is not clear that a particular activity is governed by the NLRA, "[i]t is essential to the administration of [the NLRA] that these determinations be left in the first instance to the National Labor Relations Board." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244–45 (1959).

Count 21 also alleges that Adecco's confidentiality agreement and other writings fail to include the notice required by the Defend Trade Secrets Act. *4AC* ¶ 204a. The Defend Trade Secrets Act requires an employer to give employees notice that he/she will not be held criminally or civilly liable for disclosure of a trade secret that is made in confidence to a government official or attorney, for the purpose of reporting or investigating a suspected violation of the law. 4AC ¶ 44; 18 U.S.C. § 1833(b)(3). The complaint alleges that Adecco's confidentiality agreements inform employees that they cannot disclose confidential information to *anyone. Id.* ¶ 45. This is therefore a claim that is related to a restriction on whistleblowing, *id.* ¶ 146, which I held was concerted activity covered by the NLRA. *See* Order Re Google Demurrer at 12.

Appendix D

Count 22 alleges that Adecco's confidentiality agreements and policies constitute unfair and unlawful business practices in violation of the Unfair Competition Law. 4AC ¶ 209. Those unfair and unlawful business practices alleged are all concerted activities covered by the NLRA and within the purview of the NLRB.

Count 23 is the PAGA claim. Plaintiffs argue that the NLRA does not preempt PAGA causes of action. Opposition at 5–6. I have previously rejected plaintiffs' PAGA arguments. Order Re Google Demurrer at 6–7. Plaintiffs also contend that the NLRA's purpose is unrelated to local or federal regulations protecting individual employees. Opposition at 5-6 (citing *Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 20–21 (1987)). This may be true as to the overarching purpose of PAGA, but not necessarily true as it relates to the underlying claims the subject of the PAGA action. In any event states may not "provid[e] their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA]." *Wisconsin Dept. of Industry v. Gould, Inc.,* 475 U.S. 282, 286 (1986) (citing *Garmon,* 359 U.S. at 247).

Crucial Element Test

Plaintiffs disagree with the "crucial element test" applied in the Order Re Google Demurrer. But regardless of the precise test to be used, it is not clear that a finding in state court that Adecco was engaged in the alleged illegal activity would not conflict with a NLRB finding that such activity constitutes an unfair labor practice in violation of the NLRA. My Order Re Google Demurrer

already considered activities including signing of unlawful non-compete agreements and prohibiting whistleblowing and disclosure or discussion of work to satisfy the crucial element test. Order Re Google Demurrer at 13–14. In fact, these are the same issues that the NLRB will address on Google's alleged policies. That there is no pending NLRA case relating to Adecco is irrelevant. *Sears v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 197 (1977). Even where no controversy is presented to the NLRB, there could still be a risk of interference with the NLRB's jurisdiction. *Id.*

Conclusion

The demurrers are sustained without leave, but at the argument plaintiffs' counsel desired to file a further amended complaint to allege claims based on a harassment policies. A new amended complaint must be served and filed not later than November 21, 2018.

Dated: November 7, 2017

Curtis E.A. Karnow
Judge of the Superior Court

APPENDIX E — RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 157

§ 157. Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

(July 5, 1935, ch. 372, §7, 49 Stat. 452; June 23, 1947, ch. 120, title I, §101, 61 Stat. 140.)

Amendments

1947—Act June 23, 1947, restated rights of employees to bargain collectively and inserted provision that they have right to refrain from joining in concerted activities with their fellow employees.

Effective Date of 1947 Amendment

For effective date of amendment by act June 23, 1947, see section 104 of act June 23, 1947, set out as a note under section 151 of this title.

Appendix E

29 U.S.C. § 158

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as

provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest

on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with

respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of of paragraph (3) of this

subsection shall be sixty days; and the contract period of of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in of paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1]

1. So in original. Probably should be "unenforceable".

and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice)

because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition

the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

(July 5, 1935, ch. 372, §8, 49 Stat. 452; June 23, 1947, ch. 120, title I, §101, 61 Stat. 140; Oct. 22, 1951, ch. 534, §1(b), 65 Stat. 601; Pub. L. 86–257, title II, §201(e), title VII, §§704(a)–(c), 705(a), Sept. 14, 1959, 73 Stat. 525, 542–545; Pub. L. 93–360, §1(c)–(e), July 26, 1974, 88 Stat. 395, 396.)

Amendments

1974—Subsec. (d). Pub. L. 93–360, §1(c), (d), substituted "any notice" for "the sixty-day" and inserted ", or who engages in any strike within the appropriate period specified in subsection (g) of this section," in loss-of-employee-status provision and inserted enumeration of modifications to this subsection which are to be applied whenever the collective bargaining involves employees of a health care institution.

Subsec. (g). Pub. L. 93–360, §1(e), added subsec. (g).

1959—Subsec. (a)(3). Pub. L. 86–257, §201(e), struck out "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 159(f), (g), (h) of this title" after "such agreement when made" in cl. (i).

Subsec. (b)(4). Pub. L. 86–257, §704(a), among other changes, substituted "induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment" for "induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment" in cl. (i), added cl. (ii), and inserted provisions relating to agreements prohibited by subsection (e) of this section in cl. (A), the proviso relating to primary strikes and primary picketing in cl. (B), and the last proviso relating to publicity.

Subsec. (b)(7). Pub. L. 86–257, §704(c), added par. (7).

Subsec. (e). Pub. L. 86–257, §704(b), added subsec. (e).

Subsec. (f). Pub. L. 86–257, §705(a), added subsec. (f).

Appendix E

Cal. Lab. Code § 2698

This part shall be known and may be cited as the Labor Code Private Attorneys General Act of 2004.

Appendix E

Cal. Lab. Code § 2699

(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "person" has the same meaning as defined in Section 18.

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(d) For purposes of this part, "cure" means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole. A violation of paragraph (6) or (8) of subdivision (a) of Section 226 shall only be considered cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice sent pursuant to paragraph (1) of subdivision (c) of

Appendix E

Section 2699.3.

(e)

(1) For purposes of this part, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.

(g)

(1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the

timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

(k) Nothing contained in this part is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions of this code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.

(l)

(1) For cases filed on or after July 1, 2016, the aggrieved employee or representative shall, within 10 days following commencement of a civil action pursuant to this part, provide the Labor and Workforce Development Agency with a file-stamped copy of the complaint that includes the case number assigned by the court.

(2) The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.

(3) A copy of the superior court's judgment in any civil action filed pursuant to this part and any other order in that action that either provides for or denies an award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order.

(4) Items required to be submitted to the Labor and Workforce Development Agency under this subdivision or to the Division of Occupational Safety and Health pursuant to paragraph (4) of subdivision (b) of Section 2699.3, shall be transmitted online through the same system established for the filing of notices and requests under subdivisions (a) and (c) of Section 2699.3.

(m) This section shall not apply to the recovery of administrative and civil penalties in connection with the workers' compensation law as contained in Division 1 (commencing with Section 50) and Division 4 (commencing

with Section 3200), including, but not limited to, Sections 129.5 and 132a.

(n) The agency or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of this part.

Appendix E

Cal. Lab. Code § 2699.3

(a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision listed in Section 2699.5 shall commence only after the following requirements have been met:

(1)

(A) The aggrieved employee or representative shall give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(B) A notice filed with the Labor and Workforce Development Agency pursuant to subparagraph (A) and any employer response to that notice shall be accompanied by a filing fee of seventy-five dollars ($75). The fees required by this subparagraph are subject to waiver in accordance with the requirements of Sections 68632 and 68633 of the Government Code.

(C) The fees paid pursuant to subparagraph (B) shall be paid into the Labor and Workforce Development Fund and used for the purposes specified in subdivision (j) of Section 2699.

(2)

(A) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does

not intend to investigate the alleged violation within 60 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 65 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.

(B) If the agency intends to investigate the alleged violation, it shall notify the employer and the aggrieved employee or representative by certified mail of its decision within 65 calendar days of the postmark date of the notice received pursuant to paragraph (1). Within 120 calendar days of that decision, the agency may investigate the alleged violation and issue any appropriate citation. If the agency, during the course of its investigation, determines that additional time is necessary to complete the investigation, it may extend the time by not more than 60 additional calendar days and shall issue a notice of the extension. If the agency determines that no citation will be issued, it shall notify the employer and aggrieved employee of that decision within five business days thereof by certified mail. Upon receipt of that notice or if no citation is issued by the agency within the time limits prescribed by subparagraph (A) and this subparagraph or if the agency fails to provide timely or any notification, the aggrieved employee may commence a civil action pursuant to Section 2699.

(C) Notwithstanding any other provision of law, a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part.

(D) The time limits prescribed by this paragraph shall only apply if the notice required by paragraph (1) is filed with the agency on or after July 1, 2016. For notices submitted prior to July 1, 2016, the time limits in effect on the postmark date of the notice shall apply.

(b) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision of Division 5 (commencing with Section 6300) other than those listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) The aggrieved employee or representative shall give notice by online filing with the Division of Occupational Safety and Health and by certified mail to the employer, with a copy to the Labor and Workforce Development Agency, of the specific provisions of Division 5 (commencing with Section 6300) alleged to have been violated, including the facts and theories to support the alleged violation.

(2)

(A) The division shall inspect or investigate the alleged violation pursuant to the procedures specified in Division 5 (commencing with Section 6300).

(i) If the division issues a citation, the employee may not commence an action pursuant to Section 2699. The division shall notify the aggrieved employee and employer in writing within 14 calendar days of certifying that the employer has corrected the violation.

(ii) If by the end of the period for inspection or investigation provided for in Section 6317, the division fails to issue a citation and the aggrieved employee disputes that decision, the employee may challenge that decision in the superior court. In such an action, the superior court shall follow precedents of the Occupational Safety and Health Appeals Board. If the court finds that the division should have issued a citation and orders the division to issue a citation, then the aggrieved employee may not commence a civil action pursuant to Section 2699.

(iii) A complaint in superior court alleging a violation of Division 5 (commencing with Section 6300) other than those listed in Section 2699.5 shall include therewith a copy of the notice of violation provided to the division and employer pursuant to paragraph (1).

(iv) The superior court shall not dismiss the action for nonmaterial differences in facts or theories between those contained in the notice of violation provided to the division and employer pursuant to paragraph (1) and the complaint filed with the court.

(B) If the division fails to inspect or investigate the alleged violation as provided by Section 6309, the provisions of subdivision (c) shall apply to the determination of the alleged violation.

(3)

(A) Nothing in this subdivision shall be construed to alter the authority of the division to permit long-term abatement

periods or to enter into memoranda of understanding or joint agreements with employers in the case of long-term abatement issues.

(B) Nothing in this subdivision shall be construed to authorize an employee to file a notice or to commence a civil action pursuant to Section 2699 during the period that an employer has voluntarily entered into consultation with the division to ameliorate a condition in that particular worksite.

(C) An employer who has been provided notice pursuant to this section may not then enter into consultation with the division in order to avoid an action under this section.

(4) The superior court shall review and approve any proposed settlement of alleged violations of the provisions of Division 5 (commencing with Section 6300) to ensure that the settlement provisions are at least as effective as the protections or remedies provided by state and federal law or regulation for the alleged violation. The provisions of the settlement relating to health and safety laws shall be submitted to the division at the same time that they are submitted to the court. This requirement shall be construed to authorize and permit the division to comment on those settlement provisions, and the court shall grant the division's commentary the appropriate weight.

(c) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision other than those listed in Section 2699.5 or Division 5 (commencing with Section 6300) shall commence only after the following requirements have been met:

Appendix E

(1)

(A) The aggrieved employee or representative shall give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(B) A notice filed with the Labor and Workforce Development Agency pursuant to subparagraph (A) and any employer response to that notice shall be accompanied by a filing fee of seventy-five dollars ($75). The fees required by this subparagraph are subject to waiver in accordance with the requirements of Sections 68632 and 68633 of the Government Code

(C) The fees paid pursuant to subparagraph (B) shall be paid into the Labor and Workforce Development Fund and used for the purposes specified in subdivision (j) of Section 2699.

(2)

(A) The employer may cure the alleged violation within 33 calendar days of the postmark date of the notice sent by the aggrieved employee or representative. The employer shall give written notice within that period of time by certified mail to the aggrieved employee or representative and by online filing with the agency if the alleged violation is cured, including a description of actions taken, and no civil action pursuant to Section 2699 may commence. If

the alleged violation is not cured within the 33-day period, the employee may commence a civil action pursuant to Section 2699.

(B)

(i) Subject to the limitation in clause (ii), no employer may avail himself or herself of the notice and cure provisions of this subdivision more than three times in a 12-month period for the same violation or violations contained in the notice, regardless of the location of the worksite.

(ii) No employer may avail himself or herself of the notice and cure provisions of this subdivision with respect to alleged violations of paragraph (6) or (8) of subdivision (a) of Section 226 more than once in a 12-month period for the same violation or violations contained in the notice, regardless of the location of the worksite.

(3) If the aggrieved employee disputes that the alleged violation has been cured, the aggrieved employee or representative shall provide written notice by online filing with the agency and by certified mail to the employer, including specified grounds to support that dispute, to the employer and the agency. Within 17 calendar days of the receipt of that notice, the agency shall review the actions taken by the employer to cure the alleged violation, and provide written notice of its decision by certified mail to the aggrieved employee and the employer. The agency may grant the employer three additional business days to cure the alleged violation. If the agency determines that the alleged violation has not been cured or if the agency fails

to provide timely or any notification, the employee may proceed with the civil action pursuant to Section 2699. If the agency determines that the alleged violation has been cured, but the employee still disagrees, the employee may appeal that determination to the superior court.

(d) The periods specified in this section are not counted as part of the time limited for the commencement of the civil action to recover penalties under this part.

(e) This section shall remain in effect only until July 1, 2021, and as of that date is repealed, unless a later enacted statute, that is enacted before July 1, 2021, deletes or extends that date.

Appendix E

Cal. Lab. Code § 2699.5

The provisions of subdivision (a) of Section 2699.3 apply to any alleged violation of the following provisions: subdivision (k) of Section 96, Sections 98.6, 201, 201.3, 201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, paragraphs (1) to (5), inclusive, (7), and (9) of subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3, Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of Section 1695.5, Sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, Sections 1735, 1771, 1774, 1776, 1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of Section 2673.1, Sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of Section 2929, and Sections 3073.6, 6310, 6311, and 6399.7.

Appendix E

CAL. LAB. CODE § 2699.6

(a) This part shall not apply to an employee in the construction industry with respect to work performed under a valid collective bargaining agreement in effect any time before January 1, 2025, that expressly provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and for the employee to receive a regular hourly pay rate of not less than 30 percent more than the state minimum wage rate, and the agreement does all of the following:

(1) Prohibits all of the violations of this code that would be redressable pursuant to this part, and provides for a grievance and binding arbitration procedure to redress those violations.

(2) Expressly waives the requirements of this part in clear and unambiguous terms.

(3) Authorizes the arbitrator to award any and all remedies otherwise available under this code, provided that nothing in this section authorizes the award of penalties under this part that would be payable to the Labor and Workforce Development Agency.

(b) Except for a civil action under Section 2699, nothing in this section precludes an employee from pursuing any other civil action against an employer, including, but not limited to, an action for a violation of the California Fair Employment and Housing Act (Part 2.8 (commencing with

Section 12900) of Division 3 of Title 2 of the Government Code), Title VII of the Civil Rights Act of 1964 (Public Law 88-352), or any other prohibition of discrimination or harassment.

(c) The exception provided by this section shall expire on the date the collective bargaining agreement expires or on January 1, 2028, whichever is earlier.

(d) For purposes of this section, "employee in the construction industry" means an employee performing work associated with construction, including work involving alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, repair work, and any other work as described by Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, and other similar or related occupations or trades.

(e) This section shall remain in effect only until January 1, 2028, and as of that date is repealed.

Appendix E

Cal. Lab. Code § 432.5

No employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law.

Appendix E

Cal. Lab. Code § 1102.5

(a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised their rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to their employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies that implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950) of, or the physician-patient privilege of Article 6 (commencing with Section 990) of, Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

(h) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee because

the employee is a family member of a person who has, or is perceived to have, engaged in any acts protected by this section.

(i) For purposes of this section, "employer" or "a person acting on behalf of the employer" includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.

(j) The court is authorized to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of these provisions.

Appendix E

Cal. Lab. Code § 232.5

No employer may do any of the following:

(a) Require, as a condition of employment, that an employee refrain from disclosing information about the employer's working conditions.

(b) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose information about the employer's working conditions.

(c) Discharge, formally discipline, or otherwise discriminate against an employee who discloses information about the employer's working conditions.

(d) This section is not intended to permit an employee to disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege without the consent of his or her employer.

Appendix E

CAL. LAB. CODE § 232

No employer may do any of the following:

(a) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages.

(b) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages.

(c) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.

Appendix E

Cal. Lab. Code § 1197.5

(a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential.

(4) Prior salary shall not justify any disparity in compensation. Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee's existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors in this subdivision.

(b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than race or ethnicity, such as education, training, or experience. This factor shall

apply only if the employer demonstrates that the factor is not based on or derived from a race- or ethnicity-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential.

(4) Prior salary shall not justify any disparity in compensation. Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee's existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors listed in this subdivision.

(c) Any employer who violates subdivision (a) or (b) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and an additional equal amount as liquidated damages.

(d) The Division of Labor Standards Enforcement shall administer and enforce this section. If the division finds that an employer has violated this section, it may supervise the payment of wages and interest found to be due and unpaid to employees under subdivision (a) or (b). Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (h).

(e) Every employer shall maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer. All of the records shall be kept on file for a period of three years.

(f) Any employee may file a complaint with the division that the wages paid are less than the wages to which the employee is entitled under subdivision (a) or (b) or that the employer is in violation of subdivision (k). The complaint shall be investigated as provided in subdivision (b) of Section 98.7. The division shall keep confidential the name of any employee who submits to the division a complaint regarding an alleged violation of subdivision (a), (b), or (k) until the division establishes the validity of the complaint, unless the division must abridge confidentiality to investigate the complaint. The name of the complaining employee shall remain confidential if the complaint is withdrawn before the confidentiality is abridged by the division. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to these employees.

(g) The department or division may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover unpaid wages and liquidated damages under subdivision (a) or (b), and in addition shall be entitled to recover costs of suit. The consent of any employee to the bringing of any action shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (h) unless the action is dismissed without prejudice by the department or the division, except that the employee may intervene in the suit or may initiate independent action if the suit has not been determined within 180 days from the date of the filing of the complaint.

(h) An employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage.

(i) A civil action to recover wages under subdivision (a) or (b) may be commenced no later than two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs.

(j) If an employee recovers amounts due the employee under subdivision (c), and also files a complaint or brings

an action under subdivision (d) of Section 206 of Title 29 of the United States Code which results in an additional recovery under federal law for the same violation, the employee shall return to the employer the amounts recovered under subdivision (c), or the amounts recovered under federal law, whichever is less.

(k)

(1) An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.

(2) Any employee who has been discharged, discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this section may recover in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief.

(3) A civil action brought under this subdivision may be commenced no later than one year after the cause of action occurs.

(l) As used in this section, "employer" includes public and private employers. Section 1199.5 does not apply to a public employer.

Appendix E

Cal. Lab. Code § 98.6

(a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.

(b)

(1) Any employee who is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to an adverse action, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee has made a bona fide complaint

or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer.

(2) An employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

(3) In addition to other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars ($10,000) per employee for each violation of this section, to be awarded to the employee or employees who suffered the violation.

(c)

(1) Any applicant for employment who is refused employment, who is not selected for a training program leading to employment, or who in any other manner is discriminated against in the terms and conditions of any offer of employment because the applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the applicant has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to employment and

reimbursement for lost wages and work benefits caused by the acts of the prospective employer.

(2) This subdivision shall not be construed to invalidate any collective bargaining agreement that requires an applicant for a position that is subject to the collective bargaining agreement to sign a contract that protects either or both of the following as specified in subparagraphs (A) and (B), nor shall this subdivision be construed to invalidate any employer requirement of an applicant for a position that is not subject to a collective bargaining agreement to sign an employment contract that protects either or both of the following:

(A) An employer against any conduct that is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation.

(B) A firefighter against any disease that is presumed to arise in the course and scope of employment, by limiting his or her consumption of tobacco products on and off the job.

(d) The provisions of this section creating new actions or remedies that are effective on January 1, 2002, to employees or applicants for employment do not apply to any state or local law enforcement agency, any religious association or corporation specified in subdivision (d) of Section 12926 of the Government Code, except as provided in Section 12926.2 of the Government Code, or any person described in Section 1070 of the Evidence Code.

(e) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any conduct delineated in this chapter.

(f) For purposes of this section, "employer" or "a person acting on behalf of the employer" includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.

(g) Subdivisions (e) and (f) shall not apply to claims arising under subdivision (k) of Section 96 unless the lawful conduct occurring during nonwork hours away from the employer's premises involves the exercise of employee rights otherwise covered under subdivision (a).

Appendix E

Cal. Lab. Code § 96

The Labor Commissioner and his or her deputies and representatives authorized by him or her in writing shall, upon the filing of a claim therefor by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of:

(a) Wage claims and incidental expense accounts and advances.

(b) Mechanics' and other liens of employees.

(c) Claims based on "stop orders" for wages and on bonds for labor.

(d) Claims for damages for misrepresentations of conditions of employment.

(e) Claims for unreturned bond money of employees.

(f) Claims for penalties for nonpayment of wages.

(g) Claims for the return of workers' tools in the illegal possession of another person.

(h) Claims for vacation pay, severance pay, or other compensation supplemental to a wage agreement.

(i) Awards for workers' compensation benefits in which the Workers' Compensation Appeals Board has found that the

employer has failed to secure payment of compensation and where the award remains unpaid more than 10 days after having become final.

(j) Claims for loss of wages as the result of discharge from employment for the garnishment of wages.

(k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.

Appendix E

Cal. Bus. & Prof. Code § 17200

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

Appendix E

Cal. Bus. & Prof. Code § 17201

As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

Appendix E

Cal. Bus. & Prof. Code § 17201.5

As used in this chapter:

(a) "Board within the Department of Consumer Affairs" includes any commission, bureau, division, or other similarly constituted agency within the Department of Consumer Affairs.

(b) "Local consumer affairs agency" means and includes any city or county body which primarily provides consumer protection services.

Appendix E

Cal. Bus. & Prof. Code § 17202

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

Appendix E

Cal. Bus. & Prof. Code § 17203

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

Appendix E

Cal. Bus. & Prof. Code § 17204

Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.

Appendix E

Cal. Bus. & Prof. Code § 17205

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

Appendix E

Cal. Bus. & Prof. Code § 17206

§ 17206. Civil Penalty for Violation of Chapter

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c)

(1) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the General Fund.

(2) If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered.

(3)

(A) Except as provided in subparagraph (B) and subdivision (e), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(B) If the action is brought by the City Attorney of San Diego, the penalty collected shall be paid to the treasurer of the City of San Diego.

(4) The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.

(d) The Unfair Competition Law Fund is hereby created as a special account within the General Fund in the State Treasury. The portion of penalties that is payable

to the General Fund or to the Treasurer recovered by the Attorney General from an action or settlement of a claim made by the Attorney General pursuant to this chapter or Chapter 1 (commencing with Section 17500) of Part 3 shall be deposited into this fund. Moneys in this fund, upon appropriation by the Legislature, shall be used by the Attorney General to support investigations and prosecutions of California's consumer protection laws, including implementation of judgments obtained from such prosecutions or investigations and other activities which are in furtherance of this chapter or Chapter 1 (commencing with Section 17500) of Part 3. Notwithstanding Section 13340 of the Government Code, any civil penalties deposited in the fund pursuant to the National Mortgage Settlement, as provided in Section 12531 of the Government Code, are continuously appropriated to the Department of Justice for the purpose of offsetting General Fund costs incurred by the Department of Justice.

(e) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the Treasurer. The amount of any

reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(f) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered for the exclusive use by the city attorney for the enforcement of consumer protection laws. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

Appendix E

CAL. BUS. & PROF. CODE § 17206.1

(a)

(1) In addition to any liability for a civil penalty pursuant to Section 17206, a person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which may be assessed and recovered in a civil action as prescribed in Section 17206.

(2) Subject to subdivision (d), any civil penalty shall be paid as prescribed by subdivisions (b) and (c) of Section 17206.

(b) As used in this section, the following terms have the following meanings:

(1) "Senior citizen" means a person who is 65 years of age or older.

(2) "Disabled person" means a person who has a physical or mental impairment that substantially limits one or more major life activities.

(A) As used in this subdivision, "physical or mental impairment" means any of the following:

(i) A physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological;

musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine.

(ii) A mental or psychological disorder, including intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"Physical or mental impairment" includes, but is not limited to, diseases and conditions including orthopedic, visual, speech, and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, and emotional illness.

(B) "Major life activities" means functions that include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) In determining whether to impose a civil penalty pursuant to subdivision (a) and the amount thereof, the court shall consider, in addition to any other appropriate factors, the extent to which one or more of the following factors are present:

(1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.

(2) Whether the defendant's conduct caused one or more

senior citizens or disabled persons to suffer any of the following: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.

(3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

(d) A court of competent jurisdiction hearing an action pursuant to this section may make orders and judgments as necessary to restore to a senior citizen or disabled person money or property, real or personal, that may have been acquired by means of a violation of this chapter. Restitution ordered pursuant to this subdivision shall be given priority over recovery of a civil penalty designated by the court as imposed pursuant to subdivision (a), but shall not be given priority over a civil penalty imposed pursuant to subdivision (a) of Section 17206. If the court determines that full restitution cannot be made to those senior citizens or disabled persons, either at the time of judgment or by a future date determined by the court, then restitution under this subdivision shall be made on a pro rata basis depending on the amount of loss.

Appendix E

Cal. Bus. & Prof. Code § 17207

(a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney in any court of competent jurisdiction within his or her jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover civil penalties shall take precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city, except that if the action was brought by a city attorney of a city and county the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment is entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of the reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of the reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

Appendix E

Cal. Bus. & Prof. Code § 17208

Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

Appendix E

Cal. Bus. & Prof. Code § 17209

If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, each person filing any brief or petition with the court in that proceeding shall serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General, directed to the attention of the Consumer Law Section at a service address designated on the Attorney General's official Web site for service of papers under this section or, if no service address is designated, at the Attorney General's office in San Francisco, California, and on the district attorney of the county in which the lower court action or proceeding was originally filed. Upon the Attorney General's or district attorney's request, each person who has filed any other document, including all or a portion of the appellate record, with the court in addition to a brief or petition shall provide a copy of that document without charge to the Attorney General or the district attorney within five days of the request. The time for service may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted or opinion issued until proof of service of the brief or petition on the Attorney General and district attorney is filed with the court.

Appendix E

Cal. Bus. & Prof. Code § 17210

(a) For purposes of this section, "hotel" means any hotel, motel, bed and breakfast inn, or other similar transient lodging establishment, but it does not include any residential hotel as defined in Section 50519 of the Health and Safety Code. "Innkeeper" means the owner or operator of a hotel, or the duly authorized agent or employee of the owner or operator.

(b) For purposes of this section, "handbill" means, and is specifically limited to, any tangible commercial solicitation to guests of the hotel urging that they patronize any commercial enterprise.

(c) Every person (hereinafter "distributor") engages in unfair competition for purposes of this chapter who deposits, places, throws, scatters, casts, or otherwise distributes any handbill to any individual guest rooms in any hotel, including, but not limited to, placing, throwing, leaving, or attaching any handbill adjacent to, upon, or underneath any guest room door, doorknob, or guest room entryway, where either the innkeeper has expressed objection to handbill distribution, either orally to the distributor or by the posting of a sign or other notice in a conspicuous place within the lobby area and at all points of access from the exterior of the premises to guest room areas indicating that handbill distribution is prohibited, or the distributor has received written notice pursuant to subdivision (e) that the innkeeper has expressed objection to the distribution of handbills to guest rooms in the hotel.

(d) Every person (hereinafter "contractor") engages in unfair competition for purposes of this chapter who causes or directs any other person, firm, business, or entity to distribute, or cause the distribution of, any handbill to any individual guest rooms in any hotel in violation of subdivision (c) of this section, if the contractor has received written notice from the innkeeper objecting to the distribution of handbills to individual guest rooms in the hotel.

(e) Every contractor who causes or directs any distributor to distribute, or cause the distribution of, any handbills to any individual guest rooms in any hotel, if the contractor has received written notice from the innkeeper or from any other contractor or intermediary pursuant to this subdivision, objecting to the distribution of handbills to individual guest rooms in the hotel has failed to provide a written copy of that notice to each distributor prior to the commencement of distribution of handbills by the distributor or by any person hired or retained by the distributor for that purpose, or, within 24 hours following the receipt of the notice by the contractor if received after the commencement of distribution, and has failed to instruct and demand any distributor to not distribute, or to cease the distribution of, the handbills to individual guest rooms in any hotel for which such a notice has been received is in violation of this section.

(f) Any written notice given, or caused to be given, by the innkeeper pursuant to or required by any provision of this section shall be deemed to be in full force and effect until such time as the notice is revoked in writing.

(g) Nothing in this section shall be deemed to prohibit the distribution of a handbill to guest rooms in any hotel where the distribution has been requested or approved in writing by the innkeeper, or to any individual guest room when the occupant thereof has affirmatively requested or approved the distribution of the handbill during the duration of the guest's occupancy.

APPENDIX F — NLRB NOTICE OF APPROVAL OF SETTLEMENT AGREEMENT

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 32
1301 Clay St Ste 300N
Oakland, CA 94612-5224

Agency Website:
www.nlrb.gov
Telephone: (510)637-3300
Fax: (510)637-3315

September 9, 2019

Chris Baker, Esq.
Baker Curtis & Schwartz P.C.
1 California St Ste 1250
San Francisco, CA 94111

Re: GOOGLE, INC. AND NEST LABS, INC., A SINGLE EMPLOYER
Case 32-CA-176462

Dear Mr. Baker:

We have carefully investigated and considered your charge that Google (Employer) has violated the National Labor Relations Act.

Appendix F

Decision to Approve Settlement Agreement: You have submitted two written objections to the attached Settlement Agreement which has been executed by the Employer in this matter. You contend that the Region is required to seek a formal settlement agreement in this matter and that the Agreement is unenforceable because it purports to remedy matters beyond the Board's jurisdiction to enforce the National Labor Relations Act (Act). I am unpersuaded by either of these objections. First, resolving this case through an informal settlement agreement is appropriate. Formal settlements are discretionary and there is no basis to require a formal settlement of the type of allegations raised in this case, particularly in the absence of a significant history of unfair labor practices by the Employer. With regard to the Board's jurisdiction, as set forth in the Scope of the Agreement provision, the Settlement Agreement covers only the alleged violations of the Act and does not seek to remedy or cover any other matters not before the Board. The use of the term "you" in the Notice language does not serve to extend the Board's jurisdiction to any matters not covered by Act. Accordingly, in view of the terms the Employer has agreed to in the attached Settlement Agreement, I have determined that it would not effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time. I am, therefore, approving the Settlement Agreement and refusing to reissue a complaint in this matter.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals.

Appendix F

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. To file electronically using the Agency's e-filing system, go to our website at www.nlrb.gov and:

1) Click on E-File Documents;

2) Enter the NLRB Case Number; and,

3) Follow the detailed instructions.

Electronic filing is preferred, but you also may use the enclosed Appeal Form, which is also available at www.nlrb.gov. You are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001.** Unless filed electronically, a copy of the appeal should also be sent to me.

The appeal MAY NOT be filed by fax or email. The Office of Appeals will not process faxed or emailed appeals.

Appeal Due Date: The appeal is due on **September 23, 2019.** If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than September 22,

2019. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension oftime is **received on or before September 23, 2019.** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension oftime to file an appeal received after September 23, 2019, **even if it is postmarked or given to the delivery service before the due date.** Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a

case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

s/_____
Valerie Hardy-Mahoney
Regional Director

Enclosure

cc: Michael Pfyl, Senior Counsel
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Appendix F

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Paul Hasting LLP
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Scott Ruffner
c/o Chris Baker Baker & Schwartz, P.C.
44 Montgomery Street, Suite 3520
San Francisco, CA 94104

Appendix F

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in approving the settlement agreement in

_____

Case Name(s).

_____

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*

_____

(Signature)

Appendix F

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

GOOGLE, INC. AND NEST LABS, INC.,
A SINGLE EMPLOYER

Case 32-CA-176462

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS**:

POSTING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notice to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and immediately post them in a place customarily used by the Charged Party for posting notices to employees at its corporate headquarters located at 1600 Amphitheater Parkway in Mountain View, California and the Nest Labs, Inc. headquarters located at 3400 Hillview Avenue in Palo Alto, California, within the United States of America. The Charged Party will keep all Notices posted for 60 consecutive days after the initial posting.

INTRANET POSTING - The Charged Party will also post a copy of the Notice in English and in additional languages

if the Regional Director decides that it is appropriate to do so, on its intranet ("MOMA") home screen and keep it continuously posted there for 60 consecutive days from the date it was originally posted. The Charged Party will submit a paper copy of the intranet or website posting to the Region's Compliance Officer when it submits the Certification of Posting and provide a screenshot of the home screen in the event it is necessary to check the electronic posting.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSION CLAUSE – By entering into this Settlement Agreement, the Charged Party does not admit that it has violated the National Labor Relations Act or any other law.

SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), and does not settle any other case(s) or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts

may make findings of fact and/or conclusions of law with respect to that evidence. By approving this Agreement the Regional Director withdraws any Complaint(s) and Notice(s) of Hearing previously issued in the above case(s), and the Charged Party withdraws any answer(s) filed in response.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes_____J.A.L._____No_____
Initials Initials

Appendix F

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director. The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will reissue the Amended Consolidated Complaint that previously issued on November 18, 2018.

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned case(s) provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

Appendix F

Charged Party **Google, Inc., and Nest Labs, Inc.**		**Charging Party** **Scott Ruffner**	
By: Name and Title	Date	By: Name and Title	Date
/s/ J. Al Latham Jr.	8/26/19		
Print Name and Title below J. Al Latham Jr. Attorney for Google + Nest Labs		Print Name and Title below	
Recommended By:	Date	Approved By:	Date
/s/ D. Criss Parker D. Criss Parker Field Attorney	9/09/19	/s/ Valerie Hardy-Mahoney VALERIE HARDY-MAHONEY Regional Director, Region 32	9/9/19

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to discuss wages, hours, and working conditions with other employees, the press/media,

and other third parties, and **WE WILL NOT** do anything to interfere with your exercise of those rights.

YOU HAVE THE RIGHT to freely bring workplace diversity issues and requests to clarify permissible workplace behavior to us on behalf of yourself and other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT threaten employees because they presented workplace diversity issues to us and requested clarifications of permissible workplace behavior.

WE WILL NOT reprimand, discipline, or issue a final written warning to you because you exercise your right to bring to us, on behalf of yourself and other employees, issues and complaints regarding your wages, hours, and other terms and conditions of employment.

WE WILL NOT make it appear to you that we are watching out for your protected concerted activities or ask that you report other employees who are engaging in protected concerted activity regarding their wages, hours, and working conditions.

WE WILL NOT threaten you with the loss of your job or other retaliation if you engage in protected activity with other employees regarding your wages, hours, and working conditions.

WE WILL NOT prohibit you from discussing or sharing information relating to your performance, salaries,

benefits, discipline, training, or any other terms and conditions of your employment and **WE HAVE** rescinded any such rules from our Data Classification Guidelines and related Data Security Policy effective November 2016.

WE WILL NOT maintain rules that define "confidential information" to include employee information about wages and terms and conditions of employment and **WE HAVE** rescinded sections of our Data Security Policy and our Data Classification Guidelines that arguably used such a definition of "confidential information" effective November 2016.

WE WILL NOT prohibit you from talking to the press/media about your terms and conditions of employment or require you to obtain prior approval before speaking with the press/media and **WE HAVE** rescinded any such rules in our Appropriate Conduct Policy, the "Interacting with the Press" provision in the Employee Communications Policy, and the "Outside Communication and Research" provision in the Google Code of Conduct effective September 2016, December 2016, and April 2017, respectively.

WE WILL remove from our files all references to the final written warning issued to the Charging Party on August 19, 2015, and **WE WILL** notify him in writing that this has been done and that the final written warning will not be used against him in any way.

WE HAVE notified you that we have rescinded the rules described above.

Appendix F

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

Google, Inc.
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay St Ste 300N
Oakland, CA 94612-5224

Telephone: (510)637-3300
Hours of Operation:
8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

Appendix F

Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

Google, Inc. and Nest Labs, Inc.
(Employer)

Dated: _____By:_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

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