No. S227243

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

GERAWAN FARMING, INC.
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,

UNITED FARM WORKERS OF AMERICA,
Real Party in Interest.

GERAWAN FARMING, INC.,
Plaintiff and Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,

UNITED FARM WORKERS OF AMERICA,
Real Party in Interest and Respondent.

After decision by the Court of Appeal, Fifth Appellate District,
Case Nos. F068526 and F068676

Reversing a decision of the ALRB (39 ALRB No. 17) and affirming the judgment of the Superior Court for the County of Fresno (Case No. 13CECG01408, Hon. Donald Black presiding)

REPLY IN SUPPORT OF PETITION FOR REVIEW

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REPLY IN SUPPORT OF PETITION FOR REVIEW

Gerawan Farming, Inc. (Gerawan) does not dispute that the Fifth Appellate District's decision creates a conflict about the constitutionality and application of a statute that is central to the operation of the Agricultural Labor Relations Act (ALRA). Accordingly, the Court should grant the petitions for review filed by the United Farm Workers of America (Union or UFW) and Agricultural Labor Relations Board (ALRB).

Contrary to Gerawan's contention, the pendency of a separate decertification proceeding – which Gerawan itself illegally instigated and supported – provides no reason to deny or defer review. Regardless of the outcome of that proceeding, the legal issues presented by the petitions for review are of statewide importance and should be resolved expeditiously.

Gerawan also contends that, if the petitions for review are granted, this Court should expand the issues for review. The non-constitutional issues that Gerawan asks this Court to decide either were not raised in Gerawan's petition for a writ of review to the Court of Appeal or were correctly resolved by the ALRB and Court of Appeal. There is no good reason for this Court to expand the issues on review to consider them.

On the other hand, it would serve the interests of justice for the Court to expand the issues on review to include *all* the unaddressed constitutional challenges to mandatory mediation and conciliation (MMC) that Gerawan raised in its petition for a writ of review in the Court of Appeal. Otherwise, if this Court concludes that the Fifth Appellate District erred in striking down the MMC statute on equal protection and delegation grounds, Gerawan will resurrect these unaddressed constitutional challenges on remand, and the constitutionality of MMC will remain in dispute. If the Court does not expand the issues to include *all* the

unaddressed constitutional challenges, however, there is no efficiency to be gained in expanding the issues on review to include only the two unaddressed constitutional issues proffered by Gerawan in its answer.

I. The Court should grant the petitions for review

A. Gerawan does not dispute that the Fifth Appellate District's holdings that the MMC statute violates equal protection and makes an unconstitutional delegation of legislative authority squarely conflict with the Third Appellate District's holdings in *The Hess Collection Winery v. ALRB* (2006) 140 Cal. App. 4th 1584. Moreover, Gerawan's defense of the Fifth Appellate District's reasoning (Answer at 7-13) is premised upon a misrepresentation of the MMC statute.

The MMC statute does not leave the resolution of contract disputes to whim. The MMC statute provides that, if the parties cannot reach a full resolution through mediation, the mediator must issue a reasoned report that recommends resolution of the remaining disputes in light of statutory factors that are commonly used to resolve other labor contract disputes through interest arbitration. *See* Labor Code §1164(e); *see also* UFW Petition at 20. The mediator's report must "include the basis for the mediator's determination" and must be "supported by the record." Labor Code §1164(d). The ALRB must set aside a provision of the mediator's report if the provision is "based on clearly erroneous findings of material fact" or "is arbitrary or capricious in light of the . . . findings of fact." *Id.* §1164.3(a).

That being so, the MMC statute is not analogous to the law in *Yick Wo v. Hopkins* (1886) 118 U.S. 356, a decision from which Gerawan quotes. *See* Answer at 11. The *Yick Wo* statute granted government officials unbounded, unguided, unreviewable authority to deny business permits

based on their personal prejudices. *See* 118 U.S. at 366-67 ("The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."). The MMC statute, by contrast, requires reasoned decisionmaking based on an evidentiary record and provides both "guidance" (through the statutory factors) and "restraint" (through the requirement of a reasoned decision supported by an evidentiary record and the provisions for ALRB and judicial review). The failure to grant review of the Court of Appeal's decision invalidating the MMC statute would create doubt about the constitutionality of many other statutes that provide for fact-specific decisionmaking. *See* UFW Petition at 20 & n.5.

B. Gerawan also does not dispute that the Fifth Appellate District's decision creates a conflict with ALRB precedent about whether alleged "abandonment" can be raised as a defense to a certified union's request for referral to MMC. UFW's petition for review demonstrates that the Court of Appeal's analysis of this issue makes no sense as a matter of statutory interpretation, fails to give proper deference to the ALRB, would undermine much of what the Legislature sought to accomplish in adopting the MMC statute to revive dormant bargaining relationships, and would leave many farmworker bargaining units in limbo. *See* UFW Petition at 25-32.

Gerawan's defense of the Court of Appeal's ruling (Answer at 13-15) fails to deal with the actual language of the MMC statute or the background ALRB caselaw against which the statute was adopted. Gerawan also continually misrepresents the record relevant to its allegation of abandonment by claiming that the Court of Appeal's decision was justified by the undisputed history of the bargaining relationship between

the parties here. *See, e.g.*, Answer at 14, 18. To the contrary, Gerawan's narrative about why the parties never reached an initial collective bargaining agreement is a work of fiction. The ALRB summarily and correctly rejected Gerawan's attempt to raise an abandonment defense, so the Union never was asked to respond.[1]

II. The decertification proceeding illegally instigated by Gerawan provides no basis for denying or deferring review

Contrary to Gerawan's contention, the pendency of a separate ALRB decertification proceeding provides no reason for denying or deferring review of the legal issues presented by the petitions for review. The MMC statute is central to the continued operation of the ALRA. The Fifth Appellate District's decision creates an urgent need for this Court's review to settle the disputes about the constitutionality and application of this statute.[2]

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[1] The Court of Appeal explained that, because of the procedural posture, "it does not appear that all the relevant facts were presented by both sides" and "it is unclear whether the facts are undisputed." Op. at 41 n. 33.

[2] Even if this Court were bound by Article III mootness doctrine, the decertification proceeding could not moot this case. After the Court of Appeal's decision, Gerawan filed a motion in the Court of Appeal seeking a $2.6 million fee award from UFW and the ALRB based on Gerawan's status at the prevailing party in the Court of Appeal. The Court of Appeal deferred consideration of Gerawan's fee motion pending this Court's disposition of the petitions for review. *Cf. Local No. 82 v. Crowley* (1984) 467 U.S. 526, 535 n.11 (rejecting mootness argument because "there are still pending several important collateral matters, including claims for damages, attorney's fees, and costs, that are dependent upon the propriety of the District Court's preliminary injunction"); *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1417, 1419 (case not moot where potential fee claim was predicated on correctness of ruling below).

Equally to the point, giving any consideration to the mere pendency of a decertification proceeding would be inconsistent with longstanding ALRA precedent. It also would reward Gerawan for its own misconduct.

Under the ALRA, the employer has a legal duty to continue to bargain in good faith with the certified union and enter into contracts, notwithstanding the pendency of decertification proceedings, which are legally irrelevant before issuance of a final ALRB order.[3] A common employer tactic is to try to destabilize the union by illegally instigating and supporting a decertification campaign.[4] Giving any consideration to the mere pendency of a decertification proceeding would provide a further incentive to such behavior, which is inimical to the purposes of the statute.

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[3] *See, e.g., Nish Noroian Farms* (1982) 8 ALRB No. 25, at 14-16 ([t]he duty to bargain, which springs from certification, will be terminated only with the certification of the results of a decertification . . . election where the incumbent has lost"); *id.* at 14 ("Under the ALRA, the rule is as follows: After a union is certified, an employer has a duty to bargain upon request with that union. A filed petition, direction of election, or tally of ballots does not affect that duty."); *M. Caratan, Inc.* (1983) 9 ALRB No. 33, at 13 ("Respondent's sole reason for refusing to sign the contract was the pendency of the decertification petition. Neither the pendency of the decertification petition, nor the tally of ballots, which later issued, suspended the Respondent's duty to bargain in good faith"); *Montebello Rose Co., Inc. v. ALRB* (1981) 119 Cal.App.3d 1, 24-25 (employer's duty to bargain with certified union does not lapse "until such time as the union is officially decertified").

[4] *See, e.g., Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2, at 24 (dismissing decertification petition because of illegal employer involvement); *D'Arrigo Bros. Co. of California* (2013) 39 ALRB No. 4 at 27-29 (same); *Cattle Valley Farms* (1983) 9 ALRB No. 65, at 7 (same); *Abatti Farms, Inc.* (1981) 7 ALRB No. 36, at 5-7 (same); *S & J Ranch, Inc.* (1992) 18 ALRB No. 2, at 87-89 (same); *M. Caratan, Inc.* (1983) 9 ALRB No. 33, at 7 (same).

In this case, moreover, the ALRB already ordered the decertification election ballots impounded because of prima facie evidence presented by UFW and the ALRB General Counsel that Gerawan "unlawfully initiated, assisted in and supported the gathering of signatures for the decertification petition and decertification campaign." *Gerawan Farming, Inc.* (2013) 39 ALRB No. 20, at 3-4, 47-48.

Gerawan seeks to mislead the Court by claiming that "Gerawan workers initiated one of the largest sustained decertification drives in California agricultural history." Answer at 1. Rather, Gerawan owners, high-level managers, and supervisors instigated the decertification effort. The misconduct was so egregious that it resulted in the longest evidentiary hearing in the 40-year history of the ALRA. The evidence at that hearing showed, among other things, that Gerawan and its agents coerced workers to sign the decertification petition, illegally supported signature gatherers, promoted "staged" work stoppages to force workers to support these Gerawan-backed efforts, threatened workers with company closure, and hired workers for the express purpose of running the decertification campaign. The matter is now under submission before an administrative law judge. The outcome of the process is likely to be the complete dismissal of the decertification election petition. (Gerawan's first attempt to instigate a decertification election resulted in the ALRB dismissing the election petition because of evidence of mass forgeries of worker signatures and other illegal employer misconduct.)

The ALRB, moreover, held in abeyance the resolution of many other election objections and unfair labor practice charges alleging that Gerawan engaged in additional unlawful activities that would invalidate any election results. *See Gerawan*, 39 ALRB No. 20 at 2-3, 4-15, 47-51. The ALRB already has found that these are allegations "for which a prima facie case is

supported by declarations" and that, if proven, they involve conduct that "would constitute sufficient grounds for the Board to refuse to certify the election." *Id.* at 2. Multiple declarations supported allegations that Gerawan violated the ALRA by, among other things, "giving preferential access to decertification supporters," *Gerawan*, 39 ALRB No. 20 at 4, "paying for, supporting or coercing worker participation in anti-UFW protests," *id.* at 5, "threatening bankruptcy, closure, or discontinuance of operations," *id.* at 6, "unlawfully la[ying] off/discharg[ing] union supporters," *id.* at 7, "unlawfully hir[ing] employees for the purpose of supporting decertification efforts and voting in the decertification election," *id.* at 8, and unlawfully granting benefits to employees to influence the election, *id.* at 9-11. If the election petition is not dismissed, the ALRB will conduct subsequent evidentiary hearings on these allegations. *Id.* at 48-50.

Denying the petitions for review because of the pending decertification proceeding would reward Gerawan for its own misconduct. Similarly, deferring the petitions for review until the final outcome of the decertification proceeding would both reward Gerawan for its misconduct and give Gerawan a further incentive to drag out resolution of the decertification proceeding. As Gerawan itself admits, the resolution of the proceeding could take "years." Answer at 2. Accordingly, this Court should grant the petitions for review to resolve the important legal issues while the decertification proceeding runs on its separate track.

III. The issue whether the ALRB erred by not staying its final MMC order was not raised in the petition for a writ of review and also is not worthy of review

Gerawan contends that, if the petitions for review are granted, this Court should expand the issues to decide whether the ALRB erred by not staying its final MMC order pending resolution of the decertification petition. Answer at 16. This issue was not raised in Gerawan's petition for a

writ of review to the Court of Appeal, and the Court of Appeal did not address the issue in its opinion. Therefore, this issue is not properly part of this proceeding.

In any event, there is no substantial legal issue for the Court's review. The MMC statute provides that if, as here, no party petitions the ALRB for review of a mediator's second report, then that report "shall take immediate effect as a final order of the board." Labor Code §1164.3(d). The statute does not provide the ALRB with authority to stay issuance of its final order.

A rule that MMC proceedings automatically are stayed by the filing of a decertification petition also would be contrary to settled ALRA caselaw that the pendency of a decertification petition is irrelevant to the certified union's status as the bargaining representative, and it would give employers an additional incentive to illegally support decertification efforts. *See* p. 9, *supra.* Even if the ALRB had authority to issue discretionary stays, moreover, a situation in which the ballots were impounded based on prima facie evidence of serious employer misconduct is not an appropriate situation for such a stay. Accordingly, there is no issue that merits this Court's review.

IV. The statutory arguments that the Fifth Appellate District rejected are not worthy of this Court's review

Gerawan also contends that, if the petitions for review are granted, this Court should expand the issues presented to decide whether UFW's declaration requesting referral to MMC satisfied two statutory prerequisites for such requests. Answer at 17-24. Neither issue involves a conflict or otherwise merits review.

A. The MMC statute provides that, when a union was certified "prior to January 1, 2003," either party can request referral to MMC if, among other things, "the parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain." Labor Code §1164.11.

UFW's declaration requesting referral to MMC here stated that the parties had never reached a CBA and that more than a year had passed since UFW's initial request for bargaining in July 1992. Gerawan nonetheless argued to the ALRB that UFW's declaration did not satisfy the prerequisites for referral to MMC because the declaration did not address the quantity and quality of the bargaining sessions. The ALRB correctly rejected that argument as contrary to the plain statutory language:

> The Employer contends that the UFW was required to show that it engaged in "a good faith and sustained effort to bargain" during the one-year period after the initial bargaining request. . . . Labor Code section 1164.11, subdivision (a), contains no language imposing such a requirement. It requires only that the parties failed to reach an agreement for at least one year.

Gerawan Farming, Inc. (2013) 39 ALRB No. 5, at 2.

The Fresno County Superior Court rejected the same argument when Gerawan sought a writ of mandate. *See* Order Denying Petition for Writ of Mandate, Sep. 26, 2013 (*Gerawan Farming, Inc. v. ALRB*, Fresno County Sup. Ct. Case No. 13 CECG 01408), Clerk's Transcript on Appeal ("CTA") at 3110-11 ("it appears to the court that [Gerawan] seeks to graft language onto the statute which does not now exist . . . it appears undisputed that: (1) the parties failed to reach agreement for at least one year after UFW made its initial request to bargain"). The Court of Appeal agreed with the ALRB and the Superior Court. Op. at 18-20.

Gerawan fails to show any conflict on this issue or even that its own construction of the statutory language is plausible. Further, nothing in the MMC statute provides any standards for an inquiry into the quality or quality of the bargaining sessions, and the statute requires the ALRB to "immediately" refer the parties to MMC upon receipt of a declaration showing that the prerequisites for referral exist. Labor Code §1164(b). The requirement for "immediate[]" referral makes clear that the Legislature intends the prerequisites for MMC to be easily verifiable, not the potential subject of evidentiary hearings about whether a party bargained in "good faith." The Legislature also provided that, when a union was certified prior to January 1, 2003, a party may request MMC only at least "90 days after a renewed demand to bargain" (Labor Code §1164(a)(1)), so regardless of why no CBA was reached in the past, the parties have had another opportunity to engage in meaningful bargaining before referral to MMC. There is no issue worthy of this Court's review.

B. The MMC statute also provides that, when a union was certified "prior to January 1, 2003," either party may request referral to MMC only if "the employer has committed an unfair labor practice." Labor Code §1164.11. UFW's declaration requesting referral to MMC stated that Gerawan had committed multiple unfair labor practices and cited the relevant ALRB decisions. Gerawan nonetheless argued that the declaration was not sufficient to establish the prerequisites for MMC. Again, the ALRB correctly rejected Gerawan's argument as contrary to the plain statutory language:

> The Employer also contends that the UFW was required to show that the Employer committed a ULP arising out of conduct that occurred after the UFW was certified, and which involved a refusal to bargain in good faith. The plain language of Labor Code section 1164.11 subsection (b), however, does not support the Employer's argument. That

> subsection requires only that the employer "has committed an unfair labor practice." The cases identified by the UFW in its declaration, *Gerawan Ranches* (1992) 18 ALRB No. 5 and *Gerawan Ranches* (1992) 18 ALRB No. 16, which involved multiple ULPs committed in connection with the elections that resulted in the certification of the UFW, including a refusal to bargain over unilateral changes made in the post-election, pre-certification period, meet the requirement of Labor section 1164.11 subsection (b) that the employer "committed an unfair labor practice."

Gerawan, 39 ALRB No. 5, at 3. The Fresno County Superior Court rejected the same argument when Gerawan sought a writ of mandate. *See* Order Denying Petition for Writ of Mandate, Sep. 26, 2013, CTA at 3110 ("[t]here is no provision in the unambiguous language of section 1164.11 requiring that . . . the employer commit an unfair labor practice at any particular point in the process"). The Court of Appeal agreed with the ALRB and the Superior Court. Op. at 24-25.

Again, Gerawan does not establish that there is a conflict or even that its own interpretation of the statutory language is plausible. Moreover, even if Gerawan were correct that the MMC statute requires that the unfair labor practice be related to bargaining, Gerawan's illegal "refusal to bargain over unilateral changes" (39 ALRB No. 5, at 3) *was* an unfair labor practice related to bargaining. There is no issue worthy of this Court's review.

V. The Court should expand the issues to include all the unaddressed constitutional challenges to the MMC statute raised in Gerawan's petition for a writ of review

Finally, Gerawan contends that the Court should expand the issues on review to include two of constitutional challenges to the MMC statute that the Court of Appeal did not address. Answer at 24-27.[5] While none of

[5] Gerawan's Answer asks the Court to expand the issues to decide whether the MMC statute "deprives Gerawan of liberty and property interests

Gerawan's unaddressed constitutional challenges have any merit, the interest of justice would be served by this Court's resolution of *all* of Gerawan's constitutional challenges to MMC in a single proceeding. Otherwise, if the Court reverses the Fifth Appellate District's decision, Gerawan would raise these constitutional challenges on remand, and the constitutionality of the MMC statute would remain in dispute for longer than necessary. While this Court does not typically address legal issues in the first instance, the MMC statute allows a petition for a writ of review from a final MMC order to be filed directly in this Court rather than the Court of Appeal. *See* Labor Code §1164.5(a).

The two unaddressed constitutional issues proffered in Gerawan's answer are just a subset of the unaddressed constitutional issues raised in Gerawan's petition for a writ of review to the Court of Appeal. Gerawan's petition for review raised the following constitutional issues: 1) "Whether compulsory arbitration under the MMC Statute violates the U.S. and State Constitutions by depriving Gerawan of property and liberty of contract without due process of law"; 2) "Whether the MMC's combination of mediation and adjudicative procedures in one decisionmaker violates due process"; 3) "Whether the MMC Statute's delegation of near plenary legislative power to one private mediator violates separation of powers and the due process clauses under the U.S. and State Constitutions"; 4) "Whether the MMC Statute unconstitutionally strips Gerawan of its right to judicial review of the Order"; 5) "Whether the MMC Statute and the Order violates the equal protection clauses of the U.S. and State Constitutions"; 6) "Whether the Order violates the Contracts and Takings Clauses of the

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without due process" and whether the MMC statute "violates dues process, or constitutes an unconstitutional taking of property without just compensation, by failing to provide the employer with any mechanism that secures 'a just and reasonable rate of return' . . . ." Answer at 4.

U.S. and State Constitutions"; and 7) "Whether the Board's determination to bar the public and Gerawan's workers from access to the 'on-the-record' MMC proceedings violates the U.S. and state Constitutions and thus nullifies the Order." Gerawan's Petition for a Writ of Review, at 6-7.[6]

If this Court expands the issues on review to include unaddressed constitutional challenges to MMC, the Court should expand the issues to include *all* the unaddressed constitutional issues that Gerawan raised in its petition for writ of review to the Court of Appeal.[7] On the other hand, if this Court decides not to expand the issues to include *all* the unaddressed constitutional issues, the Court should not expand the issues to include any of the unaddressed issues, as there is no efficiency to be gained.

CONCLUSION

The petition for review should be granted.

Dated: July 23, 2015

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By: */s/ Scott A. Kronland*
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[6] The issue of public access to MMC proceedings is also the subject of a separate appeal by Gerawan to the Fifth Appellate District, *Gerawan Farming, Inc. v. ALRB*, Case No. F069896.

[7] Gerawan's petition for a writ of review also challenged nine specific provisions of the mediator's report. Those challenges raise case-specific issues, not constitutional challenges to MMC.

CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.504(d)(1) of the California Rules of Court that this Reply in Support of Petition for Review is proportionally spaced, has a typeface of 13 points or more, and contains 3,873 words, excluding the cover, tables, signature block, and this certificate, which is fewer than the number of words permitted by the Rules of Court. Counsel relies on the word count of the word processing program used to prepare this brief.

Dated: July 23, 2015 by: */s/ Scott A. Kronland*
Scott A. Kronland
Counsel for Real Party in Interest
United Farm Workers of America

PROOF OF SERVICE

Case: *Gerawan Farming, Inc. v. ALRB*,
Supreme Court Case No. S227243
Fifth App. Dist. Nos. F068526 and F068676

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On July 23, 2015, I served the following document(s):

REPLY IN SUPPORT OF PETITION FOR REVIEW

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Submission via TrueFiling: I submitted a service copy of such document(s) via TrueFiling, thus sending an electronic copy and effecting service.

Method of Service	**Addressee**	**Party**
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A	The Hon. Donald Black Fresno County Superior Court 1100 Van Ness Avenue Fresno, CA 93724-0002	Trial Court
B	California Court of Appeal For the Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Court of Appeal

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this July 23, 2015, at San Francisco, California.

/s/Jean Perley
Jean Perley