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.

Fifth Appellate District, Case No. F068526
ALRB Case No. 2013-MMC-003 [39 ALRB No. 17]

Fifth Appellate District, Case No. F068676
Fresno County Superior Court, Case No. 13CECG01408
Hon. Donald S. Black, Judge

REAL PARTY IN INTEREST UNITED FARM WORKERS OF AMERICA'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Whether the Agricultural Labor Relations Act ("ALRA") mandatory mediation and conciliation ("MMC") process for employers and certified unions that have never reached a first collective bargaining agreement violates on its face the equal protection clauses of the federal and California constitutions.

2. Whether the MMC statute unconstitutionally delegates legislative authority.

3. Whether the ALRA permits an employer to oppose a certified union's request for referral to the MMC process by contending that the union "abandoned" the bargaining unit.

See Order of August 19, 2015 ("The issues to be briefed and argued are limited to the issues raised in the petitions for review.").

INTRODUCTION

Twenty-five years after the California Legislature enacted the Agricultural Labor Relations Act ("ALRA") in 1975, it was clear that the statute had failed to achieve the Legislature's goal of providing millions of farm workers the right to collectively bargain with their employers, so as to improve farm workers' lives and the lives of their families. Many farm workers voted for union representation but, as of 2002, fewer than half of the agricultural employers whose employees had elected a union since 1975 had ever agreed to a collective bargaining agreement, and fewer farm workers had union contracts than prior to enactment of the ALRA. In 2002, a frustrated Legislature amended the ALRA to provide a mandatory

mediation and conciliation ("MMC") process for certified unions and employers that had failed to reach first contracts. The Legislature concluded these amendments were necessary to

> ensure a more effective collective bargaining process . . . and thereby more fully attain the purposes of the [ALRA], ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California's well-being by ensuring stability in its most vital industry.

Stats. 2002, ch. 1145, §1.

After several years of litigation, the Third Appellate District rejected employer constitutional challenges to the MMC statute in *Hess Collection Winery v. ALRB* (2006) 140 Cal. App. 4th 1584, 1603-10, *review denied.* Nonetheless, many agricultural employers still do not accept MMC just as they never accepted that they had a legal duty to bargain in good faith with certified unions prior to adoption of the MMC statute. In this case, Gerawan Farming, Inc. ("Gerawan") received a renewed demand for bargaining from the United Farm Workers of America ("UFW"), and then resisted, challenged, and delayed the MMC process at every step while at the same time illegally campaigning to have UFW removed as the bargaining unit's representative. The Agricultural Labor Relations Board ("ALRB") ultimately issued a final order in 2013 finally establishing a reasonable, initial collective bargaining agreement for a bargaining unit that voted for union representation in 1990.

That agreement, however, has never gone into effect. At Gerawan's urging, the Fifth Appellate District stayed enforcement of the ALRB's final order. The Fifth District then struck down the MMC statute as a facial violation of equal protection and an unlawful delegation of legislative authority and also held that the ALRB should not have referred the parties to MMC without permitting Gerawan to challenge UFW's status as the

certified bargaining representative. The Fifth District erred in deciding each of these issues.

The Fifth District's equal protection analysis harkens back to outdated *Lochner*-era jurisprudence about economic regulation. It is now settled law that economic regulation may treat businesses differently as long as the regulation is rationality related to a legitimate government purpose. The MMC statute provides for the ALRB to resolve labor contract disputes, if necessary, through a process that involves consideration of the details of each dispute and a common list of rational statutory factors for resolving such disputes. The individualized process serves the legitimate government purposes of encouraging parties to resolve their own disputes, and of bringing labor disputes to a reasonable conclusion, tailored to each dispute, when that is not possible. As such, the statute is not a facial violation of equal protection. The Court of Appeal's ruling that the MMC process poses too great a risk of "arbitrary" decision-making ignores both the statutory safeguards against arbitrary administrative action and settled equal protection jurisprudence that a hypothetical risk of arbitrary or discriminatory administration does not make a statute unconstitutional on its face.

The Fifth District's analysis of the delegation issue is equally out of step with modern jurisprudence. This Court has upheld statutes that provide the same type of guidance for implementation. This Court has rejected the contention that the Legislature must set out detailed standards that pre-determine the outcome of administrative processes in circumstances in which such a formula would be inappropriate. The MMC statute satisfies constitutional requirements for providing guidance to administrators and for procedural safeguards against arbitrary administration. It also bears emphasis that there is a long history of statutes requiring interest arbitration as a means of resolving labor disputes. The Fifth District's analysis ignored

that history and the many court decisions that uphold similar interest arbitration statutes against similar delegation challenges.

The Fifth District also erred as a matter of statutory interpretation by holding that an employer may challenge the status of a certified union representative by claiming, in response to the union's request for referral to MMC, that the union "abandoned" the bargaining unit. The Fifth District acknowledged that, under the ALRA, a union elected by workers through a secret ballot election and certified by the ALRB remains the certified representative for purposes of bargaining unless *workers* decertify the union. The Legislature felt so strongly about precluding agricultural employer involvement in representational issues that the ALRA differs from the National Labor Relations Act ("NLRA") on which it was modeled: employers sometimes may raise challenges to a union's representative status under the NLRA, but never under the ALRA. *Compare* Labor Code § 1156.3 *with* 29 U.S.C. § 159(c)(1)(B); *see also F & P Growers v. ALRB* (1985) 168 Cal. App. 3d 667, 672-78.

The Court of Appeal recognized that, under the language of the ALRA and long-standing ALRB and Court of Appeal precedent, an employer may not challenge a union's majority status as a defense to the duty to bargain. There is no basis in the language or history of the MMC statute for distinguishing, as the Court of Appeal did, between whether a union is the certified representative for purposes of collective bargaining and whether the same union is the certified representative for purposes of invoking the MMC process to resolve bargaining disputes. The Court of Appeal's interpretation of the MMC statute would invite employers to challenge the representative status of previously-certified unions and undermine a large part of what the Legislature sought to accomplish in adopting the MMC statute to revive dormant bargaining relationships and produce collective bargaining agreements that benefit farm workers.

STATEMENT OF THE CASE

1. The ALRA and MMC Amendments

Congress excluded farm workers from the protections of the NLRA. *See* 29 U.S.C. §152(3). In 1975, the California Legislature adopted, and Governor Jerry Brown signed, the ALRA, Labor Code §1140 *et seq.*, to ameliorate the poor working conditions of farm workers and harm to the public interest caused by labor conflict in the most important segment of the California economy. This landmark statute gave farm workers in California for the first time the right to elect a representative for purposes of collective bargaining with their employer and protected that right from employer interference. The preamble to the ALRA states that: "In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations." Stats. 1975, Third Ex. Sess., ch. 1, §1, p. 4013; *see also Harry Carian Sales v. ALRB* (1985) 39 Cal. 3d 209, 223. The Act also declares that it is

> the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Lab. Code §1140.2.

The ALRB is responsible for overseeing and certifying the results of union representation elections. If farm workers elect a bargaining representative, the certified representative and the employer have a mutual legal obligation to bargain in good faith regarding employment terms and to

reduce any resulting agreements to writing. Labor Code §§1153(e), 1155.2(a).

Immediately following passage of the ALRA, the ALRB was inundated both with election petitions and with employers' refusal to accept the new law. While farm workers voted for union representation in hundreds of secret-ballot elections, many agricultural employers, through legal delays, obstinacy, and unfair labor practices, made contract negotiations a futile exercise. As this Court recognized shortly after adoption of the ALRA, employer "dilatory tactics after a representation election" undermine the statutory right to collective bargaining and "substantially impair the strength and support of a union." *J.R. Norton Co. v. ALRB* (1979) 26 Cal. 3d 1, 30.

In case after case, growers were found to have intentionally delayed the collective bargaining process through surface bargaining, to have intentionally avoided good-faith resolutions of contract disputes, and to have disregarded collective bargaining agreements once made. *See, e.g., Mario Saikhon, Inc. and United Farm Workers of Am.* (1987) 13 ALRB No. 8; *Paul W. Bertuccio and United Farm Workers of Am.* (1984) 10 ALRB No. 16; *Tex-Cal Land Mgmt., Inc. and United Farm Workers of Am.* (1985) 11 ALRB No. 28. Even when unions had the resources to successfully challenge the employer's refusal to bargain and other anti-union tactics, legal proceedings often took years to resolve, during which time employees had no contract. For example, this Court in *Rivcom Corp. v. ALRB* (1983) 34 Cal. 3d 743, affirmed the ALRB's decision finding a grower's anti-union tactics and refusal to bargain unlawful, but more than five years passed between certification in 1978 and this Court's decision in 1983 — during which all the employees who voted for the union were fired and replaced, and were never able to bargain or enforce a contract. *Id.* at 763; *see also Lindeleaf v. ALRB* (1986) 41 Cal. 3d 861, 881 (recognizing

that "Lindeleaf workers have endured a prolonged delay — more than five years — because of the protracted proceedings" filed by employer); *Harry Carian Sales,* 39 Cal. 3d at 219 (upholding 1980 bargaining order based on more than 30 unfair labor practices committed by employer); *Highland Ranch v. ALRB* (1981) 29 Cal. 3d 848, 851-52 (upholding ALRB's decision that grower refused to bargain with certified union in violation of the ALRA, four years after certification was granted in 1977). In the 1980s, this Court *twice* addressed the same growers' challenge to the ALRB's make-whole order following a finding that the employer unlawfully refused to bargain, a refusal that continued for *years* after the union had been elected in 1976, despite this Court's conclusion that the employer's refusal to recognize the union's certification was in bad faith. *George Arakelian Farms, Inc. v. ALRB* (1985) 40 Cal. 3d 654, 667; *George Arakelian Farms, Inc. v. ALRB* (1989) 49 Cal. 3d 1279, 1287.

As the years passed, the statute's failure to fulfill its intended purpose of providing a meaningful right to collectively bargain only grew worse. By 2000, 25 years after the passage of the ALRA, of the 428 bargaining units that had voted for UFW as their certified representative – often after protracted anti-union campaigns and egregious employer unfair labor practices – only 185 employers (about 43 percent) had ever entered into contracts. *See* August 31, 2002 Assembly Floor Analysis of SB 1156.

To resolve these long-standing contract disputes and to avoid such disputes going forward, and ultimately to improve the lives of California farm workers, the Legislature amended the ALRA in 2002 to include the MMC process. The Legislature recognized that the existing ALRA had failed to achieve its purpose of enabling farm workers to secure improved wages and working conditions through collective bargaining. *Supra* at 17 (quoting Stats. 2002, ch. 1145, §1); *see also* August 20, 2002 Senate Floor Analysis of SB 1156 ("This bill is necessitated by the continued refusal of

agricultural employers to come to the bargaining table once an election has occurred. Without this measure, proponents contend, represented employees will continue to languish without the negotiated contracts they have elected to secure."). As Governor Davis explained in signing the MMC legislation:

> In nearly 60% of the cases in which a union wins an election, management never agrees to a contract. For example, in one case, the parties have been negotiating since 1975. The appeals process, coupled with a complicated formula for determining damages, often takes so long that the farmworkers can no longer be located by the time the award is made. The bottom line is that too many people who were supposed to benefit from the protections of the ALRA are left without a contract, without a remedy and without hope.

Governor's Signing Message, Historical and Statutory Notes, Labor Code §1164, Annotated California Codes (West 2011).

The statutory amendments permit the certified union or the employer to request referral to MMC under specified circumstances. Labor Code §1164(a). For bargaining units in which unions were "certified prior to January 1, 2003," either the union or the employer may request referral to MMC beginning 90 days after service of "a renewed demand to bargain." *Id.* §1164(a)(1), §1164.11. For these previously-certified unions, and their corresponding employers, the Legislature then further limited requests to MMC to those where: (a) the parties had failed to reach agreement for at least one year after the date on which the union made its initial request to bargain; (b) the employer committed at least one unfair labor practice; and (c) the parties had never previously agreed to a contract. §§1164.11. Going forward from January 1, 2003, for any union certified after that date, the

statute permits either party to request referral to MMC beginning 90 days after service of an initial request to bargain. *Id.* §1164(a)(2).[1]

Upon receipt of a declaration establishing that the statutory prerequisites are met, the ALRB must "immediately issue an order directing the parties to mandatory mediation and conciliation of their issues," and request a list of nine mediators from the California State Mediation and Conciliation Service. *Id.* §1164(b). The parties then jointly select an experienced, neutral mediator to assist the parties in reaching agreement, and proceed first to mediation for a thirty-day period (which may be extended upon mutual agreement of the parties). *Id.* §1164(b), (c). The process includes the opportunity for the parties to make an evidentiary record supporting their respective positions. *Id.* §1164(d); §1164.3(a).

If mediation does not resolve all outstanding issues in dispute, the mediator must certify that the mediation process has been exhausted and then file a report with the ALRB with recommendations for resolving the remaining issues and establishing the final terms of the CBA. *Id.* §1164(d). The report must "include the basis for the mediator's determination" and

---

[1] In 2012, the Legislature amended the MMC process to reduce the number of days following certification before a union or employer can invoke the MMC process from 180 to 90 under Labor Code §1164(a)(2), and added two more circumstances under which the parties may request MMC, both of which focus on employer interference with the representation process:

> (3) 60 days after the board has certified the labor organization pursuant to subdivision (f) of Section 1156.3, or
> (4) 60 days after the board has dismissed a decertification petition upon a finding that the employer has unlawfully initiated, supported, sponsored, or assisted in the filing of a decertification petition.

Id. §1164(a)(3), (4). Labor Code §1156.3(f), also added to the ALRA in 2012, permits certification of a union where the level of employer interference is so great as to permanently taint the election process.

"be supported by the record." *Id.* In 2004, the Legislature amended the MMC statute to direct that:

> (e) In resolving the issues in dispute, the mediator may consider those factors commonly considered in similar proceedings, including:
>
> (1) The stipulations of the parties.
>
> (2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union's wage and benefit demands.
>
> (3) The corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements.
>
> (4) The corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed.
>
> (5) The average consumer prices for goods and services according to the California Consumer Price Index, and the overall cost of living, in the area where the work is performed.

Id. §1164(e).

Either party may then seek review of the mediator's report before the ALRB on the ground that:

> (1) a provision of the collective bargaining agreement set forth in the mediator's report is unrelated to wages, hours, or other conditions of employment . . .
>
> (2) a provision of the collective bargaining agreement . . . is based on clearly erroneous findings of material fact, or

> (3) a provision of the collective bargaining agreement . . . is arbitrary or capricious in light of the mediator's findings of fact.

Id. §1164.3(a). If any of these grounds are established, the ALRB must remand the report to the mediator for revision and to permit an additional 30-day period of mediation. *Id.* §1164.3(c). If the parties again do not resolve the remaining disputes, the mediator then submits a second report to the ALRB. *Id.* The parties may then again invoke the process for seeking review of that report. *Id.* §1164.3(d).

A party also may seek review from the ALRB if "(1) the mediator's report was procured by corruption, fraud, or other undue means, (2) there was corruption in the mediator, or (3) the rights of the petitioning party were substantially prejudiced by the misconduct of the mediator." *Id.* §1164.3(e). If any of these grounds are established, the ALRB must vacate the report and appoint a new mediator. *Id.*

If no party seeks review, or the ALRB concludes that a challenge to the mediator's report lacks merit, the ALRB issues a final order establishing the terms of the CBA and "order[s] it into immediate effect." Labor Code §1164.3(b),(d). The ALRB's final order is then subject to review in the Court of Appeal or Supreme Court. *Id.* §1164.5. The Legislature also provided for enforcement of the ALRB's final order by the Superior Courts and that, if there is an appeal, "[n]o final order of the board shall be stayed during any appeal under this section, unless the court finds that (1) the appellant will be irreparably harmed by the implementation of the board's order, and (2) the appellant has demonstrated a likelihood of success on appeal." *Id.* §1164.3(f).

Finally, to avoid a drain on the agency's resources (and implicitly recognizing the long back-log of previously certified unions), the Legislature limited the number of MMC petitions by one party that could

be filed in the initial years after adoption of the MMC statute. Labor Code §1164.12.

2. Gerawan Farming, Inc. and the ALRB Proceeding

UFW is the ALRB-certified bargaining representative of the agricultural workers at Gerawan Farming, Inc. Gerawan is a Fresno County-based grower and the largest tree fruit producer in California. Gerawan employees elected UFW in a secret ballot representation election in 1990, long before the amendments creating the MMC process. *Gerawan Ranches et al.* (1992) 18 ALRB No. 5. Gerawan challenged the election results, and the ALRB finally certified UFW as the unit's representative in 1992. *Id.* The ALRB also determined that Gerawan committed multiple unfair labor practices before, during, and after the election, including intentionally hiring and laying off workers to impact the election results and refusing to bargain over changes made in the post-election, pre-certification period (changes that involved closing six labor camps used for worker housing following the vote to certify the UFW). *Gerawan Ranches* (1992) 18 ALRB No. 5; *Gerawan Ranches* (1992) 18 ALRB No. 16; *see also Gerawan Farming* (2013) 39 ALRB No. 5.

Despite the workers' vote in 1990 and UFW's attempts at bargaining, Gerawan has never agreed to a collective bargaining agreement. At the time of the 2002 amendments to the ALRA, Gerawan was one of the 243 companies where farm workers had previously voted for UFW but the company had never agreed to a contract. *See* August 31, 2002 Assembly Floor Analysis of SB 1156. After *Hess* upheld the MMC statute against constitutional challenges in 2006 (*see* 140 Cal. App. 3d at 1603-10), UFW began renewing demands for bargaining with agricultural employers that had never agreed to contracts. As in this case, such demands can trigger an employer campaign to oust the union, accompanied by multiple employer

unfair labor practices and protracted and expensive legal proceedings intended to exhaust the union's resources.

UFW served Gerawan with a "renewed demand to bargain" pursuant to Labor Code §1164(a) on October 12, 2012. Although UFW then met with Gerawan for at least 10 bargaining sessions, no CBA was reached. Meanwhile, Gerawan immediately began a scorched-earth, multi-million-dollar, anti-union campaign that included illegal sponsorship of a decertification election, myriad unfair labor practices, and a public relations effort to discredit UFW and the ALRB.[2]

On March 29, 2013, with voluntary negotiations having failed, UFW requested that the ALRB refer UFW and Gerawan to the MMC process. On April 16, 2013, the ALRB found that the statutory prerequisites for MMC were met. *Gerawan Farming* (2013) 39 ALRB No. 5. Specifically, the ALRB found that UFW: was certified by the ALRB as the representative of Gerawan's employees prior to January 1, 2003; the parties had not reached a contract for more than one year following the initial demand for bargaining; UFW had made a renewed demand for bargaining; Gerawan had committed multiple unfair labor practices, before and after the

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[2] An initial decertification petition was dismissed because the ALRB Regional Director concluded that the signatures were forged. *See* UFW's Motion for Judicial Notice, filed herewith, Exh. A. The ALRB processed a second decertification petition and conducted a decertification election on November 5, 2013, but the ALRB ordered the ballots impounded as a result of allegations of unfair interference by Gerawan. After the longest evidentiary hearing in ALRB history, an ALRB administrative law judge found that Gerawan violated the ALRA by providing unlawful assistance to the decertification effort, among other unfair labor practices, and ordered dismissal of the decertification Petition. See Sept. 17, 2015 ALRB Administrative Law Judge decision in Case No. 2013-RD-003-VIS (attached as Exh. B to UFW's Motion for Judicial Notice, filed herewith). Gerawan has challenged the ALJ decision before the ALRB. Meanwhile, other unfair labor practice charges against Gerawan remain pending.

certification election; the parties had not previously agreed to a CBA; and Gerawan had the statutory minimum number of employees. *Id.*

Gerawan opposed UFW's request for referral to MMC. Gerawan challenged the statutory basis for the referral by arguing, among many other things, that UFW had "forfeited" its status as the bargaining representative by (according to Gerawan) unreasonably giving up on negotiations with Gerawan in 1995 (five full years after the workers voted for union representation in 1990 during which negotiations proved futile). The ALRB summarily rejected this argument as foreclosed by ALRB precedent:

> The Employer urges the Board to hold that the UFW abdicated its responsibilities, thereby forfeiting its status as bargaining representative. The Board has previously considered and rejected this type of "abandonment" argument. (*Dole Fresh Fruit Company* (1996) 22 ALRB No. 4; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3; *San Joaquin Tomato Growers* (2011) 37 ALRB No. 5 . . . .).

Gerawan Farming, 39 ALRB No. 5, at 3-4. Accordingly, the ALRB directed the parties to MMC.

Gerawan then filed a petition for a writ of mandate in the Fresno County Superior Court, asking the Superior Court to set aside the Board's order sending the parties to the MMC process. The Superior Court denied the writ petition. Gerawan appealed that denial to the Fifth District (which eventually consolidated that appeal with Gerawan's later petition for review of the ALRB's final order).

Following the denial of Gerawan's petition by the Fresno Superior Court, the parties jointly selected an experienced labor mediator/arbitrator from the list provided by the ALRB, Matthew Goldberg, to resolve the contract dispute. Mediation proved unsuccessful in producing an agreement on all terms. After further proceedings, the mediator issued a report settling

the remaining disputed terms of the CBA, and incorporating the terms upon which the parties did agree. *Gerawan Farming*, 39 ALRB No. 17, at 1.

Gerawan objected to the mediator's report and sought review from the ALRB, which remanded the matter to the mediator for further proceedings regarding six provisions. *Gerawan Farming*, 39 ALRB No. 16, at 3-8. The parties subsequently met among themselves and with the mediator, and were able to agree upon all six provisions remanded by the ALRB. The mediator issued a second report that incorporated the agreed-upon provisions. No party filed a request for review of the mediator's second report.

On November 19, 2013, the ALRB issued its final order adopting the mediator's second report and fixing the terms of the CBA. *Gerawan Farming*, 39 ALRB No. 17 at 2-3. The CBA provides the farm workers at Gerawan with wage increases and other improvements in working conditions, as well as a grievance and arbitration procedure to protect them from arbitrary treatment. Certified Record 357-609 (September 28, 2013 mediator report); *id.* at 745-47 (Nov. 6, 2013 meditator report).

3. Status of the ALRB's Final Order

The ALRB's November 19, 2013 final order states, consistent with Labor Code §1164.3(d), that the order "shall take immediate effect as a final order of the Board." 39 ALRB No. 17 at 2. Under Labor Code §1164.3(f), such orders are immediately enforceable by the superior courts:

> Within 60 days after the order of the board takes effect, either party or the board may file an action to enforce the order of the board, in the superior court for the County of Sacramento or in the county where either party's principal place of business is located. No final order of the board shall be stayed during any appeal under this section, unless the court finds that (1) the appellant will be irreparably harmed by the implementation of the board's order, and (2) the appellant has demonstrated a likelihood of success on appeal.

On November 21, 2013, UFW filed an action in the Sacramento Superior Court to enforce the ALRB's order. The Superior Court denied the request, without making the findings required by §1164.3(f), on the ground that Gerawan intended to seek review of the ALRB's final order in the Fifth District. After Gerawan sought such review in the Fifth District, the Sacramento Superior Court stayed UFW's enforcement action pending the outcome of the Fifth District proceeding. UFW appealed the Sacramento Superior Court's stay order to the Third Appellate District. The Third District stayed that appeal (Case No. C075444) pending resolution of the Fifth District proceeding, without making the findings required by §1164.3(f).

The Fifth District, after initially denying Gerawan's request for a stay of the ALRB's final order, issued an order on October 23, 2014, staying "any proceedings to enforce the Decision and Order in 39 ALRB No. 17," without making the findings required by §1164.3(f). As a result, the ALRB's final order has never been enforced.

4. The Fifth District's Decision

On May 14, 2015, the Fifth District issued a decision resolving Gerawan's petition for review of the ALRB's final order and Gerawan's appeal from the Fresno County Superior Court's denial of its writ petition to stop the ALRB from referring the parties to MMC. *Gerawan Farming v. ALRB* (2015) 236 Cal. App. 4th 1024.

The Court of Appeal ruled that the MMC statute, on its face, "violates equal protection principles." *Id.* at 1036. The Fifth District agreed with Justice Nicholson, the dissenter in *Hess*, that MMC is not consistent with equal protection because MMC orders apply to a single labor dispute and because "the risk is simply too great that results will be based largely on the subjective leanings of each mediator or that arbitrary differences will otherwise be imposed on similar employers." *Id.* at 1071-72. The Fifth

District's equal protection analysis does not turn on any facts regarding the ALRB's resolution of the Gerawan contract dispute.

The Fifth District also held, again relying on the dissent in *Hess*, that the MMC statute "invalidly delegates legislative authority in violation of the California Constitution." *Id.* at 1072-76. The Fifth District reasoned that, while the Legislature provided a list of factors for mediators to consider in resolving disputes about contract terms, the Legislature failed to provide a "standard" for how those factors should be applied. *Id.* at 1073-74. The Fifth District further reasoned that the MMC statute "lacks the necessary procedural safeguards or mechanisms to assure a fair and evenhanded implementation of the legislative mandate to impose a CBA." *Id.* at 1075-76.

The Fifth District also held that the ALRB "abused its discretion" by summarily rejecting Gerawan's "abandonment" argument. *Id.* at 1065. The Court of Appeal based its ruling on Labor Code §1164, which provides that a union must be "certified as the exclusive bargaining agent of [the] . . . agricultural employees" to request MMC. *Id.* at 1053-55. The Court of Appeal acknowledged that UFW is "certified as the exclusive bargaining agent" because the ALRB had previously certified UFW as the exclusive bargaining agent. The Court of Appeal also acknowledged that, under the ALRA, a union can be "decertified" *only* through an employee election and an employer cannot raise abandonment as a defense to its duty to bargain with a certified union. *Id.* at 1042, 1059. Nonetheless, the Court of Appeal reasoned that the MMC process "differs materially from bargaining and is largely a postbargaining process" so "the employer's continuing duty to bargain is *not* an impediment to our recognition of the employer's ability to raise, at [the MMC] stage, a defense that the union forfeited its representative status by abandonment." *Id.* at 1059 (emphasis in original).

The Court of Appeal then reasoned that allowing *employers* to raise an "abandonment" defense to the certified representative's MMC request would "uphold[] the core legislative purposes" of the ALRA by protecting *employees*' rights to a "representative of their own choosing." *Id.* at 1060. The Court of Appeal reasoned that the ALRB's interpretation of the MMC statute "would eviscerate important ALRA policy and, therefore, we do not follow it." *Id.*

The Court of Appeal did not reach Gerawan's other challenges to the constitutionality of the MMC statute or to the terms of the ALRB's final order. *Id.* at 1065-66. The Court of Appeal also concluded that Gerawan's appeal from the Fresno Superior Court's denial of Gerawan's writ petition was moot. *Id.* at 1076-77.

After the Court of Appeal decision, Gerawan filed a motion in the Court of Appeal seeking a $2.6 million attorneys' fee award from UFW and the ALRB pursuant to Code of Civil Procedure §1021.5. Gerawan's fees motion asserts that Gerawan had spent more money on litigation than it would cost Gerawan to grant its workers the wage increases and improved benefits provided by the contract imposed by the ALRB's final order. The Court of Appeal has stayed disposition of the fees motion.

ARGUMENT

I. Interest Arbitration Has Long Been Used to Resolve Labor Disputes in the Public and Private Sectors

The Fifth District's decision treats interest arbitration as if it were a new and strange phenomenon, ignoring the long history of interest arbitration as a rational means of resolving labor contract disputes. Although labor relations policy in the United States since the enactment of the NLRA in 1935 generally has been grounded in the basic idea of collective bargaining as a process in which disputes must be resolved through economic pressure, there also are many examples of Congress and

state legislatures providing for mandatory and binding interest arbitration to resolve and prevent labor disputes that could adversely impact the public interest. Moreover, for more than a century, many private sector unions and employers have voluntarily agreed to submit disputes about the terms of new labor contracts to resolution through binding interest arbitration, and many thousands of labor contract disputes have been resolved through such interest arbitrations. *See generally* Elkouri & Elkouri, *How Arbitration Works* (7th ed. 2012), at Ch. 22 (Arbitration of Interest Disputes).

Compulsory arbitration of labor disputes first arose at the federal level during World War I, through creation of the National War Labor Board, and continued again in World War II with the re-constitution of that Board, which handled tens of thousands of disputes impacting significant segments of the United States economy.[3] That War Labor Board had authority to resolve labor disputes, including disputes about the terms of future agreements, that the parties were unable to resolve through private negotiations. *See* Executive Order 9017 ("Establishment of the National War Labor Board") (January 12, 1942), *available at* 7 Fed. Reg. 237 ("After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration

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[3] *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 697 (discussing National War Labor Boards in WWI and WWII); *Allen v. Grand Cent. Aircraft Co.* (1954) 347 U.S. 535, 544 ("Nearly 100,000 proceedings were thus held" before the War Labor Board); U.S. Exec. Order 9017 (Establishment of the National War Labor Board); 7 Fed.Reg. 237 (1942); War Labor Disputes Act of 1943, 57 Stat. 163 (1943). For further discussion of the National War Labor Board during World Wars I and II, *see* J.Joseph Lowenberg, "Compulsory Arbitration in the United States" at 142-43, in *Compulsory Arbitration: An International Comparison* (J.Joseph Lowenberg, et al., eds., D.C. Health 1976).

under rules established by the Board."). Such dispute resolution continued with the Wage Stabilization Board during the Korean War.[4]

In addition to these Boards with general powers to resolve labor disputes across industries during wartime, Congress has at times required the use of interest arbitration in peacetime to resolve particular private sector labor disputes. In 1963, for example, Congress provided for compulsory arbitration of a long-standing dispute between certain railroads and their employees over the appropriate staffing levels for trains. *See* Pub. L. 88-108, 77 Stat. 132 (1963).[5] Under current federal law, interest arbitration is used to resolve labor disputes involving postal workers. *See* 39 U.S.C. §1207.

Perhaps as a result of the success of the War Labor Board, state legislatures began passing their own compulsory interest arbitration statutes. Eleven states enacted laws soon after World War II to both limit strikes in certain industries (such as utilities, transportation, and communications) and provide for the compulsory arbitration of labor disputes.[6] Wisconsin's law, for example, was structured as follows:

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[4] *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. at 547 (describing the creation and authority of the Wage Stabilization Board).

[5] *See also Brotherhood of Locomotive Firemen and Enginemen v. Certain Carriers Represented by Eastern Conference Committees* (D.C. Cir. 1964) 331 F.2d 1020 (upholding Public Law 88-108 against constitutional and delegation challenges); *Brotherhood of Locomotive Engineers v. Chicago, Rock Island and Pacific Railroad Co.* (1966) 382 U.S. 423, 432 (describing the railroad staffing dispute and history of Public Law 88-108 and holding that it did not preempt state law). *See also* Pub. L. 91-226, 84 Stat. 118 (1970) ("To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees.").

[6] J.Joseph Lowenberg, "Compulsory Arbitration in the United States" at 144-45, in *Compulsory Arbitration: An International Comparison* (J.Joseph Lowenberg, et al., eds., D.C. Health 1976). Early compulsory

> In the event of a failure of conciliation, the Board is directed to select arbitrators who shall 'hear and determine' the dispute. *Id.*, s 111.55. The act establishes standards to govern the decision of the arbitrators, *id.*, ss 111.57—111.58, and provides that the order of the arbitrators shall be final and binding upon the parties, *id.*, s 111.59, subject to judicial review, *id.*, s 111.60. In summary, the act substitutes arbitration upon order of the Board for collective bargaining whenever an impasse is reached in the bargaining process. And, to insure conformity with the statutory scheme, Wisconsin denies to utility employees the right to strike.

Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of Am., Div. 998 v. Wisconsin Empl. Relations Bd. (1951) 340 U.S. 383, 388. These 1947 statutes were used widely from 1947 and 1951 to resolve disputes about hundreds of contracts.[7] Then, in 1951, the U.S. Supreme Court held that, with respect to employers and employees covered by the NLRA, these interest arbitration statutes in the private sector were preempted by federal law. *Amalgamated Ass'n*, 340 U.S. at 399. In deciding the case on preemption grounds, the Court did not suggest that these laws violated the Constitution. *Id.*

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arbitration laws that impacted the private sector included: Florida (Fla. Stat. §453.01 (repealed 1983); Indiana (Ind. Code Ann. § 22-6-2-1); Kansas (Kansas Stat. §44-608, 609); Missouri (Mo. Ann. Stat. §§ 295.010, 295.080); Nebraska (Neb.Rev.St. §48-802, 810); New Jersey (N.J.S.A. 34:13B-23); Pennsylvania (43 Penn. Stat. §721, repealed 1978); Wisconsin (Wis. Stat. §111.52). While the earliest state law requiring compulsory resolution of private labor disputes, which was passed by Kansas in 1920, was struck down by the *Lochner*-era Supreme Court in *Wolff Packing Co. v. Court of Industrial Relations*, (1923) 262 U.S. 522, and *Wolff Packing Co. v. Court of Industrial Relations* (1925) 267 U.S. 552, as a violation of substantive due process, that entire line of cases was subsequently repudiated. *See Hess,* 140 Cal. App. 4th at 1599.

[7] J.Joseph Lowenberg, "Compulsory Arbitration in the United States" at 145-48.

After 1951, to the extent that state laws applied to employees exempt from the NLRA (public sector and private sector excluded industries), they remained in force, and states were free to enact new laws providing for compulsory arbitration for employees not covered by the NLRA. For example, Nebraska's law applied to public utility workers outside the scope of the NLRA, and that law continued to be enforced after 1951. *See* Neb.Rev.St. §48-802, 810. Maryland enacted new legislation in 1956 to mandate interest arbitration for certain transit workers. Maryland Code, Trans., §7-602 (formerly Art. 64B, §37(b)). Minnesota, New York, and Massachusetts enacted similar laws to provide mandatory interest arbitration to settle disputes at non-profit hospitals, before the NLRA was amended in 1974 to cover those hospital employees. *See* Minn. Stat. §179.35; *Fairview Hosp. Ass'n v. Pub. Bldg. Serv. & Hosp.* (1954) 241 Minn. 523, 539 (upholding constitutionality of Minn. Stat. §179.35 against equal protection and delegation challenges); N.Y. Lab. Law §716; *Mount St. Mary's Hosp. of Niagara Falls v. Catherwood* (1970) 26 N.Y.2d 493, 511 (upholding New York Labor Law §716 against delegation challenge); Mass. Gen. Law Ch. 150A §9A. Hundreds of non-profit hospital labor disputes were resolved successfully through these mandatory interest arbitration procedures.[8]

Public employees are excluded from the NLRA, and states are therefore free to regulate their labor relations. States began to adopt public sector collective bargaining laws in the 1960s and 70s, and many such laws prohibit strikes by certain public employees and require mandatory interest arbitration of their contract disputes.[9] Initially, interest arbitration was

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[8] J.Joseph Lowenberg, "Compulsory Arbitration in the United States" at 148-49.

[9] *See, e.g., Caso v. Coffey* (N.Y. 1976) 359 N.E.2d 683, 687 (upholding mandatory interest arbitration for police and firefighters); *City of*

required only for employees in public safety roles such as firefighters and police, but the trend has been to expand mandatory interest arbitration to other types of public employees as well. See Elkouri & Elkouri, *supra*, at 22-26 to 22-51 (state-by-state chart).

While specific requirements vary, these state statutes generally share the structure of the ALRA amendments at issue here: first directing parties to mediation to attempt to voluntarily resolve disputes, then allowing a neutral arbitrator(s) to resolve any remaining disputes. *Id.; e.g.*, Mass. Gen. Law Ch. 150E, §9. Many state statutes contain criteria for resolving labor contract disputes that are similar to the criteria provided in the ALRA. See Elkouri & Elkouri, *supra*, at 22-26 to 22-51; *see also* Mich. Comp. Law §423.239. Other statutes provide less specific guidance and rely on the

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Washington v. Police Dept. of City of Washington (Pa. 1969) 259 A.2d 437, 441 (upholding mandatory interest arbitration for public employees); *accord Fraternal Order of Police, Lodge No. 5 ex rel. Costello v. City of Philadelphia* (Pa. Cmwlth. 1999) 725 A.2d 206, 209-10; *Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n,* (Alaska 1992) 839 P.2d 1080; *City of Columbus v. State Employment Relations Bd.* (Ohio Com.Pl. 1985) 505 N.E.2d 651; *Milwaukee County v. Milwaukee Dist. Council 48-American Federation of State, County and Municipal Employees AFL-CIO,* (Wis.App. 1982) 325 N.W.2d 350, 356; *Superintending School Committee of Bangor v. Bangor Education Association* (Me. 1981) 433 A.2d 383; *City of Detroit v. Detroit Police Officers Ass'n* (Mich. 1980) 294 N.W.2d 68, 74; *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters* (Minn. 1979) 276 N.W.2d 42, 47; *Medford Firefighters Association v. City of Medford* (Or. 1979) 595 P.2d 1268, 1270 n.1; *Division 540, Amalgamated Transit Union, AFL-CIO v. Mercer County Improvement Authority* (N.J. 1978) 386 A.2d 1290,1294; *Town of Arlington v. Board of Conciliation and Arbitration* (Mass. 1976) 352 N.E.2d 914, 918 n.3; *City of Amsterdam v. Helsby* (N.Y. 1975) 332 N.E.2d 290; *Dearborn Firefighters Union Local No. 412 v. City of Dearborn* (Mich. App. 1972) 201 N.W.2d 650; *City of Warwick v. Warwick Regular Firemen's Ass'n* (R.I. 1969) 256 A.2d 206; *New Jersey Bell Telephone Co. v. Communications Workers of American, New Jersey Traffic Division No. 55* (N.J. 1950) 75 A.2d 721, 733.

"common law" of interest arbitration. *See e.g., Superintending Sch. Comm. of City of Bangor*, 433 A.2d at 387 ("[T]he ever-widening use of arbitration in labor disputes, particularly in the public sector, has resulted in the evolution of criteria which have become inherent in today's arbitration process.") (citation, internal quotation marks omitted).

This interest arbitration legislation reflects an understanding that substantial economic leverage is often necessary to achieve labor-management agreement, and for workers that leverage comes in the form of the strike threat. Where workers lack that leverage because of a prohibition on strikes, legislators have provided for interest arbitration as an alternative mechanism for encouraging agreement and deterring protracted disputes that harm workers and the public interest. *See* Loewnberg, J. Joseph, *Interest Arbitration: Past, Present, and Future*, at Ch. 5 ("Labor Arbitration Under Fire") (1997).

While farm workers in California have the right to strike, the nature of the agricultural industry can make the use of that form of economic leverage ineffective or unrealistic. As the Third District recognized in *Hess*:

> In most collective bargaining situations the primary power an employee bargaining agent has is the power to strike. The power to take collective action through a strike serves to equalize the bargaining position of the parties. However, with respect to agricultural employment the Legislature could reasonably conclude that the power to strike is illusory. The unskilled character of the work, the relatively low wages paid, and the seasonal rather than year-round nature of the work combine to make collective action by employees untenable. The Legislature could reasonably conclude that despite the ALRA, agricultural workers lack 'actual liberty of contract.'

140 Cal. App. 4th at 1600. Thus, it makes eminent sense that the California Legislature would turn to interest arbitration as a means of settling labor disputes for agricultural workers after the threat of strikes proved

insufficient to produce first contracts during the period from 1975 to the adoption of the MMC statute in 2002.

II. The MMC Statute Does Not Violate Equal Protection on its Face

The Fifth District ruled that the MMC statute "on its face violates equal protection principles" for two reasons. First, the Court of Appeal reasoned that the MMC process results in a final ALRB order that applies to only a single employer and bargaining unit, which could result in different terms and conditions of employment among "similarly-situated" agricultural employers. 236 Cal. App. 4th at 1068. Second, the Court of Appeal reasoned that the MMC process creates too great a risk of arbitrary treatment of employers. *Id.* at 1071. Neither basis for invalidating the statute is tenable.

Social and economic legislation that does not employ "suspect" classifications, such as race or gender, or impinge on fundamental rights, such as the right to vote, "must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." *Hodel v. Indiana* (1981) 452 U.S. 314, 331-332. No suspect classification or fundamental right is at issue here.

In adopting the MMC statute, the Legislature rationally concluded that the ALRA had not sufficiently achieved its goal of improving the lives of farm workers and their families. California is the nation's largest agricultural state, and a 1998 report found that California's farm workers have the lowest family incomes and the highest poverty rate of any occupation surveyed by the Bureau of Census, and that the occupation is characterized by heavy physical labor performed in often unsanitary and unsafe working conditions. *See* California Research Bureau, California State Library, *Farmworkers in California* at 1, 4 (July 1998).[10] The

[10] The report is located at www.library.ca.gov/crb/98/07/98007a.pdf.

Legislature also rationally concluded that using interest arbitration, a process that has been used to resolve many thousands of labor disputes in other contexts (see pp. 30-36 supra), could avoid and resolve labor disputes that prevented the ALRA from achieving its original goals.

The federal and California constitutions' equal protection clauses are not a barrier to a system that permits an administrative agency to resolve labor disputes one-by-one based on consideration of the details of each dispute and a set of rational factors. The Legislature may adopt a system that requires individualized treatment when there is a rational basis for such treatment. *See, e.g., Davis v. Mun. Court* (1988) 46 Cal. 3d 64, 87-89 (rejecting equal protection challenge to statutes allowing for broad prosecutorial discretion); *People v. Wilkinson* (2004) 33 Cal. 4th 821, 838-39 (same). The rule is not different when decisions are legislative. For example, zoning and re-zoning decisions are legislative, whether they apply to an entire city or a single parcel. *Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal. 3d 511, 516-18. The use of an individualized process to resolve labor disputes encourages the parties to reach their own agreements and, if necessary, resolves disputed CBA terms in a manner tailored to the particular bargaining unit.

There is nothing unusual or constitutionally suspect about the issuance of "quasi-legislative" orders that set the terms of individual contracts. All rate-setting is quasi-legislative, *see Prentis v. Atlantic Coast Line Co.* (1908) 211 U.S. 210, 226, and there is a long history of legislation that delegates to an administrative agency the responsibility to set fair and reasonable terms for individual private contracts.[11] For purposes of an equal

[11] *See, e.g., 20th Century Ins. Co. v. Garamendi* (1994) 8 Cal. 4th 216, 277 (determination by Insurance Commissioner of the rates of individual insurers comes within agency's delegated quasi-legislative authority); *Wood v. Public Utilities Commission* (1971) 4 Cal. 3d 288, 292-93

protection challenge, it is not enough to show that such government action applies to a "class of one." The challenger must show "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564.

The Fifth District gave a hypothetical example of three grower-employers (described in the abstract) that fail to reach collective bargaining agreements and are then subject to final ALRB orders that have different terms regarding wages. 236 Cal. App. 4th at 1071 n.37. But no two employers or bargaining units or labor disputes or evidentiary records are precisely the same, so differences in the terms of these hypothetical final ALRB orders would not establish an equal protection violation. *Cf. Warden v. State Bar* (1999) 21 Cal. 4th 628, 644 ("Where there are 'plausible reasons' for [the classification] 'our inquiry is at an end.'") (citations omitted); *Ft. Smith Light & Traction Co. v. Bd. of Imp. of Paving Dist. No. 16* (1927) 274 U.S. 387, 391-92 ("[n]or need we cite authority for the

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(upholding power of PUC to determine rates charged by individual utility company without public hearing); *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 768, 772-73 (rent control boards typically must consider individual petitions for rent control laws to meet constitutional standards); Labor Code §1191 (granting Industrial Welfare Commission authority to set minimum wage rates on an individual basis for physically and mentally disabled employees); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* (1990) 497 U.S. 116, 120-22 (discussing former authority of Interstate Commerce Commission to review and set individual rates charged by motor common carriers); *Federal Power Comm'n v. Hope Natural Gas Co.* (1944) 320 U.S. 591, 602 (upholding order setting prices for natural gas delivered by one company); 15 U.S.C. §717c and 42 U.S.C. §7172(a)(1)(C) (granting Federal Energy Regulatory Commission the power to review and set rates for individual natural gas contracts); 17 U.S.C. §801 *et seq.* (establishing Copyright Royalty Judges to resolve individual disputes and set royalty rates for specific copyrighted materials); 47 U.S.C. §252 (delegating to public service commission the power to set prices in individual telecommunications contracts).

proposition that the Fourteenth Amendment does not require the uniform application of legislation to objects that are different"); *Squires v. City of Eureka* (2014) 231 Cal. App. 4th 577, 594-95.

The Court of Appeal also reasoned that the MMC process creates a risk of arbitrary treatment. But the statute contains multiple safeguards against such treatment, including selection of a neutral mediator, the requirement of a reasoned decision based on an evidentiary record, and review by both the ALRB and the courts. In any event, pointing to a hypothetical risk of arbitrary treatment, which exists with most processes, is not sufficient to establish an equal protection violation. *Cf. McCleskey v. Kemp* (1987) 481 U.S. 279, 282-83 (even "a risk that racial considerations enter into capital sentencing determinations" is not enough to show an equal protection violation in a particular case); *Snowden v. Hughes* (1944) 321 U.S. 1.

Even in *Yick Wo v. Hopkins* (1886) 118 U.S. 356, the Supreme Court did not invalidate as a *facial* violation of the Equal Protection Clause an ordinance that gave public officials "a naked and arbitrary power to give or withhold consent" for the operation of laundries "without reason and without responsibility," based not on "discretion in the legal sense of that term" but on "their mere will" with "neither guidance nor restraint." *Id.* at 366-67. Rather, the evidence showed that the ordinance actually was applied "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." *Id.* at 373-74; *see also Murgia v. Mun. Court* (1975) 15 Cal. 3d 286, 295 ("The *Yick Wo* court . . . declin[ed] to strike down the standardless permit ordinance on its face [but] granted the requested writ of habeas corpus [because] the board had impermissibly discriminated against Chinese, and . . . such administrative discrimination directly violated the mandate of the equal protection clause.").

Here, moreover, the MMC statute does not remotely provide the ALRB with a "naked and arbitrary power" to resolve labor disputes subject to "neither guidance nor restraint." *Yick Wo,* 118 U.S. at 366. Rather, if mediation proves unsuccessful, the neutral mediator must issue a report to the ALRB recommending resolution of the parties' remaining disputes in a reasoned decision based on an evidentiary record and the consideration of rational statutory factors. See pp. 21-23 supra. That different mediators might hypothetically reach different, reasonable conclusions in issuing such a report reflects that interest arbitration is a process that, like many others, requires the exercise of judgment, not that the process is arbitrary or irrational. *Cf. Engquist v. Oregon Dep't of Agr.* (2008) 553 U.S. 591, 603-04 (for purposes of equal protection, "[i]t is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized").

It bears emphasis that the Court of Appeal did not conclude here that the contract terms set forth in the ALRB's final order actually were an irrational or arbitrary resolution of the contract dispute between Gerawan and UFW. Rather, the Court of Appeal concluded only that irrational or arbitrary treatment is a *possible* under the MMC statute, just as it is possible with criminal sentencing, prosecutorial discretion, zoning, insurance rate setting, rent control, and countless other government decisions by judges, executive branch officials, and administrative agencies. The MMC statute provides a rational system for resolving labor disputes, in which final ALRB orders would reflect the consideration of rational factors, so the MMC statute does not violate equal protection principles on its face.

III. The California Legislature Did Not Unconstitutionally Delegate Legislative Authority By Creating the MMC Process

The Fifth District also reasoned that the MMC statute unconstitutionally delegates legislative authority. 236 Cal. App. 4th at

1072-76. But this Court long ago cautioned that "[d]octrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse. Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, [should the courts] intrude on legislative enactment because it is an 'unlawful delegation' . . . ." *Kugler v. Yocum* (1968) 69 Cal. 2d 371, 384; *see also Mistretta v. United States* (1989) 488 U.S. 361, 371-79 (summarizing federal precedent about delegations of legislative authority, which holds that a statute unconstitutionally delegates legislative authority only if it lacks any "intelligible principle" for administrators to follow). Government has only grown more complex in the years since *Kugler*, necessitating more reliance on administrative processes, and this Court has reiterated the limited role of the courts in reviewing statutes under the non-delegation doctrine. *Kasler v. Lockyer* (2000) 23 Cal. 4th 472, 493; *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal. 3d 184, 191; *People v. Wright* (1982) 30 Cal. 3d 705, 713; *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 168.

The Court of Appeal reasoned that the MMC statute unconstitutionally delegates legislative authority by "leav[ing] the resolution of fundamental policy issues to others." 236 Cal. App. 4th at 1076. But the California Legislature made the relevant "fundamental policy decision" by providing that the ALRB should use a mandatory mediation and conciliation process to resolve outstanding labor disputes about the terms of an initial CBA. The Legislature decided which labor disputes the ALRB should refer to MMC, how that process will operate, the types of issues to be mediated, what factors should be considered to resolve disputes, and how the agency should review mediator's reports. As the Third District explained in *Hess*:

> Here, the "fundamental policy decisions" [quoting *Wright*, 30 Cal.3d at 705], are contained in the Legislature's express declaration that "a need exists for a mediation procedure in order to ensure a more effective collective bargaining process between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the [ALRA], ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural work force, and promote California's economic well-being by ensuring stability in its most vital industry." (Stats.2002, ch. 1145, § 1.)

140 Cal. App. 4th at 1605.

The delegation of authority to the ALRB is narrowly focused. The ALRB does not have authority to resolve disputes on any possible topic regardless of its relationship to working conditions. Rather, the ALRA imposes a duty on the employer and certified union to bargain about certain mandatory subjects of bargaining. *See* Labor Code §1155.2 (duty to "confer in good faith with respect to wages, hours, and other terms and conditions of employment"); *Cardinal Distrib. Co. v. ALRB* (1984) 159 Cal. App. 3d 758, 775 (adopting NLRA precedent to hold that grower's decision to stop growing beets was not mandatory subject of bargaining under ALRA). The MMC statute limits the scope of the dispute resolution process to disputes about those mandatory subjects by requiring the ALRB to review and set aside provisions of the mediator's report if they are "unrelated to wages, hours, or other conditions of employment within the meaning of Section 1155.2" Labor Code §1164.3.

Moreover, the parties' duty to bargain in good faith, and the mediation phase of the MMC process, should eliminate or at least narrow most disputes about mandatory bargaining subjects. The ALRB's final order, if necessary, settles only the disputed terms of a single CBA, not a "fundamental" issue of public policy of the type that can be resolved only by the Legislature itself. *Cf. Pac. Legal Found. v. Brown* (1981) 29 Cal. 3d

168, 201 (rejecting as "totally untenable" the argument that "the working details of the wages, hours and working conditions of [certain public] employees" involved "fundamental policy determinations" that can only be resolved by the Legislature); *Wright*, 30 Cal. 3d at 713 (upholding delegation of authority to Judicial Council to adopt rules establishing circumstances in aggravation and mitigation for criminal sentencing).

The Fifth District also reasoned that the MMC statute "fails to provide adequate direction" for the neutral mediator to use in issuing a report, and for the ALRB to use in reviewing that report. 236 Cal. App. 4th at 1076. But the Legislature set out in the statute itself a list of factors to be considered in resolving the parties' disputes. *See* Labor Code §1164(e). The MMC statute provides exactly the same type of guidance this Court held was sufficient to withstand a delegation challenge in *Birkenfeld*: "By stating its purpose and providing a nonexclusive illustrative list of relevant factors to be considered, the charter amendment provides constitutionally sufficient legislative guidance to the Board for its determination of petitions for adjustments of maximum rents." 17 Cal. 3d at 168.

The Fifth District viewed the MMC process as flawed because, in the Court of Appeal's view, "there is no goal to aim for." 236 Cal. App. 4th at 1073. But the "goal" is clear from the declared statutory purpose of resolving labor disputes to encourage a more effective bargaining process. *Birkenfeld,* 17 Cal. 3d at 168 ("Standards sufficient for administrative application of a statute can be implied by the statutory purpose."); *see also In re Petersen* (1958) 51 Cal. 2d 177, 185. The "goal to aim for" is the most reasonable resolution of the remaining unresolved contract disputes in light of the evidentiary record, the parties' arguments, and the list of statutory factors. In this context, in which reasonableness depends on many considerations and the goal is to encourage the parties to reach their own agreements, it would not be possible for the Legislature to dictate a formula

to be applied mechanically to resolve each dispute. The Legislature need not provide such a formula. *See, e.g.*, *Wright*, 30 Cal. 3d at 713; *Birkenfeld*, 17 Cal. 3d at 168; *Carson Mobilehome,* 35 Cal. 3d at 191.

This Court already rejected the argument that a city charter mandating interest arbitration by a private arbitrator involved an unconstitutional delegation of legislative authority in *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal. 3d 608. By way of standards, the charter provided only that in deciding the contract dispute "[t]he arbitrators shall consider all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition." *Id.* at 613 n.3. Limited judicial review was then "available to determine whether the arbitrators have exceeded their powers." Id. at 615 n.6. This Court rejected the unlawful-delegation challenge, concluding:

> Arbitration of public employment disputes has been held constitutional by state supreme courts in *State v. City of Laramie*, 437 P.2d 295 (Wyo. 1968) and *City of Warwick v. Warwick Regular Firemen's Ass'n*, 256 A.2d 206 (R.I. 1969). To the extent that the arbitrators do not proceed beyond the provisions of the Vallejo charter there is no unlawful delegation of legislative power.

Id. at 622 n.13. Labor Code §1164 provides more detailed standards for the mediator to follow and more searching review (by both the ALRB and the courts) than did the Vallejo city charter.

The great weight of authority from other states, moreover, is that a statute providing for compulsory interest arbitration of labor disputes does not violate the delegation doctrine by setting out a list of factors for the arbitrator to consider – or even by providing no explicit standards at all and relying on the "common law" of interest arbitration. *See, e.g.*, *City of Richfield,* 276 N.W.2d at 47 ("It would be difficult if not impracticable to formulate rigid standards to guide the arbitrators in dealing with the

complex and potentially volatile issues that might arise during labor negotiations. To do so might well destroy the flexibility necessary for the arbitrators to effect the legislative purpose of enacting the law."); *Superintending School Committee of Bangor,* 433 A.2d at 387 ("Formulation of rigid standards for the guidance of arbitrators in dealing with complex and often volatile issues would be impractical, and might destroy the flexibility necessary for the arbitrators to carry out the legislative policy of promoting the improvement of the relationship between public employers and their employees."); *Harney v. Russo* (Pa. 1969) 255 A.2d 560, 563 ("To require a more explicit statement of legislative policy in a statute calling for labor arbitration would be sheer folly. The great advantage of arbitration is, after all, the ability of the arbitrators to deal with each case on its own merits in order to arrive at a compromise which is fair to both parties.").[12]

Where the Legislature has made the "fundamental" policy decision and has provided guidance to administrators on how to implement that policy, the remaining concern of the "unlawful delegation" doctrine is with whether the statute provides constrains against arbitrary action. *See Birkenfeld,* 17 Cal. 3d at 168 ("The need is usually not for standards but for safeguards. . . .") (quotations omitted); *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal. App. 4th 619, 633 ("a delegation of authority must be accompanied by safeguards which insure that the

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[12] *See also Municipality of Anchorage,* P.2d 1080; *City of Columbus,* 505 N.E.2d 651; *Milwaukee County,* 325 N.W.2d at 356; *City of Detroit,* 294 N.W.2d at 74; *Medford Firefighters Ass'n,* 595 P.2d at 1270 n.1; *Mercer County Improvement Authority,* 386 A.2d at 1294; *Town of Arlington,* 352 N.E.2d at 918 n.3; *City of Amsterdam,* 332 N.E.2d 290; *City of Dearborn,* 201 N.W.2d 650; *City of Warwick,* 256 A.2d 206; *Fairview Hospital Ass'n,* 64 N.W.2d 16; *New Jersey Bell Telephone,* 75 A.2d at 733; *United Gas, Coke & Chemical Workers of America, Local 18 v. Wisconsin Employment Relations Board* (Wis. 1949) 38 N.W.2d 692.

delegatee does not act arbitrarily"); *see also Superintending School Committee of Bangor*, 433 A.2d at 387 ("Especially where it would not be feasible for the Legislature to supply precise standards, the presence of adequate procedural safeguards may be properly considered in resolving the constitutionality of the delegation of power"); *Town of Arlington,* 352 N.E.2d at 920 ("We are less concerned with the labels placed on the arbitrators as public or private, as politically accountable or independent, than we are with 'the totality of the protection against arbitrariness' provided in the statutory scheme."); *accord Municipality of Anchorage*, 839 P.2d at 1084; *City of Richfield*, 276 N.W.2d at 47; *Milwaukee County*, 325 N.W.2d at 358; *City of Warwick*, 256 A.2d at 210-11; *Medford Firefighters Association*, 595 P.2d 1268.

The Court of Appeal stated that the Legislature failed here to provide "necessary procedural safeguards or mechanisms to assure a fair and evenhanded implementation of the legislative mandate" (236 Cal. App. 4th at 1075), and that the ALRB's review of the mediator's report is just a "rubber-stamp approval." *Id.* To the contrary, the Legislature did provide constitutionally sufficient "safeguards" and "mechanisms," which go beyond those in many other interest arbitration statutes, beginning with the process for the parties to select a neutral mediator. The ALRB must obtain a list of nine experienced labor mediators from the State Mediation and Conciliation Service and, if the parties cannot agree upon the mediator, the parties alternately strike from this list. Labor Code §1164(b). The Legislature further provided for the participation of both parties in the MMC process; creation of a record; preparation of a written mediator's report that relies upon the record; review of the mediator's report by the ALRB; and review of the ALRB's order by the courts. *Cf. Mount St. Mary's Hospital*, 26 N.Y.2d at 511 (upholding statute that required interest

arbitration to settle labor disputes involving private, non-profit hospitals, where arbitration awards were reviewable only for abuse of discretion).

Under the MMC statute, the ALRB's role is not to "rubber-stamp" mediator's reports, but to review the parties' objections, if any, to those reports and to reject any recommendations that are outside the scope of mandatory bargaining subjects, unsupported by the factual record, or "arbitrary and capricious." Labor Code §1164.3. In this case, after reviewing the initial report and Gerawan's objections, the ALRB returned *six issues* to the mediator for further mediation with the parties, which then resulted in a successful second mediation and complete agreement — hardly a "rubber stamp."

In sum, the Fifth District's analysis of the delegation issue is at odds with the entire body of modern precedent in this area. The Court of Appeal's approach invites returning the courts to their former, *Lochner*-era role of second-guessing the wisdom of the Legislature's policy decisions about economic regulation, by implying sufficient standards from the purposes and structure of some statutes while striking down other disfavored regulation as containing "no goal to aim for." Accordingly, this Court should continue to reject that approach to the non-delegation doctrine.

IV. The ALRA Does Not Permit an Employer to Avoid the MMC Process By Challenging a Certified Union's Representative Status Through An "Abandonment" Objection

The Fifth District interpreted the MMC statute to create a distinction between whether a union is the certified bargaining representative for purposes of the employer's duty to bargain and whether the union is the certified bargaining representative for purposes of requesting referral to the MMC process if that same bargaining proves unsuccessful. The Court of Appeal acknowledged that, under longstanding ALRA precedent, once a

union has been certified after an election, the union remains the certified representative unless workers decertify the union through another election (unless the union itself disclaims the unit or is defunct). 236 Cal. App. 4th at 1059. The Court of Appeal ruled, however, that an employer may oppose referral to the MMC process by claiming that the union certified as the bargaining representative for a unit has since "forfeited that status through abandonment." *Id.* at 1054. There is no basis for the Court of Appeal's distinction in the language or history of the MMC statute. Even if the language and history of the MMC statute provided any room such a distinction, moreover, the ALRB's decision about labor policy would be entitled to deference.[13]

Labor Code §1164(a)(1) permits a request for referral to the MMC process to be filed by "a labor organization certified as the exclusive bargaining agent of a bargaining unit of agricultural employees" at any time following: "90 days after a renewed demand to bargain by an agricultural employer or a labor organization certified prior to January 1, 2003." The Legislature did not qualify this provision with any requirement that the union have actively pursued bargaining on a consistent basis over the years prior to serving the "renewed demand to bargain." The requirement of a "renewed demand to bargain" also makes clear that the bargaining relationship may previously have become dormant.

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[13] On the same day the Court of Appeal issued its decision in this case, the same panel issued its decision in *Tri-Fanucchi Farms v. ALRB* (2015) 236 Cal. App. 4th. 1079. In *Tri-Fanucchi*, the Court of Appeal upheld the ALRB's decision that the employer committed an unfair labor practice by refusing to bargain at the request of a certified union, notwithstanding the employer's contention that the union had previously "abandoned" the bargaining unit by allowing negotiations to remain dormant. This Court granted review in *Tri-Fanucchi* to consider the issue whether an employer may claim that it has no duty to bargain with a certified union because of the union's alleged prior "abandonment" of the unit.

Moreover, while the MMC statute provides very specific procedures for processing MMC declarations, the statute provides no procedure for consideration of challenges to the status of a certified representative that would require evidentiary proceedings, such as an "abandonment" defense. The Legislature mandated that "[u]pon receipt of a declaration" demonstrating that the specific and easily verified statutory criteria are met, the ALRB "shall *immediately* issue an order directing the parties [to MMC]." Labor Code §1164(b) (emphasis supplied). The Legislature would not have required an "immediate[]" referral upon receipt of a declaration if the Legislature had intended the ALRB to conduct the evidentiary proceedings concerning "abandonment" envisioned by the Fifth District.

The Legislature also adopted the MMC statute against the backdrop of very clear and consistent precedent interpreting the ALRA to mean that, once the ALRB certifies a representative for a bargaining unit after an employee election, the representative can *only* be decertified through another employee election. *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4, at 15 n.7; *see also, e.g., San Joaquin Tomato Growers* (2011) 37 ALRB No. 5, at 3-4; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, at 10-11; *Bruce Church* (1991) 17 ALRB No. 1, at 9-10; *Ventura County Fruit Growers* (1984) 10 ALRB No. 45, at 3-7; *Nish Noroian Farms* (1982) 8 ALRB No. 25, at 15-16. Before the MMC statute was adopted, the ALRB and courts had consistently rejected employers' attempts to claim that the union should not be considered the bargaining representative because the union allegedly had "abandoned" the unit. *See F & P Growers Ass'n v. ALRB* (1985) 168 Cal. App. 3d 667, 672-78.

The issue of "decertifying" unions is one of the specific areas in which the California Legislature chose in the original ALRA to deviate from the analogous provisions of the NLRA by precluding any employer involvement in challenging the representative status of previously certified

labor organizations. *Compare* Labor Code § 1156.3 (permitting only workers to file decertification petitions) with 29 U.S.C. § 159(c)(1)(B) (employers may file petitions challenging representative status); *see F & P Growers,* 168 Cal. App. 3d at 672-78.[14] The difference in the statutory language is one of the reasons the courts and the ALRB had concluded that employers cannot raise any defenses to the representative status of a certified ALRA union:

> [T]o permit an agricultural employer to be able to rely on its good faith belief in order to avoid bargaining with an employee chosen agricultural union indirectly would give the employer influence over those matters in which the Legislature clearly appears to have removed employer influence. This court will not permit the agricultural employer to do indirectly, by relying on the NLRA loss of majority support defense, what the Legislature has clearly shown it does not intend the employer to do directly.

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[14] While the ALRA was in many respects modeled on the structure and requirements of the NLRA, the California Legislature, and then later the ALRB through implementing rules and regulations, have modified certain requirements to reflect the particular nature of the agricultural workforce and the challenges of organizing and protecting the right to bargain in that context. For example, the ALRA gives unions the right to enter a grower's property to access workers, unlike the NLRA which is silent with respect to access. See 8 C.C.R. §20900 and *ALRB v. Superior Court* (1976) 16 Cal. 3d 392 (where this Court upheld the ALRA's access rule). The ALRA permits the use of signatures on election petitions of workers hired by farm labor contractors not just direct employees of the grower, which also differs from the NLRA. See Lab. Code § 1140.4(c) (deeming the employer engaging any labor contractor employee as "the employer for all purposes"); 8 C.C.R. §20310(a)(2). The ALRA permits the selection of representative only by secret-ballot election conducted by the ALRB and regulates when during the growing season those elections can occur, unlike the NLRA which permits other forms of voluntary recognition like card-check, at any time. Finally, as most relevant to the issue before this Court, the ALRA also expressly differs from the NLRA by making it more difficult to decertify a union, by codifying the contract bar to a decertification petition, and permitting only unions or employees, not an employer, to file a decertification petition. Labor Code §1156.7.

Id. at 676-77. Nothing in the MMC statute remotely suggests any intent by the Legislature to invite employer involvement into an area in which employer involvement previously had been foreclosed.

The Fifth District reasoned that the legal background against which the Legislature adopted the MMC statute was not so clear in precluding employer challenges to a certified union's status. The Fifth District pointed out that *Montebello Rose Co. v. ALRB,* (1981) 119 Cal. App. 3d 1, had referred to a "rebuttable presumption" of majority status that exists beyond the initial year following certification, implying that there are circumstances in which the presumption can be "rebutted." 236 Cal. App. 4th at 1055. But *Montebello Rose* actually recognized that *the NLRA* has been read to include a "rebuttable presumption" of continued representative status after the first year, and then contrasted the language of the ALRA, recognizing that: 1) no provision of the ALRA expressly imposes a time limit with respect to an employer's duty to bargain with a certified union, and 2) the one year time limit in the ALRA pertains only to the "contract bar" for employee decertification petitions, not the duty to bargain. *Montebello Rose,* 119 Cal. App. 3d at 24-25 ("While the code section implying the duty to bargain contains no express time limit (§ 1153, subd. (e)), the section creating the election bar does contain a one-year time limit (§ 1156.6). The Board therefore concluded that "certification" lapses after one year for the purpose of the election bar, but not for the purpose of the bargaining duty."). Nothing in *Montebello Rose* suggests that there are circumstances in which *an employer* may "rebut" the status of a certified union.

Moreover, in *F & P Growers*, the Court of Appeal agreed with the ALRB that an employer cannot challenge a certified union's representative status. 168 Cal. App. 3d at 672-78. *F & P Growers* explained that what the Fifth District referred to as the "rebuttable presumption rule" under the

NLRA is *inapplicable* in light of the language and purpose of the ALRA. *Id.* at 676 ("We agree that these differences in the NLRA and the ALRA, with respect to employer participation in the certification and decertification petitions, show a purpose on the part of the Legislature to prohibit the employer from being an active participant in determining which union it shall bargain with in cases arising under the ALRA.").[15] As such, the Legislature, in adopting the MMC statute, would not have understood the ALRA to allow *employers* to "rebut" a certified union's status as the legal representative of the unit under any circumstances. Instead, the "rebuttal" may come only from workers, and only through a valid, secret ballot election.

The legislative history of the MMC statute is also inconsistent with the distinction drawn by the Fifth District. As discussed above, the Legislature was well aware in crafting the MMC statute of the hundreds of previous union certifications – going back twenty-five years to 1975 -- for which no first contract had ever been reached. *Supra*, at 19. The Legislature understood that recalcitrant employers had often made bargaining in these units a futile process. Nothing in the history of the MMC statute remotely suggests that the Legislature intended to exclude, *sub silento*, those

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[15] As the Court of Appeal in *F & P Growers* explained:

> Where there is such a rapid turnover of agricultural employees and many of these temporary employees are also alien workers, who do not speak the English language, the workers may be especially unable to bargain with the employer, without the assistance of a union, and there is all the more reason for the Legislature to decide to remove the employer from any peripheral participation in deciding whether to bargain with a particular union.... Applying the NLRA defense would fail to respond to the particular needs of the California agricultural scene.

Id. at 677.

represented employees for whom bargaining had been rendered futile for years by employer resistance; rather, those were the employees who the Legislature was attempting to help.

Nonetheless, Fifth District reasoned as follows: The "MMC process differs materially from bargaining and is largely a postbargaining process" and, therefore, "the employer's continuing duty to bargain is *not* an impediment to our recognition of the employer's ability to raise, at [the MMC] stage, a defense that the union forfeited its representative status by abandonment." 236 Cal. App. 4th at 1059 (emphasis in original). That reasoning is not based on an accurate understanding of the role of the MMC process. The Legislature adopted MMC not as a "postbargaining" substitute for bargaining but to "ensure a more effective collective bargaining process." Stats. 2002, ch. 1145, §1. The initial step in invoking MMC, where a union had been certified prior to the effective date of the MMC statute, is a "renewed demand for bargaining." Labor Code §1164(a)(1). If that renewed bargaining proves unsuccessful in producing a contract, and the parties are referred to MMC, the next step is *continued bargaining*, facilitated by the jointly-selected mediator (which the Court of Appeal attempted to dismiss away as just "a brief 30-day period of bargaining at the outset," 236 Cal. App. 4th at 1058). Labor Code §1164(c). If that mediation phase proves unsuccessful, the parties are free to reach their own agreement before the mediator issues a formal report, or before the ALRB adopts that report, and, if a final ALRB order is necessary, the parties are still free to agree to change those terms. The point of MMC is to encourage serious bargaining.

Under the Fifth District's ruling, a certified representative could renew dormant bargaining with an employer that never agreed to an initial CBA (because the employer has a duty to bargain in good faith), but would lack the additional "leverage" provided by the MMC statute to make that

bargaining effective. As such, the bargaining unit workers would be unlikely to ever obtain a reasonable contract, because under so-called "traditional bargaining" many agricultural employers never agree to contracts. That was the situation the Legislature sought to change, not perpetuate.

The Fifth District also justified its ruling as necessary to further the overall "policy" of the ALRA to enable farm workers to have collective bargaining representatives "of their own choosing." 236 Cal. App. 4th at 1060. Accepting Gerawan's version of events, the Fifth District expressed concern that a labor representative that had stopped actively attempting to engage in bargaining with a hostile employer might no longer be the desired representative of a majority of the current employees: "it may be the case that the employees do not want to be represented by that union or any other union, which Gerawan asserts was the situation here. Against that backdrop is the prospect, in the MMC process, a CBA will be imposed whether the employees want it or not." *Id.* at 1061.[16] The Fifth District also expressed concern that the timeframe set by the Legislature for the MMC process might not be sufficient to allow workers to mount a "decertification" campaign and that the MMC statute would encourage "destabilizing, beat-the-clock" bargaining by unions that sought the "reward" of being sent to the MMC process. *Id.* at 1062. The Fifth District's concerns, however, cannot justify overriding the policy decision made by the Legislature in 2002, especially where the result of such a decision will be to incentivize agricultural employers to engage in illegal

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[16] Despite disclaiming any reliance on the then-pending decertification election proceedings at Gerawan, the Fifth District repeatedly refers to them. 236 Cal. App. 4th at 1039, 1062. An ALJ recently determined that the decertification campaign was illegally supported by Gerawan itself, in a blatant interference with its employees' protected rights. *See* Exhibit B to UFW's Motion for Judicial Notice.

decertification campaigns -- as Gerawan has done here -- to stall renewed collective bargaining efforts.

The Legislature concluded that farm workers in a bargaining unit that had elected union representation in a secret-ballot election, even an election that occurred long ago, would be better off if their certified bargaining representative could obtain a reasonable contract on their behalf than if bargaining remained a futile and hopeless exercise. The Legislature also concluded that decertification is a speedy enough process when there is truly a grassroots decertification campaign by employees, rather than one illegally instigated and supported by the employer.[17] The Legislature also concluded that requiring the ALRB to "immediately" refer parties to MMC upon request, rather than providing for potentially lengthy and protracted evidentiary proceedings to consider an employer defense like "abandonment," would best serve the bargaining process.

The aim of any exercise in statutory interpretation is to determine and implement the intent of the Legislature that adopted the statute at issue. In this case, the language and history of the MMC statute show that the Legislature's intent in 2002 was to make the MMC process available in units in which bargaining had become dormant, so long as the certified union or employer first makes a "renewed demand to bargain." The Fifth District erred by replacing the Legislature's policy determinations with its own, and thereby providing agricultural employers with a vehicle to thwart MMC collective bargaining: unlawful decertification campaigns.

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[17] The ALRA provides for the ALRB to schedule a decertification election within 7 days after receipt of a decertification petition accompanied by sufficient signatures. Labor Code §1156.3(b). The ALRB's final order here was not issued until more than a year after UFW's renewed demand to bargain. MMC timelines are not inconsistent with employee choice.

Even if there were room in the statutory language for the distinction drawn by the Fifth District, moreover, the ALRB's contrary interpretation of the statute should have been given deference. *ALRB v. Superior Court (Gallo Vineyards)* (1996) 48 Cal. App. 4th 1489, 1506 ("The ALRB is the agency entrusted with the enforcement of the Act and its interpretation should be given great respect by the courts and followed if not clearly erroneous."); *Highland Ranch v. ALRB* (1981) 29 Cal. 3d 848, 858-62 (courts must give "great weight" to the ALRB's interpretation of the Act); *San Diego Nursery v. ALRB* (1979) 100 Cal. App. 3d 128, 140 (same).The Fifth District grounded its decision solely in labor policy concerns, and the Legislature charged the ALRB, not the courts, with administering the ALRA, including by weighing competing policy concerns when the statutory language is unclear. For the reasons stated, there are sound policy reasons to allow certified unions to revive dormant bargaining relationships and request MMC if the bargaining is unsuccessful, rather than to leave the workers in these units with union representation but no hope of ever obtaining a reasonable contract.

CONCLUSION

For the foregoing reasons, real party in interest UFW respectfully requests this Court reverse the Fifth District's decision and order the Fifth District to lift the stay of the ALRB's final order.[18]

[18] If Gerawan contends that its other, unresolved challenges to the ALRA's final order justify a stay, Gerawan has the burden of seeking and justifying such a stay under the standard set forth by the Legislature. *See* Labor Code §1164.3(f).

Dated: November 17, 2015

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.520(c)(1) of the California Rules of Court that the foregoing brief is proportionally spaced, has a typeface of 13 points or more, and contains 13,954 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: November 17, 2015

By: */s/ Scott A. Kronland*
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PROOF OF SERVICE

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

I, Laurel Kapros Rohrer, 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 November 17, 2015, I served the following document(s):

Real Party In Interest United Farm Workers Of America's Opening Brief On The Merits

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:

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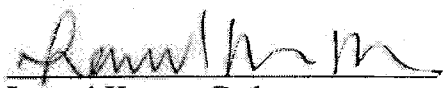
A	The Hon. Donald Black Fresno County Superior Court 1100 Van Ness Avenue Fresno, CA 93724-0002	Trial Court
A	California Court of Appeal For the Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Court of Appeal

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this November 17, 2015, at San Francisco, California.



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