Case No. S227243

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GERAWAN FARMING, INC.,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent,

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

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
The Honorable Donald S. Black, Judge

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ISSUES PRESENTED

1. Whether the California Agricultural Labor Relations Board ("ALRB") erred by failing to consider the UFW's abandonment of Gerawan's employees as a statutory defense to the invocation of Mandatory Mediation and Conciliation ("MMC") proceedings.

2. Whether the MMC statute violates the Equal Protection Clause of the Federal and California Constitutions by providing no rational basis for a mediator to distinguish between similarly situated employers.

3. Whether the MMC statute is an unconstitutional delegation of legislative authority lacking sufficient standards or safeguards to guide a mediator's discretion.

INTRODUCTION

By the ALRB's reasoning, the State of California could, in the interest of "stability" in the agricultural fields, appoint a mediator at the request of a union and give that mediator the virtually unfettered power to bar strikes, limit the workers' access to courts, set wages, compel agency fees, and otherwise dictate all of the rules between a farmer and its employees. The Fifth District correctly held that such a law is unconstitutional.

The MMC scheme challenged here is, to our knowledge, the only law in the United States that permits a state agency to impose a contract on private citizens. Compulsory interest arbitration, the generic name for what

happens in an MMC, is only imposed by consent of the parties or in governmental or quasi-governmental settings where strikes are barred.

The ALRB makes the circular argument that the statutory purpose of MMC is to allow a mediator to make individualized, discretionary decisions, and, on that basis, *any* decision the mediator makes is rationally related to that purpose. By design, the process necessitates that individuals, all similarly situated with respect to the statute's aim, be treated distinctly. And because the MMC statute provides no guidelines to instruct (or limit) the mediator's reordering of these economic relationships, and no direction as how to achieve the legislative goal of "more effective collective bargaining" or "stability" in agricultural labor, the door is flung open to unchecked, unreviewable, and arbitrary special legislation. The Fifth District was the first appellate court to review an MMC contract and, having studied its sprawling provisions, concluded that this scheme is the "antithesis of equal protection" and an improper delegation of legislative authority. (*Gerawan Farming, Inc. v. ALRB* ("*Gerawan Farming*") (2015) 236 Cal.App.4th 1024, 1069.)

Because MMC may be demanded by any certified union that satisfies the ALRB's wooden application of the statutory criteria to invoke the process, it empowers a self-interested union to pick one employer when the timing suits the union and force that employer into non-consensual interest arbitration, backed by the power of the State to compel compliance.

The ALRB analogizes these arbitrary choices to discretionary acts, such as charging decisions by a prosecutor or criminal sentencing by a judge. A private union is not a prosecutor. The MMC mediator is not a judge or a legislator, though he dictates one contract through a "quasi-legislative" process. The discretion as to enforcement of the law as a threshold matter is given to a private union. The discretion as to writing this special legislation is given to a private mediator, without any definite policy direction, goal, or standards, and without any safeguards to check the use of that delegated power.

The ALRB and the UFW (collectively, "Respondents") argue that the law was intended to address "egregious" instances of persistent bad faith bargaining, but no such finding is required or was made here. As interpreted by the ALRB, the MMC statute makes no allowance for the possibility that the lack of an agreement was due to dereliction by the union.

The ALRB presumes that a heretofore moribund union has the consent of today's workers to bind them to a contract based on an election that took place decades ago when most (and perhaps nearly all) of the workers were not employed by Gerawan. According to the ALRB, the employer may not raise abandonment as a defense, and the ALRB may not consider it. The workers can test the representational standing of the union by filing a petition for a decertification election, but the ALRB barely

mentions that a majority of today's workers at Gerawan asked for an election—and the ALRB ordered one. The ALRB does not acknowledge that its decision to conduct an election on one day (but not count the ballots) and then to impose the MMC contract on the next fueled what the Fifth District called a "crisis of representation" at Gerawan.

It has been over two years since the November 5, 2013 election. What followed was a multi-million dollar investigation by the ALRB's General Counsel, based on its view that free choice by Gerawan workers is "impossible." In tandem with the incumbent union, the General Counsel conducted a six-month hearing in order to set aside the election. The ballots remain impounded pending a decision by the ALRB based on the *de novo* review of the ALJ's findings—including the central allegation which the UFW and the ALRB General Counsel failed to prove—that Gerawan instigated the decertification campaign rather than its workers.

The Fifth District analyzed the constitutional and statutory issues based on the organizing principle of the Agricultural Labor Relations Act ("ALRA")—which "'is not exclusively to promote collective bargaining, but to promote such bargaining by the employees' *freely chosen* representatives.'" (*Gerawan Farming, supra*, at p. 1061 [quoting *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, 34] [emphasis original].) The decision of the Fifth District should be affirmed in all respects.

BACKGROUND

I. 1990 Through February 1995

In May 1990, the UFW won a runoff election at Gerawan. The final tally was 654 votes for the UFW, 410 votes for "No Union," and 103 unresolved challenges out of 1,121 votes cast. (Certified Record ("CR") 1233.) Less than half the workers voted. Gerawan objected, arguing the turnout was low because of inadequate notice to workers. The ALJ held that, standing alone, the low voter turnout did not require a new election. (CR 1076.) The ALRB certified the UFW on July 8, 1992. (CR 1282.)

On July 21, 1992, Cesar Chavez, the founder of the UFW, sent Gerawan a letter requesting negotiations.[1] (CR 6.) Gerawan responded on August 13, 1992, "formally accept[ing] [the union's] offer to commence collective bargaining negotiations." (CR 28.) Gerawan invited the UFW to submit proposed ground rules for the negotiations and a proposed collective bargaining agreement ("CBA") because it was "anxious to commence negotiations" and wanted to reach "an early agreement." (CR 27.) Once received, Gerawan stated that it would immediately review them and set up a mutually convenient time and place to begin bargaining. (*Ibid.*) The union did not provide the documents until November 22, 1994, two years later. (CR 8.)

[1] Mr. Chavez passed away shortly thereafter on April 23, 1993.

The UFW held one brief, introductory meeting with Gerawan in February 1995. (CR 23.) At the meeting, the UFW agreed to submit a revised CBA proposal. It never did. (CR 23–24.) The UFW thereafter made no attempt to initiate further negotiations until October 2012, a decade after the 2002 MMC amendments became law. (CR 358.) In the record of this proceeding, there is no explanation from the UFW as to why it disappeared.

II. October 2012 Through The Present

On October 12, 2012, the UFW sent a letter to Gerawan requesting negotiations and information about Gerawan's employees, including their names, mailing addresses, wage rates, and benefits.[2] (CR 10.) On October 30, 2012, the UFW threatened to file an unfair labor practice ("ULP") charge if Gerawan failed to comply.[3] (CR 13.)

Gerawan asked the UFW for an explanation of its lengthy absence. (CR 36.) The UFW refused. (CR 39.)

The parties conducted nine bargaining sessions between January 17, 2013 and March 29, 2013, when the union demanded MMC. (CR 358.)

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[2] The request was made when the company's harvest season was winding down, making it impossible for employees to request an election be conducted before MMC initiated. (CR 31.)

[3] Gerawan advised its employees of the UFW's demand: "As your employer, we did not want [to give your personal information to the UFW,] but we have no control over this." (CR 1386.) In response, the union filed a charge claiming that Gerawan was engaging in the "unlawful initiation of a decertification campaign." (CR 1337.)

During that period, the UFW never made an economic proposal regarding wages. (CR 634.)

On January 18, 2013, Gerawan filed a ULP charge against the UFW for failing to designate a negotiator, make CBA proposals, and communicate with Gerawan for approximately two decades after being certified. (CR 42.) On May 13, 2013, the ALRB Regional Director dismissed the charge. Citing the six-month statute of limitations for filing ULPs, he determined that it is not permissible to file a charge "approximately 17 years after the union allegedly failed to exercise due diligence in the course of contract negotiations with Gerawan." (Regional Director's Letter (May 13, 2013) [RJN, Ex. A].) Gerawan appealed this decision to the General Counsel, as per ALRB regulations. (Gerawan's Request for Review (May 28, 2013) [RJN, Ex. B].) The General Counsel never responded or acted on this request.

III. The ALRB Compels Gerawan Into MMC

On April 16, 2013, the ALRB issued an order directing the parties to MMC, rejecting Gerawan's arguments that the prerequisites for invoking MMC had not been met. (CR 146.) The ALRB rejected Gerawan's abandonment defense in one sentence. (CR 148.)

IV. The Off-The-Record MMC Proceedings

As required under the statute, the parties conducted mediation sessions under the supervision of the mediator, Matthew Goldberg. On

June 11, 2013, a 23-year Gerawan employee, Lupe Garcia, and 15 other Gerawan farm workers, asked to attend the mediation. (CR 231.) Mr. Goldberg informed them that the mediation was confidential and open only to the parties. (*Ibid.*)

Mr. Garcia asked the ALRB for permission to intervene. It denied this request on July 29, 2013, concluding that he is not a party to the MMC process and therefore lacked sufficient "'interest in the outcome of the proceeding' to confer standing." (CR 232.) The ALRB decided that, "even assuming that Garcia had 'an interest' in the outcome of MMC," he was "adequately represented" by the UFW and such intervention "would be fundamentally inconsistent with the union's status as bargaining representative." (CR 235, 237.)

V. The On-The-Record MMC Proceedings

After declaring that mediation was "exhausted," Mr. Goldberg conducted two days of "on-the-record" hearings in which he received testimony and evidence. (CR 361.) The proceedings were transcribed. The mediator, now acting as the decision-maker, is required to issue a report to the ALRB resolving disputed issues and fixing the terms of the contract, based on the sworn testimony and evidence received at that hearing (the "Report"). The Report must "be supported by the record," (Lab. Code §1164(d)), and the mediator is required to "cite evidence in the record." (8 C.C.R. §20407(a)(2).)

On August 2, 2013, Mr. Garcia asked to observe in silence the on-the-record process. (CR 167.) The ALRB denied his request on August 21, 2013. (CR 275.) It held that "strategic compromises [that] are often made that further the goals of achieving a contract . . . would not be made with the prospect of real-time publicity of those compromises and demands for explanations prior to the conclusion of negotiations," ignoring that this was an on-the-record, adversarial proceeding. (CR 281.) Accordingly, "the public interest" would not be served by the "public presence" at this hearing, including Mr. Garcia's presence. (CR 284.)[4]

VI. The Mediator's Report

On September 28, 2013, the mediator submitted his Report. (CR 357–609.) The term of the contract was for three years. (CR 412.) Several of the dozens of terms fixed by Mr. Goldberg are noteworthy. First, he imposed a provision whereby Gerawan shall recognize the UFW as the "sole and exclusive labor organization representing all of the agricultural employees" of Gerawan. (CR 366.) Second, he imposed wage increases, including retroactive increases as to workers whose employment had been completed. The undisputed evidence was that Gerawan historically already paid higher wages than any competitor or other growers

[4] Gerawan and Mr. Garcia each filed challenges to this order. *Gerawan Farming, Inc. v. ALRB et al.*, Case No. 13CECG03374 (Fresno Super. Ct.) (filed Oct. 28, 2013), appeal pending Case No. F069896 (Fifth Appellate District).)

in the region. (CR 366–67.) Third, Mr. Goldberg adopted comprehensive grievance and arbitration procedures as to individual disputes, as well as interest arbitration as to any disputes concerning the contract itself. (CR 384–85.) Fourth, he adopted the union's "Length of Service" (*i.e.*, seniority) provisions, notwithstanding Gerawan's concerns that employees would lose credit for past employment if (as is frequently the case) they took breaks in service. (CR 374–77.) Though there was no factual basis upon which to determine whether the current system required a complete overhaul, he determined that seniority systems are "common" in CBAs. (CR 377.)

Fifth, he adopted "no strike/no lockout" provisions proposed by the union, finding that these would "promote[] labor peace and stability" and "are generally viewed [as] a trade-off for grievance and arbitration rights." (CR 386.) Sixth, Mr. Goldberg imposed a "non-disparagement" clause on Gerawan; he erroneously believed that this provision was mutual. (CR 367–68, 723.) That misunderstanding aside, he viewed such "language" as not "atypical" among other UFW agreements and would assist the parties to mutually recognize "a new set of ground rules governing their interactions, and will hopefully wipe the slate clean." (CR 368.) Seventh, he adopted the UFW's so-called "union security" provision which enables the UFW to require Gerawan to terminate any employee who refuses to pay dues or agency fees to the UFW. (CR 368–

71.) The wage increase he ordered would partially offset the three percent to be charged workers by the UFW.

The compulsory fee provision was termed by Mr. Goldberg as "decidedly the thorniest" issue presented. (CR 370.) He wrote: "Undeniably, for a considerable period, the Union has absented itself from acting in any representative capacity for these employees. The election which resulted in its certification occurred so long ago that it is highly unlikely that any members of its current work force participated in it. All other things being equal, the imposition of membership fees to support an organization that most of the Employer's employees have had little if anything to do with would appear to be a bit of an overreach." (CR 370.) Nonetheless, he concluded that such clauses "are the rule rather than the exception in agricultural labor contracts. ...Without them, the Union is placed at a decided disadvantage in providing to the members of this bargaining unit the full range of representational services." (CR 371.)

Gerawan petitioned the ALRB to review the Report. (CR 640–707.) On October 25, 2013, without hearing, the ALRB remanded as to six issues and denied review as to all others. (CR 721–31.) (Of the provisions discussed above, only the non-disparagement clause was reviewed by the ALRB.) The mediator issued a second report on November 6, 2013. (CR 745–47.) On November 19, the ALRB summarily adopted the mediator's

Report and directed that it "shall take immediate effect as a final order of the Board." (CR 800.)

VII. The Decertification Petition

During the summer of 2013, Gerawan workers initiated a petition drive to seek decertification of the UFW. (CR 304–07.) The ALRA requires at least half the peak workforce be currently employed to run an election and that 50% of those currently working employees must have signed the petition. (Lab. Code §1156.4.) As Gerawan employs over 5,000 full-time direct-hire workers during the year, the number of signatures required, and the task involved, is substantial. (CR 358.) During this time, there were numerous worker protests directed at the ALRB and the union.

On October 25, 2013, a Gerawan worker, Silvia Lopez, submitted a petition to decertify the UFW. (Order, *Gerawan Farming, Inc.* (Nov. 1, 2013) Case No. 2013-RD-003-VIS, Admin. Order No. 2013-46 [RJN, Ex. C].) On October 28, 2013, the Regional Director dismissed it as untimely, concluding that the ALRB's order imposing an MMC contract created a collective bargaining agreement, thereby resulting in a "contract bar" that precluded the holding of the election. (*Id.*) The ALRB vacated that dismissal, noting that immediate effectuation of that agreement was precluded because Gerawan had challenged it in its petition for review with the ALRB. (*Id.*)

The Regional Director dismissed the petition again on October 31, 2013. (RJN, Ex. C].) Although he concluded that petitioner had met the statutory requirements for holding an election—*i.e.*, a majority showing of interest—he determined that the election should be blocked based on the pendency of three unfair labor practice complaints against Gerawan. (*Id.*)

The ALRB again vacated this dismissal, noting its "serious doubts" as to the propriety of using an "eleventh-hour" complaint as to "stale" charges as a basis to block an election. (RJN, Ex. C.) As to one of the pending complaints (alleging employer interference in a decertification petition), the ALRB noted that the Regional Director failed to mention "the degree to which remedial efforts by the General Counsel and agreed upon by Employer, which were allegedly represented by the General Counsel to the Fresno Superior Court in injunctive relief proceedings as having remedied some of the alleged unfair labor practice charges, in fact did so." (*Id.*)

The ALRB instructed the Regional Director not to file any further dismissals and ordered an election, holding that "there are enough questions as regarding the degree to which any taint had been remedied, as well as questions as to the appropriateness of relying on the late-filed complaint to block the election." (*Id.*)

The election was held on November 5, 2013. The ballots were impounded pending resolution of election objections and litigation of the complaints. (*Id.*)

VIII. Post-Election Efforts To Enforce The MMC Contract

On November 13, 2013, eight days after the election—but before the MMC order issued—Gerawan asked the ALRB to temporarily stay MMC, so that the ALRB could decide whether to count the ballots *before* it issued its final decision and order approving the contract. (CR 748–96.) The ALRB summarily denied this request the following day. (CR 797–98.) The final order issued five days later. (CR 799–803.)

The UFW and the General Counsel then separately filed *ex parte* enforcement actions in Superior Court to compel immediate compliance with the order. These requests were denied (Minute Order, *UFW v. Gerawan Farming, Inc.* (Nov. 27, 2013) Case No. 34-2013-0015803-CL-MC-GDS [RJN Ex. D]; Order, *ALRB v. Gerawan Farming, Inc.* (June 2, 2014) Case No. 14CECG00987 [RJN, Ex. E]), in part because they contradicted prior ALRB decisions that an MMC order is not enforceable until affirmed following Court of Appeal review. (*See Hess Collection Winery* (2009) 35 ALRB No. 3, at pp. 14–15; *Ace Tomato Co.* (2012) 38 ALRB No. 8, at p. 7.)

IX. The Post-Election Hearing

A post-election hearing began on September 29, 2014. On September 9, 2014, the General Counsel filed a 28-page amended complaint covering 21 separate charges, some of which alleged events occurring one year before the election. The ALJ commented that the filing of the amended complaint three weeks before the hearing "had the general feel of trial by ambush." (Decision, *Gerawan Farming, Inc.* (Sept. 17, 2015) Case No. 2013-RD-003-VIS at p. 5, fn.4 [RJN, Ex. F].) None of the charges alleged misconduct on the day of the election itself.

This hearing took six months. The Regional Director acted as the General Counsel's "lead prosecutor."[5] Following the ALJ's decision, the parties filed exceptions with the ALRB. The UFW and the General Counsel filed (in total) 61 exceptions to his decision, including as to his conclusion that there was "no persuasive evidence of company instigation" of the decertification drive. (RJN, Ex. F, at p. 165.) The ALRB has not yet ruled on these exceptions.

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[5] The ALJ expressed "serious reservations regarding a Regional Director serving as the General Counsel's lead prosecutor in an election matter. . . . By assuming the 'hat' as the General Counsel's lead prosecutor in a consolidated election case, the Regional Director may simultaneously become an unadulterated advocate for one side over the other as to the election objections, which then undermines the Regional Director's ability to be persuasive as a potential percipient witness." (RJN, Ex. F, at p. 164, fn.40.)

X. The MMC Statute

The UFW discusses the history of the 2002 MMC amendments without mentioning its history in this case, or the reasons for its failure to invoke MMC for more than a decade after its enactment.[6] The UFW claims that by early 1995, its negotiations with Gerawan "proved futile." (UFW Br. at p. 26.) Thereafter, the UFW filed no grievances or ULPs against Gerawan.

The UFW claims that MMC made "eminent sense," given that "the threat of strikes proved insufficient to produce first contracts." (UFW Br. at pp. 36–37.) Strikes and in particular boycotts were used by the UFW, often with great effect, before and after the enactment of the ALRA, because they threatened growers with the destruction of perishable crops or the destruction of their reputations.[7] The "unique circumstances" of

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[6] In its Petition for Review (at p. 26, fn.9), the UFW states that it "is aware of at least 50 bargaining units throughout California for which the MMC process could be invoked." (Compare UFW Br. at p. 19 [citing legislative history] [185 out of 428 UFW certified bargaining units reached initial contracts as of 2002].) Setting aside the reasons for why MMC was not demanded as to these 50 (or 233) certified bargaining units since MMC was enacted, the ALRB's public records indicate that MMC has been invoked fewer than a ***dozen*** times since passage of the statute.

[7] Governor Jerry Brown recounted his conversation with Mr. Chavez in which they discussed the merits of what became the ALRA:

> Chavez pulled up to my Laurel Canyon house in an old car with a German shepherd dog named Huelga—Spanish for "strike." We talked for several hours about whether the proposed state law or any labor law could actually help farmworkers. Chavez repeatedly said that his boycott was a

agriculture gave farm labor unions a degree of "leverage" (UFW Br. at p. 54), which may explain why, at the time of the Act's passage, the ALRB was "inundated" with election petitions. According to the ALRB's Chairman, "[u]nion organizational activity in California agriculture at this moment is completely moribund, notwithstanding the passage of [the MMC statute]." William B. Gould IV (Jan. 28, 2016) Agricultural Personnel Management Association's 36th Annual Forum at p. 5 [RJN, Ex. G].) As of 2012, the UFW reported 3,391 active members.[8]

More workers asked for a decertification election in 2013 than voted in the certification election in 1990. This reflects the substantial change in the size of Gerawan's work force at the time the UFW reemerged in 2012. (CR 24.) It also reflects the extent to which Gerawan's business, and its business model, changed in the two decades since that election. (*Ibid.*) In the intervening 18 years, Gerawan added roughly 8,000 acres under

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> much better organizing tool because the law would always be captured by the powerful economic interest that control politics. I argued with him and said that a law would be his best protection. He finally agreed, but remained skeptical.

(McGregor, *Remembering Cesar Chavez* (2000) at p. 48.)

[8] U.S. Department of Labor, *2012 LM-2 Labor Organization Annual Report of the UFW*, at p. 15 (RJN, Ex. H). The ALJ "reach[ed] the inescapable conclusion that [UFW National Vice-President Armando Elenes] was lying when he stated that he was unable to give an estimate as to the number of UFW dues-paying members." (RJN, Ex. F, at pp. 69–70.) "Most probably Elenes was concerned about conceding the smallness of existing UFW membership, especially in comparison to the number of Gerawan workers at stake." (*Ibid.*)

cultivation and planted more labor-intensive crops, such as table grapes. (CR 65, 358.) During the UFW's absence, the company built a vertically integrated business and "developed unique interactive methods to maintain quality control and paid workers above the industry average." (*Gerawan Farming, supra,* at p. 1037.)[9]

As the Fifth District noted, the UFW's long absence gave it no basis to understand the company, its business, or its workers. Mr. Goldberg acknowledged that "[t]he party offering a proposal which seeks to modify the status quo bears the burden of demonstrating if and how its proposal satisfies the [statutory] considerations." (CR 364.) The "status quo" at Gerawan included the absence of the union. With only one exception—the imposition of compulsory dues and agency fees—Mr. Goldberg made no mention of the UFW's absence in applying his judgments. (CR 368.)

XI. The MMC Process

The ALRB views MMC as a means of "changing the attitudes toward collective bargaining" so that employers "will learn that collective bargaining can be mutually beneficial." *Gerawan Farming*, (2013) 39 ALRB No. 11, at 7.) Here the Fifth District had an actual MMC "Report" to consider.

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[9] In 2012, Gerawan paid its employees who only pick grapes an average of $13.48 per hour, which was about 48% more than the average for Fresno County. It contributes 50% of the total cost for medical, dental, and vision insurance for its employees and eligible family members. (CR 65–66.)

The Report to a significant degree based its conclusions on CBAs submitted by the parties, or Mr. Goldberg's views concerning current labor shortages, the possibility of a drought, or what he felt would be in Gerawan's best interests—such as a wage increase. (CR 415.) Mr. Goldberg conceded that there was no evidence based on the CBAs submitted that would establish that other farm operations were "similar" in terms of any of the categories listed in the statute, or provide guidance as to any economic terms. (CR 362–63.) In fact, Gerawan submitted several CBAs to highlight differences as to certain terms proposed by the UFW. (CR 395, 727.) He nonetheless accepted most of the non-economic terms proposed by the UFW, based on his view that they were not "atypical" from, or "common" in, other agricultural labor agreements. This was the basis for adopting the union's security provision (CR 371), grievance and arbitration procedures (CR 384), no strike/lock-out provisions (CR 386), seniority requirements (CR 375–76), disciplinary procedures, and just-cause termination requirements. (CR 388.)[10]

Faced with the undisputed fact that Gerawan pays wages higher than its competitors, and that no comparability analysis (even if one had been offered by the union) could support a wage increase, Mr. Goldberg cited a

[10] Gerawan submitted expert testimony that the UFW's proposed disciplinary provisions would slow down or interrupt quality control processes, including Gerawan's ability to use corrective actions, such as repacking for instructional purposes. (CR 1052–54.) Mr. Goldberg rejected this claim as "unsubstantiated" and "self-serving." (CR 388.)

CBA for a boutique vineyard near Monterey to justify a wage increase at Gerawan, concluding that raising wages "is in the Company's best interests, allowing it to maintain its competitiveness for a quality, stable and loyal work force." (CR 415.) Mr. Goldberg dismissed First Amendment concerns implicated by the compulsory fee provision, as "workers retain their freedom of association by opting for agency fees rather than Union dues, and by refraining from participating in any Union activities." (CR 371.)

ARGUMENT

I. No State Has Ever Before Imposed Interest Arbitration On A Private Company By Government Fiat

The UFW accuses the Fifth District of "ignoring the long history of interest arbitration" and treating the MMC process as a "new and strange phenomenon." (UFW Br. at p. 30.) But, as its seven-page exegesis on interest arbitration demonstrates, interest arbitration is limited to two categories, neither of which is applicable here. First, where the parties have "voluntarily agreed." (*Id.* at p. 31.) Gerawan never agreed to interest arbitration, nor did its employees. Second, to "prevent labor disputes that could adversely impact the public interest [*i.e.*, public health and safety]," such as for police, firefighters, transit workers, and hospital workers. (*Ibid.*) Almost invariably, these situations involve governmental or quasi-government employers and they almost always involve situations

where the law prohibits the workers from striking. That does not exist here. As the UFW recognizes, "farm workers in California have the right to strike." (*Id.* at p. 36.)

At the UFW's urging, California has pushed interest arbitration where it has never gone before—to private sector companies engaged in ordinary commerce. The fact that compulsory interest arbitration is recognized in the public employment context does not create a basis for the State to impose it in the private employer context. Missing entirely from the ALRB's brief, and relegated to a footnote in the UFW's brief, is *Wolff*—a U.S. Supreme Court case that struck down an interest arbitration system similar to the MMC statute, and which remains good law.

A. Consent is the linchpin of arbitration; there is no consent here.

Arbitration "is a matter of consent, not coercion." (*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 479.) "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC* (2012) 55 Cal.4th 223, 236; see also *AT&T Techs., Inc. v. Commc'ns Workers of Am.* (1986) 475 U.S. 643, 648–49.)[11]

[11] Even in those rare cases in which a party has the unilateral power to bind a non-signatory to arbitration, this Court has required either that the parties be in a special agency or fiduciary relationship or that the non-signatory be given adequate notice. (*Pinnacle Museum Tower Assn., supra,* 55 Cal.4th at p. 238; *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 853–54.)

The notion that an agreement to arbitrate is a "bargained-for" exchange holds in the labor context as well. (*14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 257; *Litton Fin. Printing Div. v. NLRB* (1991) 501 U.S. 190, 199–200) [arbitration is "a consensual surrender of the economic power which the parties are otherwise free to utilize" in the absence of agreement]; *Gateway Coal Co. v. Mine Workers* (1974) 414 U.S. 368, 374 ["The law compels a party to submit his grievance to arbitration only if he has contracted to do so."].)

In *NLRB v. Jones & Laughlin* (1937) 301 U.S. 1, the Supreme Court upheld the NLRA against a constitutional due process challenge specifically because "[t]he Act does not compel agreements between employers and employees. It does not compel any agreement whatever." (*Id.* at p. 45.) The right to freedom of contract has been cited repeatedly as the basis for upholding the constitutionality of collective bargaining. (See, e.g., *H.K. Porter Co. v. NLRB* (1970) 397 U.S. 99.)

In *H.K. Porter*, the Court held that the right to resist concessions meant that the employer did not have to accept a dues check-off provision, and the NLRB could not impose them. To do so "would violate the fundamental premises on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." (*Id.* at p. 108 [footnotes omitted]; see also *NLRB v. American Nat'l Ins. Co.* (1952) 343 U.S. 395,

404 ["[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."].)

The ALRA is patterned after the NLRA and includes language identical to Section 8(d) of the national act, which provides the constitutional safeguard against forced contracting. (See Lab. Code §1155.2(a).) This provision was not changed by the MMC statute.

B. The public safety justification for compulsory interest arbitration is not applicable here; *Wolff* controls.

Non-consensual compulsory arbitration is rarely, if ever, imposed except in public or quasi-public employment situations where strikes are prohibited. This tradeoff is at the core of every case Respondents cite,[12] such as public utilities,[13] police, firefighters, and other public employees,[14]

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[12] E.g., *Medford Firefighters Ass'n, Local No. 1431 v. City of Medford* (Or. App. 1979) 595 P.2d 1268, 1270–71 ["One of the differences [between collective bargaining in the public and private sectors], binding arbitration, is essentially a quid pro quo for the prohibition of strikes by firemen."]; *Town of Arlington v. Bd. of Conciliation & Arbitration* (Mass. 1976) 352 N.E.2d 914, 922 [same].

[13] E.g., *Bd. of Locomotive Firemen & Enginemen v. Chicago, B. & Q. R. Co.* (D.D.C.) 225 F.Supp. 11, 21, *aff'd* (D.C.Cir. 1964) 331 F.2d 1020 ["[I]t is elementary that railroads, as common carriers for hire, are engaged in a public employment affecting the public interest and, therefore, are subject to legislative control."].

[14] E.g., *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622–23 ["[T]he arbitration and no-strike provisions were interdependent."].

and hospitals receiving public funding.[15] (See *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 132.)

Except in cases of national emergency, such as war, no legislature has adopted, and no court has approved, any scheme that would compel a private employer to adjudicate the terms of employment with its employees or force workers to surrender their right to strike. (See *Catherwood, supra*, 260 N.E.2d at 510–11 ["compulsory arbitration has been used hardly at all and there is a dearth of legal analysis and precedent in the courts to illuminate the principles to be applied to this drastic remedy"].) Even in situations where public sector interest arbitration is used, the state has made the deliberate choice as to its ***own*** employment relationships with its ***own*** employees to offer binding interest arbitration as a fair exchange for depriving its employees "of such economic weapons as strikes and work stoppages which are available to employees in private employment." (*City of Biddeford by Bd. of Ed. v. Biddeford Teachers Ass'n* (Me. 1973) 304 A.2d 387, 398.)

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[15] E.g., *Fairview Hosp. Ass'n v. Pub. Bldg. Serv. & Hosp. & Institutional Emp. Union* (Minn. 1954) 64 N.W.2d 16, 28 [characterizing hospitals as part of "a field of enterprise in which the public has a direct and vital interest, distinct from almost any other type of business."]; *Mount St. Mary's Hosp. of Niagara Falls v. Catherwood* (1970) 260 N.E.2d 508, 518 [same].

The constitutional foundation for these limiting principles is *Charles Wolff Packing Co. v. Court of Indus. Relations* ("*Wolff I*") (1923) 262 U.S. 522. Writing for a unanimous court, Chief Justice Taft struck down the Kansas Industrial Relations Act, which gave a three-judge industrial court the power to resolve labor disputes as to a single employer by setting wages, hours, and conditions of employment, and to bar strikes if it found "the peace and health of the public imperiled by such controversy" in any industry "affected with a public interest." (*Id.* at p. 524.)

The Court stated that the Kansas act "curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs." (*Wolff I, supra*, at p. 534; see also *Dorchy v. Kansas* (1924) 264 U.S. 286; *Charles Wolff Packing Co. v. Court of Indus. Relations* (*Wolff II*) (1925) 267 U.S. 552, 569 [collectively, "*Wolff*"].)[16] The Court condoned such "joint compulsion" only where required by exigent circumstances, or as to those industries, such as public utilities, "where the obligation to the public of continuous service is direct, clear, and mandatory, and arises as a contractual condition express or implied of entering the business either as owner or worker." (*Wolff I, supra*, at p. 543 [citing *Wilson v. New* (1917) 243 U.S. 332, 364].)

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[16] *See* P. Moreno, *The American State from the Civil War to the New Deal* (2013) at p. 194 ["[AFL President] Samuel Gompers had denounced the Kansas statute, which prohibited strikes, as establishing involuntary servitude."].)

Wolff echoed Taft's earlier admonition that collective action "was essential to give laborers [the] opportunity to deal on equality with their employer." (*American Foundries v. Tri-City Council* (1921) 257 U.S. 184, 209 [cited with approval in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 400, fn.3 (conc. & dis. opn. of Werdegar, J.)].) The *Wolff* scheme "involves a more drastic exercise of control . . . upon the employee than upon the employer," and could not be justified as to private employees who, unlike public sector employees, have no "obligation to the public of continuous service. . . somewhat equivalent to the [obligation] of officers and the enlistment of soldiers and sailors in military service." (*Wolff I, supra*, at p. 541.)

These distinctions drew the constitutional line between private and public sector interest arbitration, and the trade-off where the public employees' obligation of "continuous service" was a condition of employment, and not subject to a strike.[17] (*See United Steelworkers of Am.*

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[17] *Hess* dismisses *Wolff* as a relic of the "bygone" *Lochner* era. (*Hess Collection Winery v. ALRB* ("*Hess*") (2006) 140 Cal.App.4th 1584, 1598–99.) This is not a basis to avoid those aspects of *Wolff* that remain good law. While the Court disapproved *Wolff*'s holding concerning wage-fixing, *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.* (1949) 335 U.S. 525, *Lincoln* expressly noted that "[c]onsiderations involved in the constitutional validity of those other parts of the [Kansas] statute are not relevant here." (*Id.* at p. 536, fn.6.) *Wolff* did not rely on decisions such as *Adair v. United States* (1908) 208 U.S. 161 or *Coppage v. Kansas* (1915) 236 U.S. 1, 17, which invalidated legislative protections from "yellow dog" contracts on substantive due process grounds. Unlike these cases, *Wolff* highlighted the need to protect

v. United States (1959) 361 U.S. 39, 75 [dis. opn. Of Douglas, J.] [citing *Wolff* as the reason why collective bargaining, not compulsory arbitration, is the norm].) *Wolff* is often cited by modern courts when discussing whether non-consensual binding arbitration is constitutional. (See *Catherwood*, *supra*, 260 N.E.2d at pp. 500, 503; see also *Healy v. Onstott* (1987) 192 Cal.App.3d 612, 616 [due process requires *de novo* review of arbitral determination]; *Bayscene*, *supra*, 15 Cal.App.4th at p. 13 [same]; *Peick v. Pension Benefit Guaranty Corp.* (7th Cir. 1983) 724 F.2d 1247, 1277 [distinguishing between compulsory arbitration of public and private disputes]; *United Farm Workers Nat. Union v. Babbitt* (D. Ariz. 1978) 449 F.Supp. 449, 466, vacated on other grounds (1979) 442 U.S. 936.)

Wolff sets out the conditions for the imposition of compulsory arbitration that every court, and every case cited by Respondents, has followed since. (*United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578, fn.4 [compulsory arbitration is deemed a necessary "'quid pro quo' for the agreement not to strike"].)

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collective rights, a view later vindicated by the New Deal Court, which upheld "'the legality of collective action on the part of employees in order to safeguard their proper interests' . . . against constitutional challenge." (*Iskanian*, *supra*, 59 Cal.4th at pp. 400–01 [conc. & dis. op. of Werdegar, J.] [citing *Jones & Laughlin*, *supra*, 301 U.S. at pp. 33–34].)

C. Government imposed interest arbitration infringes employer and employee rights.

The MMC statute here empowers a union, upon demand, to enable a private mediator to impose restrictions on employees' rights of free association, of access to courts to hear individual grievances against their employer, and on free speech through the imposition of agency fees, among other restrictions. It does so without any indicia of the individual's consent to grant such power. The individual consensual link giving the union the right to give away individual rights or to demand compulsory fees either does not exist at all or has been broken.

Collective bargaining rests on the premise of majority rule. This "'majority-rule concept is unquestionably at the center of our federal labor policy'" (*NLRB v. Allis-Chalmers* (1967) 388 U.S. 175, 180 [quotation omitted]), and is a fundamental component of the ALRA. A duly elected union is given "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." (*Steele v. Louisville & N.R. Co.* (1944) 323 U.S. 192, 202.) In the collective bargaining setting, majority rule gives a union the authority to "forfeit the economic rights of the bargaining unit, including the right to strike as a trade-off for the employer's acceptance of grievance and arbitration procedures." (*Textile Workers v. Lincoln Mills of Ala.* (1957) 353 U.S. 448, 455.) It may require employees to arbitrate certain statutory claims,

including those involving the employees' individual, non-economic rights. (*14 Penn Plaza, supra*, 556 U.S. at pp. 256–57.) It may limit, or abolish, the ability of workers to picket. (*Emporium Capwell Co. v. W. Addition Cmty. Org.* (1975) 420 U.S. 50, 69–70.) A court may not nullify such "contractual concessions." (*NLRB. v. Magnavox Co. of Tenn.* (1974) 415 U.S. 322, 328 [conc. & dis. opn. of Stewart, J.].)

The legitimacy of that power in labor relations derives from employees' "full freedom" to designate representatives of their own choosing for the purposes of collective bargaining. (Lab. Code §1140.2.) That power "presuppose[s] that the selection of the bargaining representative 'remains free.'" (*Magnavox Co., supra*, 415 U.S. at p. 325 [quoting *Mastro Plastics Corp. v. NLRB* (1956) 350 U.S. 270, 280].)

A union "may not surrender rights that impair the employees' choice of their bargaining representative." (*Metro. Edison Co. v. NLRB* (1983) 460 U.S. 693, 708 [quotations and citations omitted].) Where, as here, the right of employees to that choice is at issue, "it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative." (*Magnavox Co., supra*, 415 U.S. at p. 325 [citation omitted].)

The risk of forfeiture of the workers' right to choose is magnified here by the power of the union to compel contractual arrangements based on so-called "dormant certifications." So viewed, the principle of

"exclusive representation," without some check as to the legitimacy of the union's standing to represent the workers, risks making the workers "prisoners of the Union." (*Emporium Capwell Co., supra*, 420 U.S. at p. 73 [dsn. opn. of Douglas, J.].)

The imposition of the "security agreement" illustrates this, as would the potential "election" bar, should the MMC contract be imposed. Because "the question of union security [is premised] on collective bargaining and not compulsion, . . . [a] requirement that employees be compelled to become or remain members of a labor organization" would have no place in the compulsory interest arbitration process. (*N.J. Bell Tel. Co. v. Commc'ns Workers of Am., N. J. Traffic Div. No. 55* (N.J. 1950) 75 A.2d 721, 728.) Here, the mediator imposed his own vision of public policy in spite of California's position of "benign neutrality" toward union security agreements, which should be left "to collective bargaining agreements freely entered into." (*Pasillas v. ALRB* (1984) 156 Cal.App.3d 312, 346.)

The MMC statute not only constrains *employers*. It allows a union to compel *employees* to give up their representative rights even when they have not consented to compulsory interest arbitration, let alone to a union which chooses to invoke it. There is no *explicit* consent, as employees are formally barred from the MMC process, and cannot ratify the contract. There is no *implicit* consent, as the employees are not engaged in critical

public services that justify the quid pro quo of binding interest arbitration, or are not adequately represented by a conflicted union with the power (but not the legitimacy) to bargain away their rights. There is no consent at all.

II. The Fifth District Correctly Held That The ALRB Must Consider The Abandonment Issue On The Facts Of This Case

The Fifth District held that "an employer, in defending against a union's request to institute the MMC process, may challenge the union's status as the employees' bargaining representative by raising a claim of abandonment . . ." (*Gerawan Farming*, *supra*, at p. 1064.) The Fifth District concluded that if it were to decide the case on this basis, remand to the ALRB to decide the issue in the "first instance" would be the proper remedy. (*Id.* at p. 1065 & fn. 33.) The Fifth District's conclusion that the ALRB should have considered the abandonment issue in this case is correct, and its analysis supporting that conclusion is well-reasoned.

Citing its own "certified until decertified" rule, the ALRB argues that an employer cannot ask—and the ALRB may not consider—whether a union's disappearance and failures to act over decades are a basis for declining to institute MMC. The ALRB identifies two errors in the Fifth District's decision, neither of which is a basis for reversal. (ALRB Br. at pp. 44–45.)

First, the ALRB argues that the MMC is just part of the bargaining process. (ALRB Br. at p. 43.) The Fifth District correctly observed that

state-imposed nonconsensual interest arbitration is fundamentally different from voluntary resolution of a dispute. MMC is not "simply an additional bargaining obligation" to "facilitate conclusion of elusive first contracts." (ALRB Br. at p. 16.) MMC is not "bargaining" at all—it is, by design, a coerced contracting process. The ALRB's MMC order did not "facilitate" a consensual agreement. It imposed a contract without the consent of the employer or its workers.

The "crux of the MMC process" is the compelled imposition of a CBA "whether the employees want it or not; and it will be imposed with the formerly absent union, whether the employees want its representation or not." (*Gerawan Farming, supra*, at p. 1061.) For the purposes of deciding this issue, this Court must accept the allegations in Gerawan's answer as true and assume that the UFW did abandon the workers. With that assumption, the UFW should have no right to impose itself or its views on workers through the MMC process—including a requirement that the abandoned workers pay that union a fee.

Second, the ALRB argues that there are "policy reasons" to bar employers from pointing out that the union disappeared. (ALRB Br. at p. 45.) The UFW similarly argues that "there are sound policy reasons to allow certified unions to revive dormant bargaining relationships and request MMC." (UFW Br. at p. 57). But there are also policy reasons to address (and not ignore) abandonment. The Fifth District was correct when

it concluded: "Without disturbing the well-settled rule that an employer's duty to bargain is a continuing one, we conclude that abandonment may be raised defensively in response to a union's demand to invoke the substantial legal measures of the MMC process." (*Gerawan Farming*, *supra*, at p. 1054.)

A. The decertification process is an illusory alternative to ALRB consideration of abandonment.

The ALRB suggests that the timing of a decertification election obviates the Fifth District's concern that "a decertification option would often be too late to stop the MMC process." (ALRB Br. at p. 42, fn.17; see also UFW Br. at p. 50.) The ALRB improperly placed on workers the burden of protecting their associational rights while the government machinery was working to take them away. (See generally *Terminiello v. Chicago* (1949) 337 U.S. 1.) The burden should be on the UFW to demonstrate that it has the consent of the employees before it may intrude on such rights. (See *Chicago Teachers Union, Local No. 1 v. Hudson* (1986) 475 U.S. 292, 306.) When the ALRB placed the burden of self-protection on the workers, it fueled what the Fifth District correctly called "a crisis of representation." (*Gerawan Farming*, *supra*, at p. 1061.)

A majority of Gerawan's workers asked for an election. The ALRB held that the workers satisfied the statutory requirements to hold an election. At minimum, this should have caused the ALRB to stay the

compulsory contracting procedures so that the ballots could be counted before the agency-ordered CBA was finalized. It refused, and then the ALRB General Counsel and the UFW tried, unsuccessfully, to enforce the MMC contract.

The ALRB never acknowledges that the "decertification option" is a "Catch-22" risk for workers. Because an MMC contract may be imposed if the decertification election is set aside due to unlawful employer conduct, (Lab. Code §1164(a)(4)), the workers will learn that, through no fault of their own, their failed effort to oust a union and avoid the MMC contract would assure that result. Many workers might now conclude that they would have been better off had they not sought an election in the first place.

B. The Act's "rebuttable presumption" rule supports an employer's right to raise abandonment as a defense to the MMC process.

To invoke MMC, a union must be "certified as the exclusive bargaining agent of a bargaining unit of agricultural employees." (Lab. Code §1164(a).) The initial certification lapses 12 months after being granted by the ALRB. (*Id.*; §1155.2(b).) The certification may be extended for one 12-month period, but only "[i]f the board finds that the employer has not bargained in good faith" with the currently certified labor organization. (*Ibid.*)

It is undisputed that the UFW failed to seek the extension of its certification in 1993. The ALRB deemed that lapse to be irrelevant, citing

the continuing obligation of an employer to bargain after the end of the initial certification period. But that continuing obligation is not an all-purpose and perpetual license to compel an employer into compulsory bargaining. (*Gerawan Farming, supra*, at 1058 [citing *Kaplan's Fruit & Produce Co., Inc.* ("*Kaplan's*") (1977) 3 ALRB No. 28 at pp. 2, 4].) The ALRB's own precedent (never cited by Respondents) distinguishes between the employer's ongoing duty to negotiate and its right to resist compelled concessions.

Montebello Rose "held that after the initial certification year expired, there was a rebuttable presumption that a certified union continued to enjoy majority support." (*Gerawan Farming, supra*, at p. 1055 [citing *Montebello Rose v. ALRB* (1981) 119 Cal.App.3d 1, 24].) Adopting the ALRB's "somewhat strained" analysis in *Kaplan's*, *Montebello Rose* held that "after the one-year period expired, certification lapsed for the purpose of the election bar, but not for the purpose of the bargaining duty." (*Gerawan Farming, supra*, at pp. 1055–56.)

That duty "did not 'alter[] the statutory protection given to employers' because '[t]heir duty to bargain, no matter how long its duration, does not compel them to agree to a proposal or require them to make a concession.'" (*Gerawan Farming, supra*, at pp. 1058–59 [quoting *Kaplan's, supra*, at p. 7].) To the contrary, *Kaplan's* held that the certification is not "a single, all-purpose concept, but rather serves two

distinct functions"—it creates a duty to bargain, and it creates a one-year election bar, during which "no one may raise a question as to the union's representative status." (*Kaplan's*, *supra*, at pp. 2, 4.) Accordingly, and of critical importance here, "'certification' may lapse for one purpose, but not for another." (*Id.* at p. 3.) No subsequent decision has extended this so-called "certified until decertified" rule outside the bargaining context. (*Gerawan Farming*, *supra*, at p. 1059.)

Respondents suggest an equivalence between an affirmative defense to an MMC demand and a unilateral refusal to bargain. This comparison quickly breaks down once one considers the difference between consensual bargaining and compulsory contracting. A refusal to bargain would, in effect, permit an employer to act "as though the union were in fact decertified." (*F&P Growers Assn. v. ALRB* (1985) 168 Cal.App.3d 667, 677.) This would violate the "distinctive provisions" of the Act, which (unlike the NLRA) removed the employer from exercising any influence over the selection or deselection of a union. (*Ibid.*) In the MMC context, the abandonment defense would negate a statutory prerequisite to compel an employer into the process. (*Gerawan Farming*, *supra*, at p. 1054.) The employer is not acting "as though the union were in fact decertified." It is asking the ALRB to decide whether there are grounds to relieve it of a compulsory contracting process before it begins.

Nor is it clear why posing that question, any more than getting the answer from the ALRB, amounts to an employer's "active participation in choosing or decertifying a union." (*F&P*, *supra*, 168 Cal.App.3d at p. 678.) The ALRB, and not the employer, would make that determination. And while the answer may call into doubt the union's presumptive majority status, it is, as a matter of fairness to all involved, difficult to accept the proposition that the question should not be asked at all.[18]

Interest arbitration is not merely "part and parcel of the collective bargaining process." (ALRB Br. at p. 44). The ALRB recognizes the fundamental difference between collective bargaining and compelled arbitration. (*Kaplan's*, *supra*, at p. 7.) "Any process by which parties are compelled to agree to imposed terms—which is the crux of the MMC process—does not fit into the parameters of bargaining under the ALRA." (*Gerawan Farming, supra*, at p. 1059.) This much was conceded in the only prior judicial interpretation of the MMC statute. (*Hess*, *supra*, at 1597.)[19]

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[18] The ALRB acknowledges its obligation to police the failure of a labor organization to represent employees, including under circumstances of abandonment. (*Dole Fresh Fruit* (1996) 22 ALRB No. 4 at pp. 16–17.) Gerawan did what *Dole* instructed it to do (see *supra* at p. 7), and what the Fifth District said it should do in lieu of refusing to bargain. (*Tri-Fanucchi Farms v. ALRB* (2015) 236 Cal.App.4th 1079.)

[19] The Board's citation of *public* sector cases is inapposite. (ALRB Br. at p. 31, fn.14.) In that setting, the public employer may displace the workers' right to strike with interest arbitration as part of its collective bargaining process.

The Fifth District did not ignore any "implicit acquiescence" by the Legislature to this rule.[20] The Legislature was aware of prior judicial construction of the rebuttable presumption rule. "In light of the particular judicial decisions that have explained and fleshed out the meaning of the union's certification status under the ALRA, we do not operate on a blank slate and neither did the Legislature when it enacted the MMC statute in 2002." (*Gerawan Farming, supra*, at p. 1055.) As "no contrary intention was indicated in the MMC statute," the Fifth District correctly concluded that the Legislature intended to adopt the same meanings and implications of the certification status (*i.e.*, its nature and duration) as was decided by said prior judicial construction." (*Id.* at p. 1058.) This, as the Fifth District held, "opened the door" to the abandonment defense, as that concept is "analogous" to a "loss of majority status" and in many ways shares the identical objective features. (*Id.* at p. 1063.)

[20] But if such inferences are to be drawn, then they may be supported by the rejection of legislation as well. (*See* Governor's Veto Message (Senate Bill 25) (Sept. 28, 2014) [proposing expansion of MMC statute] ["Both contract enforcement and election disputes should be dealt with so the process is balanced and fair. This bill only addresses contract enforcement. We should look at the entire process before making further changes."] [available at https://www.gov.ca.gov/docs/SB_25_Veto_Message.pdf].)

C. The abandonment defense vindicates the Act's core purpose of protecting the workers' right to freely choose their bargaining representative.

As the Fifth District here concluded, the reasons which support the extension of the certification for bargaining purposes cut decisively against permitting the "decertified until decertified" rule to bar the abandonment defense in the MMC setting. The Fifth District framed its analysis based on the core purpose of the Act, which is to protect worker choice. But given the difficult if not illusory nature of decertification as the only means for workers to stop the MMC process, the employer's ability to raise the abandonment defense is, as the Fifth District correctly held, the only way to protect the workers' right to choose.

Kaplan's held that the "Legislature could not have intended to 'make the process of collective bargaining into a kind of sporting event in which the parties played against each other and against the clock at the same time, with the employees' right to effective representation as the stakes.'" (*Montebello Rose*, *supra*, 119 Cal.App.3d at p. 26 [citing *Kaplan's*, *supra*, at pp. 6–7].) Given the burdens associated with the election process, there was "'no need to conduct a ritual reaffirmance of a union's certification where the employees are satisfied with their representative.'" (*Gerawan Farming*, *supra*, at p. 1056 [quoting *Montebello Rose*, *supra*, 119 Cal.App.3d at pp. 25–26].) "So long as the employees can petition for a new election if they wish to remove the union, the employer has no real

concern about whether it is bargaining with the true representative of its employees." (*Montebello Rose*, *supra*, at p. 28.)

Here there is no reason to presume that Gerawan's employees are "satisfied" with the UFW, and real reason for concern that the decertification option is "too late" to stop the MMC process. (*Gerawan Farming, Inc.*, *supra*, at p. 1062.) The efforts leading to the decertification drive and the election did not take place in a vacuum. They were set in motion by the UFW (when it reappeared and invoked MMC), the ALRB (when it ordered MMC), and the Regional Director (who repeatedly dismissed or blocked worker efforts to obtain the right to vote). The ALRB says nothing about its unprecedented intervention in the election process. It asked the Superior Court to issue orders protective of the workers' right to vote, which the court did. It asked Gerawan to give it unfettered access to "notice" and "educate" its employees as to their right to vote, which Gerawan did. When the ALRB vacated the Regional Director's decision to block the election, it pointedly observed that the Regional Director made no mention of the ALRB's efforts to remediate any "taint" or comment on the degree to which these efforts worked. The same staff which sought to block the election led the prosecution in the post-election hearing of charges to obtain that result.

A decertification election "is not a game of chance but a matter of the highest importance to employees and employers alike. . . . Only in

exceptional circumstances, where it is obvious that the extensive machinery and power of the NLRB is inadequate to ensure a free election, should employees be denied their right to cast a secret ballot for or against an exclusive bargaining agent." (*NLRB v. K&K Gourmet Meats, Inc.* (3d Cir. 1981) 640 F.2d 460, 469.) As this case demonstrates, it can be delayed for years by the incumbent (anti-election) union, working in tandem with the ALRB staff,[21] to such an extent that farmworker voting rights risk becoming a theoretical possibility rather than a reality.

III. The MMC Statute Violates Equal Protection By Empowering A Self-Interested Union To Compel Arbitrary, Individualized Legislative Decisions.

Respondents contend that the legislative choice to impose individuated compulsory arbitration is rationally related to the statute's purpose of fostering collective bargaining and consummating first contracts. First, it is not clear that such a legislative decision *is* rational, given the danger posed to constitutionally protected rights. Second, it does not answer the question at issue in this case: Whether a unique CBA, targeted by one union and imposed by quasi-legislative decree, has any discernible rationality between the statutory goal and the special legislation imposed.

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[21] RJN, Ex. F, at pp. 163–164, fn.40 ["The record should make clear, should the General Counsel and UFW attempt to characterize their litigation strategy [at the post-election hearing] as completely independent, that portrayal would be inaccurate."].

The core of equal protection is equal treatment—those that are similarly situated shall be treated similarly. The corollary is that the state cannot "pick and choose" only a few to whom it will apply legislation. Both principles are violated by the MMC statute: first, by empowering a self-interested union to compel the regulation of individual employers of its choosing, and, second, by requiring a private mediator to draw individualized classifications that have no rational relationship to the statute's purpose.

Respondents compare the MMC statute to discretionary actions of criminal sentencing and prosecutorial discretion. A private MMC mediator is not a judge, but acts as a quasi-legislator, subject only to a highly deferential standard of administrative and judicial review. A private union is not a prosecutor. But, just as a prosecutor can choose his defendants, here a union can decide, whether for reasons of expediency, profit, or punitive intent, to invoke a "dormant" certification and target a weak employer (with fewer employees) or a successful employer (with many employees). The union has unilateral power to decide which employer will be targeted (some perhaps never), or when (a decade after the law is passed).

A legislative body may adopt laws of a "less than comprehensive fashion by merely 'striking the evil where it is felt most,' [but] its decision as to where to 'strike' must have a rational basis in light of legislative

objectives." (*Hays v. Wood* (1979) 25 Cal. 3d 772, 791.) Respondents argue that the law was intended to address "egregious" instances of bad faith bargaining, but the law makes no allowance for the possibility that the lack of an initial agreement was due to gross dereliction by the union now seeking to invoke this remedy.

In essence, Respondents assert that the statutory purpose is to allow a mediator to make individualized, discretionary decisions, and, on that basis, *any* decision is rationally related to that purpose. But reducing rational basis scrutiny to such a tautology violates equal protection by necessitating that individuals, all similarly situated with respect to the statute's aim, be treated distinctly. What results from this process is "special legislation" without any rational basis to distinguish why this employer was singled out, why the differences or similarities as to its business justify treating it differently from other employers, or how such distinctions were made. This is, as the Fifth District said, "'the very antithesis of equal protection.'" (*Gerawan Farming, supra*, at p. 1071.)

A. The classifications drawn by a statute must be rationally related to the statutory purpose.

Legislatures may not "discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation." (*Hays*, *supra*, 25 Cal.3d at p. 787.) This Court must engage in "a serious and genuine judicial inquiry into the correspondence between the

classification [at issue] and the legislative goals." (*Ibid.*) The California and Federal Constitutions are in accord as to this standard (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481–82.), which applies with equal force to administrative orders of a quasi-legislative character. (*Knudsen Creamery Co. v. Brock* (1951) 37 Cal.2d 485, 494; see also *Hess*, *supra*, at 1597–58.)

A statute violates equal protection if it "intentionally treated [one individual] differently from others similarly situated and [] there is no rational basis for the difference in treatment." (*Vill. of Willowbrook v. Olech* (2000) 528 U.S. 562, 564.) Such an equal protection claim can give rise to a facial constitutional violation where the disparate treatment is "occasioned by express terms of a statute." (*Ibid.*; *see also Gerhart v. Lake Cnty., Mont.* (9th Cir. 2011) 637 F.3d 1013, 1022.) While evidence of unequal or arbitrary application (present here) certainly supports a finding that a statute facially violates equal protection, if a statute "lays down no rules by which its impartial execution can be secured or partiality and oppression prevented," and thereby allows arbitrary distinctions to be drawn, it necessarily violates equal protection. (*Yick Wo v. Hopkins* (1886) 118 U.S. 356, 372–23.)

Schaezlein v. Cabaniss (1902) 135 Cal. 466, a case cited by *Hess* for the proposition that "the Legislature has the authority to regulate employment" (*Hess*, *supra*, at 1597), points out why the exercise of that authority in this case violates equal protection. By delegating power to a

union to compel contracting and unrestrained authority to a mediator to fix the contract's terms, the Legislature left "the question as to whether and how these things shall be done or not done to the arbitrary disposition of [an] individual." (*Schaezlein, supra,* 135 Cal. at p. 470.) Equal protection requires that such singularized treatment be rationally related to the statute's purpose. Respondents can offer none.

It is these specific distinctions as to how similarly-situated persons are treated, and not the legislative device of compulsory arbitration in the abstract, that must be rationally related to the legislative goals. (*Gerhart, supra,* 637 F.3d at p. 1022.) In *Gerhart,* the Ninth Circuit explained that the district court had made a "crucial error in its analysis of the rational basis requirement" by misconstruing *for what* there must be a rational basis. The court explained that it was not the legislative act—in that case, denying Gerhart's construction permit application—that must be justified as rational, but rather the decision to "treat[] Gerhart differently" than similarly situated individuals under the statute. (*Id.* at p. 1023; see also *Hodel v. Indiana* (1981) 452 U.S. 314, 332.)

Equal protection "compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) The classifications must be rationally related to the specific, expressed purpose of the legislation. (*Ibid.*) The MMC statute allows for

no rational relationship between a particular CBA and the statute's general aim of "promoting peace and stability in agricultural labor relations." (ALRB Br. at p. 3.)

B. There is no rational relationship between the terms of any individual CBA and promoting collective bargaining.

Where, as here, constitutionally protected rights are threatened by a statute, "the ordinary deference a court owes to any legislative action vanishes." (*Spiritual Psychic Sci. Church v. City of Azusa* (1985) 39 Cal.3d 501, 514; see also *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 348.) But "[e]ven under deferential rational basis review, justifications for legal discrimination 'must find some footing in the realities of the subject addressed by the legislation.'" (*Johnson v. Dep't of Justice* (2015) 60 Cal.4th 871, 903 [Werdegar, J. dissenting] [quoting *Heller v. Doe* (1993) 509 U.S. 312, 321].) This "footing" is missing here.

The only stated purpose of the MMC statute is to promote stability in bargaining relationships and foster collective bargaining. But the objective of imposing ***some*** CBA on ***some*** employers is accomplished no matter ***which*** employer a union chooses to compel into MMC, and no matter ***what*** terms the mediator ultimately supplies. The imposition of ***any*** individual term of a CBA on a particular employer, then, is not rationally related to the statute's purpose—***all*** terms, whatever their content, would be equally related to the statutory goal of imposing ***some*** CBA.

Based on this statutory objective, the statute might plausibly differentiate between those employers with an existing CBA and those without—treating those classes of employers distinctly may bear a rational relationship to the statutory purpose of promoting collective bargaining. But even within that class, the statute does not discriminate rationally. The only difference between Gerawan and those employers not forced into MMC is that the union chose Gerawan, for reasons that the statute does not does not consider, and the ALRB will not consider.

"[B]because the mediator has no power to extend the enactment [of a CBA] to other agricultural employers," each regulated employer forms a "class of one," without any means to insure the differences or similarities between contracts bear a rational relationship to the statutory purpose. (*Gerawan Farming, supra*, at pp. 1069, 1071.) It is not the *potential* for an individuated outcome, but the *certainty* that each employer will be subjected to an "individual legislative act," which makes the classification intentional. (*Id.* at p. 1069.) It is the lack of any nexus between the statutory purpose and the distinctions drawn by any individual mediator which makes the classification arbitrary. (*Barsky v. Bd. of Regents of Univ.* (1954) 347 U.S. 442, 470 [finding constitutional violation where "a State licensing agency lays bare its arbitrary action, or if the State law explicitly allows it to act arbitrarily"].)

Respondents contend that the mediator is guided by various statutory factors that ensure that similarly situated individuals will be treated alike. (See Lab. Code §1164(e) [listing "factors commonly considered in similar proceedings"].) These are not standards at all. It is impossible to replicate bargaining (because the mediator cannot understand, based on his review of "comparable" CBAs, the trade-offs that were made as part of a consensual negotiation); he cannot find any equivalence for a fair adjustment of dozens of competing terms in any agreement.

Because the statute does not pass any judgments as to the ***sort*** of terms that would foster collective bargaining and stability, a mediator could consider one employer's wages with relation to "comparable firms" and choose to impose a wage increase, a wage decrease, or no change at all, with equal justification. (See *Gerawan Farming*, *supra*, at p. 1071, fn.37; *Schaezlein*, *supra*, 135 Cal. at p. 470.) The mediator imposed a wage increase on Gerawan, despite the undisputed record that Gerawan pays its employees the highest average wages among any of its competitors. The mediator may *nominally* have considered comparable wages in making that determination, but there is no clarity in the statute as to why one standard of wages would be any more conducive to "creating stability" than another.

Respondents claim that because the statute requires that the mediator make "subjective, individualized determinations," disparate treatment is to be expected and, therefore, there is no equal protection violation.

Respondents cite *public* employment cases involving highly discretionary government actions based on legislative choices as to how its employees would be differentiated, based on standards to guide the implementation of those distinctions. (*Engquist v. Or. Dep't of Agric.* (2008) 553 U.S. 591, 598.) These cases are not applicable to private employers, particularly where the Legislature ceded responsibility for making these choices through quasi-legislative regulation applicable to only one regulated individual.

The difference between the present case and a case like *RUI One Corp. v. City of Berkeley* (9th Cir. 2004) 371 F.3d 1137 is stark. *RUI* upheld the city's imposition of a Living Wage Ordinance on a select few businesses operating *on public land* specifically because the city council chose the means of determining whether a particular business should be subject to regulation or not—basing the classification on a company's geographical location and size of its business. (*Id.* at pp. 1155–56.) Here, by contrast, the Legislature has not made any such decision and has not laid out any such classification.

The statute's lack of an independent purpose cannot be rescued by analogy to the exercise of prosecutorial discretion. A prosecutor exercises discretion against a background of "permissible factors such as the circumstances of the crime, the background of the minor, or a desire to show leniency" that are expressed in a criminal statute's purpose, as well

as. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838–39; see also *Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 596–98; *People v. Romo* (1975) 14 Cal.3d 189, 196–97.)

Similarly, in cases involving the discretionary power of permitting and regulation of land use, the state acts as a trustee of public land and operates against a backdrop of clear standards and objectives to guide its discretion. (See *Las Lomas Land Co., LLC v. City of L.A.* (2009) 177 Cal.App.4th 837, 860.) The exercise of discretion in zoning decisions is checked by safeguards against the risk of confiscation, and constrained by specific and general plans "which must conform to requirements established by state statute" and "reasonably relate to the welfare of the region affected." (*Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 524.)

The basic constitutional defect of the MMC statute is that it provides only "arbitrary classification[s]." (*Davis v. Mun. Ct.* (1988) 46 Cal.3d 64, 88.) Respondents' contention that the MMC process is, by design, so discretionary as to be impervious to equal protection review proves the point. The ALRB cannot simultaneously argue that the MMC statute affords adequate guiding standards to the mediator and that it is intended to enable subjective determinations that are insulated from rational basis review.

IV. The MMC Statute Is An Unconstitutional Delegation Of Legislative Authority

A. The MMC statute lacks standards to guide the exercise of discretion.

A legislative body may not delegate its authority in a manner that "(1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." (*Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190; *People v. Wright* (1982) 30 Cal.3d 705, 712–13.) In order to make these "fundamental policy determinations," a legislature must both declare "the legislative goals" and establish "a yardstick guiding the administrator" in effectuating those goals. (*Wright, supra*, 30 Cal.3d at p. 713; *Clean Air Constituency v. State Air Resources Bd.* (1974) 11 Cal.3d 801, 816–17.)

Respondents claim that imposition of a CBA on a private employer is "not a 'fundamental' issue of public policy." (UFW Br. at pp. 43–44; ALRB Br. at p. 27.) But, the fact is that for Gerawan and its employees, the mediator's decisions fix "fundamental" policies as to ***their*** economic relations and as to ***their*** constitutional rights, even though that is not the law. When the Legislature empowered the mediator to dictate a generalized code governing the one employer's relationship with its workers, it made a "fundamental policy decision" not to make ***any*** policy

decisions as to how CBAs were to be imposed as to a discrete set of growers.[22]

The Legislature could have set down rules governing *all* agricultural businesses, or only those where a union had once won an election, but where no CBA was in place. It could have dictated "security agreements" in every CBA; it could have enjoined strikes as to *all* agricultural growers in exchange for mandatory interest arbitration. By not making these controversial (and likely unconstitutional) decisions, it made a different policy choice—to invest that power in a mediator, without risking the political consequences of making decisions of general application. (*Hays*, *supra*, 25 Cal. 3d at p. 787 [quoting *Railway Express v. New York* (1949) 336 U.S. 106, 112–13 (conc. op. of Jackson, J.)].)

In *County of Sonoma v. Superior Court*, the court echoed Justice Grodin's concern that public sector interest arbitration may "push the arbitrator into the realm of social planning and fiscal policy," areas of involvement "that extend beyond" bargaining subjects in private sector disputes. ((2009) 173 Cal.App.4th 322, 342 [citing Grodin, *Political Aspects of Public Sector Interest Arbitration* (1976) 64 Cal.L.Rev. 678].) In the public arena, the concern is the risk to majoritarian principles of self-

[22] A state, *when acting as a public employer*, does not make fundamental policy decisions by setting the wages and working conditions of its own employees. (*Pac. Legal Found. v. Brown* (1981) 29 Cal.3d 168, 201.) That holding has no bearing when a state makes these choices as a *regulator* of private sector employees.

governance and the non-delegable nature of certain decisions that must be made by elected (and accountable) officials. But this danger is different and more apparent when binding interest arbitration is imposed on private businesses, where there are no majoritarian checks on the potential for arbitrary decision-making. Although "it seems clear that the parties should not be forced to arbitrate non-mandatory bargaining issues," even in public sector interest arbitration (Grodin, *supra*, 64 Cal.L.Rev. at p. 697), Mr. Goldberg was required to resolve all "disputed issues" based on an agenda set by the UFW, not the Legislature. Because he had no discernible guideposts, he resolved these issues by making policy choices as to non-mandatory subjects of collective bargaining, deciding internal matters between workers and a union, including whether the workers should be put to the choice of paying dues and fees or losing their jobs.

Because the MMC statute contains only the vague standard—stability—without operationalizing how to apply it, such standards are meaningless "unless one knows what basic public policy the mediator must vindicate." (*Gerawan Farming, supra*, at p. 1073; see also *People's Fed. Sav. & Loan Ass'n v. State Franchise Tax. Bd.* (1952) 110 Cal.App.2d 696, 700 [striking down delegation of "uncontrolled and unguided power" to determine average rate entirely of administrator's own selection].) By comparison, a statute providing "that the [sentencing] criteria be based on the absence or presence of aggravating or mitigating circumstances" would

be constitutional. (*Wright, supra*, 30 Cal. 3d at p. 713.) Without that guidance, the statute's purpose of promoting "uniformity" in sentencing "may not provide a sufficient standard."[23]

Respondents rely on *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, which, by contrast to the MMC statute, contained a discernible statutory objective that the individual exercise of delegated authority was designed to effectuate. *Birkenfeld* held that the rent control scheme at issue gave adequate guidance in its delegation to the rent control board because, in addition to providing a list of factors to be considered, the stated purpose of the charter amendment furnished an implied standard by which the board could apply those factors. (*Id.* at p. 168.)

Respondents cite similar rent control cases, but, in each, the court found a discernible policy choice that the administrator was tasked with fulfilling, and regulations setting forth specific, attainable standards as to their application in individual cases. (*Gerawan Farming, supra*, at p. 1072

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[23] The delegation issues present here are not as problematic where the employer is a public entity. The state is afforded greater constitutional leeway as an employer managing its own affairs (*Engquist, supra*, 553 U.S. at p. 598), and courts are able to evaluate the delegation against known policy goals—namely, "the public safety, and . . . the public's interest in an uninterrupted operation of the public safety services." (*City of Warwick v. Warwick Regular Firemen's Ass'n* (R.I. 1969) 256 A.2d 206, 212.) "[A]rbitration of public employment disputes has been held constitutional . . . [t]o the extent that the arbitrators do not proceed beyond the provisions of the [city] charter there is no unlawful delegation of legislative power." (*Fire Fighters Union v. City of Vallejo*, 12 Cal.3d at p. 622.) The private sector lacks the built-in regulations and norms (and political checks) that guide and restrain the delegation of public employment decisions.

[distinguishing *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644 and *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 768–69].) In each case, the *legislature* determined what standard to apply, and the specific formula or objective pursuant to which the delegee would operate.[24] Both are lacking in the MMC statute.

Because the mediator has no guiding standards, "the risk is simply too great that results will be based largely on the subjective leanings of each mediator." (*Gerawan Farming*, *supra*, at p. 1071.) These risks are magnified by the ability of a union to pick and choose which grower will be subjected to this process. (Cf. *Dep't of Transp. v. Ass'n of Am. Railroads* (2015) 135 S.Ct. 1225, 1238 (conc. op. of Alito, J.) [citing *Carter v. Carter Coal Co.* (1936) 298 U.S. 238, 311 ["one person may not be [e]ntrusted with the power to regulate the business of another, and especially of a competitor"]]; *Allen v. Cal. Bd. of Barber Exam'rs* (1972) 25 Cal.App.3d 1014, 1020.)

Once the employer is compelled into this process, the union has little incentive to "trade off" terms that would never be acceptable to an employer and little reason to offer concessions. As Mr. Goldberg's

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[24] Accord *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 273, 283 [noting distinction between adoption of rate regulations and individualized rate-making decisions, the latter requiring "independent judgment-on-the-evidence standard of review"]; *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.* (1990) 497 U.S. 116, 120; *Fed. Power Comm'n v. Hope Nat. Gas Co.* (1944) 320 U.S. 591, 605.

decision shows, the likelihood is that the union will get nearly all of what it demands (and it did in this case), based on the mediator's conclusion that the terms demanded were not "atypical" from those found in other UFW CBAs, without regard as to tradeoffs the union and the employer made to through consensual bargaining.

B. The MMC statute lacks adequate procedural safeguards to ensure that policy determinations are made by political representatives, and not private actors.

A legislative delegation must have adequate procedural safeguards to protect against the arbitrary exercise of discretionary authority. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 376.) In the context of compulsory arbitration, the availability of adequate judicial review is one such critical safeguard. (See *Bayscene, supra,* 15 Cal.App.4th at pp. 133–34; *Healy, supra*, 192 Cal.App.3d at p. 616.) Where a statute delegates aspects of regulatory authority to a self-interested actor, courts "insist upon stringent standards to contain and guide the exercise of the delegated power." (*Allen, supra*, 25 Cal.App.3d at p. 1018.) The statute provides no checks on the union's decision as to which employer to regulate; ALRB review amounts to "rubber-stamp approval" as long as there is "at least a small kernel of plausible support" in the record. (*Gerawan Farming, supra*, at p. 1073.)

Public sector interest arbitration requires "[s]ome form of meaningful review . . . to ensure these [legislative] bounds are not

overstepped." (Grodin, *supra*, 64 Cal.L.Rev. at p. 698.) The need for review "becomes even more substantial" where parties are compelled into interest arbitration. (*Ibid.*) Given the risk of confiscatory rule-making and forfeiture of both the employer's and employees' constitutional rights, a most exacting level of judicial review would be a bare minimum under due process. But here, the boundaries were not defined. The level of judicial review was deferential in name, but illusory in fact, because neither the mediator, nor the ALRB, nor the reviewing court was given a policy destination or legislative map.

The only judicial review of the mediator's determination afforded by the MMC statute is the highly deferential "arbitrary and capricious" standard. (Lab. Code §1164.3(a).) While the statute also allows the ALRB to disapprove the Report if any provision is "unrelated to wages, hours or other conditions of employment" or is "based on clearly erroneous findings of fact," these protections are illusory. (*Ibid.*) Because the statute lacks clear legislative standards, intelligible judicial review is impossible and, as Justice Nicholson noted, "virtually meaningless." (*Hess*, *supra*, at p. 1612 [dis. op. of Nicholson, J.].)

Without such guidance, the mediator would be free to consider a fact and then derive *any* conclusion from that fact, so long as the conclusion pertained to "working conditions." As the Fifth District found, delegations of legislative power require adequate procedural safeguards "to assure a fair

and evenhanded implementation of the legislative mandate." (*Gerawan Farming, supra,* at p. 1075.) Whether an action is quasi-adjudicative or quasi-legislative, individual agency determinations require basic due process protections. Where the statute provides for only limited—if any—judicial review of the mediator's decision upon a partial record, those protections are absent.

The ALRB regulations prohibit the admissibility of "off-the-record" communications in challenging the mediator's report. (Cal. Code. Regs. tit. 8, §20407(a)(2).) These communications are not, by definition, a part of the record, and because they are absolutely barred from discovery, they cannot and may not be reviewed in evaluating a mediator's decisions. (*Ibid.*; see also *Hess Collection Winery* (2003) 29 ALRB No. 6 at p. 7.)

But a complete record is necessary under the ALRA for adequate judicial review. (See *Tex-Cal Land Mgmt., Inc. v. ALRB* (1979) 24 Cal.3d 335, 345.) Judicial review presumes the ability of the parties to present, and the court to consider, the substantive communications in the underlying proceeding. This review is impossible where the record does not disclose the evidence and communications that may have influenced the decision-maker. (See *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 16.) These infirmities give the court no means to assess whether *ex parte* or "off-the-record" communications "decisively influenced" the mediator's decisions.

(*Gerawan Farming, supra*, at p. 1075.) Whether they may have done so is secondary to the fact that no reviewing tribunal may obtain an answer to that question, thus magnifying the potential for "unfairness or favoritism." (*Ibid.*)

CONCLUSION

Gerawan respectfully requests that the Fifth District's decision be affirmed in all respects.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 8.520(c)(1) of the California Rules of Court that the foregoing brief contains 13,990 words, including footnotes, and excluding the cover, tables, signature block, and this certificate. Counsel relies on the word count function of the word processing program used to prepare this brief.

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