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 REPLY BRIEF ON THE MERITS

SCOTT A. KRONLAND (SBN 171693)
DANIELLE LEONARD (SBN 218201)
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: 415/421-7151
Fax: 415/362-8064
skronland@altshulerberzon.com

*MARIO MARTÍNEZ (SBN 200721)
THOMAS P. LYNCH (SBN 159277)
MARTÍNEZ AGUILASOCHO & LYNCH, APLC
P.O. Box 11208
Bakersfield, CA 93389
Tel: 661/859-1174
Fax: 661/840-6154
mmartinez@farmworkerlaw.com

Counsel for Real Party in Interest United Farm Workers of America

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 REPLY BRIEF ON THE MERITS

SCOTT A. KRONLAND (SBN 171693)
DANIELLE LEONARD (SBN 218201)
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: 415/421-7151
Fax: 415/362-8064
skronland@altshulerberzon.com

*MARIO MARTÍNEZ (SBN 200721)
THOMAS P. LYNCH (SBN 159277)
MARTÍNEZ AGUILASOCHO & LYNCH, APLC
P.O. Box 11208
Bakersfield, CA 93389
Tel: 661/859-1174
Fax: 661/840-6154
mmartinez@farmworkerlaw.com

Counsel for Real Party in Interest United Farm Workers of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

STATE CASES

OTHER STATE CASES

ALRB DECISIONS

FEDERAL STATUTES

STATE STATUTES AND REGULATIONS

OTHER STATE STATUTES AND REGULATIONS

INTRODUCTION

The Legislature's adoption of the MMC procedure is a rational means of providing farmworkers with long-awaited collective bargaining agreements at so-called "dormant" bargaining units, and the MMC statute does not violate equal protection by providing for the individualized resolution of disputes. The MMC statute also provides sufficient guiding standards to neutral mediators and the ALRB, and it gives objecting parties adequate judicial review of any final ALRB decision. As shown by Gerawan's multi-million dollar illegal anti-union campaign here (supported by the agricultural industry), permitting employers to assert an "abandonment defense" to MMC would lead to years of additional legal proceedings that perpetuate the problem of employer resistance to collective bargaining that the Legislature sought to remedy through the MMC statute.

Gerawan's Answering Brief fails to provide any persuasive legal authority to support the Fifth District's erroneous decision, which should be reversed in its entirety.

UPDATE ON DECERTIFICATION PROCEEDING AND RELATED UNFAIR LABOR PRACTICE CHARGES

Gerawan points to the decertification proceeding at the Gerawan bargaining unit as demonstrating that the MMC statute engendered a "crisis of representation." Gerawan Answering Brief at 4 ("Gerawan Br."). To the contrary, the decertification proceeding and related unfair labor practice charges exemplify the long history of employer interference with the ALRA rights of agricultural employees that poisoned the collective bargaining process and made it rational for the Legislature to adopt the MMC statute.

On April 15, 2016, the three-member Board unanimously affirmed the decision of an administrative law judge that the decertification proceeding should be dismissed, concluding that Gerawan was "guilty" of engaging in "extensive misconduct" by "committ[ing] numerous unfair labor practices," "support[ing] the decertification efforts, and in so doing, unlawfully undermin[ing] the very principle of free choice it so earnestly argues that the decertification represented." *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1, at 8-9; *see also id.* at 79 (Chairperson Gould, concurring); UFW Second Request for Judicial Notice, Ex. 1 ("UFW Second RJN").

The Board found Gerawan violated the ALRA by: (1) extensively allowing decertification proponents to gather decertification signatures during work time (42 ALRB No. 1 at 22-26); (2) giving the lead decertification petitioner, Sylvia Lopez, a "virtual sabbatical" of over two and one half months to permit her to illegally gather signatures (*id.* at 22-26, 30);[1] (3) allowing the decertification petitioner, who otherwise would not have gathered enough signatures before the 2013 growing season ended, to physically block the company entrances to collect 800 - 1,000 signatures for the decertification petition (*id.* at 32-37);[2] (4) working with

---

[1] The Board found that, between August 12, 2013 and October 20, 2013, Lopez worked only a total of 83 hours or 8.3 hours per week while, during the same time period, other employees were working as many as 55 hours in a week. In addition, shortly after the decertification effort began, Gerawan hired two of Lopez's daughters, Lucretia and Belen. The Board found that both worked significantly fewer hours than other employees. 42 ALRB No. 1 at 30, fn. 11.

[2] The petitioner would not have obtained enough valid signatures to request the decertification election without the illegally obtained signatures. Gerawan's claim that "a majority of Gerawan's workers asked for an election" (Gerawan Br. at 33) is false. Just as the forged signatures were not valid on the first decertification petition (*see* UFW Request for Judicial Notice, Ex. A), the unlawfully obtained signatures from employees are not a valid measure of whether employees wanted a decertification election.

the California Fresh Fruit Association[3] to give over $13,000 dollars to the petitioner to support the decertification effort (*id.* at 37-54); (5) illegally granting a wage increase to influence voters prior to the election (*id.* at 57-59); and (6) illegally bypassing the UFW by soliciting grievances from and directly dealing with bargaining unit employees so as to influence voters (*id.* at 59-63).

ARGUMENT

I. Gerawan's Meritless Substantive Due Process Claim Is Not Before the Court

Gerawan argues that mandatory interest arbitration for private sector employees violates substantive due process. Gerawan Br. at 20-30. This argument is beyond the scope of review. *See* Order of August 19, 2015 ("The issues to be briefed and argued are limited to the issues raised in the petitions for review."). In any event, the argument is meritless. It is now settled law that economic "'regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.'" *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 155 (quoting *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 391)).

Gerawan misrepresents the history of interest arbitration in asserting that "no state has ever before imposed interest arbitration on a private company." Gerawan Br. at 20. Statutes providing for interest arbitration for non-profit hospitals, public utility companies, railroads, and wartime labor disputes *did* apply to private companies. *See* UFW Br., at 30-35;

---

[3] The California Fresh Fruit Association is self-described as "a voluntary, nonprofit agricultural trade association that represents California's fresh fruit industry" and is "comprised of more than 300 members, including growers, shippers and marketers of fresh grapes, blueberries and tree fruit . . ." See "About the CFFA" at CFFA's website, available at <http://www.cafreshfruit.org/about-california-fresh-fruit-association>.

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); Pub. L. 88-108, 77 Stat. 132 (1963) ("To provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees."); *Brotherhood of Locomotive Firemen v. Certain Carriers* (D.C. Cir. 1964) 331 F.2d 1020 (upholding Public Law 88-108 against constitutional and delegation challenges); 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.").

For example, Minnesota, New York, and Massachusetts enacted interest arbitration laws to successfully settle labor disputes at non-profit *private* 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.

Contrary to Gerawan's contention, moreover, the U.S. Supreme Court did not hold in *NLRB v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1 and *H.K. Porter v. NLRB* (1970) 397 U.S. 99 that the National Labor Relations Act would violate substantive due process if it "compel[led] agreements between employers and employees." Gerawan Br. at 22-23. *Jones & Laughlin* merely observed that the NLRA does not compel

agreements; the Supreme Court never held that the Constitution would prevent Congress from using an interest arbitration procedure. *See Jones & Laughlin*, 301 U.S. at 44-46. Similarly, while *H.K. Porter Co.* held that the NLRA does not permit the remedial imposition of a contract term, the decision acknowledged that "it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements *and compulsory submission to one side's demands.*" *H.K. Porter v. NLRB* (1970) 397 U.S. 99, 109 (emphasis added). Congress simply has not chosen to provide for interest arbitration under the NLRA; but it could do so if it wanted. [4]

Gerawan relies on *Wolff Packing* for its argument that mandatory interest arbitration violates substantive due process as applied to private companies. Gerawan Br. at 23-28; *Charles Wolff Packing Co. v. Court of Ind. Relations* (1923) 262 U.S. 522. At the time of *Wolff Packing*, however, "the Supreme Court was of the view that the liberty protected by the due process clause included a freedom of contract which normally precluded . . . state legislatures . . . from regulating the amounts of prices or wages in businesses 'not affected with a public interest.'" *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 154. "[T]his restrictive view of the police power was completely repudiated." *Id.* at 155-60; *Nebbia v. New York* (1934) 291 U.S. 502, 537 ("If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . .").

Gerawan also claims that substantive due process precludes the Legislature from requiring interest arbitration unless it also bans strikes and

[4] Under current federal law, interest arbitration is used to resolve contract disputes with postal workers. 39 U.S.C. §1207. Congress has debated whether to amend the NLRA to provide for mandatory interest arbitration to resolve disputes about initial labor contracts. *See, e.g.*, H.R.1409, 111th Congress (2009-2010) (Employee Free Choice Act of 2009).

lockouts. Gerawan Br. at 23-27. Gerawan fails to cite to any authority in support of this claim other than the repudiated *Wolff Packing* case, and there is simply no support in modern case law for Gerawan's position.

While farmworkers have the right to strike, the Legislature rationally concluded (after studying 27 years of labor disputes) that the seasonal nature of employment and low earning capacity make the use of that economic pressure ineffective or unrealistic. As the Third District recognized in *Hess*:

> 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.

Hess Collection Winery v. ALRB (2006) 140 Cal.App.4th 1584, 1600. Gerawan cites to nothing in modern jurisprudence that requires banning strikes if interest arbitration is used as a means to resolve labor disputes. The decision to ban strikes in other interest arbitration statutes goes to the wisdom of the respective statutes, not to their legality, and "[t]he wisdom of the legislation is not an issue in analyzing its constitutionality. . . ." *Hale v. Morgan* (1978) 22 Cal.3d 388, 398.

Finally, in arguing that interest arbitration statutes can only be applied in the context of labor disputes that, in Gerawan's view, would threaten "public safety," Gerawan seeks to revive exactly the line of substantive due process reasoning that "was completely repudiated," *Birkenfeld,* 17 Cal. 3d at 154, because it turned the courts into unelected super-legislatures. *See Nebbia*, 291 U.S. at 537 ("With the wisdom of the

policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.").[5]

II. The MMC Statute Is Not A Facial Violation Of Equal Protection

Gerawan claims that the MMC statute violates equal protection because the statute permits a union to decide whether to request referral to MMC for a particular employer and because, if a contract is imposed through the MMC process, each employer is subject to a different, individualized contract. Gerawan Br. 41-50. Gerawan's arguments are unpersuasive.

First, that a union can "pick and choose" the employers for which it requests referral to the MMC process does not amount to an equal protection violation. If it did, every collective bargaining law would be a violation of equal protection, because unions and employees make strategic choices about where to organize all the time. That only some employers are targeted for union organizing drives and representation petitions does not establish an equal protection violation. Many statutory processes apply only when they are invoked. For example, a rent control statute may permit rent adjustments in response to landlord petitions, but not *sua sponte*. *See,*

---

[5] Gerawan also argues that a contract established through the MMC process infringes on employees' "free association" rights, rights to access the courts, and on their free speech rights through imposition of "agency fees." Gerawan Br. 28-30. These arguments are beyond the scope of this Court's order granting review, and Gerawan lacks standing to assert them. In any event, the courts have held that unions may collect fees and dues necessary to represent employees in collective bargaining. *See, e.g., Railway Employees' Dept. v. Hanson* (1956) 351 U.S. 225, 238; *Communication Workers v. Beck* (1988) 487 U.S. 735; *Breaux v. ALRB* (1990) 217 Cal.App.3d 730, 751-52. Furthermore, the CBA approved here contains no waiver of employee rights to access the courts. *See* CR 384-85; 427-29; *see also 14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247 (arbitration clause in CBA waives right to file statutory claims in court *only* where waiver is clear and unmistakable).

e.g., Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal.4th 761, 768-69; *see also* Lab. Code §2685 (requiring arbitration of pricing and product disputes arising out of contracts between garment manufacturers and contractors -- "upon the request of either any manufacturer or contractor"). Here, a situation where one party believes MMC would be useful is rationally distinguishable from a situation in which both parties would prefer to continue bargaining without MMC, so there is a rational basis for allowing either party to request referral to MMC.

Unions, moreover, cannot simply "pick and choose" where MMC will be requested because the Legislature has set out the specific conditions that must be met for MMC. The Legislature rationally drew the line for MMC coverage at employers that have committed an unfair labor practice, have never agreed to a contract, and have more than 25 employees, and at situations in which more than one year has passed after the initial request to bargain with the employer. Lab. Code §1164(a); §1164.11. Where the Legislature "ha[s] to draw the line somewhere," "[t]his necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *FCC v. Beach Comm., Inc.* (1993) 508 U.S. 307, 316.

Gerawan misconstrues the statute by characterizing MMC as being triggered only by a "self-interested union." Gerawan Br. at 42. In fact, the MMC process can be triggered either by an employer or by the certified labor organization. Lab. Code §1164(a). There is nothing stopping employers that have never signed contracts with the certified union from making a renewed bargaining demand and requesting MMC if the bargaining is unsuccessful. An employer can also agree to a contract during the renewed bargaining period and thereby eliminate the need for an MMC request.

Second, there is no merit to Gerawan's argument that the MMC statute violates equal protection on its face because there is no rational basis for issuing individualized ALRB orders based on the facts of particular labor disputes. Gerawan Br. at 42, 46-50. The individualized process encourages the parties to resolve their own disputes to the maximum extent possible, thereby serving a legitimate interest in promoting collective bargaining. If the MMC statute itself provided default contract terms or a rigid formula to decide those terms, the statute would discourage collective bargaining because a party that prefers those terms would have no incentive to bargain.

Moreover, to the extent the parties cannot reach agreement, the MMC process leads to contract terms that are tailored to the positions taken by the parties and the facts of the particular dispute at issue, which is a rational resolution of the dispute. Almost every voluntary agreement to submit a labor dispute to interest arbitration, and almost every statute requiring interest arbitration, provides similar authority to the interest arbitrator to tailor the resolution of the dispute to the circumstances.

Given that each labor dispute is unique, it is rational for the Legislature to direct the neutral mediator and ALRB to craft agreements that meet the particular needs of the parties, with guidance from the statutory list of factors. When state action rationally involves individualized, discretionary decisionmaking, there is no equal protection violation "when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted." *Engquist v. Oregon Dep't of Agr.* (2008) 553 U.S. 591, 603; *Squire v. City of Eureka* (2014) 231 Cal.App.4th 577, 595 ("individual discretionary decisions will not support [an equal protection]" claim). Gerawan asserts that its operations are unique and distinct from the operations of its competitors (*see* Gerawan Br. at 9-10, 17-18 fn.9), and it is

rational for the MMC process to take into account such differences. Legislative acts that apply to a "class of one" violate equal protection only when they are arbitrary or inadequately justified. *See Bank Markazi v. Peterson* (Apr. 20, 2016) __ U.S. __, 2016 WL 1574580, at *10-11 & fn.27.

In sum, the distinctions made by the MMC statute in terms of coverage are rational distinctions, and the factors considered in resolving contract disputes are rational factors, so Gerawan's facial equal protection claim fails.[6]

III. The MMC Statute Does Not Unconstitutionally Delegate Legislative Authority

Gerawan attacks the MMC as an unconstitutional delegation of legislative authority (Gerawan Br. at 51-59), but its arguments ignore the plain language of the statute and applicable authority, and Gerawan misstates the facts of this case.

A. The Legislature made the fundamental policy decision to use interest arbitration to settle initial contract disputes

According to Gerawan, UFW and the ALRB claim that the ordering of a CBA "is not a fundamental issue of public policy." Gerawan Br. at 51. But the ALRB and UFW never make this claim. Instead, UFW and the ALRB maintain that the Legislature -- not the ALRB or the mediator -- made the fundamental policy decision to have an MMC process to provide farmworkers with first contracts. *See* UFW Br. at 42-43; ALRB Br. at 26-27. The Legislature decided that the ALRA was not fulfilling its purpose because farmworkers were not achieving collective bargaining agreements

[6] An "as applied" equal protection claim is not before this court and the Fifth District did not address such a claim. As such, Gerawan's criticisms of the terms of the final MMC order in this case (which are meritless) are not relevant to the equal protection claim at issue.

and the Legislature therefore established a procedure to "establish[] the final terms of a collective bargaining agreement." Lab. Code §1164.3(d). The Legislature decided which labor disputes may be referred to MMC, the procedures to be followed, the factors to be considered by a neutral mediator, and the process for review by the ALRB and the courts. *See* UFW Br. at 42-43; ALRB Br. at 27-27.

Gerawan offers no persuasive argument as to why the precise resolution of a contract dispute for a private sector bargaining unit presents a "fundamental" policy issue that cannot be delegated under appropriate standards, when such disputes in the public sector are routinely resolved through binding interest arbitration. Nor is there any logical reason why the delegation doctrine should apply differently to private employment.

B. The statute provides a list of factors that adequately guide the mediator and ALRB

Gerawan largely ignores the entire body of caselaw upholding interest arbitration statutes against non-delegation challenges when those statutes use a list of factors that is indistinguishable from the list provided by the Legislature here. *See* UFW Br. at 43-48. The reasoning of those decisions is sound and should apply here.

Gerawan claims that the rent control statute in *Birkenfeld* is distinguishable from the MMC statute because the rent control statute "contained a discernible statutory objective." Gerawan Br. at 54. But the objective in *Birkenfeld* was "implied" from the rent control charter's "purpose of counteracting the ill effects of 'rapidly rising and exorbitant rents.'" *Birkenfeld, supra*, 17 Cal.3d at 168. The objective of the MMC is expressly stated in the statute itself: to provide a more "effective collective bargaining process." Stats. 2002, ch. 1145, §1. The overall purpose and list of statutory factors in the MMC statute provide the same level of guidance

for implementation as was present in the *Birkenfeld* rent control statute. *See* UFW Br. at 44-45.

Gerawan's claim that the MMC statute must provide a specific formula or a predetermined result is untenable. *See, e.g., Pac. Legal Found. v. Brown* (1981) 29 Cal.3d 168, 201 (rejecting 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); *Birkenfeld, supra*, 17 Cal.3d at 165; *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal. 3d 184, 191; *Power Comm'n. v. Pipeline Co.* (1942) 315 U.S. 575, 586 (Constitution "does not bind rate-making bodies to the service of any single formula or combination of formulas").

C. The non-delegation doctrine does not preclude use of private neutrals to report to the agency

Gerawan claims that certain decisions involving interest arbitration must only be made by "elected (and accountable) officials." Gerawan Br. at 53. But Gerawan cites to no authority for this claim. Interest arbitrators are often private neutrals appointed to resolve a single dispute. *See, e.g., Town of Arlington v. Board of Conciliation and Arbitration* (Mass. 1976) 352 N.E.2d 914, 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 Anchorage v. Anchorage Police Dept. Empl. Assoc.* (1992) 839 P.2d 1080, 1084; *Medford Firefighters Assoc. v. Medford* (1979) 40 Ore.App. 519, 526-27. This Court has already recognized that private neutrals may be used to help resolve public sector disputes. *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal. 3d 608, 622 fn.13. Again Gerawan provides no persuasive reasons why the delegation doctrine should apply differently here.

D. "Self-interested actor" cases do not apply

Gerawan argues that the mediator in this case resolved all the disputed issues based on "an agenda set by the UFW, not the Legislature." Gerawan Br. at 56. This is completely false. The MMC statute sets the "agenda" by limiting the scope of the dispute resolution process to disputes about "mandatory subjects of bargaining" that the parties cannot agree upon on their own. The ALRB must 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." Lab. Code §1164.3. This is precisely what happened in this case, as the ALRB struck down a "non-disparagement" provision and a "successorship" clause because they were not mandatory subjects of bargaining. CR 723-24 (non-disparagement); CR 727-28 (successorship). The resolution of disputes about mandatory subjects involves the consideration of evidence from both sides and a list of factors set by the Legislature.[7]

Relying on *Allen v. California Bd. of Barber Examiners* (1972) 25 Cal.App.3d 104, Gerawan argues that heightened scrutiny applies to the MMC statute because the Union is a "self-interested actor" that has been delegated regulatory authority. Gerawan Br. at 56. Gerawan's argument is flawed because the statute does not delegate any regulatory authority to the Union.

---

[7] Gerawan falsely claims that "the union will get nearly all of what it demands (and it did in this case)." Gerawan Br. at 55-56. The record shows that the mediator rejected many UFW proposals, adopted many Gerawan proposals, and modified many of both. *See, e.g.,* CR 367 (adopting Gerawan's Section 3 - Recognition language); CR 374 (rejecting UFW proposal on Hiring - Section 7 language); CR 408 (rejecting UFW request for health plan coverage for workers); CR 409 (rejecting UFW request for pension contributions for employees); CR 372 (combining proposals from both parties on Hiring clause); CR 374 (rejecting UFW proposal on Hiring clause language); CR 383-84 (combining proposals on "Promotion and Transfer" clause).

In *Allen*, the minimum barber shop prices would be set by a board that included "interested members of the industry," i.e., other barbers. *Allen* held that "[w]hen the power which the Legislature purports to confer is the *power to regulate the business of one's competitors*. . . a real danger of abuse arises, and the courts accordingly insist upon stringent standards to contain and guide the exercise of the delegated power." *Allen,* 25 Cal.App.3d at 1017-18. Here, the MMC statute does not delegate any decisionmaking authority to UFW (and UFW is not a Gerawan competitor). The final MMC order is issued by a government agency, based on a report from a neutral mediator.[8] As such, the line of cases about "self-interested actors" is not implicated.

E. The MMC statute provides adequate review procedures

Gerawan claims that the judicial review afforded Gerawan "was deferential in name, but illusory in fact" because the mediator and ALRB are not given a "policy destination or legislative map." Gerawan Br. at 57; *see also* 236 Cal.App.4th at 1075. But, as discussed *supra*, the Legislature itself made the policy decisions and provided sufficient guidance for the mediator and ALRB. The Legislature also provided constitutionally sufficient "safeguards" and "mechanisms" that go beyond those in many other valid interest arbitration statutes, beginning with the process for the parties to select a neutral mediator. Lab. Code §1164(b).[9] The Legislature provided for the participation of both parties; 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. Lab. Code. §§1164.3; 1164.5; *cf. Mount St. Mary's,* 26

---

[8] The MMC regulations disqualify a mediator "for bias, prejudice, or interest in the outcome of the proceeding." 8 Cal. Code Regs. § 20404(a).

[9] In this case, Gerawan proposed the use of Mediator Goldberg, and UFW agreed.

N.Y.2d at 511 (upholding statute that required interest arbitration involving private hospitals, where arbitration awards were reviewable only for abuse of discretion); *City of Washington v. Police Dept. of City of Washington* (Pa. 1969) 259 A. 2d 437, 441 (upholding state's compulsory arbitration law for public employees against a procedural due process challenge, when the statute lacked any provision for judicial review, by implying into the statute a limited *certiorari* form of review); *Fraternal Order of Police, Lodge No. 5 ex rel. Costello v. City of Philadelphia* (Pa. Cmwlth. 1999) 725 A.2d 206, 209-10 (upholding compulsory arbitration statute for public employees with no provision for judicial review on similar grounds).

Under the MMC statute, the ALRB's role is not to "rubber-stamp" mediators' 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 -- hardly a "rubber stamp." CR 721-31.

Gerawan also complains that ALRB regulations prohibit the admissibility of "off-the-record" communications in challenging the mediator's report. Gerawan Br. at 58-59. That is not correct. Gerawan had the right to move to set aside the mediator's report for misconduct or "corruption, fraud, or other undue means" (Lab. Code §1164.3(e)) and could complain about "off-the-record" proceedings by "attach[ing] declarations that describe pertinent events that took place off the record . . .

to establish the grounds for review stated in the petition." 8 Cal. Code Regs. § 20408(a). Gerawan did not do so here.[10]

In sum, the provisions for review of the mediator's report by the ALRB, and review of the ALRB's final order by the appellate courts are not "illusory." They provide for provisions of the report to be set aside if they go beyond the mediator's authority or they are arbitrary and capricious in light of the record. More searching review would not be possible because of the nature of interest arbitration.

IV. The Legislature Did Not Intend To Permit Employers To Obstruct An MMC Request By Raising An "Abandonment" Defense

Gerawan and the Fifth District interpret 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 MMC if that same bargaining proves unsuccessful. Gerawan Br. 31-32. Gerawan cites to nothing in the language or history of the statute itself to suggest that the Legislature intended that result. To the contrary, the Fifth District's interpretation of the statute ignores all the indicia of what the Legislature intended.

---

[10] To the extent that Gerawan is arguing that off-the-record communications violate the Due Process Clause, the Fifth District did not address that argument (*see* 236 Cal.App.4th at 1076-77), and it is not before this Court on review. Moreover, the argument depends entirely upon the presumption that otherwise neutral mediators who are exposed to off-the-record information as part of their duties cannot be trusted to follow the law. The Supreme Court adopted the opposite presumption for purposes of the Due Process Clause in *Withrow v. Larkin* (1975) 421 U.S. 35. Moreover, in this case the mediator did not receive *ex parte* communications. Mediator Goldberg met with the parties in joint session at all times. *See* Mediator's Report, CR 362 ("Mediation sessions were conducted on June 6 and 11, and on August 8 and 19, 2013").

A. The statutory language does not support Gerawan's argument

Gerawan argues that assertion of the abandonment defense "would negate a statutory prerequisite to compel an employer into the process." Gerawan Br. at 36. The Fifth District agreed, reasoning that abandonment could be raised to show that "the union forfeited [its representative] status through abandonment." *Gerawan Farming, Inc., supra*, 236 Cal.App.4th at 1054. According to the Fifth District, this defense would not "add to the MMC statute's express provisions." *Id.* This reasoning is untenable.

The statute provides that "a labor organization certified as the exclusive bargaining agent" is qualified to request referral to MMC. Lab. Code §1164(a). The language is in the past tense, referring to a certification that already has occurred. Nothing in the MMC statute provides any grounds or procedures to challenge that prior certification and thereby "decertify" the representative.

The MMC statute was enacted in large part to provide for meaningful collective bargaining in units where the parties could not agree to a first contract for years or even "decades" following an election. *See* SB 1156 Analysis, at 7; AB 2496 Analysis at 7-8; Historical and Statutory Notes, 44A West's Ann. Lab. Code (2011) §1164, p.401. The statutory provision for making an MMC request "90 days after a *renewed* demand to bargain," Lab. Code § 1164(a)(1) (emphasis added), shows that the Legislature intended MMC to be available where bargaining had been dormant. The Legislature did not qualify this provision with any requirement that the parties have actively pursued bargaining on a consistent basis over the years or for a certain amount of time prior to serving the "renewed demand to bargain."

Moreover, while the MMC statute provides very specific procedures for processing MMC declarations, the statute provides no procedure for

challenges to the status of a certified representative, much less a procedure that would require evidentiary proceedings. Lab. Code §1164(b) ("[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]." (emphasis supplied)). As such, Gerawan's interpretation of the statute does not comport with the statutory language.

B. The Legislature relied on the absence of an abandonment defense in adopting the MMC statute

Gerawan's proposed interpretation of the MMC statute also would contravene the principle that, when the Legislature adopts a statute, the Legislature is presumed to be aware of how the statutory scheme has been interpreted. *See Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 (the Legislature "is presumed to have been aware of and acquiesced in the previous judicial construction"); *Thornton v. Carlson* (1992) 4 Cal.App.4th 1249, 1257 ("The Legislature is presumed to be aware of long-standing administrative practice . . . [and if it] makes no substantial modifications to the act, there is a strong indication that the administrative practice [is] consistent with the legislative intent.").

Prior to adoption of the MMC statute, the ALRB had consistently adhered to its "certified until decertified" rule, which was first announced in 1982. *See* UFW Br. at 35-40. The ALRB had for decades rejected employer attempts to assert an abandonment defense. *See Dole Fresh Fruit Co.* (1996) 22 ALRB No. 4, at 16 (concluding that the Legislature would have to create an "abandonment" procedure because "[t]he Board does not have authority" to do so).

Prior to adoption of the MMC statute, the courts of appeal had agreed with the ALRB that employers cannot refuse to bargain with a certified union unless and until employees vote to decertify the union. *See*

Montebello Rose Co. v. ALRB (1981) 119 Cal.App.3d 1, 24-25 (employer's duty to bargain with certified union does not lapse "until such time as the union is officially decertified"); *Adamek & Dessert v. ALRB* (1986) 178 Cal.App.3d 970, 983 ("the company has a duty to bargain with the union until the union is decertified through a second election."); *F & P Growers Assoc. v. ALRB* (1985)168 Cal.App.3d 667, 672-78 (employer may not refuse to bargain with certified representative, regardless of whether employer claims the union no longer is supported by a majority of employees).

The Legislature adopted the MMC statute against that backdrop in 2002, so the Legislature would have understood that a "certified" bargaining representative means a representative that had been certified by employee vote and that could be decertified only by another employee vote.

Moreover, in 2003 the ALRB expressly held that there is no "abandonment" defense in the context of MMC proceedings. *Pictsweet Mushroom Farms, Inc.* (2003) 29 ALRB No. 5, at 10-11. The Legislature then amended the MMC statute in 2011, through an amendment to Labor Code section 1164, to *expand* the circumstances under which MMC could be invoked. Stats. 2011, ch. 697, Sec. 4 (SB No. 126). The Legislature therefore must be presumed to have understood and to have accepted the settled meaning of the "certified" bargaining representative.[11]

---

[11] The Legislature recently entertained a proposed amendment to the ALRA that would have made it an unfair labor practice for a union to "abandon or fail to represent [a] bargaining unit for a period of three years or more" and that would have required the Board to "decertify a labor organization that violates this subdivision." UFW Second RJN, Ex. 2 (Assembly Bill 1389 (Patterson) (Cal. Legis. 2015-2016 Sess.) at 6, lines 3-5). The bill failed to garner enough votes to pass out of the Assembly Committee on Labor and Employment and died on January 31, 2016. UFW Second RJN, Ex. 3 (Vote on AB 1389 and Bill History).

C. MMC is part of bargaining

Gerawan also claims that the Fifth District was correct in concluding that MMC is not part of the bargaining process and, therefore that there is room for a distinction between whether a union is certified for purposes of bargaining and certified for purposes of MMC. Gerawan Br. at 31-32. To the contrary, aside from the lack of any support in the language or history of the statute for that distinction, MMC is plainly a part of bargaining.

For example, while the end result here was not a voluntary agreement, a review of the record shows that UFW and Gerawan agreed to 34 separate provisions in the CBA. *See* CR 419-448 (matrix of agreed upon and disputed contract language).[12] This was 34 more agreements than the parties ever achieved in the 21 years before MMC was used. The MMC process also resulted in the parties attending at least nine bargaining sessions before MMC was requested (CR 362) and an additional five bargaining sessions from April 2 - July 29, 2013 (CR 362), in addition to the four "on-the-record" mediation sessions (CR 361). While these 14 bargaining sessions did not result in a voluntary agreement, they certainly narrowed the issues in dispute.

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; *see also* UFW Br. at 54-57. As such, precluding a union that is certified for purposes of bargaining from requesting referral to MMC would result in a less effective collective bargaining process and undermine the legislative purpose.

---

[12] The agreed-upon language is denoted in the negotiation "matrix" by a "T/A" (Tentative Agreement) and a date indicating the date on which the parties reached agreement on a particular provision. CR 362.

D. Allowing employers to resist referrals to MMC by questioning the status of the certified union does not help farmworkers

Finally, Gerawan argues that this Court should reject the "certified until decertified" rule in the context of MMC for policy reasons. According to Gerawan, the employer's assertion of an abandonment defense is the only way to "protect the workers' right to choose." Gerawan Br. at 39. To the contrary, the workers exercised their right to choose by electing a union in the first place, and they can exercise their right to choose through an untainted decertification election. Allowing the employer the option of raising a challenge to the certified union's status would give the employer leverage to extract a contract less favorable to the workers and would allow the employer to use the opportunity for delay to continue to send farmworkers the message that collective bargaining is futile.

Although disclaiming any reliance on the then-pending decertification election, the Fifth District repeatedly referred to that election as showing that the MMC process is unfair to workers. *See* 236 Cal.App.4th at 1039; *id.* at 1061 ("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 potential backdrop is the prospect, in the MMC process, a CBA will be imposed whether the employees want it or not."); *id.* ("as the present case illustrates, where a union has arguably abandoned the employees but later returns to invoke the MMC process, that situation may create a crisis of representation").

But the recent ALRB decision shows that decertification proceedings often drag on for years and are eventually dismissed as the product of unlawful conduct by an anti-union employer. *See* 42 ALRB No. 1, at 9 (Gerawan "unlawfully undermined the very principle of free choice it so earnestly argues" for). Permitting employers to raise an abandonment

defense would only give growers a further opportunity and incentive to resist collective bargaining by delaying MMC until evidentiary proceedings are held regarding the certified union's activities, and then using the intervening time period to illegally support decertification campaigns.

Perhaps seeing the "writing on the wall" and knowing very well that its own illegal conduct would lead to dismissal of the current decertification proceeding, Gerawan argues that decertification is a not a real option for workers because it puts them in the "Catch-22" that a contract will be imposed "if the decertification election is set aside due to unlawful employer conduct." Gerawan Br. at 34. But if the decertification effort reflects genuine employee free choice, it would not be invalidated based on a finding of illegal employer support. Existing decertification procedures and the 7-day election period contained in the ALRA are sufficient to provide employees the opportunity to decertify any incumbent union if they truly wish to do so. *See* Lab. Code § 1156.3(b); *Montebello Rose, supra*, 119 Cal.App.3d at 28 ("So long as the employees can petition for a new election if they wish to remove the union, the employer has no real cause for concern about whether it is bargaining with the true representative of its employees."). Gerawan also does not explain how farmworkers suffer from a reasonable collective bargaining agreement that *improves* their employment terms.

In any event, the Legislature made the policy decision to allow MMC proceedings to be initiated after so-called dormant certifications are revived through a "renewed demand to bargain," and the purpose of statutory interpretation is to implement the Legislature's intent, not a different policy choice.

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.

Dated: April 25, 2016

SCOTT A. KRONLAND
DANIELLE E. LEONARD
ALTSHULER BERZON LLP

MARIO MARTÍNEZ
THOMAS P. LYNCH
MARTÍNEZ AGUILASOCHO &
LYNCH, APLC

By: */s/ Mario Martinez*
Mario Martinez

Counsel for Real Party in Interest
United Farm Workers of America

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 6,747 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: April 25, 2016

By: */s/ Mario Martinez*
Mario Martinez

Counsel for Real Party in Interest
United Farm Workers of America

PROOF OF SERVICE

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

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On April 25, 2016, I served the following document(s):

Real Party In Interest United Farm Workers Of America's Reply 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:

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

Method of Service	Addressee	Party
A	David Abba Schwarz Michael A. Behrens Irell & Manella LLP 1800 Avenue of the Stars, #900 Los Angeles, CA 90067-4276	Gerawan Farming, Inc.
A	C. Russell Georgeson Georgeson, Belardineli & Noyes 7060 N. Fresno Street, Suite 250 Fresno, CA 93720	Gerawan Farming, Inc.
A	Ronald H. Barsamian Barsamian Saqui and Moody 1141 W. Shaw Ave, Suite 104 Fresno, CA 93704	Gerawan Farming, Inc.

A	Agricultural Labor Relations Board 1325 J Street, Suite 1900B Sacramento, CA 95814-2944	Agricultural Labor Relations Board
A	Jose Antonio Barbosa Agricultural Labor Relations Board 1325 "J" Street, Suite 1900 Sacramento, CA 95814-2944	Agricultural Labor Relations Board
A	Benjamin Matthew Glickman Office of the Attorney General 1300 I Street, Suite 125 P. O. Box 944255 Sacramento, CA 94244	Agricultural Labor Relations Board
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 April 25, 2016, at San Francisco, California.

Jean Perley