Case No. S227270

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

TRI-FANUCCHI FARMS,
Petitioner and Respondent,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Petitioner and Respondent,

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

After a decision by the Court of Appeal, Fifth Appellate District,
Case No. F069419

Affirming in part a decision of the ALRB
[*In re Tri-Fanucchi Farms* (2014) 40 ALRB No. 4]

COMBINED ANSWER OF UNITED FARM WORKERS OF AMERICA TO BRIEFS ON THE MERITS BY TRI-FANUCCHI FARMS AND ALRB

MARIO MARTINEZ (SBN 200721)
MARTINEZ AGUILASOCHO & LYNCH, APLC
P.O. Box 11208
Bakersfield, Ca. 93389-1208
Tel: (661) 859 - 1174
Fax: (661) 840 - 6154
email: mmartinez@farmworkerlaw.com

Counsel for United Farm Workers of America

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email: mmartinez@farmworkerlaw.com

Counsel for United Farm Workers of America

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Pursuant to California Rule of Court 8.520(a), Real Party in Interest United Farm Workers of America ("UFW") submits this combined answer brief on the merits to the Opening Briefs filed by Tri-Fanucchi Farms ("Tri-Fanucchi" or "Fanucchi") and the Agricultural Labor Relations Board ("ALRB" or "Board").

INTRODUCTION

Tri-Fanucchi paints itself as the guardian of its employees' rights, defending the rights of farmworkers who -- in its view -- are unable to defend themselves. But the long history of Tri-Fanucchi's refusals to engage in collective bargaining demonstrates that, over the course of four decades, Tri-Fanucchi has repeatedly violated the law to undermine its employees' choice of union representation and collective bargaining. The employer's paternalistic and distorted arguments here highlight that Tri-Fanucchi is simply a wolf in sheep's clothing, trampling on its employees' rights in the name of "protecting" them.

As explained by the nation's high court, courts are "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union." *Auciello Iron Works v. NLRB* (1996) 517 U.S. 781, 790. Nowhere is that principle more applicable than in this case, in which Tri-Fanucchi repeatedly claims that it is helping its employees by refusing to engage in collective bargaining with their certified representative.

The ALRB, the expert agency created to enforce the Agricultural Labor Relations Act ("ALRA"), issued a sound and reasonable decision finding that Tri-Fanucchi again violated the ALRA when it refused to bargain with the UFW. Based on this clear violation of the ALRA, the Board properly awarded relief in the form of a "makewhole" award to Tri-Fanucchi's employees. By contrast to the National Labor Relations Act ("NLRA"), which has no makewhole remedy, the ALRA provides the Board with authority to order that employees be "made whole" for "loss resulting from an employer's refusal to bargain" with a union selected by its employees. Lab. Code § 1160.3; *Holtville Farms, Inc. v. ALRB* (1985) 168 Cal.App.3d 388, 390; *cf. Auto Workers v. NLRB (Ex-Cell-O-Corp.)* (D. C. Cir. 1971.) 449 F.2d 1046 (affirming NLRB denial of union's request for "affirmative compensation" or make whole for employer's refusal to bargain).[1] "Makewhole" is an attempt to compensate employees for the lost wages and other benefits they would have received under a collective bargaining agreement, and is determined by calculating the amount of additional wages and benefits employees would have earned had they

[1] The adoption of the makewhole remedy in the ALRA was motivated by the inadequacy of NLRA's remedies for refusals to bargain. See *Adam Dairy* (1978) 4 ALRB No. 24 at 4-5. In particular, employers were able, by refusing to bargain, to weaken the certified union and avoid paying out collective bargaining benefits, thus denying employees their collective bargaining rights under the ALRA. *Id.*

worked under a union contract during the period of bad faith bargaining. *Holtville Farms, supra,* 168 Cal.App.3d at 391-92.

In light of the Board's decades-long precedent rejecting an employer's refusal to bargain based on the assertion of an abandonment "defense," an Administrative Law Judge and the Board found that Tri-Fanucchi had no valid basis for refusing to bargain with its employees' certified representative. *Tri-Fanucchi Farms v. ALRB* (2015) 236 Cal.App.4th 1079 at 1087 (Rev. Granted and Op. Superseded by *Tri-Fanucchi Farms v. ALRB*, Aug. 19, 2015); *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, at 7-9, 16-20 (Certified Record at 394-396; 403-407) (hereafter "CR"). Under the standard announced by the Board in *F&P Growers Assn.* (1983) 9 ALRB No. 22, and affirmed by a court of appeal in *F&P Growers Assn. v. ALRB (1985)* 168 Cal.App.3d 667, the Board considered whether Tri-Fanucchi's position furthered the polices and purposes of the Act. CR 405. Examining the employer's proffered justification for its refusal to bargain, the equitable arguments against makewhole, and the facts and circumstances of the case, the Board awarded makewhole. *Tri-Fanucchi Farms, supra*, 236 Cal.App.4th. at 1087-88; CR 405-407. The Court of Appeal erred by overturning this award, and Tri-Fanucchi's defense of the Court of Appeal's ruling on this issue is unpersuasive.

Equally unpersuasive is Tri-Fanucchi's argument for overturning decades of precedent holding that employers cannot refuse to bargain with their employees' certified representative based on an "abandonment" defense. As will be shown, the ALRA requires that agricultural employers not have any role whatsoever in their employees' choice about union representation: "The clear purpose of the Legislature is to preclude the employer from active participation in choosing or decertifying a union, and this certainly overrides any paternalistic interest of the employer . . ." *F&P Growers Assn., supra,* 168 Cal.App.3d at 678. The Legislature relied on that precedent in amending the ALRA. As such, once employees have elected a union representative, the union may be decertified only through another employee vote.

BACKGROUND

In one of the UFW's earliest election victories after passage of the ALRA in 1975, the UFW was certified as the bargaining representative of Tri-Fanucchi's agricultural employees in 1977 after a secret-ballot election. *Tri-Fanucchi Farms, supra,* 236 Cal.App.4th at 1083. After the certification, Tri-Fanucchi refused to bargain, claiming that it intended to engage in a "technical refusal to bargain" to challenge the validity of the election. See *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms* (1986) 12 ALRB No. 8 at 2. However, after the UFW filed an unfair labor practice charge ("ULP") with the ALRB alleging Tri-Fanucchi was violating the

law, Tri-Fanucchi agreed to bargain and negotiations began. *Id.* Between May 1979 and July 1981, there was a hiatus in bargaining. *Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, at 2. When UFW requested to resume bargaining in 1981, Tri-Fanucchi refused, asserting that it had conducted a poll of employees and no longer believed that UFW enjoyed majority support of its employees. *Id.*, at 2-3.

UFW filed another charge against Fanucchi, but despite the Board's issuance of *Nish Noroian Farms* (1982) 8 ALRB No. 25, holding that employers could not utilize employee polls indicating a loss of majority support to refuse to bargain with a certified union, the ALRB Regional Director dismissed UFW's charge on May 17, 1982. *Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, at 2-3. On April 19, 1984, after a lapse of nearly two years, the UFW again requested collective bargaining. On May 2, 1984, Tri-Fanucchi declined the Union's request for negotiations based on its 1981 employee poll and its new claim that UFW had "abandoned" the bargaining unit. *Id.*, at 2-3; *Tri-Fanucchi, supra,* 236 Cal.App.4th at 1085. The Board rejected these defenses in a 1986 decision and awarded bargaining makewhole pursuant to Labor Code section 1160.3. See *Tri-Fanucchi, supra,* 236 Cal.App.4th at 1085-86.

Fanucchi appealed the Board's 1986 decision, and the Fifth District Court of Appeal upheld the Board's decision, including the makewhole award. Although that 1987 decision was not published, in its May, 2014

decision the Fifth DCA took judicial notice of that decision. *Tri-Fanucchi,* 236 Cal.App.4th at 1086, fn. 2; *Tri-Fanucchi Farms v. ALRB* (Nov. 21, 1987, F008776) (nonpub. opn.). The 1987 Fifth DCA decision found that Tri-Fanucchi's abandonment defense "was not compelling" because "Union inactivity alone does not mandate a finding of abandonment." *Tri-Fanucchi Farms v. ALRB, supra,* at 9 (Nov. 21, 1987, F008776). The Court of Appeal further held that "by requesting negotiations, the Union indicated it was active . . . [and] [t]hus, the Union had resumed its role by the time Fanucchi questioned its status." *Id.* Thus, Tri-Fanucchi was already found in 1987 to have illegally refused to bargain with UFW based on a legally meritless "abandonment" defense and was ordered at that time to provide makewhole relief.

After the Court of Appeal's decision in 1987, Tri-Fanucchi indicated its willingness to bargain with the UFW. *Tri-Fanucchi,* 236 Cal.App.4th at 1086. Although Tri-Fanucchi claims here that the UFW did not have any contact with Tri-Fanucchi or Tri-Fanucchi's employees for some 24 years (*Tri-Fanucchi,* 236 Cal.App.4th at 1086), the Board did not take any evidence on that issue,[2] and UFW has always disputed that allegation. Indeed, UFW has maintained contact with Tri-Fanucchi's employees

[2] ALRB Petition for Review at 9, fn. 3. The Board never took evidence on the Union's alleged "abandonment" because the Board ruled, correctly, that an employer cannot assert an "abandonment" defense.

throughout the 24 year period, has represented Tri-Fanucchi employees on many non-bargaining matters,[3] and the 2012 request to bargain was made in an attempt to realize the desires of current Tri-Fanucchi employees for a collective bargaining agreement.

After UFW requested information and made another formal request to bargain in 2012, Tri-Fanucchi again refused to bargain, claiming it was engaging in a "technical refusal to bargain" to challenge UFW's status as the bargaining representative. *Tri-Fanucchi,* 236 Cal.App.4th at 1086.

Although its abandonment claim had already been rejected by the Fifth DCA in 1987 as legally meritless, Fanucchi once again asserted the same defense in 2012. *Tri-Fanucchi, supra,* 236 Cal.App.4th at 1085-87. Moreover, this defense had been rejected by the ALRB in numerous decisions reaching back decades in the intervening period, as Tri-Fanucchi was aware. *Id.,* at 1087; CR 394-396. In light of the Board's well-established precedent regarding abandonment, an ALJ and the Board found that Tri-Fanucchi had no valid excuse for refusing to bargain with its

[3] Tri-Fanucchi employees have been involved in UFW's legislative efforts to improve their wages and working conditions. For example, they were involved in UFW efforts to push for historic heat regulations (8 Cal. Code Regs. § 3395 et seq.), giving farmworkers the right to drinking water, shade, and paid rest periods during periods of high heat; they have been involved in legislative efforts to improve the ALRA, including the 2002 Mandatory Mediation and Conciliation law (Cal. Lab. Code 1164 et seq.), and have been involved in numerous other non-bargaining UFW efforts over the past 25 years.

employees' certified representative and awarded the bargaining unit employees makewhole relief. *Id.*, at 1087; CR 394-396; CR 403-407.

The Court of Appeal affirmed the Board's rejection of the abandonment defense as it applies to "normal bargaining" and affirmed the Board's conclusion that Fanucchi's refusal to bargain violated the ALRA. *Tri-Fanucchi, supra*, 236 Cal.App.4th at 1085, 1097-98. Nonetheless, the Court of Appeal reversed the Board's remedial order to award makewhole relief essentially disagreeing with the way the Board applied the *F &P Growers* makewhole standard. *Id.*, at 1097-98. The Court of Appeal stated that the Board awarded makewhole "solely" based upon its conclusion that Tri-Fanucchi's assertion of the abandonment defense did not further the policies and purposes of the ALRA, a conclusion that the Court of Appeal characterized as "clearly wrong." *Id.*, at 1097. Instead, the Court of Appeal found that because there had been *no published appellate decision* on the "specific issue" of abandonment, the litigation of the issue served the beneficial purpose of "clarifying and/or confirming" the law and furthered the "broader purposes of the ALRA to promote greater stability in labor relations . . . " *Id.*, at 1097-98. The Court of Appeal therefore concluded that Tri-Fanucchi's employees should not have been made whole for their employer's illegal refusal to bargain.

UFW's POSITION ON THE ISSUES IN THIS CASE

The ALRB petitioned for review of the Court of Appeal's reversal of its makewhole award, while Tri-Fanucchi petitioned for review of the Court of Appeal's decision on the abandonment issue. This Court granted review of both petitions on August 19, 2015.

The ALRB's petition for review raises two related questions: (1) whether the Court of Appeal exceeded its authority by failing to afford deference to the ALRB's remedial "makewhole" order; and (2) whether Tri-Fanucchi's refusal to bargain furthered the policies and purposes of the ALRA. ALRB Petition for Review, at 1-2.

As will be discussed, the California Legislature adopted the makewhole remedy to combat the prevalent problem faced under the NLRA that employers routinely avoided bargaining to weaken the certified union and to avoid paying out collective bargaining benefits. See *Adam Dairy* (1978) 4 ALRB No. 24 at 4-5; *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, 30 ("dilatory tactics after a representation election" undermine the statutory right to collective bargaining and "substantially impair the strength and support of a union."). Rather than remedying Tri-Fanucchi's illegal conduct, the Court of Appeal's reversal of the ALRB's makewhole decision rewards Tri-Fanucchi for violating the law and encourages other employers to do so. The Court of Appeal plainly disregarded the deferential standard of review to be accorded the ALRB, as the expert

administrative agency in charge of enforcing the ALRA. Accordingly, this Court should overturn the lower court's erroneous decision on the makewhole award.

Tri-Fanucchi's petition for review seeks reversal of the Court of Appeal's decision that "abandonment" cannot be raised as a defense to the duty to bargain. First, Tri-Fanucchi claims that, from a policy perspective, this Court should permit employers to protect employee rights under the ALRA; second, it claims the history of the ALRA and early ALRB cases support the assertion of an abandonment defense; third it argues that existing published case law supports an abandonment defense; and finally Tri-Fanucchi argues that a certification is a state granted monopoly or franchise that should be revocable through employer action.

As will be explained, Tri-Fanucchi's arguments are yet another attempt to nullify its employees' collective bargaining rights. Tri-Fanucchi's refusal to bargain is not in furtherance of its employees' rights; rather, Tri-Fanucchi has never accepted its employees' desire for union representation. Its arguments have no support in the text of the ALRA, the history of the Act, or in any published state or ALRB decisions. Moreover, the Legislature has relied on the precedent holding that an employer cannot raise as an abandonment defense in subsequent amendments to the ALRA. Accordingly, the Court of Appeal's decision on the abandonment issue should be affirmed.

STANDARD OF REVIEW

While the courts have a duty to ensure that the ALRA is interpreted properly (see *ALRB v. Superior Court (Pandol & Sons)* (1976) 16 Cal.3d 392), the Board's decisions are entitled to deference because the Legislature entrusted the Board as the expert agency with primary enforcement jurisdiction over claims arising under the ALRA. *See, e.g., Tex-Cal Land Management Co. v. ALRB* (1979) 24 Cal.3d 335, 346 (ALRB is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."); *ALRB v. Superior Court (Gallo Vineyards)* (1996) 48 Cal.App.4th 1489, 1506 ("The ALRB is the agency entrusted with the enforcement of the Act and its interpretation should be given great respect by the courts and followed if not clearly erroneous."); *Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 858-62 (courts must give "great weight" to the ALRB's interpretation of the Act); *San Diego Nursery v. ALRB* (1979) 100 Cal.App.3d 128, 140 (same).

With respect to the issue of the ALRB's ordered remedies, this Court has remarked that "the Legislature plainly intended to arm the ALRB with" not only "the full range of broad remedial powers traditionally exercised by the NLRB," but that "the drafters of the ALRA intended to broaden, not diminish, the ALRB 's remedial authority." *Highland Ranch, supra,* 29

Cal.3d at 865. Indeed, "the power to fashion and order backpay and other remedies is vested in the expert regulatory agency alone, not in the courts of the state." *Sandrini Bros. v. ALRB* (1984) 156 Cal.App.3d 878, 885. In light of the Board's broad authority to remedy unfair labor practices, the Board's remedial orders are to be upheld "unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." *Karahadian Ranches v. ALRB* (1985) 38 Cal.3d 1, 16; *Harry Carian v. ALRB* (1984) 36 Cal.3d 654, 674 (same).[4] The rationale for this rule is that "'the relation of remedy to policy is peculiarly a matter of administrative competence . . ." *Cardinal Distributing Co. v. ALRB* (1984) 159 Cal.App.3d 758, 778, citing *Jasmine Vineyards, Inc. v. ALRB* (1980) 113 Cal.App.3d 968, 982-983. "[Courts] must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Cardinal Distributing Co., Id.*, at 778.

[4] We previously noted the California Legislature's clear purpose in providing remedies to farmworkers that were denied to workers under the NLRA, through the provision of the "makewhole" remedy. See *supra*, at 2-3, fn.1, citing *Adam Dairy* (1978) 4 ALRB No. 24 at 4-5.

ARGUMENT

I. The Court Of Appeal Erred by Overturning the ALRB's Award of Makewhole Relief

A. Makewhole Relief Plays a Vital Role in Protecting Agricultural Employees

Labor Code section 1142 makes it the state's policy to "encourage and protect" the right of agricultural employees to full freedom of association, "to negotiate the terms and conditions of their employment" and "to be free from the interference, restraint, or coercion of employers . . . for the purpose of collective bargaining . . ." Lab. Code § 1142. The obligation of collective bargaining "is the core of the Act, and the primary means fashioned by Congress [and California] for securing industrial peace." *Int'l. Union of Electrical, Radio and Machine Workers v. NLRB* (D.C. Cir. 1970) 426 F.2d 1243, 1249, *citing NLRB v. American Nat'l. Ins. Co.* (1952) 343 U.S. 395, 402-404; *see also,* Lab. Code § 1142 .[5] "Enforcement of the obligation to bargain collectively is crucial to the statutory scheme." *NLRB v. American Nat'l. Ins. Co., supra,* 343 U.S. at 402.

Shortly after passage of the ALRA, this Court recognized the pernicious effect of employer delays, holding that when an employer engages in "dilatory tactics after a representation election, his action may

[5] The ALRB is directed by statute to follow "applicable precedents of the National Labor Relations Act." Lab. Code § 1148.

substantially impair the strength and support of a union and consequently employees' interest in selecting an agent to represent them in collective bargaining," thus undermining the statutory right to collective bargaining. *J.R. Norton Co., supra,* 26 Cal.3d at 30. When an employer refuses to bargain, "it commits an act which strikes at the very heart of the system of labor-management relations which the Legislature sought to create. It has thereby deprived the employees of the statutorily created right to be represented by their Board-certified agent in the negotiation of wages, hours, and other terms and conditions of their employment." *J.R. Norton, Id.* at 28, quoting *Perry Farms, Inc.* (1978) 4 ALRB No. 25, at 10; [6] *see also, F & P Growers, supra,* 9 ALRB No. 22, at 8 ("an employer's outright refusal to bargain, like a unilateral change in working conditions, constitutes a per se violation of its duty to bargain in good faith. Unlike some unilateral changes however, refusals to bargain are final and singularly destructive of the bargaining relationship.").

Without a makewhole remedy, the employer's violation of law "reaps" "avoidance of bargaining which he considers an economic benefit." *Int'l. Union of Electrical, Radio and Machine Workers, supra,* 426 F.2d at 1249, *citing Montgomery Ward & Co. v. NLRB* (6th Cir. 1965) 339 F.2d 889, 894. Indeed, "[e]mployee interest in a union can wane quickly as

[6] *Perry Farms* was reversed on other grounds by *Perry Farms, Inc. v. ALRB* (1978) 86 Cal.App.3d 448, but the language quoted was cited with approval by the *J.R. Norton* Court (see 26 Cal. 3d at 28, 30).

working conditions remain apparently unaffected by the union or collective bargaining." *J.R. Norton, supra*, 26 Cal.3d at 30. Therefore, without a makewhole award, an employer can "reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively." *Id.*, at 30.

Accordingly, California sought to "progressively" address the problem under the NLRA that employers were able to refuse to bargain, thereby weakening the certified union, while avoiding paying out collective bargaining benefits. *Adam Dairy, supra,* 4 ALRB No. 24 at 4-5. The makewhole remedy was adopted as a protective measure to "reduce the employer's financial incentive for refusing to bargain" and to provide "the salutary purpose of discouraging frivolous election challenges designed to stifle employees' self-organization [citations omitted]." *J.R. Norton, supra*, 26 Cal.3d at 31.

While the Board cannot automatically award makewhole in every case where the employer refuses to bargain (see *J.R. Norton*, 26 Cal.3d at 9), Labor Code section 1160.3 vests the Board with discretion to award makewhole "when the board deems such relief appropriate." Lab. Code § 1160.3.

B. The Court of Appeal Failed to Properly Defer to the ALRB's Expertise and Interpretation of the Act

The ALRB challenges the Fifth DCA's reversal of its makewhole order on the ground that the Court of Appeal failed to apply the proper deferential standard in reviewing remedial orders. ALRB Opening Brief on Merits at 24-41 (hereafter "ALRB Brief"). The ALRB's position is reasonable and supported by this Court's precedent.

The Courts and the Board have developed two standards that guide the Board's analysis in deciding whether to award makewhole. One standard, called the "*J.R. Norton* standard" applies *only* in cases involving a "technical refusal to bargain," where the employer is challenging the propriety of the election certifying a union as its employees' representative. See *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, 772. When an employer's refusal to bargain is not a technical refusal to obtain judicial review, but instead involves an illegal tactic, the *J.R. Norton* standard -- which examines good faith and reasonableness of the employer's position -- does not apply. *Id.,* at 772-773.

In the non-technical refusal to bargain case, the "*F & P Growers* standard" applies because "[n]o purpose of the ALRA would be served by insulating [employers] from responsibility for the losses caused by their unlawful failure to bargain." *Rivcom Corp., Id.,* at 772-773; *F & P Gowers Assn.* (1983) 9 ALRB No. 22 (establishing the standard), *aff'd. by F & P*

Growers Assn., supra, 168 Cal.App.3d 667. Under the *F & P Growers* standard, the Board determines whether makewhole is warranted on a "case-by-case basis," analyzing "the extent to which the public interest in the employer's position weighs against the harm done to employees by its refusal to bargain. Unless the litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees should ultimately bear the financial risk of its choice to litigate rather than bargain." *F & P Gowers Assn., supra,* 9 ALRB No. 22 at 8. The "reasonableness" of the employer's litigation posture and the employer's good faith do not control under this standard. *Id.*, at 7.

In this case, the Board correctly applied the *F & P Growers* standard, as acknowledged by the Court of Appeal. *Tri-Fanucchi*, 236 Cal.App.4th at 1097 ("Here, the Board explicitly followed the standard that was approved in *F & P Growers.*"). Tri-Fanucchi was not engaging in a technical refusal to bargain, because the underlying representation election was no longer in dispute. *Tri-Fanucchi, Id.*, at 1096 ("contrary to Fanucchi's characterization of its actions, the refusal to bargain was not technical (in the *J.R. Norton Co.* sense) because the validity of the representation election and original certification of UFW based on that election were not at issue.").[7] The Board found that Tri-Fanucchi's

[7] Contrary to clearly established case law, Tri-Fanucchi continually characterized its refusal to bargain as a "technical refusal," knowing that

justification for refusing to bargain was its claim that UFW "forfeited" the right to represent the employees because of its alleged "abandonment." CR 405. However, this was found by the Board to be "contrary to over 30 years of Board precedent holding that abandonment is not a defense to the duty to bargain." CR 405. Further, the Board noted that it previously rejected this same defense, asserted almost twenty years earlier by the same employer. CR 405. Based upon this clear precedent, and on the Board's assessment of the entire facts of the case, it found that makewhole was an appropriate remedy. CR 405-07.

As discussed *supra*, a court's review of an ALRB decision must "be given great respect by the courts and followed if not clearly erroneous." *ALRB v. Superior Court, supra,* 48 Cal.App.4th at 1506; *Tex-Cal Land Management Co., supra,* 24 Cal.3d 335, 346. This standard is even more deferential when a Board decision concerns a remedial order. An ALRB remedial order is to be upheld "unless it can be shown that the order is a

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"good faith" and "reasonableness of the employer's position" are considered under the *J.R. Norton* standard, but are irrelevant under the *F & P Growers* standard. *See, e.g.*, CR 26 (Oct. 19, 2012 Letter from Fanucchi counsel to UFW representative stating that Fanucchi "will engage in a technical refusal to bargain."); Tri-Fanucchi Petition for Review (Cal. Sup. Ct.), at 7 (characterizing its refusal as a "technical refusal to bargain"); Tri-Fanucchi Opening Brief (Cal. Sup. Ct.) at 1 ("TFF maintains that this case is unique in that it involves a technical refusal to bargain . . ."). It was not until Tri-Fanucchi filed its Answer to the ALRB's Petition for Review that it finally switched course and conceded that its refusal to bargain was not a "technical" one. Tri-Fanucchi Answer to ALRB Petition for Review (July 14, 2015) at 11, fn. 2.

patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." *Karahadian Ranches, supra,* 38 Cal.3d at 16; *Harry Carian, supra,* 36 Cal.3d at 674 (same).

While the Court of Appeal paid lip service to the idea of deferring to the ALRB's judgment on the makewhole order (*see* 236 Cal. App. 4th at 1088), the Court ignored the standard of review and overturned the Board's makewhole order without making the necessary finding that the Board was "patently" attempting to achieve ends other that those which effectuate the purposes of the Act. *See Tri-Fanucchi, supra*, 236 Cal.App.4th at 1097 ("With all due deference to the Board regarding ALRA policy issues, we believe the Board was *clearly wrong* in its legal conclusion . . .") (emphasis added). The Court's conclusion that the Board's order was "clearly wrong" does not comport with the standard set by this Court for overturning a remedial Board order, which requires that a reviewing court find that the ALRB order is a "patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." *Karahadian Ranches, supra,* 38 Cal.3d at 16; *Harry Carian, supra,* 36 Cal.3d at 674.

C. The Court Of Appeal's Decision Undermines The Primary Authority Of The ALRB To Enforce The ALRA

The ALRB also challenges the Fifth DCA's decision as undermining the Board's role as the expert agency with primary and exclusive jurisdiction to resolve unfair labor practices and to rule on representation

issues. ALRB Brief at 24-26. UFW agrees that overturning of the makewhole relief undermines the Board's proper place as the "expert agency" with primary responsibility to interpret the ALRA and enforce the law. In *Tex-Cal Land Management*, in resolving a broad attack on the judicial authority of the ALRB, this Court recognized the importance of the ALRB as "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings . . . courts do not possess and therefore must respect." *Tex-Cal Land Management, supra,* 24 Cal.3d at 346.

Under well-established preemption principles, the ALRB has primary exclusive jurisdiction over conduct which arguably involves practices covered, protected or prohibited under the ALRA, including remedies for violations. *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 68, citing *San Diego Unions v. Garmon* (1959) 359 U.S. 236. Importantly, preemption principles prohibit courts from deciding issues that are arguably best left to the decision of the ALRB. The preemption doctrine serves three critical purposes. It permits the ALRB to resolve issues within its area of expertise; it avoids burdening the courts with matters that are best left to administrative resolution; and it avoids inconsistent adjudications of the same issues.

In finding that the Board was "clearly wrong" in ordering makewhole, the Court of Appeal stated that the Board's decision "was

based solely on its . . . value judgment that Fanucchi's litigation of the abandonment issue herein . . . did not further the policies and purposes of the ALRA." *Tri-Fanucchi, supra*, 236 Cal.App.4th at 1097.[8] Despite the Court of Appeal taking judicial notice of its own prior unpublished decision awarding makewhole relief against the same employer for refusing to bargain (236 Cal.App.4th at 1086, fn.2) and despite the Court of Appeal's recognition that ALRB law in this area was settled (236 Cal.App.4th at 1097), the Court of Appeal reasoned that "no appellate court has (or had) decided the specific issue" and, therefore, that Tri-Fanucchi's litigation of the issue "was reasonably necessary and helpful" to unions and agricultural employers by resulting in a published decision.[9] The Court of Appeal thus retreated from its own unpublished decision 20 years earlier, in which it affirmed the Board's makewhole finding and conclusion that once the Board

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[8] The Board's decision was not solely a "value judgment;" rather the Board examined the history of the case, the fact that Fanucchi had asserted "abandonment" in refusing to bargain for the third time, the fact that the Fifth DCA had two decades earlier rejected the same defense, and the fact that Fanucchi was asserting a "technical refusal to bargain," when it was not challenging the underlying representation election.

[9] The Court neglected to discuss how a published decision was beneficial to the affected farmworkers who have been waiting more than 35 years for a collective bargaining agreement, especially in light of the fact that "the employer, not the employees, should ultimately bear the financial risk of [the employer's] choice to litigate rather than bargain." *F & P Growers Assn., supra,* 9 ALRB No. 22, at 8.

> "had clarified the exclusivity of the decertification process . . . the employer could claim no public interest in refusing to bargain based on good faith doubt of the Union's majority support, especially while its employees had sought no decertification or rival union election . . . Litigation of the claim . . . could not possibly further the policies and purposes of the ALRA."

Tri-Fanucchi Farms, supra, at 11-12 (Nov. 21, 1987, F008776) (nonpub. opn.); *Tri-Fanucchi, supra,* 12 ALRB No. 8 at 6-7.

In requiring that a published appellate decision is necessary to "resolve" an area of law under the ALRA, the Court of Appeal's decision upends the role of the Board to resolve disputes, essentially turning the ALRB into a meaningless servant to develop the record on disputes so that appellate courts can pronounce what the "real" body of law should be. [10] But this is precisely the result that should be avoided. As stated by the court in *UFW v. Superior Court* (1977) 72 Cal.App.3d 268, if appellate courts had the last say in what a settled area of law is "the Board would be replaced by *ad hoc* determinations by already overcrowded courts. The legislative effort to bring order and stability to the collective bargaining process would be thwarted. The work of the Board would be effectively impaired, its decisions similar in impression to that of a tinkling triangle

[10] Given that the Court of Appeal failed to acknowledge its prior decision on this issue as having "settled" the abandonment matter -- at least as to this employer -- it is clear that the Court of Appeal regards only a *published* appellate decision as resolving an issue under the ALRA. See *Tri-Fanucchi,* 236 Cal.App.4th at 1098 ("Therefore, Fanucchi's advancement of this litigation plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations *by obtaining an appellate decision* on this important issue.") (emphasis added).

practically unnoticed in the triumphant blare of trumpets." *UFW v. Superior Court* (1977) 72 Cal.App.3d 268, 271-272; *Tex-Cal Land Management, supra*, 24 Cal.3d at 346 (it is necessary to permit the ALRB to perform its judicial functions because if courts took the place of the Board, resolution of cases would take place "on a case-by-case basis" and would result in "a prolific source of the litigious delay that the Legislature indisputably sought to avoid."); *George Arakelian Farms, Inc. v. ALRB* (1989) 49 Cal.3d 1279, 1295 (rejecting a "procedural system that encourages successive reviews by appellate courts of questions that were previously decided.").

By replacing the Board's makewhole decision with its own findings and requiring a published appellate decision to "settle" an area of law, the Court of Appeal decision disrupts the scheme established by the Legislature for effective resolution of disputes under the ALRA. Indeed, under the Fifth DCA framework, it is easy to imagine employers adding new details in challenges that were never before considered in a published appellate decision, all under the guise of seeking to settle a "disputed" area of the law and to "further the purposes of the ALRA." Moreover, this rationale would encourage growers in different appellate districts to argue that if the appellate court in their district has not issued a published ruling on a subject matter, it is entitled to a challenge the Board's authority under the guise of

seeking a published decision from that district.[11] For this reason alone, the Court of Appeal's decision should be overturned, as it would invite endless litigation and delay.

In rejecting the Board's reasoned makewhole order, the Fifth DCA impermissibly substituted its own policy judgment for that of the Board. See *George Arakelian Farms v. ALRB* (1980) 111 Cal.App.3d 258, 282 ("We may not substitute our judgment for that of the Board in its area of special expertise . . .") citing *Abatti Farms, Inc. v. ALRB* (1980) 107 Cal.App.3d 317, 333; *J. R. Norton Co. v. ALRB* (1984) 162 Cal.App.3d 692 (Courts may not substitute their judgment for that of the Board on matters within the Board's discretion), citing *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111.

D. The Court of Appeal's Denial of Makewhole Conflicts With its Own Conclusion that Prior Judicial Decisions Resolved the "Abandonment" Issue

In rejecting Tri-Fanucchi's abandonment defense, the Fifth DCA cited to published appellate decisions decided thirty or more years ago holding that under the ALRA, a union remains "certified until decertified." *Tri-Fanucchi*, 236 Cal.App.4th at 1090, 1092. The Court of Appeal concluded that "[t]he Board's position [] on the abandonment issue as it

[11] This is precisely the position that Gerawan Farming took in its cases, arguing to the Fifth DCA that the *Hess Collection Winery* decision from the Third DCA was wrongly decided. See *Hess Collection Winery v. ALRB* (2006) 140 Cal. App. 4th 1584.

relates to the employer's duty to bargain is consistent with how California appellate courts have construed the ALRA . . . an employer's duty to bargain with the originally certified union *continues* until that union is replaced or decertified by a subsequent election." *Tri-Fanucchi, supra*, 236 Cal.App.4th at 1092 [citing *Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1; *F&P Growers, supra*; *Adamek & Dessert, Inc. v. ALRB* (1986) 178 Cal.App.3d 970 (underline added; emphasis in original)].

The Court of Appeal also cited with approval the language in *F & P Growers* that "Fanucchi's assertion of abandonment as an alleged defense to its duty to bargain is *clearly analogous to the loss of majority support defense* that was asserted by the employer in *F&P Growers. . . In light of the similar nature of the case at bench*, we believe that the same reasoning applies and the same result should follow. Thus, here, Fanucchi was not entitled to refuse to bargain with UFW . . ." *Tri-Fanucchi, Id.*, at 1093. (emphasis added).

Further, the Fifth DCA agreed with the *Montebello Rose* court's conclusion that if a union's neglect or inaction causes employees to be dissatisfied with the union, "the appropriate remedy is for the employees to pursue a decertification election." *Id.*, at 1092. "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." *Id.*, citing *Montebello Rose,*

supra, 119 Cal.App.3d at 28.

The Court of Appeal could not reasonably cite to *three published appellate decisions* and hold that the Board's abandonment decisions were "consistent with how California appellate courts have construed the ALRA" (236 Cal. App. 4th at 1092) and then, in its makewhole discussion, claim the abandonment issue was "unresolved" and that there was no published decision on the subject. In particular, the Court of Appeal's adoption of the "certified until decertified" rule expressed in the appellate decisions in *Montebello Rose, F & P Growers,* and *Adamek & Dessert, Inc.* -- decided more than thirty years ago -- do not square with the Court's reasoning that this was an unsettled area of the law. See *Tri-Fanucchi*, 236 Cal.App.4th at 1092 ("The Board's position [] on the abandonment issue as it relates to the employer's duty to bargain is consistent with how California appellate courts have construed the ALRA."); 236 Cal.App.4th at 1094 ("In light of the existing judicial construction of the ALRA as reflected in the Court of Appeal decisions noted above, the Board's position on this issue constituted a reasonable interpretation and application of the ALRA.").

Given that the Fifth DCA relied on published decisions in affirming the "certified until decertified" rule and rejecting the abandonment defense, its conclusion that there were no published decisions to guide the makewhole issue is without merit.

E. The Court of Appeal's Decision Rewards Tri-Fanucchi for Litigating and Violating the Law, at the Expense of its Employees

By denying makewhole to employees, the Court of Appeal decision rewards the employer who violated the law, at the expense of employees whose rights the statute is intended to protect. See ALRB Brief at 51-52. This is contrary to this Court's precedent. "[T]he employer, not the affected employees, should ultimately face the consequences of its choice to litigate the representation issues rather than bargaining with the employees in good faith." *George Arakelian, supra,* 49 Cal.3d at 1294-1295, citing *F & P Growers Assn., supra,* 168 Cal.App.3d at 682; *see also, F & P Growers Assn.,* 9 ALRB No. 22 at 8 (same).

The employer's abandonment claim is another in a long line of illegal actions taken to avoid a collective bargaining agreement with UFW. As discussed *supra*, the employer refused to bargain at the outset, asserted the abandonment "defense" three times before the ALRB and two times before the Fifth DCA, after having been ordered to pay makewhole the first time it did so. See *Tri-Fanucchi Farms, supra,* (Nov. 21, 1987, F008776) (nonpub. opn.); *Tri-Fanucchi Farms, supra,* 12 ALRB No. 8 at 9-10.

Indeed, despite claiming that it was engaging in a "technical refusal to bargain" (and insisting that UFW and the ALRB agree to stipulate it was a "technical refusal") (CR 26, 91-93), the Court of Appeal held that the employer's refusal to bargain was not a "technical" one. *Tri-Fanucchi*, 236

Cal.App.4th at 1096. Moreover, the 1987 unpublished decision from the Court of Appeal concluded the same. See *Tri-Fanucchi Farms v. ALRB, supra,* at 10, fn. 5 (Nov. 21, 1987, F008776) ("In the present case the refusal to bargain is not technical because the union's election and certification are not at issue.").

Therefore, the employer's litigation posture was not a good faith challenge, but a "repetitive litigation tactic" that justifies the imposition of a makewhole order. As explained by this Court in *George Arakelian Farms,*

> "elementary concepts of justice require that after one has been administratively and judicially determined to be a wrongdoer he must bear the perils and consequences his own wrong has created. Were we at this late date to determine that imposition of the make-whole remedy would be inappropriate . . . it is likely that [the employer's] employees would continue to suffer because of [employer's] repetitive litigation tactics. Such a result would be inconsistent with the purposes of the Agricultural Labor Relations Act . . . the employer, not the affected employees, should ultimately face the consequences of its choice to litigate the representation issues rather than bargaining with the employees in good faith."

George Arakelian Farms, supra, 49 Cal.3d at 1294-1295.

Finally to the extent the Court of Appeal concluded that its decision to deny makewhole "promotes" the purposes of the ALRA by providing "greater stability in labor relations" (236 Cal. App. 4th at 1098), the present record does not reveal stable labor relations. Rather, it reveals a history of refusing to bargain by Tri-Fanucchi and rebuffing any collective bargaining efforts made by UFW. At the same time, the Court's decision ignored two *more* important purposes of the ALRA: collective bargaining and employee

free choice. See Lab. Code § 1142. The record reveals a repetitive pattern by Tri-Fanucchi to avoid bargaining at all costs; the Court's decision does nothing to remedy Fanucchi's repeat offender status. In addition, it is clearly established that "agricultural employees have the exclusive responsibility for exercising and protecting their own free choice under the ALRA." *F & P Growers*, 9 ALRB No. 22 at 9 (underline in original); *see also, Montebello Rose, supra,* 119 Cal.App.3d at 24-25 (employer's duty to bargain with certified union does not lapse "until such time as the union is officially decertified").. There is no "public benefit derived from [Fanucchi's] refusal, as decertification by the employees is less disruptive and, as a matter of law, the exclusive approach" to getting rid of a union. *F & P Growers, supra*, 9 ALRB No. 22 at 10. No purpose of the ALRA would be served "by insulating [Fanucchi] from responsibility for the losses caused by [its] unlawful failure to bargain." See *Rivcom Corp., supra,* 34 Cal.3d at 772-773

Here, the Court never considered the harm to the employees of having voted for UFW representation and never realizing their goal of a collective bargaining agreement because of the employer's repeated refusals to bargain.[12] The ALRA's more important goals of free choice and collective bargaining were never considered by the Court.

[12] The fact that the Court substituted its judgment for that of the Board is highlighted by the fact that it did not remand the matter to the Board for

F. The Court Of Appeal Improperly Accepted Fanucchi's Allegations Of Abandonment As True

The Court of Appeal's results-oriented efforts to shield Tri-Fanucchi from a makewhole award are further highlighted by the fact that although there is no evidentiary record about UFW's alleged "abandonment," the Court accepted as true Tri-Fanucchi's *allegation* that UFW abandoned the workers for 24 years, and suggested that a denial of makewhole is an appropriate "punishment" against UFW. There is no dispute that evidence was not taken by the ALRB on the question of abandonment. *See, e.g.*, Tri-Fanucchi Opening Brief (5th DCA) at 6 ("TFF was not afforded an opportunity to present evidence at the ALJ's hearing or present any type of defense . . ."); Tri-Fanucchi Opening Brief at 8 (hereafter "TFF Brief") (the Board "*refused to allow Fanucchi to have an evidentiary* hearing to cross-examine UFW subpoenaed witnesses regarding whether the UFW had completely abandoned it employees during the twenty-four (24) years . . .) (emphasis added); ALRB Petition for Review at 9, fn. 3 ("Because the case was decided via dispositive motion, the ALRB *assumed* that the facts

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further proceedings. Ordinarily, if the Board errors in a makewhole decision, the matter is remanded to the Board for resolution based on the reviewing court's decision. *See, e.g., J.R. Norton, supra*, 26 Cal.3d at 38-39 ("Because the Board applied the wrong standard . . . the case must be returned to the Board so that it can apply the proper standard."); *William Dal Porto & Sons, Inc. v. ALRB* (1987) 191 Cal.App.3d 1195, 1212-14 ("the case ordinarily should be referred to the Board so it may reconsider its decision.").

alleged concerning this period of inactivity were true . . .") (emphasis added).

Despite the fact that no evidence was taken on the abandonment issue, the Court's opinion is littered with findings that UFW *in fact* abandoned the workers at Tri-Fanucchi. For example, the Court stated that "*for reasons UFW has not explained*, no bargaining occurred between 1988 and 2012, a period of 24 years." *Tri-Fanucchi*, 236 Cal.App.4th at 1083 (emphasis added). The Court also found that Tri-Fanucchi's litigation of the abandonment issues was "premised on UFW's 24 years of inactivity." *Id.*, at 1097. Finally, the Court concluded that the courts would clearly be concerned "that a union has apparently disregarded its statutory responsibilities to a bargaining unit for over two decades, *as occurred here*;" something which the Court characterized as "extreme dereliction." *Id.*, at 1098, fn. 2 (emphasis added).

Given that no evidence was taken on the abandonment issue, it was improper for the Court of Appeal to find that UFW in fact abandoned the workers, and to reverse the Board's makewhole order based on a judgment concerning that error.[13] As pointed out by the ALRB in its brief, the Board

[13] To the extent that Tri-Fanucchi claims it knows UFW had no contact with its workers, that claim should be rejected as having no evidentiary support. An employer would not be a in a position to know if the Union was making contact with workers outside of their place of employment, unless the employer engaged in unlawful interrogation of its employees.

does not have the authority to "punish" the UFW for any alleged abandonment, primarily because that would serve to deprive workers of their collective bargaining rights, and secondarily, because no charge was ever filed against UFW for its alleged abandonment. ALRB Brief at 53-54.[14]

II. The Court of Appeal Correctly Ruled That Employers May Not Refuse to Bargain With a Certified Union

Tri-Fanucchi argues that permitting employers to refuse to bargain by asserting an abandonment "defense" promotes "the fundamental legislative purposes of the ALRA" of collective bargaining and employee "freedom of choice." TFF Brief at 15-22. This claim has no support in the language, purpose, or judicial interpretation of the ALRA. Moreover, the Legislature has amended the ALRA in reliance on clear precedent that employers cannot assert an abandonment defense to the duty to bargain. Accordingly, the Court of Appeal was correct in affirming the Board's decision that Tri-Fanucchi's refusal to bargain with the certified union was an unfair labor practice.

Labor Code section 1153 makes it unlawful for an employer to interrogate its employees about their union activity.

[14] The Court's suggestion that denial of makewhole is a proper remedy or punishment for UFW's "extreme dereliction" also ignores the fact that the ALRA can only remedy conduct occurring within six months of the filing of a charge. Lab. Code § 1160.2 ("No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board . . .").

A. The ALRA Expressly Prohibits Refusals to Bargain

It is the state's policy is to "encourage and protect" the right of agricultural employees to free choice and "to negotiate the terms and conditions of their employment." Lab. Code § 1142. To promote this policy, the ALRA expressly prohibits employers from refusing to bargain. Lab. Code § 1142; § 1153(a) and (e). The obligation of collective bargaining "is the core of the Act, and the primary means fashioned by Congress [and California] for securing industrial peace." *Int'l. Union of Electrical, Radio and Machine Workers, supra,* 426 F.2d at 1249; *see also,* Lab. Code § 1142 .[15] Enforcement of the obligation to collective bargaining is "crucial to the statutory scheme." *NLRB v. American Nat'l. Ins. Co., supra,* 343 U.S. at 402.

When an employer refuses to bargain with the certified representative of its employees, it "deprives the employees of the statutorily created right to be represented by their Board-certified agent in the negotiation of wages, hours, and other terms and conditions of their employment." *J.R. Norton, supra,* 26 Cal. 3d at 28; *see also, F & P Growers, supra,* 9 ALRB No. 22, at 8 ("refusals to bargain are final and singularly destructive of the bargaining relationship.").

[15] The ALRB is directed by statute to follow "applicable precedents of the National Labor Relations Act." Lab. Code § 1148.

Because collective bargaining is the cornerstone of the ALRA, Labor Code section 1153(e) makes it an unfair labor practice for an employer "[t]o refuse to bargain collectively in good faith with labor organizations certified pursuant" to the ALRA. Lab. Code § 1153(e). Section 1153(e) provides no exceptions that excuse an employer from complying with its duty to bargain. Had the Legislature wanted to provide exceptions to the duty to bargain, it certainly would have done so. *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 423 ("the Legislature clearly knows how to establish" statutory exceptions "if it so desires."); *Cal Fed. Savings & Loan Assn. v. Los Angeles* (1995) 11 Cal.4th 342, 349 (Courts assume the Legislature knows "how to create an exception if it wished to do so.").

B. The ALRA Provides Only Two Statutory Bases for a Union to be Decertified

Under the plain text of the ALRA, there are two exclusive methods by which a union can be decertified: (1) either through a secret ballot election initiated by employees, resulting in the decertification or replacement of a union; or (2) decertification by the Board if a union is found to have violated federal or state anti-discrimination laws. Lab. Code § 1156.3(a)-(e);[16] § 1156.3(h). The ALRA does not contain any language that permits an employer to initiate a decertification procedure through the

[16] In *Cattle Valley Farms* (1982) 8 ALRB No. 24, at 7, the Board clarified that the decertification procedures in Labor Code § 1156.3(a) apply where there is a certified representative, but no current collective bargaining agreement.

assertion of 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). This has been confirmed by both the ALRB's decisions and appellate court decisions.

Under the Board's longstanding "certified until decertified" rule, a union continues to enjoy its representative status until it loses this status through a secret ballot election. *See, e.g., Nish Noroian Farms* (1982) 8 ALRB No. 25, at 15-16 ("[o]nce a union representative has been certified it remains the exclusive collective bargaining representative of the employees in the unit until it is decertified . . . The duty to bargain, which springs from certification, will be terminated only with the certification of the results of a decertification . . . election where the incumbent has lost"); *Dole Fresh Fruit,* 22 ALRB No. 4, at 15 (rejecting abandonment defense and explaining that a "certified bargaining representative[] remain[s] certified until decertified by the employees themselves in either a decertification or rival union election"). [17]

[17]ALRB cases for more than 30 years have rejected various employer "abandonment" defenses in affirming the "certified until decertified" rule. *See, e.g., Lu-Ette Farms* (1982) 8 ALRB No. 91, at 8; *Tri-Fanucchi, supra,* 12 ALRB No. 8, at 9; *Bruce Church, Inc.* (1991) 17 ALRB No. 1, at 44; *Ventura County Fruit Growers* (1984) 10 ALRB No. 45, at 11-12; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, at 10-11; *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5 at p. 3; *Arnaudo Bros., LP* (2014) 40 ALRB No. 3, at 9-12.

The Board's "certified until decertified" rule has been judicially approved by *Montebello Rose*, *F & P Growers*, and *Adamek & Dessert*. See *Montebello Rose, supra,* 119 Cal.App.3d at 24-25 (employer's duty to bargain with certified union does not lapse "until such time as the union is officially decertified"); *Adamek & Dessert, supra,* 178 Cal.App.3d at 983 ("the company has a duty to bargain with the union until the union is decertified through a second election.").

In *F & P Growers Assn.*, in an exhaustive discussion on the subject, the Court squarely rejected the idea that an employer can have even a peripheral role in deciding whether it should bargain with a union or not. Its discussion of the issue contains the following conclusions:

> (1) Differences between the ALRA and NLRA "shows a purpose on the part of the Legislature to prohibit the employer from being an active participant in determining which union it shall bargain with in cases arising under the ALRA." *F & P Growers, supra,* 168 Cal.App.3d at 676.
>
> (2) "[I] it does appear that the Legislature's purpose in enacting the ALRA was to limit the employer's influence in determining whether or not it shall bargain with a particular union. Therefore, to permit an agricultural employer to . . . avoid bargaining with an employee chosen agricultural union indirectly would give the employer influence over those matters in which the Legislature clearly appears to have removed employer influence." *Id.,* at 676-677.
>
> (3) "Our conclusion is consistent with the court's reasoning in *Montebello Rose Co.* . . . Again the Legislature had shown its purpose was to provide employees, and not employers, a method for changing unions." *Id.,* at 677.

(4) "the workers may be especially unable to bargain with the employer, without the assistance of a union, and there is all the more reason for the Legislature to decide to remove the employer from any peripheral participation in deciding whether to bargain with a particular union. To allow the employer to [refuse to bargain] would permit the employer in effect to act as though the union were in fact decertified . . . even though under the ALRA it is clear that the employer may not initiate certification or decertification proceedings." *Id.*

Therefore, the employer has no role in challenging a union's representative status.

The Fifth DCA correctly applied the reasoning of *F & P Growers, Adamek & Dessert, Montebello Rose* and ALRB precedent in rejecting Tri-Fanucchi's abandonment defense, finding that "the existing judicial construction of the ALRA as reflected in the Court of Appeal decisions noted above . . . constitute[] a reasonable interpretation and application of the ALRA." *Tri-Fanucchi*, 236 Cal.App.4th at 1094.

C. Employers Can Have No Role in the "Protection" of Employee Rights

Fanucchi claims that employers should be permitted to stand as protectors for employee rights, arguing that employees are too unsophisticated or lack funding and resources to "disseminate information, organize a decertification drive, and petition for and hold an election." TFF Brief at 19-22. Fanucchi claims it is "absurd" to expect employees to pursue a decertification election on their own. *Id.*, at 19.

Fanucchi's claim has no merit and has been repeatedly rejected by the ALRB and numerous courts. *F & P Growers*, 9 ALRB No. 22 at 9 ("agricultural employees have the exclusive responsibility for exercising and protecting their own free choice under the ALRA.") (underline in original); *Montebello Rose,* 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 . . ."). As stated by the court in *F&P Growers,* the Legislature's "clear purpose" in precluding employers "from active participation in choosing or decertifying a union" "certainly overrides any paternalistic interest of the employer" in asserting it is protecting employee rights. *F & P Growers*, 168 Cal.App.3d at 678.

D. The History of the ALRA and ALRB Decisions Do Not Support Recognition of an Abandonment Defense

Tri-Fanucchi argues that the history of the ALRA and early ALRB decisions support an employer's right to assert an abandonment defense. TFF Brief at 22-30. In support of this claim, Fanucchi distorts the holdings in *Englund v. Chavez, Bruce Church,* and *Dole Fresh Fruit*, all of which support a contrary position -- that abandonment is not recognized by the ALRA as a basis to refuse to bargain.

1. This Court's Decision in *Englund v. Chavez* Does Not Support Fanucchi's Position

Tri-Fanucchi claims that *Englund. v. Chavez* (1972) 8 Cal.3d 572, supports recognizing an abandonment defense. TFF Brief at 22, 41-42.

According to Fanucchi, the *Englund* court "refused to uphold collective bargaining agreements that were forced upon unwilling employees after being negotiated by a union that did not have the support of those employees." TFF Brief at 22. This is not an accurate statement of the holding in the that case.

As an initial matter, the *Englund* decision offers little help to Tri-Fanucchi because it was decided almost three years prior to the enactment and effective date of the ALRA. The *Englund* court was therefore not interpreting the language of the ALRA, as the Court remarked that at the time "California has never adopted a comprehensive, administrative regulatory system for resolving labor disputes . . . to date our Legislature has rejected all attempts to establish an administrative apparatus comparable to that of the National Labor Relations Board." *Englund, supra*, 8 Cal.3d at 584. Instead, *Englund* interpreted the applicability of the Jurisdictional Strike Act (Lab. Code § 115 et seq.), and whether an employer who grants recognition to a union which he knows does not enjoy majority support from employees, could use the Jurisdictional Strike Act to obtain injunctive relief against the strike activities of a competing union. *See, Id.*, at 572, 585-586.

During pre-ALRA organizational activities in 1970, in order to avoid UFW representation and contracts with UFW, vegetable growers in the Salinas and Santa Maria valleys recognized the Teamsters union and signed

"sweetheart" contracts with them, knowing that workers did not support the Teamsters. The recognition and sweetheart contracts led to bitter disputes between UFW, and the growers/Teamsters, and led to growers trying to enjoin UFW's strike activities. See *Englund, Id.*, at 576-83; *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 224-25. Contrary to Tri-Fanucchi's claim, the *Englund* court did not strike down either the recognition of the Teamsters union or the agreements entered into between the Teamsters and the growers. Rather, the Court simply held that because the recognition of the Teamsters by the growers constituted illegal "interference" under the Jurisdictional Strike Act, the employers could not use the injunction provisions to stop UFW's strike activities. *Englund, supra*, 8 Cal.3d at 587-98.

While the *Englund* case formed an important backdrop in the legislative history of the ALRA, the most important provisions arising out of the Teamsters "sweetheart" contracts were the ALRA's proscription of "voluntary recognition" of a Union (see Lab. Code § 1153(f)),[18] and in its place, the "worker-initiated" secret ballot election as the only means to certify a union. In drafting the ALRA, the Legislature intentionally excluded employers from having any role in deciding whether employees should be represented, or who they should be represented by. See *Harry*

[18] Lab. Code § 1153(f) makes it illegal for an employer to "recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified" pursuant to a secret ballot election.

Carian, supra, 39 Cal.3d at 225-26 (the drafters of the ALRA stressed the "importance of having worker-initiated secret elections" and not permitting employers to call for elections); *F & P Growers Assn., supra*, 168 Cal.App.3d at 673-74 (discussing that ALRA, unlike NLRA, does not permit employers to file election or decertification petitions). To the extent that *Englund* is instructive on the question of abandonment, its history demonstrates that the Legislature was specifically concerned with preventing employer involvement and coercion in the representation process, and thus supports the ALRA's rejection of the abandonment defense.[19]

2. The ALRB's *Bruce Church* and *Dole Fresh Fruit* Decisions Reject The Abandonment Defense

Tri-Fanucchi claims that in *Bruce Church* and *Dole Fresh Fruit*, the Board "had held that an employer's bargaining obligation may cease when a union is found to have totally abandoned the bargaining unit for a period of time." TFF Brief at 23. Fanucchi goes so far as to claim that in the ALRB cases following *Bruce Church* and *Dole*, "the Board arbitrarily began narrowing the circumstances under which an employer could demonstrate abandonment." TFF Brief at 31. However, because both *Bruce Church*

[19] Fanucchi makes the related claim that the MMC procedures provided in the ALRA can serve to bypass the employees through the imposition of a contract without their consent. TFF Brief at 42. However, the MMC provisions do not in any way impact the right of employees to seek to decertify a union under Labor Code section 1156.3, and in this case, Fanucchi employees have not validly sought to decertify the UFW.

and *Dole* are consistent in their rejection of the abandonment defense, Fanucchi's claims are without merit.

In its brief, Tri-Fanucchi repeatedly cites from the ALJ decision in *Bruce Church* and misrepresents that the ALJ decision is the Board's decision when in fact, the Board's decision expressly states that the ALJ's rulings were affirmed only "insofar as they are consistent with the decision herein." *Bruce Church, supra*, 17 ALRB No. 1, at 2.[20]

Contrary to Tri-Fanucchi's claims, *Bruce Church* does not support the existence of an abandonment defense. Rather, it affirmed the Board's long-standing "certified until decertified" rule and found only that a union's "dilatory and evasive" conduct could serve to excuse an employer's unilateral changes in terms and conditions of employment after the employer sought to bargain about those changes. *Bruce Church*, 17 ALRB No. 1, at 9-10, 20. In other words, if an employer sought to bargain with a union, and the union did not respond to the request or evaded bargaining,

[20] Tri-Fanucchi presents the ALJ decision as the Board's decision at the following pages in its brief: 11, 24-26, 28, 30-31, and 39. For example, Fanucchi writes that "'the Board recognized that although it does not utilize the doctrine of good faith doubt applicable under the NLRA, it 'nevertheless retained the doctrine of abandonment as an exception to its usual certified until decertified rule.' (*Bruce Church, supra,* 17 ALRB No. 1 at 43, 44)." TFF Brief at 24. However, the Board's *Bruce Church* majority decision only covers 20 pages. The language Fanucchi cites appears at *pages 43-44 of the ALJ decision*, which is appended to the Board's decision. That language was not adopted in the Board's decision.

the employer would be privileged to make unilateral changes, without fear of being found to have committed an unfair labor practice. *Id.*, at 20.

The *Bruce Church* Board only minimally discussed abandonment, while affirming the certified until decertified rule. *Id.*, at 9 - 10. The Board remarked that abandonment has been defined as "a showing that the Union was either unwilling or unable to represent the bargaining unit," or "had left the scene altogether." *Id.* In deciding whether there had been unwillingness or inability to represent the bargaining unit, the ALRB found that there was no evidence of disclaimer by UFW and that the "UFW was [obviously] not defunct." *Id.*, at 10, fn.5.[21]

The conclusion in *Bruce Church* that "disclaimer" and "defunctness" are the only exceptions to the certified until decertified rule is consistent with both prior and subsequent ALRB decisions.[22] *See, e.g., Dole, supra,* 22 ALRB No. 4, at 15 (Board does not "recognize the concept of 'abandonment' beyond that already present in Board case law, i.e., where

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[21] Tri-Fanucchi's brief at pages 24-26 contains a long discussion of what it says is the Board's explanation of the "interrelatedness between the concepts of defunctness, disclaiming interest, and abandonment." TFF Brief at 24. However, Fanucchi actually discusses the ALJ decision -- not the Board decision. Therefore its representation that the ALJ language is the Board's "explanation" of abandonment is error.

[22] The Board's pronouncement of the disclaimer and defunct exceptions to the certified until decertified rule first came in *Lu-Ette Farms. Lu-Ette Farms* (1982) 8 ALRB No. 91 at 5 ("Once a union has been certified, it remains the exclusive collective bargaining representative of the employees in the unit until it is decertified or a rival union is certified, or until the union becomes defunct or disclaims interest in continuing to represent the unit employees.").

certified labor organizations *become inactive by becoming defunct or by disclaiming interest* in continuing to represent the bargaining unit. In all other circumstances, certified bargaining representatives remain certified . . .") (emphasis added); *Arnaudo Bros, LP, supra*, 40 ALRB No. 3 at 10, fn.2 ("We note it is clear from Board decisions issued since *Bruce Church, Inc.* that 'unwilling or unable' means disclaimer or defunctness. There is no broader application of the phrase 'unwilling or unable.'"). Accordingly, *Bruce Church* does not support Fanucchi's arguments.

Fanucchi's claim that *Dole* recognizes an abandonment defense (TFF Brief at 26) is even more curious, given that the *Dole* Board exhaustively discussed the issue, and expressly rejected the availability of any kind of abandonment defense. In *Dole,* the Board said that the ALRA "does not recognize the concept of 'abandonment.'" *Dole,* 22 ALRB No. 4, at 15.[23] And the *Dole* decision expressly found that it was for the Legislature, and not the Board, to amend the ALRA to provide an abandonment procedure. *Id.*, at 16 ("The Board does not have authority to create a process which is inconsistent with the Act as it is now written."). While the Board did discuss that it would "hold[] accountable labor representatives" for "absence of conduct" (*Dole, Id.*, at 17), it immediately explained what it meant, when it said that a union's inactivity could serve as

[23] The Board has held that a union is "defunct" when it is "institutionally dead and unable" to represent the employees. *Arnaudo Bros, LP, supra*, 40 ALRB No. 3 at 11.

a basis to find that the union illegally refused to bargain under Labor Code § 1154(c), and that such inactivity could be a "waiver of the right to bargain over proposed changes in terms and conditions of employment." *Id.*, at 18. To the extent that Fanucchi argues that under *Dole*, a union can lose its certification status through inactivity, the Board's express language plainly rejects that.

Finally, Fanucchi complains about the ALRB's finding in *Dole* that it makes no sense "for an employer to attempt to defend its refusal to bargain . . . immediately after the union has come forward with an affirmative request to bargain." See *Dole*, 22 ALRB No. 4 at 11. According to Fanucchi, the *Dole* Board did not intend to find that abandonment is a "factual impossibility" under those circumstances, because it did not end its inquiry into abandonment upon reaching that conclusion. TFF Brief at 27, fn.4.

However, the *Dole* conclusion is consistent with other ALRB decisions finding that abandonment is a factual impossibility when a union is presently asserting its bargaining rights. For instance, in *Ventura County Fruit Growers, supra*, 10 ALRB No. 45, the ALRB held that abandonment cannot exist if the incumbent union demonstrates its willingness and ability to represent the unit employees "*at the time its status is called into question.*" *Ventura County Fruit, Id.*, at 7 (emphasis added). The Board reasoned that "[e]ach time the Union requested bargaining, it thereby

affirmatively notified [the employer] of its desire and intent to actively represent unit employees in the conduct of negotiations . . . [the] abandonment theory was a factual impossibility." *Id.*, at 7 – 8; *see also*, *Tri-Fanucchi, supra*, 12 ALRB No. 8, at 9 (by its "recurrent requests for bargaining, the Union 'affirmatively notified Respondent of its desire and intent to actively represent unit employees in the conduct of negotiations.'"); *Arnaudo Bros, supra*, 40 ALRB No. 3 at 12, fn.3 (reaffirming that abandonment theory is a "factual impossibility" when an employer is faced with a union's request to bargain).

3. Existing Case Law Does Not Support an Abandonment Defense

Tri-Fanucchi argues that under *Montebello Rose*, there exists a "rebuttable presumption that a certified union continue[s] to enjoy majority support," and that an employer can rebut the presumption of majority support through an abandonment defense. TFF Brief at 33-34. Fanucchi's argument is premised on the erroneous claim that the *Montebello* court misconstrued the Board's holding in *Kaplan's Fruit, supra*, 3 ALRB No. 28.

Fanucchi argues that the *Montebello* court "inaccurately summarized" *Kaplan's Fruit.* According to Fanucchi, the *Montebello* court meant only to say that the duty to bargain continues after "the initial certification year," not until the "union is officially decertified." TFF Brief

at 34, fn.6. In essence, Fanucchi's argument here is that *Montebello* did not mean what it said when it ruled that the duty to bargain continues "until the union is officially decertified." See *Montebello Rose*, 119 Cal.App.3d at 24. However, the *Montebello* court accurately represented the holding in *Kaplan's* in affirming the certified until decertified rule.

In *Kaplan's* the Board found that there is no need for unions to repeatedly seek reaffirmance of their certification. *Kaplan's Fruit, supra*, 3 ALRB No. 28, at 6 ("We fail to see the need to commit our resources to a process of ritual reaffirmance of certifications in cases where employees are satisfied with their representatives."). Instead, the *Kaplan*'s Board concluded that an employer's "duty to bargain" continues "no matter how long its duration," (*id.* at 7) and rejected "the idea that requiring an employer to continue to meet and confer with a union prejudices it in any way" because "it is the policy of this state that an employer has this obligation [to bargain] whenever his employees have properly designated their representative." *Id.*, at 7-8. Contrary to Tri-Fanucchi's claim, the *Montebello* court accurately represented the holding in *Kaplan's* when it held that an employer's duty to bargain continues "until the union is officially decertified." See *Montebello Rose*, 119 Cal.App.3d at 24. The Fifth DCA properly relied on *Montebello Rose* in rejecting the abandonment defense.

Fanucchi also incorrectly claims that the "rebuttable presumption"

discussed by *Montebello Rose* necessarily means that an employer can play a role in rebutting the presumption. TFF Brief at 34-35. However, this is an incorrect statement of the law. To the extent the ALRA has adopted a "rebuttable presumption," that presumption can only be rebutted by *employees* -- either by decertifying the present union, or by replacing it with another union, and only through a secret ballot election. This is the embodiment of the "certified until decertified" rule. *See, e.g., Nish Noroian Farms, supra*, 8 ALRB No. 25, at 15-16; *F & P Growers*, 168 Cal.App.3d at 678 (it is "legislative policy" that "unions be chosen solely by employees and not by employers."). Fanucchi's argument that an employer can play a part in challenging the Union's representative status has been plainly rejected by ALRB cases for over 30 years and by *Montebello Rose*, *F & P Growers*, *Adamek & Dessert*, and the Court of Appeal in this case.

4. The Fifth DCA Properly Applied the *F & P Growers* Decision

Tri-Fanucchi argues that the Fifth DCA "erroneously deferred to *F & P Growers*, whose analysis is inapplicable" to this case. TFF Brief at 35-40. The crux of Fanucchi's attack is its claim that abandonment is a distinct defense from an employer's "good faith doubt" that a union has lost its majority support. See TFF Brief at 37 ("Fanucchi's abandonment defense *is not analogous* to the loss of majority defense scrutinized in *F & P Growers*.") (emphasis added). Fanucchi's claim is inconsistent with its

prior briefing on this matter, and in any event, is incorrect as a matter of law.

In its Opening Brief before the Fifth DCA, Tri-Fanucchi wrote that "abandonment is a narrow theory within the broader area of good faith doubt, which includes many theories such as loss of majority status . . . Thus, cases concerning good faith doubt where there are factors indicating that a union has abandoned a unit provide guidance in resolving the issue at hand." Tri-Fanucchi Opening Brief (5th DCA) at 15. This was the same position Fanucchi took before the ALRB. *See, e.g.*, CR 193 (Tri-Fanucchi's Brief I/S/O Exceptions to ALJ Decision).

The Fifth DCA accepted Fanucchi's argument that "good faith doubt" and abandonment were related "defenses," but rejected the claim that abandonment could be asserted as a defense to bargain. *Tri-Fanucchi*, 236 Cal.App.4th at 1093 ("Fanucchi's assertion of abandonment as an alleged defense to its duty to bargain is clearly analogous to the loss of majority support defense that was asserted by the employer in *F & P Growers*."). Having lost this argument before the Fifth DCA, Tri-Fanucchi's about-face should be rejected by this Court. At all times until now, Fanucchi took the position that "abandonment is a narrow theory within the broader area of good faith doubt." It cannot now change its argument because it did not like the result it obtained in the Court of

Appeal.[24]

Moreover, for the reasons expressed by the Fifth DCA and the ALRB in this case, abandonment *is* related to the "good faith doubt" defense recognized by the NLRB, because both constitute an employer's challenge to the continuing representative status of a union. And because the Legislature "did not intend for an agricultural employer to participate in deciding whether or not it shall bargain with a particular union . . . the employer [cannot] refuse to bargain with a union" based on either a loss of majority support or based on alleged abandonment. *Tri-Fanucchi*, 236 Cal.App.4th at 1093.

Finally, to the extent that abandonment is to be treated as a defense completely "independent" from "good faith doubt," Fanucchi's argument must be rejected because it essentially reduces to the proposition that even though *F & P Growers* rejected the whole of the defense (i.e. "good faith doubt"), it has not rejected a part of the defense. This argument is untenable.

5. The ALRB's Interpretation of the Act Was Accepted by the Legislature

Tri-Fanucchi's argument is also contrary to the longstanding principle that when the Legislature amends a statute without altering

[24] Because Fanucchi's current position was not raised before the ALRB or the Fifth DCA, its argument should be deemed waived. *Lindeleaf v. ALRB* (1986) 41 Cal.3d 861, 869-70.

portions of a provision that has been judicially construed, "it is presumed to have been aware of and acquiesced in the previous judicial construction." *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734; *see also, Thornton v. Carlson* (1992) 4 Cal.App.4th 1249, 1257 ("The Legislature is presumed to be aware of long-standing administrative practice . . . If the Legislature . . . makes no substantial modifications to the act, there is a strong indication that the administrative practice [is] consistent with the legislative intent."); *Gibson v. Unemployment Insurance Appeals Bd.* (1973) 9 Cal.3d 494, 498 fn. 6, citing *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 756 (a "settled administrative construction of a statute must be given great weight."). Indeed, although there is existing statutory language giving the Board express authority to decertify a union (see Lab. Code § 1156.3(h)(1) and (2)),[25] the Legislature has amended the ALRA numerous times since the Board's pronouncements on abandonment, and has not changed the procedure by which a union may be decertified.

In *Dole Fresh Fruit Co., supra,* 22 ALRB No. 4, after rejecting the abandonment defense, the Board remarked that it was for the Legislature to amend the ALRA if it felt the need to create an abandonment defense. The Board stated that it could not

"extend its present regulations or case law precedents in regards to

[25] The Board can decertify a union when the union has been found to have violated either state or federal anti-discrimination laws. Lab. Code §§ 1156.3(h)(1) and (2).

> initiating an abandonment procedure without distorting the express directives of the ALRA and invading the province of the Legislature. Since California is a code state, the power to enact and amend statutes is constitutionally entrusted to the Legislature and not to the judiciary or any quasi-judicial subdivision of the executive branch. Thus . . . the Legislature [] is [where] employers must look. The Board does not have authority to create a process which is inconsistent with the Act as it is now written."

Dole, Id., at 16. Despite this express language from the Board that it was the Legislature's province to change the *status quo*, the Legislature has not done so.

In 2002, the Legislature added Labor Code sections 1164-1164.13, the Mandatory Mediation and Conciliation (MMC) provisions being challenged in *Gerawan Farming, Inc. v. ALRB* (S227243). The MMC was enacted to cure what were called "lost decades" during which the purpose of the Act to provide collective bargaining rights was not fulfilled. Proponents of the law asserted that "this bill is necessitated by the continued refusal of agricultural employers to come to the bargaining table once an election has occurred" and that "enforcement [of the ALRA] in the '80s and '90s was almost non-existent and bad faith bargaining became the rule rather than the exception." Off. of Assem. Floor Analyses, 3rd Reading of SB 1156 (2001-2002 Reg. Sess.), Aug. 31 2002, pp. 7-8; Off. of Assem. Floor Analysis, conc. in Sen. Amendments of Assem. Bill No. 2596 (2001-2002 Reg. Sess.) Aug. 31, 2002, pp. 6-7. The requirements for seeking MMC do not include a threshold for union activity during the "lost

decades" where no agreement was reached. See Lab. Code § 1164.11.

The Legislature also amended the ALRA in 2011 through the addition of Labor Code section1156.3(f) [added by Stats. 2011, Senate Bill 126]. Under section 1156.3(f), the Board may now certify a union as the representative for employees in cases where it finds that the employer engaged in misconduct that affected the results of the election and that such misconduct would render "slight" the chances of a new fair election. Lab. Code. 1156.3(f). The Legislative history reveals that this section was added by the Legislature to address the problem of employers "coercing" employees during elections, with the Board having no tool to remedy this misconduct. See *Giumarra Vineyards Corp.* (2006) 32 ALRB No. 5, at 5 ("due to the lack of any sanctions other than setting aside the election, there is no method for removing the taint on employee free choice created by election misconduct . . . Regrettably, the statute in its present form does not provide the Board with remedial authority through which it might address this problem."); *see also* Senate Floor Analysis, SB 126, Sep. 9, 2011, p. 7 (SB 126 sought to address the "Giumarra problem" identified by the Board by "requiring the ALRB to issue bargaining orders if an employer is found to have coerced an election outcome. . .").[26]

[26] 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

Given that the Legislature expressly amended the only ALRA section permitting the Board to decertify a union (section 1156) by providing an avenue for certification of a union because of employer misconduct, and given that the Legislature attempted to remedy the "lost decades" with no collective bargaining agreements through the enactment of MMC, it is clear that the Legislature was not only "presumed to have been aware of and acquiesced in the previous judicial construction," but that it supported the ALRA's prior construction by not amending it. See *Marina Point, Ltd., supra,* 30 Cal.3d at 734. The fact that the Legislature recently rejected an attempt to provide an "abandonment" procedure through proposed legislation is even stronger evidence that the Legislature has ratified the ALRB's interpretation of the ALRA.

E. Under the ALRA, a Union Certification Cannot Be Forfeited

Having failed to convince the ALRB or the courts that a union can lose its certification through alleged "abandonment," Tri-Fanucchi argues that this Court should import case law interpreting entirely different statutes, under different factual backgrounds, to provide cover for its illegal refusal to bargain with UFW. TFF Brief at 42-46. Fanucchi offers no

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violates this subdivision." See UFW Request for Judicial Notice, Ex. 1 [Assembly Bill 1389 (Patterson) (Cal. Legis. 2015-2016 Sess.) at 6, lines 3-5]. However, the bill failed to garner enough votes to pass out of the State Assembly Committee on Labor & Employment. See UFW Request for Judicial Notice, Ex. 2 [May 6, 2015, State Assembly Committee on Labor & Employment, Vote on AB 1389].

convincing argument as to why this Court should look outside the terms of the ALRA (and its case law) to resolve the abandonment question.

The ALRA is a "comprehensive" state statute governing labor relations between agricultural employers, labor organizations, and agricultural employees, created to "encourage and protect the right of agricultural employees to full freedom of association . . . and collective bargaining." Lab. Code § 1140.2; *J.R. Norton, supra*, 26 Cal.3d at 8. The Legislature gave the ALRB primary exclusive jurisdiction over conduct which "arguably involves practices covered, protected or prohibited under the ALRA, including remedies for violations." See *Kaplan's Fruit & Produce Co., supra,* 26 Cal.3d at 68, citing *San Diego Unions, supra,* 359 U.S. 236. Given this "comprehensive" statutory scheme, Fanucchi offers no convincing argument as to why this Court should look beyond the ALRA in resolving its abandonment claim. Even so, Fanucchi's arguments offer no persuasive authority in resolving the issue.

For example, Tri-Fanucchi cites to *Steele v. Louisville & Nashville Railroad Co.* (1944) 323 U.S. 192 and *James v. Marinship Corp.* (1944) 25 Cal.2d 721, cases which predate the enactment of the ALRA by more than 30 years, involved different statutes, and which concerned two unions' discriminatory practices in excluding African-Americans from membership in the unions. See TFF Brief at 43. There is absolutely no analogy between the issue in the present case, and the rulings in the *Steele* and

James cases that unions cannot engage is invidious discrimination and must fairly represent all members of the union.[27]

Similarly, Tri-Fanucchi's citation to cases involving the state granting a franchise to public utilities (TFF Brief at 43-44) is of no value in resolving its abandonment claim. Those cases involved the issue of whether a franchise to use public lands and highways for the provision of utilities was lawful under the California Constitution and whether the grant of a franchise required compensation to the counties from the utility companies' use of public lands. Those cases have no shared facts, statutes, case law, or applicable authority that are even remotely related to an employer's duty to bargain under the ALRA.

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[27] Fanucchi's citation to *Pasillas and UFW* (1982) 8 ALRB No. 103 (TFF Brief at 43), is also inapposite because that case involved a challenge to a union-membership requirement and to the ability of UFW to discipline and expel members for failing to honor a strike and picket line.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeal decision insofar as it upheld the ALRB's determination that Tri-Fanucchi committed an unfair labor practice. This Court should reverse the Court of Appeal's decision insofar as it set aside the ALRB's award of makewhole relief.

Dated: February 12, 2016

MARIO MARTÍNEZ

MARTÍNEZ AGUILASOCHO & LYNCH, APLC

By: _____
Mario Martinez

Counsel for Real Party in Interest
United Farm Workers of America

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.504(d), I certify that UFW's Combined Answer to Briefs on the Merits by Tri-Fanucchi Farms and ALRB contains 13,851 words, according the Microsoft Word program being used.

Dated: February 12, 2016

MARIO MARTÍNEZ

MARTÍNEZ AGUILASOCHO & LYNCH, APLC

By: _____
Mario Martinez

Counsel for Real Party in Interest
United Farm Workers of America

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PROOF OF SERVICE BY MAIL

Case Name: Tri-Fanucchi Farms v. Agricultural Labor Relations Board
Case No.: S227270

I am a resident of the County of Kern. I am over the age of eighteen years and not a party to the within entitled action. My business address is P.O. Box 11208, Bakersfield, California, 93389. On February 12, 2016, I served foregoing documents described as:

COMBINED ANSWER OF UNITED FARM WORKERS OF AMERICA TO BRIEFS ON THE MERITS BY TRI-FANUCCHI FARMS AND ALRB

__x__ (BY REGULAR MAIL) by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Bakersfield, California addressed as set forth below.

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Service List

Howard A. Sagaser
Sagaser, Watkins & Wieland, PC
7550 N. Palm Avenue, Suite 100
Fresno, CA 93711-5500
has@sw2law.com

Antonio Barbosa, Executive Secretary
Scott P. Inciardi, Senior Board Counsel
Agricultural Labor Relations Board
1325 J. Street, Suite 1900-A
Sacramento, CA 95814
JBarbosa@alrb.ca.gov
Scott.Inciardi@alrb.ca.gov

Office of the Clerk
Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721
Via regular mail only

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on February 12, 2016, in the County of Kern, California.

Molly Hart