In the Supreme Court of the State of California

GERAWAN FARMING, INC.,

Petitioner and Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent,

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest and Respondent.

Case No. S227243

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

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

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INTRODUCTION

Respondent Agricultural Labor Relations Board (ALRB or Board) submits this consolidated answer to the briefs submitted in support of Petitioner Gerawan Farming, Inc. (Gerawan) by amici curiae National Federation of Independent Business Small Business Legal Center, et al. (NFIB Br.) and Silvia Lopez (Lopez Br.).

The NFIB Brief restates Gerawan's facial equal protection and non-delegation claims challenging the 2002 amendments to the Agricultural Labor Relations Act (ALRA), which created a mandatory mediation and conciliation process (MMC) for the resolution of collective bargaining disputes in specified circumstances. (Lab. Code, § 1164 et seq. (MMC Statute).)[1] As explained below, NFIB's arguments fare no better than Gerawan's. First, NFIB's attempt to reframe Gerawan's equal protection claim as a "class of one" challenge fails for myriad reasons, including the most obvious: the MMC Statute is a generally applicable law, which does not create a "class of one." Second, NFIB's recapitulation of Gerawan's argument that the MMC Statute impermissibly delegates legislative authority fails for the reasons set forth in the Board's opening and reply briefs on the merits—namely, the Legislature made the fundamental policy decisions establishing MMC and provided adequate guidance and safeguards for its fair implementation.

The Lopez Brief, for its part, repeats Gerawan's claim that the Board abused its discretion in directing Gerawan and the United Farm Workers of America (UFW) to MMC. As thoroughly addressed by the Board in its prior briefing, this claim is premised on a fundamental misunderstanding of the ALRA. Ms. Lopez's argument compounds Gerawan's errors, introducing several additional misstatements of law and fact, which are

[1] All further statutory references are to the Labor Code.

addressed below. Finally, the Lopez Brief improperly asserts an entirely new claim, alleging that MMC violates the procedural due process of agricultural employees. Gerawan—the sole petitioner in this case—has never before raised this claim, and the Court of Appeal did not address it. Because Ms. Lopez's new legal theory is not "fairly included" in the issues on review, the Court should not consider it.

For the reasons set forth below and in the Board's opening and reply briefs on the merits (ALRB OBM and ALRB RBM), which the Board incorporates here, the Court of Appeal's judgment should be reversed.

ARGUMENT

I. THE NFIB BRIEF

A. The MMC Statute Does Not Violate Equal Protection on Its Face

The NFIB Brief first restates Gerawan's argument that the MMC Statute violates equal protection on its face, because the statutory process may result in a Board-imposed collective bargaining agreement applicable to a single employer. (NFIB Br. 8-17.) But under the highly deferential standards governing facial constitutional challenges to economic legislation, the MMC Statute easily withstands review. (ALRB OBM 15-25; ALRB RBM 6-15; Slip Op. 51.) NFIB's characterization of Gerawan's equal protection claim as a "class of one" challenge does not alter this conclusion.

As explained below, NFIB's "class of one" argument fails because: (1) the MMC Statute does not create a "class of one," but rather sets neutral eligibility criteria and appropriate procedures for MMC's application; (2) MMC's design, which requires individualized processes and subjective and discretionary decision-making, is rationally related to legitimate state interests and does not support a "class of one" challenge; and (3) the MMC Statute does not facially discriminate against similarly situated employers.

1. The MMC Statute Does Not Create a "Class of One"

The MMC Statute does not violate equal protection "on its face" because, as Gerawan concedes, the statutory criteria established by the Legislature to determine which parties are potentially subject to MMC are rationally related to the State's legitimate interest in facilitating collective bargaining under the ALRA. (Gerawan's Answering Brief on the Merits (ABM) 47; see ALRB RBM 9.) NFIB nonetheless asserts that the MMC Statute violates equal protection by allegedly discriminating against a "class of one." But NFIB's "class of one" theory fails at the threshold because the MMC Statute is a generally applicable law, which does not single-out Gerawan or any other employer.

The United States Supreme Court has "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564.) Specifically, "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" (*Engquist v. Or. Dept. of Agriculture* (2008) 553 U.S. 591, 601.)

Here, the Legislature did not single-out Gerawan or any other agricultural employer in enacting the MMC Statute, but rather defined generally applicable, objective circumstances in which MMC may be utilized. (See §§ 1164, subd. (a), 1164.11; ALRB OBM 23-24, fn. 13; ALRB RBM 14-15.) Gerawan concedes that the class of employers the Legislature determined could be subject to MMC "distinctly may bear a rational relationship to the statutory purpose of promoting collective bargaining" under the ALRA (ABM 47), and NFIB offers no argument or

evidence to the contrary. The "class of one" equal protection analysis need go no further.

2. The Individualized Processes in the MMC Statute Are Rationally Related to Legitimate State Interests and Do Not Support a "Class of One" Claim

NFIB next attempts to reformulate as a "class of one" claim Gerawan's argument that the MMC Statute violates equal protection on its face because it may result in a Board-ordered contract applicable to a single employer. NFIB confuses Gerawan's *facial* equal protection challenge to the MMC Statute with a challenge to the MMC Statute *as applied* in a particular case. A statute is not *facially* unconstitutional under a "class of one"—or any other—equal protection theory simply because it may yield an individualized outcome. To hold otherwise would call into question every remedial and regulatory law authorizing a neutral decision-maker to apply a generally applicable statute to a particular individual or entity. As the Board has repeatedly stated, to the extent that Gerawan or any other employer believes it has been singled out for unfair treatment in a particular MMC, such treatment could give rise to an *as-applied* equal protection claim. (See ALRB OBM 24-25; ALRB RBM 12.) But there is no as-applied claim before this Court—the Court of Appeal held that the MMC Statute violated equal protection "on its face"—(Slip Op. 51)—and the mere possibility of an as-applied equal protection claim in some hypothetical future case does not render the MMC Statute facially unconstitutional.

The "class of one" challenge to the MMC Statute also fails on its own terms because: (1) the Legislature had a rational basis for designing MMC so that the process would create contracts tailored to the particular needs of the parties; and (2) subjective and individualized discretionary decisions—like those required by the mediator to resolve bargaining disputes arising in

MMC—cannot support a "class of one" facial equal protection challenge.

a. MMC's Individualized Processes Are Rationally Related to the State's Legitimate Interest in Tailoring Each Contract to the Unique Circumstances and Particular Needs of the Bargaining Parties

NFIB's argument that the MMC's individualized processes violate equal protection because the Legislature failed to "articulate a rational basis for the *manner* of regulation, i.e., regulating on an individual rather than a broader basis" (NFIB Br. 10) fails because it applies the wrong legal standard. Where, as here, "purely economic interests are at stake, the Legislature may impose any distinction between classes which bears some 'rational relationship' to a conceivably legitimate state purpose." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 395.) The Legislature need not articulate any rationale for such distinctions; rather, "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." (*F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 314-315.)

When the proper legal standard is brought to bear, NFIB—like Gerawan—cannot dispute the rational basis for MMC's design. Specifically, there is no dispute that collective bargaining is an inherently individualized process, as each employer and bargaining unit will have unique interests and concerns. (See ALRB OBM 21-22; ALRB RBM 12.) Because each labor negotiation is unique, it is perfectly rational for MMC to facilitate contracts tailored to the particular needs of the bargaining parties. The Legislature likewise could rationally conclude that such tailoring would promote labor stability by creating mutually beneficial agreements and fostering productive bargaining relationships. Nothing more is constitutionally required.

b. MMC's Individualized Processes Cannot Support a "Class of One" Facial Equal Protection Challenge

NFIB's argument that MMC violates equal protection because it results in a contract applicable to a single employer fails for the additional reason that inherently subjective and individualized discretionary decisions—like those required to resolve the parties' disputes in MMC—cannot support a "class of one" challenge. (See ALRB OBM 21-22; ALRB RBM 11-12.) As the United States Supreme Court explained in *Engquist*, *supra*, for equal protection purposes, "[i]t is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized." (553 U.S. at p. 604.) NFIB does not dispute that MMC involves such "subjective, individualized" decisions, but nonetheless asks the Court to ignore the Supreme Court's analysis.

NFIB asserts that *Engquist*'s "class of one" analysis should be restricted to "executive or quasi-adjudicative decision-making" and should not apply to quasi-legislative proceedings like MMC. (NFIB Br. 12.) But the *Engquist* analysis is not so limited.[2] The viability of a "class of one" claim does not turn on the type of proceeding, but rather on the nature of

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[2] See, e.g., *Las Lomas Land Co., LLC v. City of L.A.* (2009) 177 Cal.App.4th 837, 859 ["[a]lthough the holding in *Engquist* was limited to the public employment context, . . . its reasoning applies more broadly"]; *Caesars Mass. Management Co., LLC v. Crosby* (1st Cir. 2015) 778 F.3d 327, 336 [same]; *Abcarian v. McDonald* (7th Cir. 2010) 617 F.3d 931, 939 ["[w]e have interpreted *Engquist* to stand for the broad proposition that inherently subjective discretionary governmental decisions may be immune from class-of-one claims"]; see also *Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 595 [applying *Engquist* to municipal code enforcement]; *Towery v. Brewer* (9th Cir. 2012) 672 F.3d 650, 660 [applying *Engquist* to Arizona's lethal injection statutes]; *Flowers v. City of Minneapolis* (9th Cir. 2009) 558 F.3d 794, 799-800 [applying *Engquist* to police investigations]; *Douglas Asphalt Co. v. Qore, Inc.* (11th Cir. 2008) 541 F.3d 1269, 1273-74 [applying *Engquist* to governmental contracting decisions].)

the decision and the manner in which it is made. The benchmark consideration is "the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed." (*Engquist*, *supra*, 553 U.S. at p. 602; see also *Olech*, *supra*, 528 U.S. at p. 565 [zoning board's arbitrary departure from consistently applied requirement].) Some forms of state action, like MMC, "by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments," and therefore are not subject to a facial "class of one" claim, because "treating like individuals differently is an accepted consequence of the discretion granted." (*Engquist*, *supra*, 553 U.S. at p. 603.)

NFIB—like Gerawan—next mischaracterizes the Board's argument as seeking to insulate *every* MMC decision from *any* equal protection challenge.[3] (NFIB Br. 13-17; ABM 2, 43, 46.) The Board makes no such claim. The MMC Statute expressly provides for judicial review to determine, among other things, whether any order or decision of the Board "violates any right . . . under the Constitution of the United States or the California Constitution." (See § 1164.5, subd. (b)(4).) Indeed, this judicial review is among the reasons why the MMC Statute is a lawful delegation of legislative power. (ALRB OBM 26, 32-42; ALRB RBM 15, 20; see

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[3] NFIB's assertion that the MMC Statute "thwarts" the goal of "representation reinforcement" through judicial review is misconceived. (NFIB Br. 15-17.) NFIB's core contention that employers affected by MMC "cannot readily band together . . . to lobby the Board or the Legislature for redress" is belied by this case (including the large coalition of amici curiae represented in NFIB's brief), the various other past and pending cases challenging aspects of MMC, and the widespread public relations and lobbying efforts relating to this case and MMC generally. (NFIB Br. 16; see, e.g., *Hess Collection Winery v. Cal. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584 (*Hess*); *Press Releases and Statements from Gerawan Farming*, Gerawan Farming, Inc. Website <http://www.prima.com/news/> (last accessed July 7, 2016).)

Part I.B.2, *post*.) Likewise, the Board has repeatedly acknowledged the possibility of an as-applied equal protection claim if, in a given MMC, the process or result was not simply individualized, but discriminatory. (ALRB OBM 24-25; ALRB RBM 12.)

3. The MMC Statute Does Not Facially Discriminate Among Similarly Situated Employers

Finally, even assuming the MMC Statute was amenable to a "class of one" facial equal protection challenge, NFIB—like Gerawan—cannot establish the threshold requirement that the MMC Statute systematically causes *similarly situated* employers to receive materially different treatment. (See ALRB OBM 22-25; ALRB RBM 14-15.)

Courts "impose[] exacting burdens on plaintiffs to demonstrate similarity in class-of-one cases." (*Jicarilla Apache Nation v. Rio Arriba County* (10th Cir. 2006) 440 F.3d 1202, 1213.) "To be considered 'similarly situated,' the class-of-one challenger and his comparators must be '*prima facie* identical in all relevant respects or directly comparable . . . in all material respects.'" (*United States v. Moore* (7th Cir. 2008) 543 F.3d 891, 896, quoting *Racine Charter One, Inc. v. Racine Unified Sch. Dist.* (7th Cir. 2005) 424 F.3d 677, 680; see also, e.g., *Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 594-595; *Kan. Penn Gaming, LLC v. Collins* (10th Cir. 2011) 656 F.3d 1210, 1218; *Leib v. Hillsborough County Public Transportation Com.* (11th Cir. 2009) 558 F.3d 1301, 1307.) NFIB—like Gerawan—does not attempt to meet this strict standard. Nor could it.

Given the "peculiar problems with the collective bargaining process between agricultural employers and agricultural employees," agricultural employers are not similarly situated to employers in other industries. (See, e.g., *Hess*, *supra*, 140 Cal.App.4th at pp. 1603-1604.) NFIB and Gerawan do not dispute this. Nor can they establish that Gerawan received a result different from that of any similarly situated employer. As the mediator

determined, "there was no evidence" in the record "that would establish that other farm operations were 'similar' in terms of any of the categories listed in the statute." (See ABM 19, citing Certified Record (CR) 362-363.)

Finally, because the mediator's decisions are based on the application of neutral statutory criteria to a specific dispute, any differences between contracts reflect the unique circumstances of the bargaining parties and do not demonstrate that similarly situated employers were treated differently.[4] (See, e.g., *Ruston v. Town Bd. for the Town of Skaneateles* (2d Cir. 2010) 610 F.3d 55, 59-60 [holding that class-of-one plaintiff must establish that "no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy," internal quotations and citations omitted]; see also *Hess*, *supra*, 140 Cal.App.4th at p. 1604 [discussing section 1164, subdivision (e) factors].)

For these reasons and those set forth in the Board's prior briefing, the MMC Statute does not violate equal protection.

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[4] Section 1164(e)'s criteria to aid the mediator's resolution of bargaining disputes also reasonably ensures that if similarly situated employers are subject to MMC, the resulting contracts will be similar. (§ 1164, subd. (e); see *Hess*, *supra*, 140 Cal.App.4th at p. 1604; ALRB OBM 24, fn. 12.) NFIB's contention that the MMC Statute nonetheless discriminates against employers because it does not *require* a mediator to consider this statutory criteria is a red herring. (See NFIB Br. 6-7, 9-10.)

First, section 1164(e)'s use of the word "may" does not mean a mediator is free to disregard the statutory criteria. (See, e.g., *People v. Ledesma* (1997) 16 Cal.4th 90, 95 [discussing statutory construction of "may" as a mandatory directive]; *Hess*, *supra*, 140 Cal.App.4th at pp. 1606-1601 [construing "may" as "must" in section 1164, subdivision (e)].) Second, the mediator in this case clearly *did* consider the statutory criteria. (CR 362-365.) Indeed, the record is devoid of *any* evidence showing that *any* mediator in *any* MMC has failed to consider the statutory criteria. The hypothetical possibility that a mediator in some future case may disregard the statutory criteria cannot support Gerawan's facial challenge.

B. The MMC Statute Is Not an Unconstitutional Delegation of Legislative Power

NFIB next repeats Gerawan's argument that the MMC Statute is an unconstitutional delegation of legislative power. (NFIB Br. 17-27.) NFIB's "non-delegation" challenge to the MMC Statute fails for the same reason as Gerawan's—namely, (1) the Legislature made the fundamental policy decisions that MMC was necessary in specified circumstances to facilitate the conclusion of first contracts under the ALRA, and (2) the Legislature provided adequate safeguards for MMC's implementation, specifying the criteria to be considered by the mediator and establishing straightforward procedures for prompt administrative and judicial review to ensure its fair application.

1. The Legislature Made the Fundamental Policy Decisions Establishing MMC and Provided Adequate Guidance for Its Implementation

The "doctrine prohibiting delegations of legislative power is not violated if the Legislature makes the fundamental policy decisions and leaves to some other body, public or private, the task of achieving the goals envisioned in the legislation." (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 507.) This is precisely what the Legislature did here, and NFIB's "non-delegation" challenge therefore fails at the threshold.

The Legislature made the fundamental policy decisions that the conclusion of first contracts was essential to the ALRA's purpose, and that MMC should therefore be available to resolve protracted bargaining disputes. In addition, the Legislature made the related policy decisions regarding the narrow circumstances in which MMC should be available, the goals to be accomplished through MMC, the specific processes to be followed by the mediator and the Board, the scope of the mediator's

discretion, and the criteria to be considered by the mediator in resolving bargaining disputes. (See §§ 1164, subds. (a), (e), 1164.3, 1164.11; Stats. 2002, ch. 1145, § 1.)

NFIB—like Gerawan—asserts that these policy decisions are insufficient because the Legislature did not provide enough guidance regarding the specific terms to be included in each contract formed through MMC. But NFIB—like Gerawan—identifies no authority to support its contention that the determination of specific terms in an individual contract implicates the resolution of "truly fundamental issues," which the Legislature therefore may not constitutionally delegate. (See, e.g., *Kugler v. Yocum* (1968) 69 Cal.2d 371, 376.) To the contrary, in *Pacific Legal Foundation v. Brown*, this Court held that the determination of "the working details of the wages, hours and working conditions of . . . employees" does not involve "fundamental policy determinations" under the unlawful-delegation doctrine. ((1981) 29 Cal.3d 168, 201.)

NFIB's attempt to distinguish *Pacific Legal* on the grounds that the MMC Statute "is not limited to the narrow legislative matter of setting wages but instead extends to all issues relating to employment" fails. (NFIB Br. 22, fn. 11.) First, the MMC Statute restricts the mediator's discretion to the resolution of disputes over specific contract terms—the mediator thus is not authorized to dictate terms for "all issues relating to employment." (*Ibid.*; see § 1164, subd. (d); Cal. Code Regs., tit. 8, § 20407, subds. (a)(1), (e).) Indeed, if there are no disputed terms, the mediator has no power to decide anything. Second, the delegation at issue in *Pacific Legal* was not limited to setting wages, as NFIB suggests, but rather extended to determining the "working details of the wages, hours and working conditions" of covered employees. (*Pacific Legal, supra*, 29 Cal.3d at p. 201; see NFIB Br. 22, fn. 11.) The mediator's delegated authority to resolve disputes in MMC is defined in a virtually identical

fashion, extending only to contract terms related to "wages, hours, or other conditions of employment." (See § 1164.3, subd. (a).) There is therefore no basis to distinguish this Court's prior conclusion that the Legislature's delegation of such decisions "does not contravene any constitutional precept."[5] (See *Pacific Legal*, *supra*, 29 Cal.3d at p. 201.)

2. The Legislature Provided Adequate Safeguards to Ensure the MMC Statute Is Fairly Applied

In addition to making the fundamental policy decisions supporting MMC, the Legislature here provided adequate safeguards to prevent the unfair or arbitrary application of its policy. In enacting the MMC Statute, the Legislature included a two-tiered process providing for the prompt review of the mediator's report by the Board and appellate courts. (§§ 1164.3, subds. (a), (e), 1164.5; *Hess*, *supra*, 140 Cal.App.4th at pp. 1609-1610.) NFIB—like Gerawan—attempts to minimize these safeguards by simply declaring them ineffective. (See NFIB Br. 24-26.) But NFIB grossly mischaracterizes the scope and nature of administrative and judicial review under the MMC Statute, and its unsupported assertions should be rejected.

First, contrary to NFIB's unsupported assertion, the Board has broad authority—and indeed the obligation in specified circumstances—to reject the mediator's decisions. (NFIB Br. 24-25; § 1164.3, subds. (a)-(e); see ALRB OBM 31-34; ALRB RBM 19-21.)

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[5] Nor is it of any constitutional significance that the delegation is to a private mediator. (NFIB Br. 21.) First, MMC ultimately culminates in a Board order, and NFIB's purported concerns about public accountability therefore are unfounded. (§ 1164.3, subds. (b), (d).) Second, as this Court held nearly fifty years ago: "The fact that a third party, *whether private or governmental*, performs some role in the application and implementation of an established legislative scheme does not render the legislation invalid as an unlawful delegation." (*Kugler v. Yocum*, *supra*, 69 Cal.2d at pp. 379-380, emphasis added.)

Second, the Court of Appeal's review of the Board's order is not limited to the "extremely deferential" "arbitrary and capricious" or "abuse of discretion" standards, as NFIB contends (see NFIB Br. 24), but rather requires review of the entire record to determine whether the Board acted in excess of its powers or jurisdiction or did not proceed as required by law, and whether the Board's decision was procured by fraud, is an abuse of discretion, or violates any constitutional right. (§ 1164.5, subd. (b).) Thus, judicial review under the MMC Statute is actually *broader* than the "limited review" courts generally apply in other quasi-legislative proceedings. (See *Western Oil & Gas Assn. v. Air Resources Bd.* (1984) 37 Cal.3d 502, 509 ["reviewing court will determine whether the agency acted within the scope of its delegated authority, whether it employed fair procedures, and whether its action is arbitrary, capricious, or lacking in evidentiary support"].)

For these reasons and those set forth in the Board's prior briefing, the MMC Statute is a permissible delegation of legislative power.

II. SILVIA LOPEZ'S BRIEF

Silvia Lopez's brief recapitulates Gerawan's argument that the UFW's certification as the exclusive bargaining agent of Gerawan's employees was terminated due to its alleged "abandonment" of the bargaining unit, and that the Board therefore abused its discretion in referring the parties to MMC. (Lopez Br. 9-17.) This argument is addressed at length in the Board's prior briefing. (ALRB OBM 35-45; ALRB RBM 21-28). However, Ms. Lopez's "abandonment" argument relies on several additional misstatements of law and fact, which are corrected below. In addition, Ms. Lopez's brief impermissibly raises an entirely new claim, alleging that MMC violates the due process rights of Ms. Lopez and other employees, which the Court should not consider. (Lopez Br. 18-21.)

A. The Board Did Not Abuse Its Discretion in Referring the Parties to MMC

The Board correctly determined that the UFW is a "labor organization certified as the exclusive bargaining agent of a bargaining unit of agricultural employees" and therefore has standing to request MMC, notwithstanding Gerawan's allegations that the UFW had "abandoned" Gerawan's workers in the years prior to requesting MMC.[6] (§ 1164, subd. (a).) The ALRA obligates an employer to continue bargaining with a certified union until the union is decertified by a Board-conducted election. (See ALRB OBM 35-40; ALRB RBM 21-23.) Consistent with this long-standing "certified until decertified" rule, the Board has repeatedly rejected the argument that a union's alleged "abandonment"—i.e., an extended period of union inactivity—terminates its certification or otherwise excuses an employer from fulfilling its duties under the ALRA. (See ALRB OBM 35-43; ALRB RBM 21-23.) Nothing in Ms. Lopez's brief supports a departure from these accepted rules.

1. The UFW Remains Certified As the Exclusive Bargaining Agent of Gerawan's Employees

Ms. Lopez's contention that the Board has an affirmative obligation to terminate a union's certification if its bargaining efforts stall for an unspecified period of time is contrary to law. (See Lopez Br. 18.) The ALRA imposes no such duty or authority on the Board. (Cf. § 1156.3, subd. (h) [requiring Board to decertify a union if either California Department of Fair Employment and Housing or United States Equal

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[6] Gerawan's allegations are not "undisputed," as Ms. Lopez repeatedly asserts. (Lopez Br. 5, 10, 12, 16-18.) Rather, because the Board concluded the allegations were not relevant to its application of the MMC Statute in this case, it did not take evidence on Gerawan's claims (or the UFW's defense thereto). (See *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, pp. 3-4.)

Employment Opportunity Commission finds union engaged in discrimination].) Rather, as with its enforcement of the ALRA generally, the Board relies on the Act's election and unfair labor practice processes to learn of and address alleged misconduct relating to employee representation. (See §§ 1156-1159, 1160-1161.)

At any point during the UFW's alleged "abandonment," Gerawan could have utilized the ALRA's unfair labor practice procedures to compel the UFW to the bargaining table. (See *Dole Fresh Fruit Co., Inc.* (1996) 22 ALRB No. 4, pp. 16-18.) It did not do so, choosing instead to wait until the union renewed bargaining and requested MMC to seek relief. Similarly, Ms. Lopez (or any other Gerawan employee) was free to petition for a decertification election at any time during the UFW's alleged absence. (See §§ 1156.3, 1156.4, 1156.7, subd. (c).) But Ms. Lopez did not do so until August 2013, several months after the Board's MMC referral.

The assertion that the Legislature did not intend MMC to apply in cases of alleged union "abandonment" is likewise contrary to the plain language of the statute. (Lopez Br. 10-13.) First, the MMC Statute's requirement of a "*renewed* demand to bargain" plainly contemplates a bargaining hiatus prior to MMC. (See § 1164, subd. (a), emphasis added.) Second, both this "renewed demand" and MMC itself may be requested by either a union *or an agricultural employer*. (*Ibid.*) There is thus no basis to conclude that MMC is intended solely to address employer misconduct, as Ms. Lopez contends. (See Lopez Br. 10-11.)

Nor is there any basis to conclude that the Legislature intended to permit an employer to avoid MMC based on its allegations of union "abandonment" or belief that the union no longer enjoyed majority support of its employees. (Lopez Br. 12-13, 15.) When the MMC Statute was enacted, the Board's "certified until decertified" rule and rejection of the "abandonment" defense were well established, and the Legislature gave no

indication that it intended to depart from these accepted rules. (See ALRB OBM 40-43; ALRB RBM 22-23.) As Ms. Lopez acknowledges, "[h]ad the Legislature been asked to address the problem of union abandonment of workers, it no doubt would have done so."[7] (Lopez Br. 11.) *And it still can.* But absent legislative action, there is no basis to rewrite the statute.

Finally, the argument that the UFW's certification terminated because it "disclaimed interest" in representing Gerawan's employees fails as a matter of law. (Lopez Br. 15-18.) While it is true that a union may forfeit its certification by an express disclaimer of interest, mere inaction by the labor organization is insufficient for such disclaimer. Rather, consistent with the National Labor Relations Act, a union's disclaimer of interest must be "clear and unequivocal." (*Arnaudo Brothers, LP* (2014) 40 ALRB No. 3, pp. 13-14 [collecting NLRB authorities]; see, e.g., *California Overnight* (Mar. 29, 2004, Case 32-CA-20678), 2004 WL 3315213, at *11 [NLRB General Counsel Opinion].) Moreover, "an otherwise clear and unequivocal disclaimer may be rendered ineffective by subsequent union conduct manifesting a continuing jurisdictional claim." (*In re Local 79, Const. & Gen. Bldg. Laborers* (2003) 338 NLRB 997, 998.)

Here, there is no evidence that the UFW ever expressly disclaimed its

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[7] Notably, the Legislature has amended the ALRA several times, but has taken no action to override the Board's consistent rejection of the "abandonment" defense or the "certified until decertified" doctrine on which it is based. (See, e.g., Stats. 1994, ch. 1010, § 181; Stats. 2004, ch. 788, § 13; Stats. 2011, ch. 697.) Most recently, in 2011, the Legislature amended the ALRA to include an alternative means of union certification and expand the use of MMC. (See, e.g., §§ 1156.3, subd. (f) [requiring certification of union where employer interference with an election would preclude a new free and fair election]; 1164, subd. (a) [permitting MMC request by union certified pursuant to section 1156.3 due to employer interference with an election]; 1158 [pending judicial review of an election-related unfair labor practice order "shall not be grounds for a stay" of MMC proceedings].)

interest in representing Gerawan's workers, much less that it did so unequivocally. And even if it had, the UFW's "reassertion of its bargaining rights [in 2012] . . . negated any inference to be drawn from the preceding period of inactivity." (*Spillman Co.* (1995) 311 NLRB 95, 95-96; see, e.g., *Dole Fresh Fruit Co., supra*, 22 ALRB No. 4 at pp. 9-11, 15; *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5, pp. 3-4; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, pp. 10-11.) Accordingly, the UFW remains certified as the exclusive bargaining agent of Gerawan's employees, and the Board did not abuse its discretion in granting its request for MMC.

2. Concerns About the Decertification Election and the ALRA's Decertification Process Are Irrelevant to the Issues Before the Court

Concerns about the November 2013 decertification election of Gerawan's employees and the ALRA's decertification processes generally are irrelevant to the issues on review. (Lopez Br. 6-7, 13-15.) The November 2013 election, which was set aside due to Gerawan's unlawful actions, is not before this Court (and was not before the Court of Appeal), but rather is the subject of the ALRB's decision in *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1 (<https://www.alrb.ca.gov/legal_searches/decisions/42_1(2016).pdf>) and of ongoing legal proceedings, to which Ms. Lopez is a party.[8] More fundamentally, the election was held nearly seven months *after* the Board's decision to refer Gerawan and the UFW to MMC, and it therefore has no bearing on whether the Board abused its discretion in making that referral. (See ALRB RBM 5.)

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[8] See *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (F073720, app. pending); *Lopez v. Agricultural Labor Relations Bd.* (F073730, app. pending); *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (F073769, app. pending).

Likewise, general concerns about the efficacy or fairness of the ALRA's election processes, including its express prohibitions of employer participation or interference in employee elections, have no bearing on the Board's decision in this case, or the legal issues before the Court. (Lopez Br. 13-15.) Rather, such concerns are properly directed to the Legislature.

B. Ms. Lopez's New Due Process Claim Is Not Before the Court and Should Not Be Considered

Finally, Ms. Lopez's allegation that MMC violates the procedural due process rights of agricultural employees is an entirely new claim, which is not properly before the Court and should not be considered. (Lopez Br. 18-21.) "[I]t is the general rule that an amicus curiae accepts the case as [s]he finds it and may not 'launch out upon a juridical expedition of its own unrelated to the actual appellate record . . . .'" (*Prof. Engineers in Cal. Government, et al. v. Kempton* (2007) 40 Cal.4th 1016, 1047, quoting *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511.)

Here, Ms. Lopez's new claim seeks relief on behalf of herself and other employees, but neither Ms. Lopez, nor any other employee is a party to this case. For its part, Gerawan—the sole petitioner in this case—has never claimed that MMC violates the procedural due process rights of its employees (and would lack standing to do so). The Court of Appeal likewise did not address such a claim, which was not raised by any party (and was not mentioned in Ms. Lopez's amicus brief filed in that court). Because Ms. Lopez's due process challenge alleges an entirely new constitutional claim on behalf of an entirely new party, it is not "fairly included" in the issues on review in this Court. (See Cal. Rules of Court, rules 8.516(a), 8.520(b)(3).) Accordingly, Ms. Lopez's new claim should not be considered, and the Board will limit its briefing to the issues properly before the Court unless ordered otherwise.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: July 7, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Consolidated Answer to Amicus Curiae Briefs uses a 13-point Times New Roman font and contains 5,526 words.

Dated: July 7, 2016

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Gerawan Farming, Inc. v. Agricultural Labor Relations Board**

No.: **S227243**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On July 7, 2016, I served the attached **CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS** by placing a true copy thereof enclosed in a sealed envelope with the **GOLDEN STATE OVERNIGHT**, addressed as follows:

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 7, 2016, at Sacramento, California.

Eileen A. Ennis
Declarant

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