No. S227243

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GERAWAN FARMING, INC.
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest.

GERAWAN FARMING, INC.,
Plaintiff and Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest and Respondent.

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

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

REAL PARTY IN INTEREST UNITED FARM WORKERS OF AMERICA'S COMBINED ANSWER TO AMICUS CURIAE BRIEFS OF NFIB ET AL. AND SILVIA LOPEZ

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

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

Counsel for Real Party in Interest United Farm Workers of America

No. S227243

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GERAWAN FARMING, INC.
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest.

GERAWAN FARMING, INC.,
Plaintiff and Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Defendant and Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest and Respondent.

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

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

REAL PARTY IN INTEREST UNITED FARM WORKERS OF AMERICA'S COMBINED ANSWER TO AMICUS CURIAE BRIEFS OF NFIB ET AL. AND SILVIA LOPEZ

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

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

Counsel for Real Party in Interest United Farm Workers of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

CALIFORNIA CASES

OTHER STATE CASES

ALRB DECISIONS

NLRB DECISIONS

STATE STATUES AND REGULATIONS

INTRODUCTION

Pursuant to California Rule of Court 8.520(f)(7), United Farm Workers of America ("UFW") submits this combined answer to the briefs of amici curiae National Federation of Independent Business, CATO Institute, California Farm Bureau, California Fresh Fruit Association ("CFFA"), Western Growers Association, and Ventura County Agricultural Association (hereafter "NFIB Br.") and of amicus curiae Silvia Lopez (hereafter "Lopez Br.").

NFIB et al. Brief

Amici California Farm Bureau, CFFA, Western Growers Association and Ventura County Agricultural Association together represent almost the entire agricultural industry in California. They are frequent opponents of any legislation that seeks to improve farmworker collective bargaining rights, workplace health and safety, and wages. They were staunch opponents of the Mandatory Mediation and Conciliation ("MMC") statute. Gerawan is a member of CFFA, with Gerawan officials serving on CFFA's Board of Directors. Gerawan's counsel (Mr. Barsamian) is a member of CFFA's "Labor Committee." The Agricultural Labor Relations Board ("ALRB") found Gerawan guilty of collaborating with the CFFA to provide more than $13,000 to amicus curiae Silvia Lopez to illegally support decertification efforts at Gerawan. *See In re Gerawan Farming, Inc.* (2016) 42 ALRB No. 1, at 37-54 (at p. 48:"we find Gerawan unlawfully supported Lopez and the decertification effort by its affirmance and ratification of the CFFA's financial contributions [to Lopez]."). As such, CFFA cannot be regarded as an independent amicus.

The NFIB brief argues that the MMC process violates equal protection because it targets Gerawan, as a "class of one," and because the MMC statute unlawfully delegates fundamental policy issues. As will be

demonstrated below, these arguments, which are largely duplicative of Gerawan's arguments, should be rejected.

Silvia Lopez Brief

Amicus Silvia Lopez comes to this Court with unclean hands. The extensive evidentiary record in the ALRB decertification election proceedings shows that Lopez acted as Gerawan's pawn in the company's illegal attempt to rid itself of its collective bargaining obligations with UFW. Lopez was willing to do Gerawan's bidding and participated in a decertification effort that violated the law and trampled on the workers' rights she claims to defend.

Before her most recent request for a decertification election, Lopez and her counsel were responsible for submitting a decertification petition that contained forged signatures because not enough employees wanted an election at Gerawan. *See* UFW's Motion for Judicial Notice, Exh. A (Sep. 25, 2013 Letter from ALRB Regional Director Shawver to Lopez's Counsel).[1] In rejecting that petition, the ALRB Regional Director found that "a majority of the current employees at Gerawan have not expressed interest in decertifying the union" and that "[t]here were simply not enough legitimate signatures submitted" to conduct an election. *Id.* at 2. The Regional Director found "compelling evidence of the submission of one hundred falsified signatures from across different contractors and crews . . . [although] the forgeries may have been more widespread than what the Region" confirmed during its seven-day investigation. *Id.* at 6. The Regional Director concluded that Lopez's conduct, and her counsel's, in

[1] UFW's first Motion for Judicial Notice was filed on November 17, 2015.

submitting forged signatures "with the ALRB for the purpose of obtaining an election is simply disgraceful and patently unlawful." *Id.* at 6.[2]

After the petition supported by forged signatures was rejected, Gerawan and Lopez turned to other illegal means to request an election. After it became apparent (again) that not enough workers supported decertification efforts for sufficient signatures to be gathered through legitimate methods, the company gave Lopez a "virtual sabbatical" of over two and one half months to permit her to illegally gather signatures on work time. *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1, at 22-26, 30. The Board found that between August 12, 2013 and October 20, 2013, Lopez worked only a total of 83 hours or 8.3 hours per week while, during the same time period, other employees were working as many as 55 hours in a week. *Id.* at 30 n. 11. When Lopez was almost out of time to collect needed signatures before the 2013 season ended, Gerawan allowed her to physically block the company entrances to work so she could collect 800 - 1,000 invalid signatures for the decertification petition. *Id.* at 32-37. And, as stated above, Lopez happily accepted the CFFA's money, with Gerawan's approval, to stage *faux* protests against the ALRB for its decision to block her first request for an election.

Lopez's brief to this Court disregards the rule that an amicus curiae "accepts the case as [s]he finds it" and instead seeks to present arguments on issues that were not set for review by the Court. Most of her brief is devoted to arguing about the decertification election that Gerawan was found to have illegally supported and about her illegal efforts to gather enough signatures for an election petition that most employees did not support. The brief is therefore not relevant to the issues set for review. As

---

[2] While the Director did not ascribe responsibility for the forgeries to a specific person, Lopez's counsel submitted the forged signatures and Lopez was the identified "petitioner" requesting the election.

will be demonstrated below, to the extent that Lopez's arguments can be considered relevant to the question of Union "abandonment," they are based on misrepresentations of fact and law.

ARGUMENT

I. The MMC Statute Does Not Unconstitutionally Target a "Class of One" for Arbitrary Treatment

The NFIB amici argue that the MMC constitutes unconstitutional "class of one" legislation, NFIB Br. at 8-12, that does not ensure that Gerawan receives "Equal Protection Clause guarantees." NFIB Br. at 17. NFIB's arguments are meritless.

First, the MMC statute does not single out Gerawan, but has general applicability: it applies to agricultural employers that have more than 25 employees, that have failed to reach agreement on a first labor contract, and that have committed an unfair labor practice. Lab. Code §1164(a), §1164.11. That is not class of one legislation, but generalized legislation. That MMC results in an ALRB order that sets terms specific to Gerawan and the UFW does not establish an Equal Protection Clause violation, because such individualized terms are rationally related to California's legitimate interest in promoting labor stability and ensuring "a more effective collective bargaining process." *See* UFW Opening Brief on the Merits ("UFW Br.") at 38-41.

The federal and California constitutions' equal protection clauses are not a barrier to a system that permits an administrative agency to resolve labor disputes one-by-one, based on consideration of the details of each dispute and a set of rational factors. *See, e.g., Davis v. Mun. Court* (1988) 46 Cal.3d 64, 87-89 (rejecting equal protection challenge to statutes allowing for broad prosecutorial discretion); *People v. Wilkinson* (2004) 33

Cal.4th 821, 838-39 (same). The rule is not different when decisions are legislative. *See Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 516-18 (zoning and re-zoning decisions are legislative, whether they apply to an entire city or a single parcel). Indeed, the nation's high court has rejected "the assumption that legislation must be generally applicable" and the claim that "there is something wrong with particularized legislative action." *Bank Markazi v. Peterson* (2016) 136 S.Ct. 1310, 1327, *citing Plaut v. Spendthrift Farm* (1995) 514 U.S. 211, 239 n.9. While legislatures

> usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common .... Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid .... This Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects.

Bank Markazi, 136 S.Ct. at 1327-1328 (citing cases).

Moreover, there is nothing constitutionally suspect about the issuance of "quasi-legislative" orders that set the terms of individual contracts. All rate-setting is quasi-legislative, *see Prentis v. Atlantic Coast Line Co.* (1908) 211 U.S. 210, 226, and there is a long history of legislation that delegates to an administrative agency the responsibility to set fair and reasonable terms for individual private contracts. UFW Br. at 38-39 & n. 11.

Even if this case were properly analyzed as involving class of one legislation, for purposes of an equal protection challenge, it is not enough to show that such government action applies to a "class of one." The challenger must show "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564. Here, NFIB fails to show that there is anything irrational about

applying the MMC statute to Gerawan; the statutory classifications for determining which labor contract disputes are referred to MMC are rational classifications similar to those in other economic legislation. *See* UFW Br. at 18-20; *Warden v. State Bar* (1999) 21 Cal.4th 628, 644 ("Where there are 'plausible reasons' for [the classification] 'our inquiry is at an end.'"). Likewise, NFIB fails to show that the statutory factors considered in resolving individual labor contract disputes are irrational. To the extent that NFIB is complaining that the MMC statute necessarily delegates some discretion to the neutral mediator in weighing those statutory factors when providing a report to the ALRB, "[i]t is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized." *Engquist v. Ore. Dept. of Agriculture* (2008) 553 U.S. 591, 604.[3]

II. NFIB's Remaining Arguments Are Without Merit

The NFIB amici also argue that (1) the MMC statute provides no standards for resolution of collective bargaining disputes (NFIB Br. at 6, 7, 9, 15); (2) the Legislature improperly delegated to the mediator authority to resolve fundamental policy questions (*id.* at 17-24); (3) the statute violates equal protection because "similarly situated employers" are subject to varying labor regulations (*id.* at 11); and (4) the non-delegation doctrine

[3] NFIB suggests that the ALRB and UFW are arguing that the MMC statute and MMC orders are not even subject to rational basis review. *See, e.g.*, NFIB Br. at 13 ("To exclude any exercise of power from rational basis equal protection review, on the ground that the power is exercised on an individual basis, would threaten [] fundamental [governmental] principle[s] . . ."); NFIB Br. at 12 ("No class of legislative activity has ever been entirely exempted from equal protection review."). To the contrary, the ALRB and UFW maintain that the MMC statute and MMC orders *satisfy* rational basis review.

requires politically accountable elected officials to set the terms of CBAs (*id.* at 26-27). None of these arguments has any merit.

A. The Legislature set out the standards mediators must follow in recommending resolution of contract disputes

NFIB argues that the Legislature failed to provide standards to ensure that similarly situated employers will be treated in a like manner. NFIB Br. at 9. NFIB relies on the claim that the statutory list of factors contained in Labor Code §1164(e) to guide the mediator is merely permissive. But the *Hess* Court correctly disposed of that claim, concluding that because consideration of the factors involves a public duty, their consideration is "mandatory," not permissive. *Hess Collection Winery v. ALRB* (2006) 140 Cal.App.4th 1584, 1606-07 ("Words permissive in form, when a public duty is involved, are considered as mandatory."). The *Hess* court correctly concluded that the statutory factors "reasonably ensure that contracts of different employers will be similar. There is no equal protection violation." *Id.* at 1604.[4]

That being so, there is no merit to NFIB's assertion that a mediator can "set the economic terms of a contract at a rate . . . which could be higher than the employer can actually pay." NFIB Br. at 11. Labor Code Section 1164(e)(2) provides that a mediator must consider "[t]he financial

---

[4] Justice Nicholson's dissent in the *Hess* case on this issue was premised on the fact that, at the time the mediator issued his report in *Hess*, the Legislature had not yet codified the standards that are now contained in Labor Code §1164.3(e). Rather, the standards were contained only in ALRB regulations. *Hess*, 140 Cal.App.4th at 1612 (Nicholson, J., dissenting) ("The Legislature failed to provide similar [*Birkenfeld*] guidance to the mediator under Labor Code section 1164."). Since the Legislature has now provided a "nonexclusive list of [statutory] relevant factors to be considered," as in *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, the reasoning of Justice Nicholson's dissent is no longer applicable.

condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union's wage and benefit demands." Lab. Code §1164(e)(2). In this case, Gerawan never claimed an inability to meet the Union's demands. Indeed, in Gerawan's request for attorney fees of over $2.6 million before the Fifth District, Gerawan admits it has spent more money on litigation than it would cost Gerawan to grant its workers the wage increases and improved benefits provided by the contract ordered by the ALRB.

B. The Legislature resolved the fundamental policy decisions underlying the MMC process

NFIB argues that the Legislature "failed to resolve the fundamental issues of agricultural labor disputes." NFIB Br. at 17-24. NFIB suggests that these fundamental policy decisions include "how high wages should be," what the "employer's profit margin" should be, and how and when worker "time off [is] to be made available." *Id.* at 21. As demonstrated in UFW's opening brief, however, the Legislature made the relevant "fundamental policy decision" by providing that the ALRB should use MMC to resolve outstanding labor disputes about the terms of an initial CBA. The Legislature also decided which labor disputes the ALRB should refer to MMC, how that process will operate, the issues to be mediated, what factors should be considered to resolve disputes, and how the agency should review mediator's reports. UFW Br. at 41-47.

As the Third District explained in *Hess*:

> Here, the "fundamental policy decisions" are contained in the Legislature's express declaration that "a need exists for a mediation procedure in order to ensure a more effective collective bargaining process between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the [ALRA], ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural work

> force, and promote California's economic well-being by ensuring stability in its most vital industry." (Stats. 2002, ch. 1145, § 1.)

140 Cal.App.4th at 1605 (citation omitted).

The delegation of authority to the ALRB is narrowly focused and limited to resolving disputes about mandatory subjects of bargaining. *See* Labor Code §1155.2 (duty to "confer in good faith with respect to wages, hours, and other terms and conditions of employment"). The MMC statute limits the scope of the dispute resolution process to disputes about those mandatory subjects by requiring the ALRB to review and set aside provisions of the mediator's report if they are "unrelated to wages, hours, or other conditions of employment within the meaning of Section 1155.2." Labor Code §1164.3. In fact, that is precisely what happened in this case, as the ALRB struck down certain provisions that were not mandatory bargaining subjects. *See* CR 723-24; 727-28 (striking down a "non-disparagement" provision and a "successorship" clause because they were not mandatory subjects of bargaining).

Moreover, NFIB cites to no authority for its claim that the details of a particular CBA – like how much to pay in wages and what time off policies should apply – are the type of fundamental policy issues that must be decided by the Legislature itself. *See Pacific Legal Found. v. Brown* (1981) 29 Cal.3d 168, 201 (rejecting as "totally untenable" the argument that "the working details of the wages, hours and working conditions of [certain public] employees" involved "fundamental policy determinations" that can only be resolved by the Legislature); *id.* at 201 ("Past cases of this court demonstrate that the delegation of these kinds of decisions to a public official or agency does not contravene any constitutional precept."). Indeed, this Court already rejected the argument that a city charter mandating interest arbitration by a private arbitrator to resolve such issues

involved an unconstitutional delegation of legislative authority in *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

C. There is no evidence that similarly situated employers were subject to arbitrarily different treatment

NFIB urges that the MMC statute is invalid because "similarly situated agricultural employers are subject to arbitrarily varying labor regulations." NFIB Br. at 11. But the statute on its face provides for the same MMC process, using the same factors, to be used to resolve contract disputes, and this case presents only a facial challenge to the statute. A facial challenge to the constitutional validity of a statute or ordinance "considers only the text of the measure itself, not its application to the particular circumstances of an individual. To support a determination of facial unconstitutionality, voiding the statute as a whole, *petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute* .... Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (emphasis added; internal citations omitted).

Here, the Fifth District held that the "that the MMC statute on its face violates equal protection principles." *Gerawan Farming, Inc. v. ALRB* (2015) 236 Cal.App.4th 1024, 1072. No "as applied" challenge was raised by Gerawan. NFIB's claim that "similarly situated employers" will be subject to arbitrarily varying regulations is not supported by the language of

the statute and, therefore, does not support a facial equal protection challenge.[5]

D. Non-delegation principles do not require elected officials to set the terms of CBAs

NFIB argues that that the non-delegation doctrine requires politically accountable elected officials to set the terms of collective bargaining agreements. NFIB Br. at 26-27. But NFIB provides no authority for this claim.

Mandatory interest arbitration statutes often use private neutrals appointed to resolve a single dispute, and the use of private neutrals does not make the process unconstitutional. *See, e.g., Town of Arlington v. Board of Conciliation and Arbitration* (Mass. 1976) 352 N.E.2d 914, 920 ("We are less concerned with the labels placed on the arbitrators as public or private, as politically accountable or independent, than we are with 'the totality of the protection against arbitrariness' provided in the statutory scheme."); *accord Anchorage v. Anchorage Police Dept. Empl. Assoc.*

---

[5] The Fifth District made the same error as NFIB in positing a hypothetical whereby three allegedly similarly situated employers were subject to irrationally different contract terms. 236 Cal.App.4th at 1071 n.37. As stated in text, a party cannot establish a facial equal protection violation "by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute." *Tobe v. City of Santa Ana,* 9 Cal.4th at 1084. Moreover, no two employers, or bargaining units, or labor disputes, or evidentiary records would be precisely the same, so differences in the terms of these hypothetical final ALRB orders would not establish an equal protection violation anyway. *Cf. Warden v. State Bar* (1999) 21 Cal.4th 628, 644 ("Where there are 'plausible reasons' for [the classification] 'our inquiry is at an end.'") (citations omitted); *Ft. Smith Light & Traction Co. v. Bd. of Imp. of Paving Dist. No. 16* (1927) 274 U.S. 387, 391-92 ("[n]or need we cite authority for the proposition that the Fourteenth Amendment does not require the uniform application of legislation to objects that are different").

(1992) 839 P.2d 1080, 1084; *Medford Firefighters Assoc. v. Medford* (1979) 40 Ore.App. 519, 526-27.

This Court recognized that private neutrals may be used to help resolve public sector disputes, and that "to the extent that the arbitrators do not proceed beyond the provisions of the [legislation] there is no unlawful delegation of legislative power." *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608, 622 n.13. NFIB cites no contrary authority.[6]

III. Amicus Silvia Lopez Argues About Issues That Were Not Set for Review

Amicus Silvia Lopez largely presents arguments that are outside the specific issues for review. *See* Order of August 19, 2015 ("The issues to be briefed and argued are limited to the issues raised in the petitions for review."). For example, Lopez argues that she and other workers should have been given formal notice of the MMC proceedings and were barred from attending in violation of their due process rights. Lopez. Br. at 5-8. She erroneously posits that one of the issues set for review is whether the "ALRB's failure to provide workers with a notice and an opportunity to challenge the presumption of majority support underlying the certification in the MMC process violate workers' due process rights." Lopez Br. at 8. Lopez also uses her brief as a platform to make attacks on UFW (*id.* at 5);[7]

---

[6] NFIB also argues that there are no adequate review procedures or "safeguards" for MMC contracts. *See* NFIB Br. at 24-26. The statute and history of this case belie that claim. *See* Lab. Code §1164(a)-(e), §1164.5.

[7] Lopez claims that "UFW disappeared from the scene entirely" and that it "failed entirely to engage the employer at all for 17 years." Lopez Br. at 5. She parrots Gerawan's claims of "abandonment" without citation to any evidence. As noted in prior briefing, the ALRB did not take evidence or make findings on the abandonment issue because, under its well-settled interpretation of the ALRA, prior "abandonment" is not a defense to the duty to bargain or to participate in MMC proceedings.

argues about the Union's duty to bargain (*id.* at 9); and makes claims about the Legislature's purported ignorance of the issues raised by dormant certifications (*id.* at 10-13).[8]

None of these issues were set for review by this Court. Lopez's arguments are therefore irrelevant to the instant proceedings. An amicus curiae "accepts the case as he finds it" and cannot present arguments that were neither raised nor briefed by the parties. *See Cal. Redevelopment Ass'n. v. Matosantos* (2011) 53 Cal.4th 231, 242 n.2; *Rand v. Bd. of Psychology* (2012) 206 Cal.App.4th 565, 593 n.10.

IV. Under the ALRA, a Union's Certification Terminates Only Through a Valid Decertification Election

To the extent that amicus Lopez's arguments are meant to relate to the issue of an "abandonment" defense, these arguments lack merit. Lopez contends that UFW waived or otherwise relinquished its right to represent Gerawan employees. Lopez Br. at 15-18. Lopez, however, misrepresents the nature of the cases she relies on and ignores decades-long precedent under the ALRA – affirmed by courts of appeal – that employers cannot raise an "abandonment" defense to a certified union's status and that, absent institutional defunctness or an express disclaimer, a certified union can be decertified only through a valid worker election.

American Broadcasting Co. (1988) 290 NLRB 86 does not discuss abandonment or termination of representative status. Rather, that case

---

[8] As noted in UFW's Reply Brief, the Legislature has considered this issue. 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 this amendment would have required the Board to "decertify a labor organization that violates this subdivision." The bill failed to garner enough votes to pass out of the Assembly Committee on Labor & Employment and died on January 31, 2016. *See* UFW Reply Br. at 26 n.11.

addressed whether a union had contractually agreed to waive its right to certain information concerning the gender and race of workers in the bargaining unit. *American Broadcasting,* 290 NLRB at 88 ("we have examined article 38 of the [CBA] and the parties bargaining history . . . we conclude article 38 constitutes a waiver of whatever statutory right the Union might otherwise have to the information involved here."). *American Broadcasting* therefore does not support Lopez's argument here. UFW did not agree to terminate its status as the bargaining representative.

Citing to *Bruce Church, Dole Fresh Fruit* and *Ventura County Fruit Growers*, Lopez argues that "[t]he ALRB's own precedential decisions provide further support that the UFW certification terminated as a matter of law as a result of the disclaimer of interest." Lopez Br. at 16. This claim is simply not true, as the ALRB has consistently adhered to the "certified until decertified" rule, and there was no disclaimer of interest here.

Under the longstanding rule under the ALRA, 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* (1996) 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").

Indeed, for more than 30 years, ALRB cases have rejected a wide variety of 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 Farms* (1986) 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 3; *Arnaudo Bros., LP* (2014) 40 ALRB No. 3, at 9-12.

Further, the Board's "certified until decertified" rule has been judicially approved. *See Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, 24-25 (employer's duty to bargain with certified union does not lapse "until such time as the union is officially decertified"); *Adamek & Dessert, Inc. v. ALRB* (1986) 178 Cal.App.3d 970, 983 ("the company has a duty to bargain with the union until the union is decertified through a second election."); *F & P Growers Assn. v. ALRB* (1985) 168 Cal.App.3d 667, 676-77 (rejecting employer attempt to challenge union's representative status because "the Legislature had shown its purpose was to provide employees, and not employers, a method for changing unions" and to do so would "permit an agricultural employer to ... avoid bargaining with an employee chosen agricultural union").

Contrary to Lopez's claim (Lopez' Br. at 16), *Bruce Church* does not support the existence of an abandonment defense. The *Bruce Church* board 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 and the union evaded bargaining. *Bruce Church*, 17 ALRB No. 1, at 9-10, 20. In other words, if an employer seeks to bargain with a union, and the union does not respond to the request or evades bargaining, the employer is privileged to make unilateral changes, without fear of being found to have committed an unfair labor practice. *Id.* at 20.

Bruce Church affirmed the "certified and decertified" rule and found that there was no evidence of abandonment because there was no "showing

that the Union was either unwilling or unable to represent the bargaining unit," or that it "had left the scene altogether." *Id.* at 9-10. The conclusion in *Bruce Church* that "disclaimer" and "defunctness" – neither of which exist here – are the only exceptions to the "certified until decertified" rule is consistent with both prior and subsequent ALRB decisions. *See, e.g., Dole,* 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 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* (2014) 40 ALRB No. 3, at 10 n. 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.'").[9]

Lopez also cites the *Dole* case in support of her abandonment claim (Lopez Br. at 15-18), but *Dole* provides no support to Lopez, because the Board there exhaustively discussed and expressly rejected the availability of any kind of employer abandonment defense. The Board there said that the ALRA "does not recognize the concept of 'abandonment'" and expressly found that it was for the Legislature, and not the Board, to amend the ALRA to provide an abandonment procedure. *Dole,* 22 ALRB No. 4, at 15-16 ("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 state that it would "hold[] accountable labor representatives" for inactivity (*id.* at 17), the Board explained that a union's inactivity could serve only as a basis to find that the union illegally refused to bargain under Labor Code

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

section 1154(c), or that such inactivity was a "waiver of the right to bargain over proposed changes in terms and conditions of employment." *Id.* at 18. To the extent that Lopez argues that, under *Dole*, a union can lose its certification status through inactivity, the Board's express language plainly rejects that position.

Finally, Lopez claims that *Ventura County Fruit Growers* supports her claim that "the UFW certification terminated as a matter of law." Lopez Br. at 16. Lopez argues that *Ventura County* stands for the proposition that a union may "waive" its representational rights. *Id.* Again, Lopez misrepresents the holding of that case. The quoted language from Lopez's brief does not relate to the waiver of a right to represent a bargaining unit; rather, as in *Bruce Church* and *Dole*, it deals with the issue of a union waiving its right to bargain over proposals made by employers. *Ventura County,* 10 ALRB No. 45, at 23-24 ("Under the "waiver" principle, an employer is generally relieved of its obligation to bargain over a specific issue where the bargaining representative is notified of a proposed change in unit terms and conditions of employment and makes no protest or effort to bargain concerning it.").

Contrary to Lopez's argument, the *Ventura County* Board 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.*" *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 . . . [so the] abandonment theory was a factual impossibility." *Id.* at 7–8; *see also Tri-Fanucchi*, 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., 40 ALRB No. 3, at 12 n.3 (reaffirming that abandonment is a "factual impossibility" when an employer is faced with a union's request to bargain).[10]

While Lopez claims that allowing UFW to invoke the MMC process would cause "terrible damage" to the Gerawan farmworkers, the Legislature concluded otherwise when it passed the MMC statute and sought to create a more effective collective bargaining process for workers like the Gerawan farmworkers who voted for union representation but have never had a collective bargaining agreement. *See* UFW Br. at 18-20. Moreover, Lopez fails to explain how farmworkers suffer "damage" from a reasonable collective bargaining agreement that *improves* their employment terms, as there is no dispute that the ordered agreement includes wage increases, increased benefits, and other protections for all employees.

V. Certification and Decertification Elections Enable Workers to Make Their Own Decisions About Representation

Lopez – like Gerawan – argues that decertification elections are not an "effective remedy" to remove a union because employees cannot ensure that their votes will be counted. Lopez Br. at 13. Painting herself as an innocent victim, Lopez claims that due to "actions of parties outside of the workers' control" (*i.e.* Gerawan and the agricultural industry), workers' votes will not be counted. *Id.* at 15. Again, the issue whether the decertification petition was properly dismissed is not before the Court. The only issue here is whether "the ALRA permits an employer to oppose a certified union's request for referral to the MMC process by contending

[10] The UFW's involvement in asserting the rights of Gerawan bargaining unit employees, through the filing of hundreds of unfair labor practice charges, participation in the hearing on Gerawan's election misconduct, and participation at all stages of this case, directly contradicts Lopez's claim that the Union has abandoned the unit.

that the union 'abandoned' the bargaining unit." *See* Order of August 19, 2015.[11]

Moreover, as shown by recent ALRB findings, Lopez is not an innocent bystander, but was fully involved and aware that she was violating her co-workers' rights. She and her counsel did not have enough valid signatures the first time she requested an election, so they submitted forged signatures, something the ALRB Director correctly described as "disgraceful and patently unlawful." When it became apparent to Lopez and Gerawan that not enough employees supported decertification efforts, the company gave Lopez a "virtual sabbatical" of over two and one half months to permit her to illegally gather signatures on work time – and Lopez happily accepted it. *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1, at 22-26, 30. Thus, while the rest of her "coworkers" labored in backbreaking farm work, working as much as 55 hours per week during a more than ten week period, Lopez worked only 8.3 hours per week. *Id.* at 30 n.11. When Lopez was almost out of time to collect needed signatures before the 2013 season ended because workers did not support her efforts, Gerawan allowed Lopez to physically block the company entrances and to collect 800 - 1,000 invalid signatures for the decertification petition. *Id.* at 32-37. Indeed, the Board found that, in blocking company entrances, Lopez and Gerawan violated "the rights of other workers not to participate in the work blockage," and violated their right "to work for a full day's pay." *Id.* at 35. Finally, as previously stated, Lopez happily accepted the CFFA's money, with Gerawan's approval, to the tune of over $13,000.00. Lopez engaged in all of this activity while she was represented by counsel

[11] Gerawan has sought review with the Fifth District of the Board's decision regarding the decertification petition and, as noted by Lopez in her brief, she has also filed a petition for writ of mandate in the Fifth District challenging the Board's decision. The correctness of the Board's order in 42 ALRB No. 1 is not at issue here.

(Mr. Raimondo) who is a former law partner of Gerawan's counsel (Mr. Barsamian).

Therefore, contrary to Lopez's claims, the invalidation of the November 2013 election was not because "others misbehave[d]" or due to "the actions of parties outside the workers' control." Lopez Br. at 15. Rather, the Board invalidated the election in large part because of illegal conduct in which Lopez was a central player. What the Board said about Gerawan applies with equal force to Lopez: she "unlawfully undermined the very principle of free choice [she] so earnestly argues" for. 42 ALRB No. 1, at 9.

Lopez points to no evidence or authority that a valid decertification effort based on genuine employee free choice would be ineffective in removing a union, and there is none. Existing decertification procedures and the 7-day election period contained in the ALRA are sufficient to provide employees the opportunity to decertify an incumbent union. *See* Lab. Code §1156.3(b). And, as recognized by the court in *Montebello Rose,* "[s]o 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." *Montebello Rose*, 119 Cal.App.3d at 28.

By contrast, permitting employers or their agents to raise an abandonment defense at the MMC stage will only incentivize growers to further resist collective bargaining by using the intervening time period to engage in illegal decertification campaigns, as was done by Gerawan and Lopez. The ALRB is very familiar with a long history of agricultural employers using employees and others in their illegal decertification efforts. *See, e.g., Gallo Vineyards, Inc.* (2004) 30 ALRB No. 2, at 24 (dismissing decertification petition because of illegal employer involvement); *D'Arrigo Bros.* (2013) 39 ALRB No. 4 at 28-29 (same);

Peter D. Solomon (1983) 9 ALRB No. 65, at 7 (same); *Abatti Farms, Inc.* (1981) 7 ALRB No. 36, at 5-7 (same); *S & J Ranch, Inc.* (1992) 18 ALRB No. 2, at 17 (same); *M. Caratan, Inc.* (1983) 9 ALRB No. 33, at 7 (same).

Lopez's claim that the Union should be required to demonstrate it has "continued majority support" flies in the face of ALRB precedent and the court decisions in *Montebello Rose, Adamek*, and *F & P Growers*. *See, e.g., Montebello Rose,* 119 Cal.App.3d at 25-26 (upholding the ALRB's ruling that "there is no need to conduct a ritual reaffirmance of a union's certification" just because the employer challenges it). Adoption of her position would only perpetuate the problem of employer refusals to negotiate collective bargaining agreements that the Legislature was trying to solve.

CONCLUSION

Neither of the amicus briefs presents any persuasive argument supporting the Fifth District's erroneous ruling. The Fifth District's decision should be reversed in its entirety.

Dated: July 8, 2016

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

SCOTT A. KRONLAND
DANIELLE E. LEONARD
ALTSHULER BERZON LLP

By: */s/ Mario Martínez*
Mario Martínez

Counsel for Real Party in Interest
United Farm Workers of America

CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.520(c)(1) of the California Rules of Court that the foregoing brief is proportionally spaced, has a typeface of 13 points or more, and contains 6,343 words, excluding the cover, tables, signature block, and this certificate, which is fewer than the number of words permitted by the Rules of Court. Counsel relies on the word count of the word processing program used to prepare this brief.

Dated: July 8, 2016

By: */s/ Mario Martínez*
Mario Martínez

Counsel for Real Party in Interest
United Farm Workers of America

PROOF OF SERVICE

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

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On July 8, 2016, I served the following document(s):

REAL PARTY IN INTEREST UNITED FARM WORKERS OF AMERICA'S COMBINED ANSWER TO AMICUS CURIAE BRIEFS OF NFIB ET AL. AND SILVIA LOPEZ

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

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

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

Agricultural Labor Relations Board 1325 J Street, Suite 1900B Sacramento, CA 95814-2944	Agricultural Labor Relations Board
Jose Antonio Barbosa Agricultural Labor Relations Board 1325 "J" Street, Suite 1900 Sacramento, CA 95814-2944	Agricultural Labor Relations Board
Benjamin Matthew Glickman Office of the Attorney General 1300 I Street, Suite 125 P. O. Box 944255 Sacramento, CA 94244	Agricultural Labor Relations Board
The Hon. Donald Black Fresno County Superior Court 1100 Van Ness Avenue Fresno, CA 93724-0002	Trial Court
California Court of Appeal For the Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Court of Appeal
Damien M. Schiff Pacific Legal Foundation 930 G Street Sacramento, CA 95814-1802	Amici curiae National Federation of Independent Business Small Business Legal Center, et al.
Paul Joseph Bauer Walter and Wilhelm Law Group 205 East River Park Circle, Suite 410 Fresno, CA 93720-1572	Amicus curiae Silvia Lopez

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this July 8, 2016, at San Francisco, California.

/s/Jean Perley
Jean Perley