# 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

## ANSWER TO PETITIONS FOR REVIEW

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## INTRODUCTION

This case involves a statutory and constitutional challenge to a forced contracting process under the Agricultural Labor Relations Act (the "Act" or the "ALRA"), known as "Mandatory Mediation and Conciliation" ("MMC"). The Court of Appeal held "that the MMC statute unconstitutionally deprives Gerawan Farming, Inc. ("Gerawan") of equal protection and unconstitutionally delegates legislative authority." (Slip Op. ("Op.") at 8.) The Court also held the Agricultural Labor Relations Board (the "Board" or the "ALRB") abused its discretion by compelling Gerawan into MMC without giving Gerawan an opportunity to prove that Real-Party-in-Interest United Farm Workers of America ("UFW") had abandoned the bargaining unit, and thus forfeited its standing to request MMC. Through this Answer, Gerawan addresses the Petitions for Review filed by both the ALRB and UFW.

Gerawan acknowledges that this decision conflicts with *Hess Collection Winery v. California Agricultural Labor Relations Board*, (2006) 140 Cal.App.4th 1584 ("*Hess*"). Gerawan respectfully submits that Justice Nicholson's dissent in *Hess*, and the unanimous decision in this case, correctly analyze the specific constitutional infirmities of the MMC statute.

The peculiar facts of this case, however, make it different from *Hess*. This is the first – and only – appellate decision to consider the abandonment defense under the MMC statute. There is no reason to disturb the Court of Appeal's well-reasoned and narrowly-crafted analysis.

The procedural posture of this case is also unique. Following UFW's reappearance and request for MMC, Gerawan workers initiated one of the largest sustained decertification drives in California agricultural labor history. The ALRB determined that a majority of Gerawan's employees wanted an election to decertify UFW. The Board then held an election on November 5, 2013.

At UFW's request, the Board impounded the ballots pending post-election objections and challenges. The ballots have yet to be counted. A six-month hearing on the post-election challenges concluded in late May 2015. The administrative law judge is expected to issue a ruling in the near future. Individual ballot objections may necessitate further proceeding, if and when the Board counts the ballots. These decision will be reviewed by the Board and, possibly, by the Court of Appeal. The outcome of these proceedings may take months, if not years. In the event that the Board counts the ballots and finds UFW decertified, the union will be ousted, the MMC "contract" will be nullified, and the MMC process will end.

Gerawan asked the Board to stay the MMC proceedings until the outcome of the election was known. The Board denied the request without explanation. Despite the intervening decertification election, which may have ousted UFW, the Board ordered that the MMC contract take immediate effect. (Op. at 6-7.) UFW and the General Counsel of the ALRB then sought (unsuccessfully) to immediately enforce the CBA in the Sacramento County and Fresno County Superior Courts respectively, notwithstanding the pendency of Gerawan's appeal.

The Board's contradictory orders thus created a race between the incumbent union (which seeks to impose itself on the workers via a Board-ordered contract) and a majority of Gerawan's employees (who successfully petitioned for a decertification election to remove the union). By validating the union's standing to compel workers into a forced contracting scheme, the ALRB gave its imprimatur to the very union that a majority of workers wanted the right to decertify.

The MMC statute has no counterpart under federal labor law, which forbids the government from imposing contractual terms or requiring either a private employer or a union to make a concession on any substantive term. Nor does it have a counterpart for private sector employees in any other state. The

constitutionality of collective bargaining is based on the workers' right to organize and to strike, and the corresponding right of freedom of contract for all parties, employers and unions alike. Binding arbitration between private parties is a matter of contract, not government compulsion. The statute imposes a forced command on Gerawan and its workers, restricting their rights and freedoms. The unconstitutional infirmities of the MMC statute – its unlawful delegation, its creation of individuated and suspect procedures targeting one (and only one) grower, its lack of judicial review, due process safeguards, or exit rights, and its step-by-step evisceration of the workers' protected collective activities – cumulate and show the essential unfairness of the procedure, well beyond the grounds upon which the Court of Appeal based its holdings.

But the election (never mentioned in the Board's petition) also raises significant prudential considerations as to whether this Court should grant review now (if at all), or whether it should defer that decision pending the outcome of the post-election proceedings.

Should review be granted, Gerawan submits that this Court should first determine whether the Board erred by compelling Gerawan into MMC, or erred by imposing the MMC contract ***after*** it ordered an election. These present independent grounds to vacate the Board's Order. If the constitutional questions are reached, then this Court should address the other arguments raised by Gerawan, but not addressed below. Gerawan believes these different paths lead to the same outcome reached by the Court of Appeal.

## ISSUES PRESENTED FOR REVIEW

1. Whether the Board erred by directing the parties into MMC notwithstanding the failure of UFW to negotiate in good faith "for at least one year after the . . . initial request to bargain."

2. Whether the Board erred by directing the parties into MMC notwithstanding the failure of UFW to show that Gerawan had "committed an unfair labor practice" relating to contract negotiations with a certified union.

3. Whether the Board erred by imposing the MMC contract after conducting the decertification election.

4. Whether compulsory interest arbitration under the MMC statute deprives Gerawan of liberty and property interests without due process.

5. Whether the MMC statute violates due process, or constitutes an unconstitutional taking of property without just compensation, by failing to provide the employer with any mechanism that secures "a just and reasonable return" or any means to obtain relief if the terms and conditions imposed by the MMC contract proves confiscatory or arbitrary.

## BACKGROUND

### A. The MMC Statute

MMC is not "mediation" in any accepted sense of the word. The Board imposes what is termed a "collective bargaining agreement" ("CBA"), via compulsory state-imposed arbitration between a private employer and an agricultural labor union. This CBA is not an "agreement," since (as here) the employer did not agree to be bound by the terms of a CBA or agree to submit to binding arbitration. The "agreement" is drafted by a private, third-party "mediator." As applied here, the mediator exercised virtually unfettered discretion as to nearly every aspect of one grower's relationship (and only that grower) with its workers by setting the terms and conditions of employment for the thousands of workers who work at Gerawan.

Once compelled into MMC, the employer may not opt-out of this process. Once imposed, there is no mechanism for the employer to seek adjustments to the CBA, whether based on changes in working conditions, the labor market, the

agricultural economy, or matters beyond anyone's control, including the widespread drought afflicting farmers in this state. The workers have no right to ratify or reject the CBA, though it imposes upon them a union (and the payment of union dues or agency fees). The CBA limits their rights to engage in concerted activities protected under the ALRA, including the right to picket or to strike. Their only exit from the forced imposition of the contract is to quit their jobs. Their only route to dislodge the union is through a decertification election (assuming the ALRB permits the election and counts the ballots).

**B. The Board Compels Gerawan Into The MMC Process**

In response to UFW's demand to compel Gerawan into MMC, the company raised statutory and constitutional challenges, including a defense based on UFW's forfeiture of its standing due to its longstanding absence. The ALRB dismissed this argument in one sentence: "The Board has previously considered and rejected this type of 'abandonment' argument." (*Gerawan Farming Inc.* (2013) 39 ALRB No. 5, at 3.)

To invoke MMC, the Board must find that "the parties have failed to reach agreement for at least one year after the . . . initial request to bargain." (Labor Code § 1164.11, subd. (a).) The Board construed the 12-month requirement as nothing more than a calendaring event, whereby the union could make an "initial" request to bargain in 1992 (a decade before the MMC statute was passed), and then disappear until it demanded arbitration, two decades later.

The MMC statute also requires a finding that the employer "committed an unfair labor practice." Under the Board's interpretation, any unfair labor practice, no matter how distant in time or unrelated to bargaining satisfies this prerequisite. Here, the underlying "ULPs" occurred in 1990, prior to the union's certification in 1992, and were unrelated to any CBA bargaining process.

### C. The MMC Contract

Once forced into MMC, Gerawan was obligated to present and defend its position as to dozens of contractual terms which UFW demanded, or risk forfeiture in the form of a contract based solely on terms proposed by UFW.

Once MMC began, a Gerawan farm worker, Lupe Garcia, asked to participate in the mediation portion of the process. Gerawan supported his request to intervene; UFW did not. The mediator, Matthew Goldberg, and the Board rejected his request. Garcia then asked to attend and silently observe the on-the-record hearings conducted by Goldberg. The Board rejected this request as well: "we do not think the public interest in the process of reaching an agreement . . . is served by public presence during that process." (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 13, at 10.) This decision is now on appeal. (*Gerawan Farming, Inc. v. Cal. Agric. Labor Relations Bd.*, Case No. F069896 (5th Appellate District).)

The mediator submitted his final "Report," containing employment terms he "crafted," to the Board on September 28, 2013. (Op. at 6.) Gerawan excepted to numerous terms dictated by Goldberg. The fact of UFW's longstanding absence – *i.e.*, the "status quo" at the time Gerawan was forced into MMC – certainly should have been a consideration in determining whether any of UFW's contract demands could be justified before imposing a three-year CBA. Goldberg acknowledged the fact of UFW's absence, but nonetheless deemed it irrelevant to reordering the workers' economic relationship with Gerawan and UFW.

The validation of this multi-million dollar wealth transfer from workers to UFW through forced payment of union dues or agency fees, combined with the demand that workers be fired if they do not make these payments, was unsupported by any evidence. Gerawan objected to this infringement on the workers' rights of free association. California has never departed from its position of "benign neutrality" regarding these so-called "union security agreements." (*Pasillas v.*

*Agric. Labor Relations Bd.* (1984) 156 Cal.App.3d 312, 346.) Nor is it state policy that workers be promoted or laid-off based on seniority. The mediator made his own policy, in contradiction to state policy, based on his view that union security agreements and seniority provisions were "normally" a part of a voluntarily-negotiated agreement, and therefore should be "non-controversial." He retroactively imposed wage increases, including as to contracts with third-party farm labor contractors. He imposed interest arbitration as to any disputes concerning the terms of the CBA, and then justified the "no strike/no lockout provisions" proposed by UFW as a "trade-off for grievance and arbitration rights, which this Contract will provide." (App'x at 386.) Nowhere does Goldberg explain why provisions that may "normally" be part of a consensual agreement make sense in this setting, or how they relate to the company's business, its history of paying the highest wages in its industry, or its prior relationship with workers.

The Board validated the mediator's decisions, largely without comment or any meaningful check on the breathtaking scope of the contract Goldberg wrote, and issued Goldberg's Report as the Board's "final order" on November 19, 2013, two weeks after conducting the decertification election.

## ARGUMENT

### I. The Court Of Appeal Correctly Resolved The Equal Protection Challenge To The MMC Statute.

The MMC scheme is, to our knowledge, the only law in the United States that permits a state agency to order private citizens into a forced contracting process, and then to impose a "contract" via an individuated procedure applicable to only one employer and its workers. The Court of Appeal held that the MMC statute violates equal protection by intentionally singling out and discriminating against one employer by creating a special set of rules for that employer alone, based on a private legislator's *dictat* of a compulsory CBA.

Respondents argue that the Court's decision "eschews traditional rational basis analysis for a new standard under which any individualized result is a per se constitutional violation." (Bd. Pet. at 2.) The opinion was not "focused exclusively on the ***potential*** for an individualized outcome," (Bd. Pet. at 17 [emphasis added]), but on the ***certainty*** that each employer would be subjected to "an individual legislative act which, by design, holds Gerawan, and no other agricultural employer, to the terms of a private legislator's decision." (Op. at 46.) The discrimination is intentional "because the mediator has no power to extend the enactment to other agricultural employers." (Op. at 47.) The discrimination is arbitrary "because there are no standards set forth pursuant to which the mediator's decision in this case will be the same as a mediator's decision in any other case," (*id.*), and "unavoidable that even similar employers will be subject to significantly different outcomes." (Op. at 47.)

The statute provides no means to ensure that similarly situated employers will receive the same or similar results under the law. "Inevitably, each imposed CBA will still be its own set of rules applicable to one employer, but not to others, in the same legislative classification" concerning every aspect of employment and the employer-union relationship. (Op. at 49.) This is "the very antithesis of equal protection" because "every agricultural employer is the one and only member of the class." (Op. at 46 [citing *Hess*, 140 Cal.App.4th at 1615–17 (dis. opn. of Nicholson, J.)].)

Any comparison to rate-making or rent control procedures collapses, such as those considered in *Fisher v. City of Berkeley*, (1984) 37 Cal.3d 644 ("*Fisher*"), where the dispute turned on a legislative choice between a "market-value" versus "investment" value measure to adjust rent ceilings. (*Id.* at 684.) Here, no rational choices were made as to any standards to be applied, or applied uniformly. (*See 20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 273 [noting distinction

between adoption of rate regulations and individuated rate-making decisions, the latter requiring "the independent-judgment-on-the-evidence standard of review"].) The MMC statute leaves it entirely to one private legislator to decide every term based on his subjective views of an unlimited range of factors he deemed relevant, such as the future possibility of "labor shortages," or which he considered and disregarded, such as the disruption of employer's "business model," or "a cost in terms of lower productivity, morale, retention, and competitiveness." (Op. at 4 n.4.) There is no administrative "fair return on investment" standard, as there was in *Fisher*, or any safeguards to protect against the inherent procedural defects which (as in *Birkenfeld*), "inevitably deprived all landlords of due process 'except perhaps for a lucky few.'" (*Fisher*, 37 Cal.3d at 684 [quoting *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 172 ("*Birkenfeld*")].) There is no mechanism to safeguard against the danger of collusive arrangements which benefit the employer and yield millions of dollars in dues payments to a union, all at the expense of the workers.

Respondents' arguments rest largely on the imperative of deference – to the Board's "expertise" in interpreting the statute; to each mediator's subjective determinations of the entire employer/employee relationship; and to the Legislature's finding of some "rational relationship to a conceivably legitimate state purpose" that would justify compelling one grower into a forced contract. (Bd. Pet. at 17.) No reference is made as to the irrational outcome of imposing on only one grower "a distinct, unequal, individualized set of rules," a point illustrated by the mediator's imposition of a wage increase, notwithstanding that "[t]he record showed that Gerawan paid its employees the highest average wages among its closest competitors." (Op. at 50 n.38.)

Contrary to what the Board argues, more than "purely economic interests are at stake." (Bd. Pet. at 17.) The CBA eliminates or compromises a range of

protected collective activities, including the right to strike or picket. It forces association by the workers with UFW and compels speech via the payment of union dues or fees – issues now before the U.S. Supreme Court. (*Friedrichs v. California Teachers Ass'n* (9th Cir. Nov. 18, 2014) __ F.3d __ [No. 13-57095], *cert. granted* (June 30, 2015).) It also forces Gerawan to "recognize" UFW as "the sole and exclusive labor organization representing all of the agricultural employees." The Board rubber-stamped the mediator's conclusion that the recognition clause is "the well-spring from which a union draws its authority to represent" workers, (App'x at 365), notwithstanding the Board's determination ***before*** imposing the agreement that there was a *bona fide* question as to whether a majority of Gerawan workers supported UFW. The Board validated Goldberg's conclusion that the "MMC process itself . . . fundamentally requires the Employer to recognize the Union as the exclusive representative of its employees," (*id.*), without acknowledging that Gerawan was challenging UFW's representational status at the time the CBA was imposed.

This law allows "officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." (Op. at 46.) In this case, UFW targeted one employer, presumably among many others where the union failed to reach an initial agreement, and thereafter abandoned the workers. (*See* UFW Pet. at 26 n.9.)

This opens to door to a different and equally dangerous form of retribution, for it enables UFW to pick and choose among employers (and their workers) it believes should be subject to a forced contract. "While the Legislature may have intended this as a way to avoid the political retribution it might incur if it enacted laws applicable equally across the class, that motivation is entirely insufficient to justify the disparate treatment." (Op. at 46.)

As Justice Nicholson noted in his dissent in *Hess*, special legislation of this sort offends equal protection and due process. (140 Cal.App.4th at 1616 [citing Const., art. IV, § 16, subd. (b)].) While the Legislature may require all employers to pay a minimum wage, or to compel bargaining, "it may not leave the question as to whether and how these things shall be done or not done to the arbitrary disposition of any individual." (*Schaezlein v. Cabaniss* (1902) 135 Cal. 466, 470.) This concept is deeply rooted in the law: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (*Id.* at 469 [quoting *Yick Wo v. Hopkins* (1886) 118 U.S. 356].)

## II. The Court Of Appeal Correctly Ruled That The MMC Statute Constitutes An Unlawful Delegation Of Legislative Authority.

The Court found that the only "fundamental" policy determination made by the Legislature in the MMC statute "is *to resolve issues* so that a first contract may be imposed." (Op. at 49 [emphasis in original].) But this does not provide the mediator "with any policy objective to be carried out or standard to be attained once those factors have been considered." (Op. at 52.) The unlawful nature of this delegation is compounded by the lack of "necessary procedural safeguards or mechanisms to assure a fair and evenhanded implementation of the legislative mandate to impose a CBA." (Op. at 54.) The Board must give "virtually a rubber-stamp approval to the mediator's reported CBA as long as the terms thereof have at least a small kernel of plausible support." (*Id.*)

The structure of the law made the risk of inequality and arbitrariness of the MMC process a foregone conclusion because "we cannot tell what the mediator's task is supposed to be under the MMC statute." (Op. at 54.) In this case, the

mediator fashioned a CBA, often without reference to any evidence or the minimal guidelines set forth in the law, which the Board rubber-stamped, without comment.

The delegation doctrine rests on the premise that the legislative body, not an unelected private actor or administrative agency, must itself resolve the truly fundamental policy issues. "It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions." (Op. at 51 [citation omitted].) This is an essential democratic check on the use of legislative power, for it is the only means to ensure public accountability for decisions which permit the state to take exclusive control over the legal relationship between one employer, its workers, and a union. Such "individualized legislation," based on the "untrammeled" application of such a rule, is "constitutionally prohibited" even if "accomplished by the full legislative process." (*People v. Lockheed Shipbuilding & Constr. Co.* (1973) 35 Cal.App.3d 776, 785 n.4.)

In discussing the virtually unreviewable nature of the mediator's report, the Court noted that neither the Board nor a court of appeal would necessarily be given a complete or adequate record of the rationale for the mediator's decision. (Op. at 55.) That is (in part) because the mediator may have received *ex parte* or confidential communications during the "mediation" phase of the MMC process. While such communications may have been of decisive influence on the mediator, they would not become part of the mediator's report (nor could they, given that the Board's regulations call for the "mediator" to conduct confidential "off-the-record" discussions about material issues in the case), as they are shielded from discovery or disclosure. (Code Regs. tit. 8, § 20407, subd. (a)(2); Evid. Code § 1119, subd. (a), (c).)

The Court concluded correctly that these deficiencies compounded the due process defects in the statutory scheme, including the lack of an adequate

procedural mechanism to protect the parties from favoritism or unfairness in the MMC process. (*Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 16 ["On the one hand, proof as to how a particular ex parte contact weighed in an agency decision maker's calculus would be impossible to come by without inquiry into matters beyond the ken of any court."].)

## III. The Court Correctly Decided The Abandonment Defense.

The Court noted that the forced imposition of a contract on the workers by a heretofore absentee union "may create a crisis of representation," without any realistic means available to workers to decertify the union before a MMC contract is imposed. (Op. at 36.) Union "abandonment" presents a circumstance, "however rare and exceptional, in which an employer may be permitted to show the union has lost its representative status." (*Id.* at 38.)

The Board erroneously claims that the Court of Appeal creates an "entirely new conception of union certification" would "significantly undermine" agricultural collective bargaining in this state. (Op. at 25.) The arguments begin with a mischaracterization of the purpose and reach of MMC.

***First***, MMC is not merely an extension of the bargaining process, or a palliative to fix "long stalled" negotiations. Under 2012 amendments to the ALRA, MMC may be invoked to compel the forced contracting of CBAs as a sanction for employer misconduct in certification or decertification elections, whether or not the employees want to be represented by a union.

***Second***, as this case demonstrates, MMC is not a remedy for "dilatory" bargaining tactics of an employer. It rewards the union's failure to represent the workers, or to show up at the bargaining table, by excusing the fact that the reasons for the "long-stalled negotiations" to reach that "elusive" first CBA have nothing to do with employer recalcitrance, but rather UFW's longstanding abandonment of

its duties. Nor is it "simply an additional bargaining obligation" to "facilitate conclusion of elusive first contracts." (Bd. Pet. at 16.) MMC is not "bargaining" – it is coerced contracting. The Board did not "facilitate" a consensual agreement. It imposed the result.

***Third***, the holding did not "second-guess the policy choices of wisdom of particular legislation." (Bd. Pet. at 17.) Citing its so-called "certified until decertified" rule, the Board argues that, short of UFW's ouster via a decertification election or the institutional death of the union, no court may interfere with the imposition of a Board-ordered contract. This rule is not found in the Act. No judicial opinion recognizes it. The Court correctly gave no deference to the Board's self-made rule, holding that the abandonment defense may be raised by the employer in the "exceptional" circumstances of this case, as "only that result will preserve the ALRA's purpose of protecting the employees' right to choose." (Op. at 36.)

Prior decisions interpreting the Act recognize the "finely drawn legislative balance" between stability and employee choice. (*Cadiz v. Agric. Labor Relations Bd.* (1979) 92 Cal.App.3d 365, 378.) As the Court held, the Board's blanket rule rejecting abandonment (no matter how egregious) eviscerates that balance, and neither promotes "stability" in the agricultural fields nor vindicates employees' rights to freely elect their labor representatives.

The grant of exclusivity to a union carries with it the fiduciary obligations of loyalty and due care. That monopoly right, like any other grant of exclusivity by the government, may be revoked or limited, whether due to neglect or abuse. Respondents ignore these arguments, though the Court did not. As with any monopoly, a permanent or indefinite grant of exclusivity rights to a labor union is, in general, contrary to public policy. But in this case, the certification is a legislative "grant of rights to *employees* rather than a grant of power to unions."

(Op. at 36 [citing *N.L.R.B. v. Mid-States Metal Prods., Inc.* (5th Cir. 1968) 403 F.2d 702, 704].)

## IV. The Petitions Should Be Denied (Or Deferred) Given The Pending Decertification Election Proceedings.

The premise of MMC is that a certified labor organization has standing to bargain on behalf of the workers, and to bind them to a CBA. If UFW is decertified by the November 2013 election, the MMC contract will be nullified. The union cannot lawfully be a party to a CBA imposed by that order. (Labor Code §§ 1159; 1164, subd. (a).) This outcome would moot the final order under review, as the "only question presented" would lose its character as a live controversy. (*Wilson v. Los Angeles Cty. Civil Serv. Comm'n* (1952) 112 Cal.App.2d 450, 454.) Such a determination will have the same effect as if the Board had voluntarily withdrawn its order.

Gerawan acknowledges that this Court may determine to grant review as to issues of continuing public importance. Nonetheless, denial (or a grant and stay) of the Petitions may be appropriate to first permit the post-election proceedings to run their course. But even if the questions presented are not moot or are deemed ripe for review, the doctrine of constitutional avoidance counsels deciding issues that are not necessary to resolve the dispute, or that may be rendered moot by the passage of time.

This would leave for resolution whether the Board erred by issuing the final MMC order after conducting the election, or whether the Board erred by compelling Gerawan into MMC in the first place. The Court's decision impliedly answered the first question, and expressly addressed the second one. As discussed below, this Court may reach these questions, or defer resolution of the issue pending the outcome of the election.

## V. Alternatively, This Court Should Grant Review As To Whether The Board Erred By Imposing The MMC Contract After Authorizing The Decertification Election.

The Board issued its final order, and imposed the MMC contract, in contradiction of its prior decisions which, without question, were based on its findings that there was substantial doubt as to whether UFW retained its majority support. The Board took this action knowing that the "presumption" of a union's continued majority status after its initial certification year was "rebuttable." (*Montebello Rose Co. v. Agric. Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 24 ("*Montebello Rose*").) Instead, it deemed abandonment "irrelevant," reflexively applied its so-called "certified until decertified" rule, and disregarded the reasons why it authorized and conducted the election.

The Court of Appeal raised *sua sponte* whether the Board abused its discretion or reversibly erred. Although its opinion did not expressly address this error, the Court nonetheless made clear that under the "rare or exceptional" circumstances of this case, an employer is permitted to show that a union lost its representative status through abandonment. That showing would also "tend to support an inference of a lack of majority support" by workers for the union. (Op. at 38.) And that is what the Board found, when it decided to conduct an election, based on a decertification petition signed by over fifty percent of Gerawan's workers.

The Court tied this conclusion to the adequacy of the only means available to the employees to avoid an MMC-imposed contract – a decertification election. Given the rapid time-frame in which the MMC process may be invoked and completed, "a decertification option would often be too late to stop the MMC process." (Op. at 37.) But where, as here, "a union has arguably abandoned the employees but later returns to invoke the MMC process, that situation may create a

crisis of representation. Accordingly, it is appropriate to allow the employer to raise the abandonment issue at this stage, because only that result will preserve the ALRA's purpose of protecting employees' right to choose." (Op. at 36.)

The fact that a significant majority of Gerawan's workers asked for the election should have been enough to rebut the presumption. If a petition signed by more than half of the workers eligible to vote does not at least raise a question as to the union's legitimacy as the workers' exclusive representative, it is not clear what would.

In *Montebello Rose,* this Court stated that "[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." (119 Cal.App.3d at 28.) This is precisely what the workers did. These workers have real cause for concern where, as here, the Board ordered the MMC contract to take "immediate effect" after Gerawan's employees met the extraordinary hurdle of a majority showing of interest in decertifying the union. If that showing is trumped by the final order, then the Board has, in effect, declared that UFW has the power to impose itself the moment the Board issued the Order.

## VI. If The Petitions Are Granted, This Court Should Review Whether The Board Misinterpreted The Statutory Prerequisites To Compel MMC.

The MMC statute, as here applied, imposes three prerequisites before a party may be compelled into MMC. In addition to arguing that UFW forfeited its certification due to abandonment, Gerawan argued that the Board erred in its application of two requirements. The first is that "the parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain." (Labor Code § 1164.11, subd. (a).) The second is that "the employer has committed an unfair labor practice." (*Id.* at subd. (b).)

The Court held that the Board correctly applied these two provisions, based on the "plain meaning" of the statute. (Op. at 19.) The Court acknowledged that the legislative intent of the MMC statute, and the overall purpose of the Act, might counsel a different result.

The hair trigger application of these prerequisites decouples application of this statute from its remedial purpose, the overall structure and purpose of the ALRA, and the intent of the MMC statute.

### A. The Court Erred In Applying The MMC Statute's "One Year" Bargaining Requirement.

The following is not in dispute. UFW sent a letter to Gerawan on July 21, 1992 requesting negotiations. Gerawan accepted that invitation on August 3, 1992, and invited UFW to submit any proposals it wished to make. The union did not send a proposal to Gerawan until November 22, 1994. In February 1995, the parties held one introductory negotiating session. That session ended with an understanding that UFW would make a revised proposal and would contact Gerawan about future negotiations. Neither of these things happened. (Op. at 5 n.5.)

There was no further contact from UFW until October 12, 2012, when UFW sent a letter in which it claimed to be the bargaining representative of Gerawan's workers and that it was "hereby requesting negotiations." In a subsequent letter, sent on October 30, 2012, the union characterized its October 12 letter as a "first request" for negotiations. (App'x 13.) UFW filed its MMC request on March 29, 2013.

Section 1164.11(a) requires that "the parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain." It is clear that less than less than six months elapsed from what the union characterized as its "first request" for negotiations and its demand

for MMC. This does not satisfy the statutory requirement under any reading of this section.

But even if the 1992 letter constituted the "initial demand," it is implausible that the "literal" terms of the statute would lead to the absurd result that a letter, long buried in UFW archives, and written a decade before the MMC statute was enacted, would become a springboard to compel Gerawan into this forced contracting process. The word "failed," if it is to have any meaning, implies that some activity occurred – one cannot "fail" if one has not tried. No "plain meaning" rule would dictate that "did not reach an agreement" is synonymous with "failed to reach an agreement." Whether or not § 1164.11(a) specifies what constitutes good faith, sustained, or active bargaining, the Act and the legislative purpose of MMC requires something more than a near two-decade's worth of union silence.

Nor can the obligation of good faith bargaining (or lack thereof) be easily read out of the ALRA. The constitutional premise of the National Labor Relations Act (upon which the ALRA is modeled) rests on the so-called "grand bargain" over the reach and scope of rights to collective bargaining. This compromise contemplated that the "necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree to one's terms – exist side by side." (*N.L.R.B. v. Ins. Agents' Int'l Union* (1960) 361 U.S. 477, 489 ("*Ins. Agents*").) These are statutory and constitutional limits on government intrusion into private, consensual negotiations over labor agreements. (*See, e.g., Lodge 76, Int'l Ass'n of Machinists & Aero. Workers v. Wis. Emp't Relations Comm'n* (1976) 427 U.S. 132, 148-150.)

The Board's construction of the one year bargaining requirement would permit a union to engage in surface bargaining during negotiations (or no negotiations whatsoever), with the knowledge that its bad faith conduct would

preordain that the parties "failed" to reach an agreement. This "Beat the Clock" approach to collective bargaining was offered by the Court as one reason why the Board's refusal to consider the abandonment defense was "wholly untenable." In addition to destabilizing labor relations, it would eviscerate the basic premise of collective bargaining. So long as the union knows that it can compel arbitration in a year, it would have no incentive to make concessions, or to engage in the hard work required in any good faith bargaining.

The Court acknowledged that these are "significant concerns," but nonetheless "fall short of showing that we should effectively rewrite the statute by construing it to include a sustained or active bargaining requirement that the Legislature did not put there." (Op. at 21.) The Court was not asked to "rewrite" the statute. Rather, it was asked to apply the plain language of § 1164.11(a) within the context of the ALRA, the purpose of MMC, and the statutory obligations of the Board to regulate the process of negotiations.

The Board may not "dictate the parties' substantive bargaining powers," "act at large in equalizing disparities of bargaining power between employer and union," or "control . . . the results of negotiations." (*Ins. Agents,* 361 U.S. at 488-490.) By abdicating its obligation to insure that both parties engage in good faith negotiations, the Board enables one party to exploit its recalcitrance as a means to not only control the results of negotiations, but to guarantee something the Act otherwise expressly forbids – the forced concession of contractual terms and the compelled imposition of agreements.

The Court concedes that "[t]here is cogency and common sense in Gerawan's argument that active bargaining should precede the MMC process, and it is not unreasonable to suggest that the former should not be a prerequisite to commencing the latter." (Op. at 23.) Nonetheless, the Court concluded that the

"prickly questions" as to what constitutes "sustained," or "good faith" bargaining should left to the "legislative arena." (*Id.* at 23-24.)

But since the enactment of the ALRA, courts have not hesitated to weigh in on such questions, even in the absence of any codification of what constitutes "good faith" or "bad faith" bargaining. (*See, e.g., William Dal Porto & Sons, Inc. v. Agric. Labor Relations Bd.* (1984) 163 Cal.App.3d 541, 549 ["A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination."] [quoting *N.R.L.B. v. Truitt Mfg. Co.* (1956) 351 U.S. 149, 155 (Frankfurter, J., concurring/dissenting)].) Certainly similar considerations would be weighed in determining the abandonment defense, which the Court found rooted in the language of the Act.

The Court observes that the MMC statute amended the ALRA to create a "one-time" compulsory process to bring about an initial CBA. (Op. at 22.) But this amendment did not vitiate or supplant the Act's requirement of mutual good faith bargaining. The Legislature may have deemed the MMC statute as "necessary" because it was "perceived that many employers were unwilling to enter into an initial CBA," (*id.*), but it did so precisely to address bad faith bargaining – by any party. The Court correctly notes that it must ascertain the intent of the Legislature so as to effect the purpose of the law. (*Id.* at 23 n.22 [citing *J.R. Norton Co. v. Agric. Labor Relations Bd.* (1979) 26 Cal.3d 1, 29 ("*J.R. Norton*")].) The Court's interpretation would undermine that intent, as it not only compels employers who have never resisted negotiations into a forced contracting process, but rewards unions who engage in bad faith bargaining.

### B. The Court Erred In Finding That Gerawan "Committed An Unfair Labor Practice."

The Court endorsed the Board's interpretation that § 1164.11(b)'s requirement that the employer "committed an unfair labor practice" is not "limited to postcertification conduct or to special types of ULP's in relation to the union." (Op. at 24.) Put differently, the Court concludes that any unfair labor practice, no matter how distant in time, or unrelated to bargaining, satisfies this statutory requirement.

Taken to its logical and extreme conclusion (as it was in this case), a ULP concerning conduct before the union was certified meets this standard. A "technical refusal to bargain" – an unfair labor practice – is the only way an employer may seek judicial review if it believes, even in good faith, that the union is not the certified bargaining representative. The employer must, therefore, first be found guilty of the charge by the Board in order to ask a court to review the merits of its claim. (*See J.R. Norton,* 26 Cal.3d at 11.) To subject an employer who now, after close to a quarter century, finds itself compelled into MMC based on a finding unrelated to contract bargaining with a certified union – or, as was the case with regard to the ULP charges against Gerawan relating to the 1990 certification election – untethers the remedy from its statutory moorings. This is a flawed exercise in statutory interpretation. It was rejected in a case with striking parallels to the arguments advanced by the Board. (*See Mastro Plastics Corp. v. N.L.R.B.* (1956) 350 U.S. 270, 285-286.)

The retroactivity doctrine requires that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." (*Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 265 ("*Landgraf*").) In *Landgraf*, the U.S. Supreme Court explained that "elementary considerations of fairness dictat[e] that individuals should have an opportunity to know what the law

is and to conform their conduct accordingly." (*Id.* at 245.) Courts must decline "to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." (*Id.* at 270; *see also Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209, 1242 n.13].)

By enacting a law that would work a profound change in the "legal effect" of a ULP, the Legislature has brought the retroactivity doctrine into play, but failed to make clear its intent apply in this manner. In *Myers v. Philip Morris Co., Inc.*, (2002) 28 Cal.4th 828 ("*Myers*"), this Court considered statutory language regulating claims against tobacco companies that "were or are brought" by persons "who have suffered or incurred injuries." (*Id.* at 842-843.) Despite the tenses used in the statute, the Court found that such "vague phrases" were not "the unequivocal and inflexible statement of retroactivity" required for a retroactive application. (*Id.* at 843.)

Section 1164.11(b) is too vague to constitute the unequivocal statement of intent to apply retroactively, as it leaves the employer guessing as to what conduct would meet the standard, whether it was on sufficient notice of the *ex post facto* application of actions that may have occurred decades in the past, or whether the act of "committing" an unfair labor practice would even require an adjudication on the merits, whether before the Board, the NLRA, or some other agency or court charged with enforcement of labor laws.

The Board's interpretation now places employers in jeopardy if, in the past, they stipulated to an order of the Board, for no reason other than to avoid the costs, inconvenience, and expense of addressing what might be a relatively minor infraction of the ALRA. Thus, if that employer agrees that the discharge of one employee should be subject to a back-pay remedy; or that the employer committed a technical violation of the access rules, that "unfair labor practice" may now be

used to compel MMC, even if that employer has been otherwise exemplary, and has never been asked by a union to bargain.

This leads to one of two conclusions: either § 1164.11(b) is unlawful under the retroactivity doctrine, or the ULP must relate to an actual finding of a bad faith refusal to bargain over a collective bargaining agreement with a certified union – which is the remedial purpose of the MMC statute. (*Cf. Myers*, 28 Cal.4th at 846 [a law violates the Fifth Amendment's due process clause by "retroactively creating liability for past conduct"] [citing with approval *Eastern Enters. v. Apfel* (1998) 524 U.S. 498, 549 [Kennedy, J., concurring]].)

Under either scenario, courts must construe statutes to avoid constitutional infirmities. Following this basic principle, the Board's interpretation of § 1164.11(b) is in error.

## VII. The MMC Statute Violates Liberty And Property Interests Protected Under The Due Process Clause.

Section (8)(d) under the NLRA, 29 U.S.C. § 158 (as with its equivalent under Labor Code § 1152.2(a)), "does not compel either party to agree to a proposal or require the making of a concession." In *N.L.R.B. v. Jones & Laughlin* (1937) 301 U.S. 1 "*Jones & Laughlin*," the Supreme Court noted that the absence of mandatory arbitration, and the presence of the exit option for management, was essential in preserving the constitutionality of the basic law. The Court wrote:

> The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine."

(*Id.* at 45 [quoting *Virginian R. Co. v. Sys. Fed'n* (1937) 300 U.S. 515, 548 n.6].)

*Jones & Laughlin* illuminates the constitutional problems with the MMC statute. Similarly, the Supreme Court's decision in *Charles Wolff Packing Co. v.*

*Court of Industrial Relations*, (1925) 267 U.S. 552, 569 ("*Wolff*"), makes clear in its holding that a compulsory arbitration statute between private employers and unions that imposes a contract upon the parties violates the Fifth Amendment. No case has overruled that holding. *Hess* dismisses *Wolff* as a relic of substantive due process. (*Hess*, 140 Cal.App.4th at 1599.) But *Wolff* struck down a compulsory arbitration statute because, the Court earlier reasoned (in a unanimous decision authored by Chief Justice Taft), that it unconstitutionally infringed upon the rights both of employers ***and*** employees. (*Charles Wolff Packing Co. v. Court of Industrial Relations* (1923) 262 U.S. 522, 534.)

Key to *Wolff's* reasoning was its recognition that the process at issue not only bound the employer to pay certain wages, but prohibited workers from striking: "while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him." (*Id.* at 540; *see also id.* at 542 [noting that law would deprive workers of the right to strike, "a most important element of their freedom of labor"].)

*Wolff* s holdings went straight to the constitutional defects of compulsory arbitration – its *sui generis* limitation on both First Amendment and due process protections. *Wolff* announced a constitutional doctrine governing compulsory interest arbitration in the labor context in which its use is justified only when, for public policy reasons, workers lack the ability to strike. This holding has never been overruled, expressly or otherwise.

In subsequent years, the Supreme Court cited *Wolff* nearly exclusively in the context of labor strikes. For example, in the 1960 *Steelworkers* cases, in which the Court upheld an injunction on striking steelworkers, the Justices discussed compulsory arbitration as a necessary counterweight to any prohibition on strikes.

In these cases, even in the face of a national crisis favoring compulsory arbitration, the Court drew a sharp line between consensual and compulsory arbitration. (*See United Steelworkers of Am. v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 582 ["arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."].) The Court suggested that arbitration could be justified only where workers lacked the ability to strike. (*See United Steelworkers of Am. v. U.S.* (1959) 361 U.S. 39, 74 [Douglas, J., dissenting] [noting *Wolff* had outlawed compulsory arbitration].)

The same can be said for the state public employee arbitration decisions cited so voluminously by UFW. (UFW Pet. at 23 n.8.) These cases involve the delegation by a public entity of its ***own*** decision-making authority over its ***own*** collective bargaining relationships with its ***own*** employees to a third-party neutral via interest arbitration. (*See, e.g., Fire Fighters Union v. City of Vallejo* (1974) 12 Cal. 3d 608, 622.) These decisions uniformly involve public workers, such as police officers and firefighters, who for public interest reasons lack the power to strike. In upholding such laws, courts have repeatedly discussed binding arbitration as a "necessary tradeoff" or "essentially a quid pro quo" for the prohibition of strikes.

**VIII. The MMC Statute Works An Unconstitutional Taking.**

Gerawan argued below that the MMC statute fixes the terms of a CBA without providing any mechanism that secures Gerawan a "just and reasonable return" on its extensive investment in all aspects of its business operations, or provides it a means of adjustment to avoid the risk of confiscation. Although the Court of Appeal did not reach this issue, the cases cited by Respondents, such as *Birkenfeld*, underscore why the MMC statute is an unconstitutional taking of property without just compensation.

The parallel between CBAs and rate-setting is well-established. (*See J.I. Case Co. v. N.L.R.B.* (1944) 321 U.S. 332, 335 [a CBA "may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules of service"].) The element that rate-setting and rent control cases have in common with compelled arbitration is that the parties cannot exit a forced relationship. Rate-setting cases provide that, in return, parties receive the guaranteed right to a reasonable rate of return. *Bayscene* recognized as much when it noted that the compulsory arbitration of rent disputes must provide for a just and reasonable rate of return, "[a]s required by law." (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 134 [*citing Birkenfeld,* 17 Cal.3d at 165].)

The relevant test for confiscatory takings is focused "less on the rate specified in the statute than on *the ability of the seller to obtain relief* ***if*** that rate proves confiscatory." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 816 [emphasis added].)

> The face of a statute rarely reveals whether the rates it specifies are confiscatory or arbitrary, but necessarily discloses its provisions, if any, for rate adjustment. Recognizing that virtually any law which sets prices may prove confiscatory in practice, courts have carefully scrutinized such provisions to ensure that the sellers will have an adequate remedy for relief from confiscatory rates.

(*Id.* at 816-17.)

Here, the ALRB, through MMC, sets wages, conditions and terms of employment, and benefits, which are to employment what rates are to the provision of services. The risks of confiscation are the same.

The question is not what the MMC statute says regarding the *initial* determination of economic terms; it is whether the statute, on its face, provides for

an "adequate remedy for relief" ***should*** those terms turn confiscatory. The MMC statute provides for no such remedy.

Dated: July 13, 2015

Respectfully submitted,

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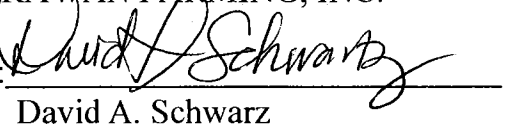
By: 
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## CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Petitions for Review uses 14-point Times New Roman font and contains 8,399 words.

Dated: July 13, 2015

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## PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1800 Avenue of the Stars, Suite 900, Los Angeles, California 90067-4276.

On July 13, 2015, I served the foregoing document described as:

**ANSWER TO PETITIONS FOR REVIEW**

on each interested party, as stated on the attached service list.

☒ (BY OVERNIGHT DELIVERY SERVICE) I served the foregoing document by FedEx, an express service carrier which provides overnight delivery, as follows. I placed a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed, as stated on the attached service list, with fees for overnight delivery paid or provided for.

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☒ (BY ELECTRONIC MAIL) I caused the foregoing document to be served electronically by electronically mailing a true and correct copy through Irell & Manella LLP's electronic mail system to the e-mail address(es), as stated on the attached service list, and the transmission was reported as complete and no error was reported.

Executed on July 13, 2015, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Denise S. Balugo (dbalugo@irell.com)
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Case No. S227243

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