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. 227243

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

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Gerawan Farming, Inc. does not dispute that the three issues presented in the Agricultural Labor Relations Board's Petition for Review—viz., (1) whether the Agricultural Labor Relations Act's mandatory mediation and conciliation (MMC) provisions violate equal protection, (2) whether MMC is an unlawful delegation, and (3) whether the Board erred by declining to consider the union's alleged abandonment of Gerawan's workers prior to directing MMC—require review to secure uniformity of decision and settle important questions of law, and review should therefore be granted.

Notwithstanding the uncontested bases for review, Gerawan asks this Court to deny or defer review pending the completion of separate proceedings related to a decertification election of Gerawan's workers. But such denial or delay would only compound the uncertainty caused by the Court of Appeal's erroneous decision. Alternatively, Gerawan asks this Court to either narrow its review to statutory questions—including one not raised in the Court of Appeal—or expand its review to include additional constitutional claims the Court of Appeal declined to address (and which present no split of authority or other basis for review). Either way, there is no reason to delay, limit, or complicate this Court's review in such manner.

For these reasons, this Court should grant review of the three issues raised in the Petition and deny review of Gerawan's additional claims.

ARGUMENT

I. GERAWAN DOES NOT DISPUTE THE BASES FOR REVIEW OF THE ISSUES PRESENTED IN THE PETITION.

Gerawan does not dispute that review of the three issues presented in the Petition is warranted to secure uniformity of decision and settle important questions of law, and review of these issues should be granted.

First, Gerawan concedes—as it must—that the Court of Appeal's

equal protection and unlawful delegation holdings directly conflict with *Hess Collection Winery v. Cal. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584 (*Hess*). Nonetheless, Gerawan contends that the "peculiar facts of this case" distinguish it from *Hess* and counsel against "disturb[ing] the Court of Appeal's" decision. (Answer, p. 1.) But even if this were true, it is merely an argument for affirming the Court of Appeal, not for denying review. Gerawan does not—and cannot—contend that this Court's review is unnecessary to resolve the current split of authority regarding the constitutionality of a critical component of the ALRA, and prompt review is therefore necessary to secure uniformity of decision.

Second, Gerawan does not dispute the importance of the legal questions presented in the Petition. The Court of Appeal's flawed constitutional analysis not only invalidates an essential component of the ALRA, but also is likely to have wide-ranging repercussions in other areas of law. (See Petition for Review, pp. 16-24.) Likewise, the Court of Appeal's flawed statutory analysis regarding the union's alleged "abandonment" of Gerawan's workers indisputably presents an important question of law, as Gerawan recognizes. (See Answer, p. 14 [ALRB's position "eviscerates" the "finely drawn legislative balance" between promoting stability in labor relations and employee choice and is "contrary to public policy"].) Accordingly, review should be granted on these important questions of law.

II. THE COURT OF APPEAL'S CONSTITUTIONAL AND STATUTORY HOLDINGS WERE IN ERROR AND WARRANT REVIEW.

Unable to refute the bases for review of the issues presented by the Board, Gerawan turns to the merits, rehashing its various legal arguments and summarizing the Court of Appeal's flawed analysis. (Answer, pp. 7-11.) But even assuming that the Court of Appeal's analysis were correct—and for the reasons set forth below and in the Petition, it is not—review is

still necessary to secure uniformity of decision and settle important questions of law.

A. The Court of Appeal's Flawed Equal Protection Analysis Warrants Review.

Gerawan's equal protection argument fails for the same reason as the Court of Appeal's: it does not apply the required rational basis review. "'[I]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*'" (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644, quoting *FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313, italics added by *Warden.*) Here, given the undisputed importance of California's agricultural industry and the unique collective bargaining challenges observed since the ALRA's enactment, such rational bases abound and were clearly articulated by the Legislature and Governor Gray Davis. (See Stats. 2002, ch. 1145, § 1; Historical and Statutory Notes, 44A West's Ann. Lab. Code (2011) foll. § 1164, p. 401.) Gerawan has no answer, except to ignore rational basis review entirely.

First, Gerawan attempts to brush aside the Board's arguments because they "rest largely on the imperative of deference." (Answer, p. 9.) But deference is precisely what rational basis review requires, and the Court of Appeal's failure to apply this critical element in its analysis is precisely why its holding is in error. (See, e.g., *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 482 [noting "deference [courts] must accord the Legislature under the rational basis standard"].)

Next, Gerawan asserts that "no rational choices were made as to any standards to be applied" in MMC. (Answer, p. 8.) But as explained in the Petition, the legislative history and statutory language tell a different story,

confirming that MMC was the product of a considered legislative policy decision to provide a targeted solution to a particular legislative concern. (See Stats. 2002, ch. 1145, § 1.) Moreover, the record in this case confirms that the mediator considered the statutory factors established by the Legislature, and his report is amply supported by the voluminous record developed by the parties.[1] (CR 361-365.) Gerawan's disagreement with these policy choices or their application in this case does not amount to an equal protection violation.

Finally, Gerawan's misapprehension of rational basis review is confirmed by its reference to the Court of Appeal's speculation that the Legislature enacted MMC to avoid "political retribution that might be visited upon [it]" with broader regulation. (Answer, pp. 10-11.) As explained, economic legislation must be upheld if there is any reasonably conceivable basis for the classification. (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 644.) Because courts "never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." (*Cal. Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 209, quotations omitted.) Here, there are multiple rational bases for MMC, and speculation regarding the Legislature's supposed "true" motivation is irrelevant.

Absent correction, the Court of Appeal's flawed equal protection

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[1] Gerawan's claim that the mediator "arbitrarily" imposed a wage increase despite Gerawan paying the highest average wages among its competitors is incorrect. (Answer, p. 9.) Gerawan—like the Court of Appeal—ignores the mediator's explanation that this modest wage increase was included in the CBA *in lieu of* requiring various employee benefits common among Gerawan's competitors. (CR 415-416.) It is hardly "arbitrary" or irrational for the mediator (and Board) to undertake a more comprehensive comparison of employee compensation.

analysis not only creates a split of authority regarding the constitutionality of MMC, but also calls into question all legislation that may result in an individualized outcome, and would arguably invalidate any remedial law, in which a decision-maker has discretion to choose from a range of reasonable alternatives. Review is therefore warranted to secure uniformity of decision and settle these important questions of law.

B. The Court of Appeal's Flawed Delegation Analysis Warrants Review.

Gerawan's Answer simply repeats the Court of Appeal's delegation analysis, which, as explained in the Petition, is fundamentally flawed and directly conflicts with *Hess*. (Answer, pp. 11-13.) Contrary to the Court of Appeal's constricted view, the Legislature here *made* the fundamental policy decision that MMC was necessary to address the unique challenges of collective bargaining in the agricultural industry, declared the policy goals to be accomplished by MMC, specified when MMC is available and the processes to be followed, enumerated the criteria to be considered by the mediator in resolving disputes, and provided for prompt administrative and judicial review. (See, e.g., Lab. Code, §§ 1164, 1164.3, 1164.5, 1164.11;[2] Stats. 2002, ch. 1145, § 1.) Nothing more is constitutionally required. (See, e.g., *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 167 (*Birkenfeld*).)

If left uncorrected, the Court of Appeal's erroneous decision not only creates a conflict regarding the constitutionality of MMC, but also casts doubt on similar interest arbitration processes utilized by local entities throughout the state, as well as the Legislature's ability to delegate legislative power in *any* complex legal area. Review is therefore warranted to secure uniformity of decision and settle these important questions of law.

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

C. The Court of Appeal's Flawed "Abandonment" Analysis Warrants Review.

Gerawan does not contest the basis for review of the Court of Appeal's alternative holding that the Board abused its discretion in directing MMC without considering Gerawan's "abandonment" argument, but instead simply summarizes the Court of Appeal's flawed analysis. (Answer, pp. 13-15.) Accordingly, Gerawan's "abandonment" argument suffers from the same fatal defect as the Court of Appeal's decision: it begins with the incorrect premise that MMC is unrelated to the ALRA's mutual duty to bargain.

As explained in the Petition—and as the statutory language and legislative history confirm—MMC was created "to ensure a more effective collective bargaining process," and there is no legal basis to sever MMC from the ALRA's general bargaining obligation. (Stats. 2002, ch. 1145, § 1.) Because "abandonment" is not a defense to an employer's bargaining obligation under the ALRA, the Board did not abuse its discretion in concluding it is not a defense to MMC. (See Slip Op., pp. 28-32, discussing *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, and *F&P Growers Assn. v. Agricultural Labor Relations Bd.* (1985) 168 Cal.App.3d 667.)

The Court of Appeal's contrary conclusion creates an entirely new conception of union certification premised on a false dichotomy between bargaining and MMC. If left uncorrected, it will inject uncertainty into a previously settled area of law—the nature and meaning of union certification and the duty to bargain under the ALRA. Such uncertainty in California's vital agricultural industry is untenable, and review is therefore warranted to settle this important question of law.

III. THIS COURT SHOULD NOT DENY OR DEFER REVIEW OF THE ISSUES PRESENTED IN THE PETITION PENDING THE OUTCOME OF THE DECERTIFICATION ELECTION.

Unable to refute the bases for review of the three issues presented in the Petition, Gerawan asks this Court to deny or defer such review for an undetermined period to permit resolution of various proceedings related to a decertification election of Gerawan's workers. There is no basis for such denial or delay.

If this Court denies review, the split of authority created by the Court of Appeal's decision will persist, and the Board will be unable to administer the ALRA as the Legislature intended. Review is therefore necessary to secure uniformity of decision. Moreover, even assuming that the election ultimately results in the union's decertification, further proceedings will be required to ascertain the legal effect of the decertification on the Board's Order and the Court of Appeal's decision—decertification would not automatically void the Board's Order or the Court of Appeal's flawed decision, as Gerawan suggests. (Answer, p. 15.) There is no legal or prudential reason to allow such uncertainty to persist indefinitely by denying review.

Nor is there any reason to delay review pending resolution of the election proceedings, which Gerawan acknowledges may take years. (See Answer, pp. 2, 15.) Such extended delay would only encourage a recalcitrant MMC participant to illegally interfere with election processes as a means to avoid imposition of a contract, while simultaneously discouraging the other MMC party from challenging such actions through the administrative process for fear of delay. Such incentives would be contrary to the core purposes of the ALRA—stability in labor relations and employee free choice—as well as the legislative purpose of MMC—to facilitate the *prompt* conclusion of stalled first contracts.

Finally, neither the possibility that subsequent events may render certain issues moot, nor the possibility that this Court could affirm the Court of Appeal solely on statutory grounds counsel against granting review or for limiting such review to statutory issues. (See Answer, p. 15.) The Court of Appeal's primary holding that MMC is unconstitutional created a split of authority, which requires correction now. (See Slip Op., p. 9.) Moreover, should this Court *reverse* the Court of Appeal's statutory analysis, the constitutional questions must be resolved to determine Gerawan's right to relief, secure uniformity of decision, and settle important questions of law. Accordingly, Gerawan's speculative concerns are not a basis for denying, delaying, or narrowing review, but rather may properly be addressed in the course of the Court's review if and when they come to fruition.[3]

IV. THIS COURT SHOULD NOT GRANT REVIEW AS TO WHETHER THE BOARD ERRED BY ISSUING ITS FINAL ORDER WHILE AN ELECTION WAS PENDING.

Gerawan next asks this Court to grant review "as to whether the Board erred by imposing the MMC contract after authorizing the decertification election"—an issue that was neither raised in Gerawan's Petition for Writ of Review, nor addressed in the decision below. (Answer, p. 16.) Gerawan does not articulate any basis for review, and there is none. (See Cal. Rules of Court, rule 8.500(b).) First, there is no authority—much less a split of authority—on this question. Second, given the "peculiar

[3] If the Court is inclined to defer further action in this case while the election proceedings remains pending, the Board urges the Court to "grant and hold" review, rather than deny it altogether. (See Cal. Rules of Court, rule 8.512(d)(2).) Granting review will permit the Board to administer MMC in other settings pursuant to *Hess* in the interim. Denying review, conversely, would perpetuate the split of authority regarding MMC's constitutionality, with no possibility of resolution.

facts" and "unique" procedural posture of this case (Answer, p. 1.), Gerawan cannot articulate why this undecided issue raises an important question of law requiring this Court's review in the first instance.

Review would be particularly inappropriate here because Gerawan did not affirmatively raise this issue in its Petition for Writ of Review. (See Petition for Writ of Review, ¶¶ 31-34 & pp. 25-28, Dec. 19, 2013.) "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal," and there is no reason to depart from this sound policy here. (Cal. Rules of Court, rule 8.500(c)(1).)

Moreover, while true that the Court of Appeal sua sponte asked the parties to submit letter briefs addressing this question (and two others), there is no dispute that the Court of Appeal did not decide the issue. This is unsurprising given that Gerawan's petition did not raise it and the Board's actions were plainly consistent with the ALRA. Where, as here, neither party to MMC challenges the mediator's second report, section 1164.3, subdivision (d), provides that the report "shall take immediate effect as a final order of the Board." This is precisely what occurred here, and the ALRA provides no exception to this unambiguous requirement for pending elections, unfair labor practice ("ULP") proceedings, or any other matters. Indeed, recent amendments to the ALRA confirm that a pending election or ULP proceeding does not impact MMC.[4]

There is no basis for review of this undecided issue.

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[4] For example, section 1158 now provides that the pending review of a final order arising from an election-related ULP "shall not be grounds for a stay" of MMC, and it therefore follows that the election itself or election-related proceedings do not operate to stay MMC. (See also §§ 1158; see also §1164, subd. (a)(3) [permitting MMC request by union certified pursuant to section 1156.3, subdivision (f), due to egregious employer misconduct with election process].)

V. THIS COURT SHOULD NOT GRANT REVIEW AS TO WHETHER THE BOARD MISINTERPRETED SECTION 1164.11.

Gerawan also asks this Court to review the Board's application of section 1164.11's MMC prerequisites, but again does not articulate any basis for such review. (Answer, pp. 17-18.) There is no split of authority on this issue. Nor does it raise an important question of law requiring this Court's intervention. As explained by the Court of Appeal, its determination that the Board did not err was based on a routine application of the section 1164.11's plain language, and Gerawan's proposed interpretation would have required the court to "effectively rewrite the statute." (Slip Op., p. 21; see *id.*, pp. 19-22.) This unremarkable conclusion does not warrant review.

The Court of Appeal correctly held that the plain language of section 1164.11, subdivision (a), "simply requires that (1) the parties have not reached agreement and (2) at least one year has passed since the initial request to bargain." (Slip Op., p. 19.) There is no dispute that both criteria are met here—UFW made its initial request to bargain in 1992, and the parties are *still* without a contract. Gerawan may believe the Legislature "*should have*" included additional requirements, but courts "are constrained by the fact that it did not." (*Ibid.*) Likewise, there is no dispute that Gerawan has committed multiple ULPs, and the Court of Appeal correctly held that section 1164.11, subdivision (b)'s plain language requires nothing more and "contains no hint of the additional requirements or limitations urged by Gerawan." (*Id.*, pp. 24-25.)

VI. THIS COURT SHOULD NOT GRANT REVIEW OF GERAWAN'S ADDITIONAL CONSTITUTIONAL ARGUMENTS.

Finally, Gerawan asks this Court to review two additional constitutional arguments, which the Court of Appeal expressly declined to

consider (Slip Op., p. 42), but again fails to articulate any basis for review. Review of these issues should be denied.

A. Gerawan's Substantive Due Process Claim Does Not Warrant Review.

Gerawan seeks review of its claim that MMC allegedly violates substantive due process, but does not articulate any basis for such review. (Answer, pp. 24-26.) Economic legislation—such as the MMC statute—is valid if the Legislature had a rational basis for enacting it. (See, e.g., *Coleman v. Dept. of Personnel Admin.* (1991) 52 Cal.3d 1102, 1124.) Because there is plainly a rational basis for MMC, it satisfies due process.[5]

There is no split of authority on this issue. To the contrary, *Hess* expressly rejected the same argument years ago, holding: "[I]n view of the Legislature's broad authority over employment, and the limited role of the courts in reviewing legislative policy decisions, [the MMC] statutory scheme meets the constitutional test for substantive due process." (*Hess*, *supra*, 140 Cal.App.4th at p. 1601.) Gerawan does not dispute this, but instead seeks to cast aside eighty years of due process jurisprudence and resurrect the *Wolff* line of cases, which the United States Supreme Court has described as "deliberately discarded," and which this Court previously held were "completely repudiated." (*Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.* (1949) 335 U.S. 525, 536-537; *Birkenfeld*, *supra*, 17 Cal.3d at p. 155; see Answer, pp. 24-26.)

In *Wolff*, the United States Supreme Court ruled that the federal constitution prohibited governmental regulation of wages and working

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[5] Gerawan's suggestion (Answer, p. 2) that MMC has no private sector counterpart in other states is both irrelevant and untrue. (See, e.g., *Mount St. Mary's Hospital of Niagara Falls v. Catherwood* (N.Y. 1970) 260 N.E.2d 508, 511 [rejecting due process challenge to mandatory interest arbitration of CBAs at private hospitals].)

conditions except in "exceptional circumstances." (*Charles Wolff Packing Co. v. Court of Industrial Relations* (1923) 262 U.S. 522, 534-36.) But this "exceptional circumstances" standard was short-lived. Since at least 1931, the U.S. Supreme Court has repeatedly upheld economic legislation alleged to impinge on the freedom of contract, including numerous labor statutes, where it is supported by a rational basis. (See, e.g., *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.* (1931) 284 U.S. 151, 157-158; *Nebbia v. New York* (1934) 291 U.S. 502, 528; *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 106-107.)

Wolff in particular is no longer good law. As the U.S. Supreme Court explained sixty-five years ago: "That the due process clause does not ban legislative power to fix prices, wages and hours as was assumed in the *Wolff* cases, was settled . . . . [and] is no longer doubted." (*Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.* (1949) 335 U.S. 525, 536.)[6] As observed in *Hess*, this Court has similarly identified the *Wolff* cases—by name—as part of a line of due process authority that has been "'completely repudiated'" by modern courts. (*Hess*, *supra*, 140 Cal.App.4th at p. 1599, quoting *Birkenfeld*, *supra*, 17 Cal.3d at p. 155.) As this Court explained, modern substantive due process analysis provides:

> "[I]n the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy

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[6] In *Lincoln Federal*, the Supreme Court upheld state "right to work" laws prohibiting "union security clauses" in contracts, notwithstanding their direct interference with private collective bargaining. (335 U.S. at pp. 533-534.) In so holding, the Court described the *Wolff* era's "due process philosophy" as "deliberately discarded," and explained that "the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." (*Id.* at pp. 536-537.)

will be struck down only if it is "so restrictive as to facially preclude any possibility of a just and reasonable return." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 816, quotations omitted.)

There is nothing about MMC that *precludes* nonconfiscatory terms in a CBA. To the contrary, the mediator is expressly required to consider "[t]he financial condition of the employer and its ability to meet the costs of the contract." (§ 1164, subd. (e)(2).) Nonetheless, Gerawan asserts—without explanation—that MMC does not provide an "adequate remedy for relief" should a CBA's terms "turn confiscatory." (Answer, pp. 27-28.) To the contrary, the MMC statute provides two levels of review to ensure a mediator's report complies with the statute. (§§ 1164.3, subd. (a) [administrative review], 1164.5 [judicial review].) These straightforward administrative and judicial procedures provide a prompt and adequate remedy for relief from confiscatory terms. (Cf. *Birkenfeld, supra*, 17 Cal.3d at pp. 169-173 [rejecting "inexcusably cumbersome" procedures for relief from rent increase].)

There is no basis for review of Gerawan's unconstitutional takings claim, which the Court of Appeal left undecided.[8]

CONCLUSION

For these reasons, the Board respectfully requests that this Court grant review only as to the three issues presented in the Petition.

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[8] If the Court is inclined to grant review of any additional issues, the Board notes that there is nothing to distinguish the two issues raised in Gerawan's Answer from Gerawan's various other claims left unresolved by the Court of Appeal.

Dated: July 23, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Reply Brief in Support of Petition for Review uses a 13-point Times New Roman font and contains 4,193 words. In making this certification, I relied on the word count function in the Microsoft Word 2010 word processing application.

Dated: July 23, 2015

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

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

No.: **S227243**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On July 23, 2015, I served the attached **REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight (GSO)** addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 23, 2015, at San Francisco, California.

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