Case No. S227270

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

TRI-FANUCCHI FARMS,
Petitioner and Respondent,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Petitioner and Respondent,

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

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

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

JOINT ANSWER OF UNITED FARM WORKERS OF AMERICA TO PETITIONS FOR REVIEW BY TRI-FANUCCHI FARMS AND ALRB

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Pursuant to California Rule of Court 8.500(e)(4), Real Party in Interest United Farm Workers of America ("UFW") submits this combined answer to the separate Petitions for Review filed by Tri-Fanucchi Farms ("Tri-Fanucchi" or "Employer") and the Agricultural Labor Relations Board ("ALRB" or "Board").

The Petition for Review filed by Tri-Fanucchi should be denied. As will be explained below, the Employer's petition does not present any grounds for review as required by California Rule of Court 8.500(b). The Employer claims that there is a present conflict between the Fifth District decision in *Montebello Rose Co. v. ALRB* and the Second District decision in *F & P Growers Assoc. v. ALRB* (Tri-Fanucchi Petition at 4, hereafter "T-F Petition"), but each of those cases was decided more than 30 years ago and the time for seeking review of those cases has long lapsed. *Montebello Rose Co. v. ALRB* (1981) 119 Cal. App. 3d 1; *F & P Growers Assoc. v. ALRB* (1985) 168 Cal. App. 3d 667. Even so, the Employer's claim that there is a conflict between those cases is without merit, and its petition for review should be denied because its petition does not present an important question of law.

The Petition for Review filed by the ALRB should be granted. The ALRB's petition raises important questions of law that require this Court's resolution. The Court of Appeal's rejection of the makewhole remedy in this case because there was no published court decision on the specific issue presented undermines the purposes of the Agricultural Labor Relations Act ("ALRA"), divests the Board of its primary authority to interpret the ALRA, and would promote litigation by employers instead of collective

bargaining, thereby clogging the courts with unnecessary legal challenges and preventing employees from enjoying their collective bargaining rights.

BACKGROUND

This case presents another in a long line of attempts by Tri-Fanucchi to illegally avoid its bargaining obligations under the ALRA. Simply put, Tri-Fanucchi has never accepted its employees' desire for union representation and a collective bargaining agreement, and has done everything in its power to illegally avoid an agreement with UFW. The Petition by the Employer represents another attempt to subvert the employees' collective bargaining desires and to turn the ALRA on its head. This Court should ensure that the courts are not used by obstinate employers to avoid collective bargaining responsibilities.

In one of the UFW's earliest election victories after passage of the ALRA in 1975, the UFW certified as the bargaining representative of Tri-Fanucchi's agricultural employees in 1977 after a secret-ballot election. May 14, 2014 Slip Opinion, *Tri-Fanucchi Farms v. ALRB* at 4 (hereafter "Slip Op."). After the certification, Tri-Fanucchi refused to bargain, claiming that it intended to engage in a "technical refusal to bargain" to challenge the validity of the election. See *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms* (1986) 12 ALRB No. 8 at 2. However, after the UFW filed an unfair labor practices charge ("ULP") alleging Tri-Fanucchi was violating the law, Tri-Fanucchi agreed to bargain and negotiations began. *Id.* Between May 1979 and July 1981, there was a hiatus in bargaining. *Tri-Fanucchi Farms, supra,* 12 ALRB No. 8 at 2. When the UFW requested to resume bargaining in 1981, Tri-Fanucchi refused, asserting that it had

conducted a poll of employees and no longer believed that UFW enjoyed majority support of its employees. *Id.* at 2-3. Despite the Board's issuance of *Nish Noroian Farms* (1982) 8 ALRB No. 25, holding that employers could not utilize employee polls indicating a loss of union majority to refuse to bargain, the ALRB Regional Director dismissed UFW's charge on May 17, 1982. *Id.* at 2-3. On April 19, 1984, after a lapse of nearly two years, the UFW again requested collective bargaining. On May 2, 1984, the Employer declined the Union's request for negotiations based on its 1981 employee poll and its new claim that UFW had abandoned the bargaining unit.. *Id.* at 2-3; Slip Op. at 4.

The Board rejected these defenses in a 1986 decision and awarded bargaining makewhole pursuant to Labor Code section 1160.3. *Tri-Fanucchi Farms, supra,* 12 ALRB No. 8 at 9-10.

The Employer appealed the Board's 1986 decision, and the Fifth District Court of Appeal upheld the Board's decision, including the makewhole award. Although that 1987 decision was not published, in its May, 2014 decision, the Court took judicial notice of that decision. Slip Op. at 5, fn. 2; *Tri-Fanucchi Farms v. ALRB, supra,* (Nov. 21, 1987, F008776) (nonpub. opn.). In its 1987 decision, the Fifth DCA found that Employer's abandonment defense "was not compelling" because "Union activity alone does not mandate a finding of abandonment." *Tri-Fanucchi Farms v. ALRB, supra,* at 9 (Nov. 21, 1987, F008776). The Court further held that "by requesting negotiations, the Union indicated it was active . . . [and] [t]hus, the Union had resumed its role by the time

Fanucchi questioned its status." *Id.* After the Court of Appeal's decision, Tri-Fanucchi indicated its willingness to bargain with the UFW. Slip Op. 5.

Although Tri-Fanucchi claims that the UFW did not have any contact with Tri-Fanucchi or Tri-Fanucchi's employees for some 24 years [Slip. Op. at 5] and the Board's resolution of the case *assumed* that to be the case,[1] UFW has always disputed that allegation. Indeed, UFW has maintained contact with Tri-Fanucchi's employees throughout the 24 year period, has represented Tri-Fanucchi employees on many non-bargaining matters, and the 2012 request to bargain was made in an attempt to realize the desires of Tri-Fanucchi employees for a collective bargaining agreement. After UFW requested information and made another request to bargain in 2012, Tri-Fanucchi again refused to bargain, claiming it was engaging in a "technical refusal to bargain." *Id.* at 5-6.

Although its abandonment claim had already been rejected by the Fifth DCA in 1987, the Employer once again asserted the same defense in in 2012. Slip Op. at 6. Also, this defense had been rejected by the ALRB in numerous decisions reaching back decades in the intervening period, as Tri-Fanucchi was aware. *Id;* Certified Record at 394-396 (hereafter "CR"). In light of the Board's well-established precedent rejecting the abandonment defense, an Administrative Law Judge and the Board found that Tri-Fanucchi had no valid excuse for refusing to bargain with its employees' certified representative and awarded bargaining makewhole. Slip Op. at 6-7, CR 394-396; CR 403-407. Under the standard announced by the Board in *F&P Growers Assoc.* (1983) 9

[1] ALRB Petition for Review at 9, fn. 3.

ALRB No. 22 and affirmed by a court of appeal in *F&P Growers Assoc. v. ALRB* (1985) 168 Cal. App. 3d 667, the Board considered whether Tri-Fanucchi's position furthered the polices and purposes of the Act. CR 405. Examining the Employer's proffered justification for its refusal to bargain, the equitable arguments against makewhole, and the facts and circumstances of the case, the Board awarded makewhole. Slip Op. 7; CR 405-407.

The Court of Appeal affirmed the Board's rejection of the abandonment defense as it applies to "normal bargaining" and affirmed the Board's conclusion that Tri-Fanucchi's refusal to bargain violated the ALRA. Slip Op. 4, 13-14.[2] However, it reversed the Board's remedial order to award makewhole, essentially disagreeing with the way the Board applied the *F &P Growers* standard. Slip Op. 19-20. The Court of Appeal found that the Board awarded makewhole "solely" based upon its conclusion that Tri-Fanucchi's assertion of the abandonment defense did not further the policies and purposes of the ALRA, a conclusion that the Court of Appeal characterized as "clearly wrong." *Id.* at 20. Instead, the Court of Appeal found that because there had been no published appellate decision on the "specific issue" of abandonment, the litigation of the issue

[2] The Court reasoned that affirming the employer's "continuing duty to bargain" did not prejudice Tri-Fanucchi because "in accordance with how bargaining is defined under the ALRA, both the employer and the union retain their respective rights of contractual consent as guaranteed in section 1155.2, subdivision (a), which states that the obligation to bargain in good faith 'does not compel either party to agree to a proposal or require the making of a concession.'" Slip Op. at 13, fn. 9. While the Court's footnote states that the continuing duty "does prejudice" the employer, it is clear from the context and from its decision in the *Gerawan Farming, Inc. v. ALRB* cases [Case Nos. F068526 and F068676] that the Court meant to say "does *not* prejudice" in footnote 9.

served the beneficial purpose of "clarifying and/or confirming" the law and furthered the "broader purposes of the ALRA to promote greater stability in labor relations . . . " *Id.* at 20-21.

MAKEWHOLE UNDER THE ALRA

In distinction to the NLRA, which has no makewhole remedy, California Labor Code section 1160.3 provides the Board with authority to order that employees be "made whole" for "loss resulting from an employer's refusal to bargain" with a union selected by its employees. Lab. Code § 1160.3; *Holtville Farms, Inc. v. ALRB* (1985) 168 Cal. App. 3d 388, 390; *cf. Ex-Cell-O-Corp. v. NLRB* (D.C. Cir. 1971) (affirming NLRB denial of union's request for "affirmative compensation" or make whole for employer's refusal to bargain).[3] "Makewhole" is an attempt to compensate employees for the lost wages and other benefits they would have received under a collective bargaining agreement, where the employer has deprived employees of those improvements through its illegal refusal to bargain. Simply put, makewhole is determined by calculating the amount of additional wages and benefits employees would have earned had they worked under a union contract during the period of bad faith bargaining. *Holtville Farms, Id.* at 391-92.

[3] The adoption of the makewhole remedy was motivated by the inadequacy of NLRA's remedies for refusals to bargain. *Adam Dairy* (1978) 4 ALRB No. 24 at 4-5. In particular, employers were able, by refusing to bargain, to weaken the certified union and avoid paying out collective bargaining benefits, thus denying employees their collective bargaining rights under the ALRA. *Id.* This Court recognized the pernicious effect of employer delays, shortly after passage of the ALRA, when it held that employer "dilatory tactics after a representation election" undermine the statutory right to collective bargaining and "substantially impair the strength and support of a union." *J.R. Norton Co. v. ALRB* (1979) 26 Cal. 3d 1, 30.

WHY THE EMPLOYER'S PETITION SHOULD BE DENIED

The Employer claims that review is warranted for two reasons; first, that there is a present conflict between the decisions in *Montebello Rose Co. v. ALRB* and *F & P Growers Assoc. v. ALRB* (T-F Petition at 4); and second, because the decision involving Tri-Fanucchi conflicts with the decision issued the same day in the *Gerawan Farming, Inc. v. ALRB* cases [Case Nos. F068526 and F068676] (hereafter "*Gerawan* cases") (T-F Petition at 5).[4] However, the Employer's characterization of a conflict between *Montebello Rose* and *F & P Growers* is nonexistent, and the Employer simply seeks to overturn both of those cases, thirty years after they were decided. And with respect to the alleged conflict between the decision being challenged here and the decision issued in the *Gerawan* cases, the "inconsistency" sought to be highlighted by the Employer here warrants granting review in the *Gerawan* cases, but not granting review as to the instant case.

A. The Employer's Petition Does Not Raise An Important Question of Law

Tri-Fanucchi argues that this case "provides this Court the opportunity to resolve an important question of law raised by conflicting opinions issued by the appellate courts" in *Montebello Rose* and *F & P Growers*. T-F Petition at 4.[5] The Employer's

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[4] Both the UFW and the ALRB have sought review with the Supreme Court of the *Gerawan Farming* cases, as Petitions for Review were filed by UFW and the ALRB on June 22 and June 23, 2015, respectively. See *Gerawan Farming, Inc. v. ALRB*, Cal. Supreme Court Case No. S227243.

[5] The Employer's argument that *Montebello Rose* and *F & P Growers* decisions are in conflict is neither well reasoned, nor well developed. For example, despite making the bald assertion that they are in "conflict" and in "tension" (T-F Petition at 4), the

argument also claims that pursuant to *Montebello Rose*, there is a rebuttable presumption of a union's continuing majority support that must permit an employer an opportunity to rebut that presumption in some way. See T-F Petition at 21-24. Neither claim is valid.

Both *Montebello Rose* and *F & P Growers* are consistent in their rejection of the principle that the employer can have any role in deciding whether to bargain with a union that has been certified by the ALRB to represent a bargaining unit of employees. In *Montebello Rose*, the Court made this abundantly clear when it rejected the employer claim that a union's certification and the corresponding employer duty to bargain expire after one year. In addressing the employer's concern that it may be negotiating with a union that does not truly represent the desires of its employees because of the passage of time, *Montebello Rose* held 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." *Montebello Rose, supra*, 119 Cal. App. 3d at 28.

The Court of Appeal properly applied *Montebello Rose* to this case. It agreed with the Board that "an employer's duty to bargain with the originally certified union continues until that union is replaced or decertified by a subsequent election," and characterized this finding (and the Board's decision) as "consistent with how California appellate courts have construed the ALRA." Slip. Op. at 12-13, *citing Montebello Rose, supra*, 119 Cal. App. 3d at 23-24.

Employer later argues that *F & P Growers* "necessarily endorsed *Montebello Rose's* adoption of the NLRA rebuttable presumption rule . . .". T-F Petition at 23.

The Employer claims that the Fifth DCA did not afford any "legal significance" to the "rebuttable presumption" discussed by *Montebello Rose*, and that it instead relied on the "flawed" analysis of the appeals court decision in *F & P Growers* to reject its abandonment claim. T-F-Petition at 21. But this claim is without merit.

The Employer incorrectly assumes that the "rebuttable presumption" discussed by *Montebello Rose* necessarily means that the employer can play a part in rebutting the presumption, but that is clearly not the case. The presumption of majority support under the ALRA can only be rebutted by *employees* -- either by decertifying the present union, or replacing it with another union, and only through a secret ballot election. This is the "certified until decertified" rule, by which 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"); *Montebello Rose Co., Inc. v. ALRB, supra,* 119 Cal.App.3d at 24-25 (employer's duty to bargain with certified union does not lapse "until such time as the union is officially decertified"); *Adamek & Dessert 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."). The Employer's assumption that the employer can play a part in challenging the Union's representative status was plainly rejected by *Montebello Rose*, *F & P Growers*, and the Court of Appeal in this case.

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

(1) Differences between the ALRA and NLRA "shows a purpose on the part of the Legislature to prohibit the employer from being an active participant in determining which union it shall bargain with in cases arising under the ALRA." *F & P Growers, supra*, 168 Cal. App. 3d at 676.

(2) "[I] it does appear that the Legislature's purpose in enacting the ALRA was to limit the employer's influence in determining whether or not it shall bargain with a particular union. Therefore, to permit an agricultural employer to . . . avoid bargaining with an employee chosen agricultural union indirectly would give the employer influence over those matters in which the Legislature clearly appears to have removed employer influence." *Id.* at 676-677.

(3) "Our conclusion is consistent with the court's reasoning in *Montebello Rose Co. v. ALRB* . . . Again the Legislature had shown its purpose was to provide employees, and not employers, a method for changing unions." *Id.* at 677.

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

Therefore, absent a secret ballot election that results in a union losing its representative status, the employer can play no role in challenging that status. Indeed, the same result was obtained in *Montebello Rose*, which adopted the Board's holding in *Kaplan Fruit & Produce Co.* (1977) 3 ALRB No 28, that "(t)he balance to be struck is between the employees' right to reject the incumbent union and the need for stability in

bargaining relationships. The employer's 'right' not to bargain is no part of the equation." *Montebello Rose*, 119 Cal. App. 3d at 25. "So long as the employees can petition for a new election if they wish to remove the union, the employer has no real cause for concern . . ." *Id.* at 28.

The Fifth DCA correctly applied the reasoning of *F & P Growers, Montebello Rose* and other precedent in rejecting Tri-Fanucchi's abandonment defense, which the Court held was "clearly analogous to the loss of majority defense." Because of the related nature of the abandonment and "good faith doubt" defenses, the Court properly concluded that Tri-Fanucchi was not entitled to refuse to bargain with UFW. Slip Op. at 14-15.

There is no conflict between *Montebello Rose* and *F & P Growers*. Slip Op. at 12. Further, the Employer's claim that the "rebuttable presumption" language in *Montebello Rose* required the Board to allow it to "rebut" the presumption is a clearly erroneous interpretation of prior California court decisions. There is no conflict, and no important question of law presented by Tri-Fanucchi's petition.

B. The Employer's Petition Does Not Present A Conflict With The *Gerawan* Cases Requiring Review In This Case

Tri-Fanucchi argues that the decision in this case conflicts with the *Gerawan* cases decided on the same day, and that the instant decision and the *Gerawan* decision, "create[] ambiguity in the case law regarding the defense of abandonment." T-F Petition at 25. In support of its argument, Tri-Fanucchi argues that the appeals court employed a "strained analysis" to find that abandonment can be used as a defense to Mandatory

Mediation and Conciliation ("MMC"), but not as a defense to traditional bargaining. T-F Petition at 25. Tri-Fanucchi also claims that the Court's finding "contravene[s] the underlying purpose of the ALRA to protect the rights of agricultural employees." T-F Petition at 28.

While UFW agrees that the analysis employed by the Court of Appeals to justify and permit an employer to assert an abandonment defense to MMC was error, that error only supports granting review in the *Gerawan* cases, but not in this case.[6] Moreover, adopting the Employer's interpretation urged here would not promote the protection of employee rights, but would destroy them.

1. The Court of Appeal Erred in the *Gerawan* Cases, Not in This Case

The Court of Appeal's attempt to justify the abandonment defense under MMC but not under traditional bargaining was error, but that error was made in the *Gerawan* cases, not in this case. As detailed more fully in UFW's Petition for Review of the Gerawan decision, the Court's "abandonment" holding in *Gerawan* was error for numerous reasons. First, it would undermine a significant part of what the Legislature sought to accomplish in adopting MMC to revive dormant bargaining relationships because the Legislature fully understood that there were many ALRA bargaining units in which the farm workers voted for union representation many years earlier but had never been able to obtain an initial contract. Second, the Court erroneously justified its distinction between raising abandonment in the face of MMC and raising it as a defense

[6] UFW's Petition for Review in *Gerawan Farming, Inc. v. ALRB* (Cal. Sup. Ct. Case No. S227243) details the legal and policy reasons why the Court in that case erred, and it will not detail those arguments here.

to regular bargaining by reasoning that the "MMC process differs materially from bargaining and is largely a postbargaining process." *Gerawan Farming, Inc. v. ALRB*, (Case Nos. F068526 and F068676) Slip Op. at 33 (hereafter "Gerawan Op.") (emphasis in original). But this reasoning that MMC is not part of bargaining is untenable because the Legislature expressly adopted MMC to "ensure a more effective collective bargaining process." Stats. 2002, ch. 1145, §1.

Third, the Court's interpretation in *Gerawan* does violence to the plain language of the MMC statute because the Legislature did not limit the applicability of the MMC statute to labor organizations that received certification "prior to January 1, 2003," nor does the statute provide for any method for an employer to "negate" the labor organization's "certif[ication] as the exclusive bargaining agent." See Labor Code §1164(a)(1); §1164.11.

But these errors all were made in the Court of Appeal's *Gerawan* decision, not the decision being challenge here. The Court's decision in *Gerawan* does not -- as the Employer asserts – create any discrepancy with the decision in this case that necessitates this Court's review.

2. Permitting Employers To Raise The Abandonment Defense In Normal Bargaining Would Eviscerate, Not Protect Employee Rights

Tri-Fanucchi argues that if an employer cannot challenge a union's representative status through abandonment, this will "contravene the purpose of the ALRA to protect the right of agricultural workers." T-F Petition at 28. However, as explained in section A *supra*, the Board and Courts have consistently endorsed the opposite view, which

precludes employers from having any role in the selection of a bargaining representative and prevents employers from refusing to bargain based on claims that a union does not represent its employees. "So long as the employees can petition for a new election if they wish to remove the union, the employer has no real cause for concern . . ." *Montebello Rose*, 119 Cal. App. 3d at 28; *see also, F&P Growers, supra,* 168 Cal. App. 3d at 678 ("The clear purpose of the Legislature is to preclude the employer from active participation in choosing or decertifying a union, and this certainly overrides any paternalistic interest of the employer . . ."); *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4, at 7-18.

Contrary to the Employer's claim, it does not promote employee rights to collective bargaining to involve the employer, as a supposed "benevolent" guardian of its employees' interests, in making any decisions about the employees' desire for union representation. *Cf. Auciello Iron Works v. NLRB* (1996) 517 U.S. 781, 790 (the courts are "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union").[7]

Finally, to the extent that the Employer argues that a union should be held "accountable" for its alleged abandonment of statutory duties (T-F Petition at 24), it ignores the long standing precedent, adopted by the Court of Appeal, that "if a certified union's neglect or inaction causes the agricultural employees to be dissatisfied with that

[7] While UFW agrees that it does not make any logical sense to apply one abandonment rule to the employer's duty to bargain and the opposite rule to the employer's duty to participate in MMC with the very same bargaining representative, this error highlights the reason for granting review in the *Gerawan* cases, but not in this case.

union, the appropriate remedy is for the employees to pursue a decertification election." Slip Op. at 13 (citing Lab. Code §§ 1156.3 & 1156.7; *F&P Growers*, *supra*, at 674–678). To be sure, the ALRB explained in *Dole Fresh Fruit Company* that an employer that is genuinely interested in collective bargaining -- which under the ALRA is a mutual obligation -- can request that the union bargain, and file an unfair labor practice charge against the union for failure to bargain. *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4, at 16-18. Employers invariably raise meritless "abandonment" arguments only when the certified union is demanding negotiations.[8]

Because the Employer's Petition fails to raise an important legal question, its Petition should be denied.

THE ISSUE PRESENTED BY THE BOARD'S PETITION

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

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[8] Moreover, the idea that a union can be held "accountable" or "punished" for abandonment of its duties over an alleged prolonged period -- other than through a decertification election or current unfair labor practice charge -- flies in the face of statutory language that "no complaint" against a party "shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge . . ." and ignores that the ALRB is without authority to "punish" or remedy conduct outside of the statute of limitations. Lab. Code § 1160.2.

WHY THE COURT SHOULD GRANT REVIEW OF THE BOARD'S PETITION

The ALRB's petition raises important questions of law that require this Court's resolution. While UFW agrees that review is warranted for the various reasons advocated by the Board in its Petition for Review, the two most important bases to grant review are: (1) the Court completely ignored the appropriate deferential standard when evaluating remedial orders by the ALRB; and (2) because if left undisturbed, the Court's decision would promote litigation by employers instead of collective bargaining, thereby clogging the courts with unnecessary legal challenges and preventing employees from enjoying their collective bargaining rights. For these reasons, the Court should grant review of the ALRB's Petition.

A. The Court's Decision Ignores The Deferential Standard Of Review To Be Applied In Reviewing The ALRB's Remedial Decisions

In *Highland Ranch v. ALRB* (1981) 29 Cal. 3d 848, this Court found that "the Legislature plainly intended to arm the ALRB with" not only "the full range of broad remedial powers traditionally exercised by the NLRB," but that "the drafters of the ALRA intended to broaden, not diminish, the ALRB 's remedial authority." *Highland Ranch v. ALRB* (1981) 29 Cal. 3d 848, 865. Indeed, "the power to fashion and order backpay and other remedies is vested in the expert regulatory agency alone, not in the courts of the state." *Sandrini Bros. v. ALRB* (1984) 156 Cal. App. 3d 878, 885. In light of the Board's broad authority to issue remedies for violations of unfair labor practices, the Board's remedial orders are to be upheld "unless it can be show that the order is a

patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." *Karahadian Ranches v. ALRB* (1985) 38 Cal. 3d 1, 16.[9]

While the Court of Appeals paid lip service to the idea of deferring to the expert judgment of ALRB on the makewhole order, the Court actually ignored the standard and overturned the Board's makewhole order without making the necessary finding that the Board was "patently" attempting to achieve ends other that those which effectuate the purposes of the Act. That alone is sufficient basis to grant review in this case.

But in addition, the Court's principal rationale for its decision is that "[a]lthough it is true that the Board's prior decisions stated that even "a prolonged period" of union absence or inactivity did not create an abandonment defense to the employer's duty to bargain [citations omitted], no appellate court has (or had) decided that specific issue until, in this case, Fanucchi sought and obtained judicial review." Slip Op. at 20. The Court also stated that the question of how an appellate court would actually rule when confronted with the novel situation of such "*long-term* union absence or *egregious* inactivity (i.e., 24 years) as alleged here was far from certain." *Id.* at 20.[10]

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[9] UFW has previously noted the California Legislature's clear purpose to provide improved remedies to farmworkers that were denied to workers under the National Labor Relations Act, through the provision of the "make whole" remedy. See *supra*, at 6-7, fn.3, citing *Adam Dairy* (1978) 4 ALRB No. 24 at 4-5.

[10] The Court's failure to recognize that the ALRA imposes a 6 month statute of limitations for misconduct undermines its characterization that the alleged long-term union absence could be considered "egregious" and somehow remedied by the rejection of makewhole. See Lab. Code 1160.2. In fact, employees should not bear the burden of their employer's unfair labor practices, or their union's delay in negotiating (assuming *arguendo* that Tri-Fanucchi's unsupported claims are accepted). "[T]he employer, not the affected employees, should ultimately face the consequences of its choice to litigate the representation issues rather than bargaining with the employees in good faith." *George*

This decision conflicts with the Court's earlier statements it made when it rejected Tri-Fanucchi's abandonment defense, and cited to published appellate decisions decided thirty or more years ago. In disposing of that defense, the Court of Appeal concluded that "[t]he Board's position (recited above) on the abandonment issue as it relates to the employer's duty to bargain is consistent with how California appellate courts have construed the ALRA . . . an employer's duty to bargain with the originally certified union *continues* until that union is replaced or decertified by a subsequent election." Slip Op. at 13 [citing *Montebello Rose, F&P Growers, Adamek & Dessert, Inc. v. Agricultural Labor Relations Bd.* (1986) 178 Cal. App.3d 970.] (underline added; emphasis in original). The Court further cited to *F & P Growers*, concluding that "Fanucchi's assertion of abandonment as an alleged defense to its duty to bargain is *clearly analogous to the loss of majority support defense* that was asserted by the employer in F&P Growers. . . *In light of the similar nature of the case at bench*, we believe that the same reasoning applies and the same result should follow. Thus, here, Fanucchi was not entitled to refuse to bargain with UFW . . ." Slip Op. at 13-14 (emphasis added).

Finally, the Court concluded that prior judicial interpretations of the ALRA compelled finding 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." Slip Op. at 13.

Arakelian Farms, Inc. v. ALRB (1989) 49 Cal. 3d 1279, 1294-1295, citing, *F & P Growers Assn. v. ALRB, supra,* 168 Cal. App. 3d at 682.

The Court could not reasonably reject abandonment by claiming that the Board's abandonment decisions were "consistent with how the California courts have interpreted the ALRA," and then in the next sentence claim that the authority surrounding abandonment was unresolved or uncertain. In particular, the Court's adoption of the *Montebello Rose* and *F & P Growers* decisions -- decided more than thirty years ago -- do not square with the Court's reasoning that this was an unsettled area of the law.

Moreover, while it is true that the courts have the final say in the meaning of statutes, the Court of Appeal gave absolutely no consideration to the longstanding principle that a "settled administrative construction of a statute must be given great weight." *Gibson v. Unemployment Insurance Appeals Bd.* (1973) 9 Cal. 3d 494, 498 fn. 6, *citing Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 756. Given the Court's reliance on long-standing judicial and ALRB precedent to reject the abandonment defense, it was error for the Court to disregard that precedent in concluding that the question of abandonment was unsettled or uncertain.

B. Review Is Necessary Because The Court Of Appeal Decision Will Promote Litigation And Delay, And Undermine Collective Bargaining Efforts

The Court of Appeal's conclusion that a published decision is necessary to "settle" a question of law disputed by employers threatens to invite endless litigation and delay, would undermine collective bargaining efforts, and does not otherwise promote the purposes of the ALRA. Although the Court recognized that "it is true that the Board's prior decisions stated that even 'a prolonged period' of union absence or inactivity did not create an abandonment defense to the employer's duty to bargain, no appellate court

has (or had) decided that specific issue until, in this case, Fanucchi sought and obtained judicial review." Slip Op. at 20. The fact that this very Court, in a case involving the very same parties, rejected the abandonment defense in 1987 was immaterial to the Court to the point that the Court regarded this case as if it were the first time this employer was before the Court on this issue.[11]

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

The failure to grant employees makewhole under the facts of this case undermines the Board's proper place as the "expert agency" with primary responsibility to interpret the ALRA and enforce the law. In *Tex-Cal Land Management v. ALRB* (1979) 24 Cal. 3d 335, in resolving a broad attack on the judicial authority of the ALRB, this Court recognized the importance of the ALRB as "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Tex-Cal Land Management v. ALRB* (1979) 24 Cal. 3d 335, 346.

Under well-established preemption principles, the ALRB has primary exclusive jurisdiction over conduct which arguably involves practices covered, protected or prohibited under the ALRA, including remedies for violations. See *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal. 3d 60, 68, *citing San Diego Unions v.*

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[11] Given that the Court failed to discuss its prior decision on this issue as having "settled" the abandonment matter -- at least as to this employer -- it is clear that the Court of Appeal regards only a *published* appellate decision as resolving a dispute under the ALRA. See Slip. Op. at 21 ("Therefore, Fanucchi's advancement of this litigation plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations *by obtaining an appellate decision* on this important issue") (emphasis added).

Garmon (1959) 359 U.S. 236. Importantly, preemption principles prohibit courts from deciding issues that are arguably best left to the decision of the ALRB. The preemption doctrine serves three critical purposes. First, it permits the ALRB to resolve issues within its area of expertise; second, it avoids burdening the courts with matters that are best left to administrative resolution; and third, it avoids inconsistent adjudications of the same issues.

By finding that a published appellate decision is necessary to resolve an area of law under the ALRA, the Court of Appeal's decision upends the role of the ALRB to resolve disputes, essentially turning the ALRB into a meaningless servant to develop the record on disputes so that appellate courts can pronounce what the "real" body of law should be. But this is precisely the result that should be avoided. As stated by the court in *UFW v. Superior Court* (1977) 72 Cal. App. 3d 268, if appellate courts had the last say in what a settled area of law is "the Board would be replaced by *ad hoc* determinations by already overcrowded courts. The legislative effort to bring order and stability to the collective bargaining process would be thwarted. The work of the Board would be effectively impaired, its decisions similar in impression to that of a tinkling triangle practically unnoticed in the triumphant blare of trumpets." *UFW v. Superior Court* (1977) 72 Cal. App. 3d 268, 271-272; *Tex-Cal Land Management v. ALRB*, *supra*, 24 Cal. 3d at 346 (holding that it is necessary to permit the ALRB to perform its judicial functions because if courts took the place of the Board, resolution of cases would take place "on a case-by-case basis" and would result in "a prolific source of the litigious delay that the Legislature indisputably sought to avoid."); *George Arakelian Farms, Inc.*

v. ALRB (1989) 49 Cal. 3d 1279, 1295 (rejecting a "procedural system that encourages successive reviews by appellate courts of questions that were previously decided.").

By replacing the Board's makewhole decision with its own findings and requiring a published appellate decision in order to "settle" an area of law, the Court of Appeal would disrupt the scheme established by the Legislature for effective resolution of disputes under the ALRA. Indeed, under such a scheme, it would not be difficult to imagine employers adding new details in challenges that were never before considered in a published appellate decision, all under the guise of seeking to settle a "disputed" area of the law and to "further the purposes of the ALRA." Moreover, this rationale would encourage growers in different appellate districts to argue that if the appellate court in their district has not issued a published ruling on a subject matter, it is entitled to a challenge the Board's authority under the guise of seeking a published decision from that district.[12] For this reason alone, the ALRB's Petition for Review should be granted.

2. The Court Of Appeal's Decision Rewards Tri-Fanucchi For Litigating And Violating The Law, At The Expense Of Its Employees' Rights

The ALRA was enacted to "encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers . . ." Lab. Code § 1140.2. Makewhole is a remedy designed to fulfill the collective bargaining

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

goal contained in the statute, by attempting to compensate employees for the lost wages and other benefits they would have received under a collective bargaining agreement, where the employer has deprived employees of those improvements through its illegal refusal to bargain. *Holtville Farms, supra,* 168 Cal. App. 3d at 391-92.

By denying makewhole to employees, the Court of Appeal decision rewards the employer who violated the law, at the expense of employees whose rights the statute is intended to protect. This is contrary to this Court's precedent. "[T]he employer, not the affected employees, should ultimately face the consequences of its choice to litigate the representation issues rather than bargaining with the employees in good faith." *George Arakelian Farms, Inc., supra,* 49 Cal. 3d 1279, 1294-1295, citing, *F & P Growers Assn. v. ALRB, supra,* 168 Cal.App.3d at 682.

This is particularly problematic because the employer's abandonment defense is another in a long line of ploys designed to avoid a union collective bargaining agreement. As discussed *supra*, the employer refused to bargain at the outset, forced UFW to file a ULP charge with the ALRB to begin bargaining, conducted an illegal poll with employees which it then used twice as justification for refusing to bargain, and then asserted abandonment as a defense not once, but two times before the Court of Appeal, asserting it the second time even after having been ordered to pay makewhole the first time it did so. See *Tri-Fanucchi Farms v. ALRB, supra,* (Nov. 21, 1987, F008776) (nonpub. opn.); *Tri-Fanucchi Farms, supra,* 12 ALRB No. 8 at 9-10.

Indeed despite claiming that it was engaging in a "technical refusal to bargain" (and insisting that UFW and the ALRB agree to stipulate it was a "technical refusal"), the

Court of Appeal recognized that the employer's refusal to bargain was not a technical refusal. Slip Op. at 18 ("In the case before us, contrary to Fanucchi's characterization of its actions, the refusal to bargain was not technical (in the *J.R. Norton Co.* sense) because the validity of the representation election and original certification of UFW based on that election were not at issue."); *J.R. Norton Co. v. ALRB* (1979) 26 Cal. 3d 1, 27. Moreover, the 1987 unpublished decision from the Court of Appeal held the same thing as to the Employer's first attempt at arguing for an abandonment defense. See *Tri-Fanucchi Farms v. ALRB, supra,* at 10, fn. 5 (Nov. 21, 1987, F008776) ("A technical refusal to bargain occurs when an employer refuses to bargain with the union in order to obtain judicial review of the union's certification . . . In the present case the refusal to bargain is not technical because the union's election and certification are not at issue.").

Therefore, the employer's litigation posture was a "repetitive litigation tactic" that this Court has frowned upon, as it did not even involve a challenge to the underlying certification, which was a settled matter. See *George Arakelian Farms, Inc., supra,* 49 Cal. 3d 1279, 1294-1295. As explained by this Court in *George Arakelian,*

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

Finally to the extent the Court of Appeal concluded that its decision to deny makewhole promotes the purposes of the ALRA by promoting "greater stability in labor

relations" (Slip Op. at 21), the Court's decision was plainly erroneous because it ignored two more equally important purposes of the ALRA: collective bargaining and employee free choice.

The Court had already decided that the employer could not insert itself into the process of whether or not its employees would be represented by a union because that would invade employee free choice. Slip Op. at 13 ("[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."). Therefore, the Employer's effort to unilaterally remove the UFW as its employees' selected bargaining representative -- when no attempt to do so had been made by the employees -- was unlawful and it was entirely proper for the Board to award makewhole for this illegal act.

Similarly, by ignoring that the ALRA also seeks to improve employee working conditions through collective bargaining, the denial of makewhole relief would nullify this important purpose of the statute. The Court of Appeal had already concluded that "Fanucchi was not entitled to refuse to bargain with UFW" based on prior judicial precedent (Slip Op. at 13-14), so it made no sense that it would ignore this finding in rejecting makewhole. Just like the good faith doubt defense in *F & P Growers*, litigation of the abandonment defense could not possibly "further the policies and purposes of the ALRA" because its salient feature is to replace employee free choice, eliminate collective bargaining, and increase delay. *F & P Growers, supra*, 168 Cal. App. 3d at 682.

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CONCLUSION

For the foregoing reasons, Tri-Fanucchi's Petition for Review should be denied, and the ALRB's Petition for Review should be granted.

Dated: July 14, 2015

MARIO MARTÍNEZ

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By: _____
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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.504(d), I certify that UFW's Answer to the Petitions for Review contains 7,641 words, according the Microsoft Word program being used.

Dated: July 14, 2015

MARIO MARTÍNEZ

MARTÍNEZ AGUILASOCHO & LYNCH, APLC

By: _____
Mario Martínez

Counsel for Real Party in Interest
United Farm Workers of America

PROOF OF SERVICE

CASE NAME: **Tri-Fanucchi Farms v. Agricultural Labor Relations Board**
CASE NO.: **S227270**
COURT: **The Supreme Court, State of California**

I am a resident of the County of Kern. I am over the age of eighteen years and not a party to the within entitled action. My business address is P.O. Box 11208, Bakersfield, California, 93389-1208. On July 14, 2015, I served foregoing document(s) described as:

JOINT ANSWER OF UNITED FARM WORKERS OF AMERICA TO PETITIONS FOR REVIEW BY TRI-FANUCCHI FARMS AND ALRB

__X__ **(BY OVERNIGHT COURIER)** by causing a true and correct copy to be delivered via overnight courier to the last known address of each person listed. It was contained in a sealed envelope, with courier fees paid, and addressed as stated above.

SERVICE LIST

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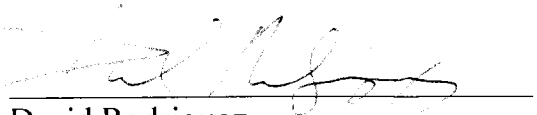
I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid.

I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct. Executed on July 14, 2015, in the County of Kern, California.



David Rodriguez