APPENDIX

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Appendix A

IN THE SUPREME COURT OF CALIFORNIA

No. S227243

Ct.App. 5 F068526/F068676

GERAWAN FARMING, Inc.,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent;

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

Filed November 27, 2017

In 1975, the Legislature enacted the Agricultural Labor Relations Act (ALRA) "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 of labor." (Lab. Code, § 1140.2; all statutory references are to this code unless otherwise specified.) The ALRA established an elaborate framework governing the right of agricultural workers to organize themselves into unions to engage in collective bargaining with their employers. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392,

398 (*ALRB I*); see § 1140 et seq.) It also created the Agricultural Labor Relations Board (ALRB or the Board) and granted it "specific powers and responsibilities of administration, particularly in conducting and certifying elections and in investigating and preventing unfair labor practices." (*ALRB I*, at p. 399.)

Twenty-five years later, the Legislature determined that additional legislation was necessary to fulfill the goals of the ALRA because it had proven ineffective at facilitating the negotiation and completion of collective bargaining agreements. The Legislature therefore enacted the ALRA's "mandatory mediation and conciliation" (MMC) provisions to "ensure a more effective collective bargaining process between agricultural employers and agricultural employees." (Stats. 2002, ch. 1145, § 1, p. 7401.) In certain cases in which an employer and a labor union have failed to reach a first contract, either party may invoke MMC, which involves a mediation process before a neutral mediator. (§ 1164 et seq. (the MMC statute).) If the parties do not reach an agreement on all terms through mediation, the mediator resolves the disputed terms and submits a proposed contract to the Board, which can then impose that contract on the parties.

In this case, the United Farm Workers of America (UFW) filed an MMC request with the Board after failing to reach a collective bargaining agreement with petitioner Gerawan Farming, Inc. (Gerawan). When mediation similarly failed to produce an agreement, the mediator submitted a report fixing the contractual terms, which the Board

adopted in its final order. Gerawan petitioned for review of the Board's order, contending, among other things, that the MMC statutory scheme was unconstitutional. The Court of Appeal agreed, holding that "the MMC statute on its face violates equal protection principles" and that it "improperly delegated legislative authority." In so holding, the Court of Appeal adopted the reasoning of the dissent in *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1611 (dis. opn. of Nicholson, J.) (*Hess*), in which the court upheld the MMC statute against a similar constitutional challenge (see *id.* at pp. 1603-1610 (maj. opn.)). We granted review to resolve this conflict, and we conclude that the MMC statute neither violates equal protection nor unconstitutionally delegates legislative power.

We also granted review to resolve an important statutory question. In arguing that the final order should be set aside, Gerawan also claimed that the UFW, the labor union certified as the bargaining representative under the ALRA, had abandoned its employees after a lengthy absence and therefore forfeited its status as representative. Applying the settled rule that a union remains certified until decertified by the employees in a subsequent election, the Board concluded that the ALRA precludes employers from raising an abandonment defense to an MMC request. The Court of Appeal acknowledged the validity of the general rule but held that an employer may raise an abandonment defense against a union's demand to invoke MMC because MMC is "a postbargaining process" materially different from ordinary collective bargaining.

We hold that the distinction drawn by the Court of Appeal is untenable and that employers may not refuse to bargain with unions—whether during the ordinary bargaining process or during MMC—on the basis that the union has abandoned its representative status. As the Board and lower courts have consistently observed, the Legislature intended to reserve the power to decertify labor organization representatives to employees and labor organizations alone. Allowing employers to raise an abandonment defense would frustrate that intent and undermine the ALRA's comprehensive scheme of labor protections for agricultural employees.

I.

The Legislature enacted the ALRA in 1975 to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations." (Stats. 1975, 3d Ex. Sess., ch.1, § 1, p. 4013.) "To achieve this goal, the act declares the right of agricultural employees to organize themselves into unions and to engage in collective bargaining, free from intimidation by either employers or union representatives." (*ALRB I*, *supra*, 16 Cal.3d at p. 398; see § 1140.2.) In enacting the ALRA, the Legislature intended to fill a gap in the labor protections afforded by the federal National Labor Relations Act (NLRA), which exempts "any individual employed as an agricultural laborer." (29 U.S.C. § 152(3); see Lab. Code, § 1140.4 [defining "agricultural employee" as "those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees"].) Accordingly, the ALRA identifies a number of unfair

labor practices and other unlawful acts (§§ 1153, 1154, 1154.5, 1155.4, 1155.5), and empowers the Board to investigate, prevent, and remedy such practices (§ 1160).

The Board's other primary duty is to oversee and certify the results of bargaining representative elections. Under the ALRA, "[r]epresentatives designated or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment." (§ 1156; see § 1156.3 [setting forth the election process].) The ALRA also provides a process by which employees may petition to decertify a labor organization as their representative. (§ 1156.7.) Once a bargaining representative is certified, the ALRA requires the employer and the representative to "bargain collectively in good faith" in order to reach an agreement "with respect to wages, hours, and other terms and conditions of employment." (§ 1155.2, subd. (a).) The obligation to bargain in good faith "does not compel either party to agree to a proposal." (*Ibid.*)

In the decades that followed, it became clear that the ALRA had not resulted in the widespread adoption of collective bargaining agreements between agricultural employers and employees. "Between 1975 and 2001 ... , of the state's approximately 25,000 farm employers, there existed fewer than 250 signed union agreements and there were another 250 farms where workers voted for union representation but had

not yet obtained a contract." (Broderdorf, *Overcoming the First Contract Hurdle: Finding a Role for Mandatory Interest Arbitration in the Private Sector* (2008) 23 Lab. Law. 323, 338.) A substantial factor was "the continued refusal of agricultural employers to come to the bargaining table once an election has occurred," which caused employees to "wait[] for years while negotiations for union contracts drag on without hope of progress." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1156 (2001-2002 Reg. Sess.) as amended Aug. 30, 2002, p. 7 (hereafter Sen. Bill 1156 Analysis).) As we have recognized, "when an employer engages in dilatory tactics after a representation election his action may substantially impair the strength and support of a union and consequently the employees' interest in selecting an agent to represent them in collective bargaining…. 'Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining.' [Citations.]" (*J. R. Norton Co. v. Agricultural Labor Relations Bd*. (1979) 26 Cal.3d 1, 30 (J. R. Norton).) The Legislature found that in 2002, agricultural employers had not agreed to a contract in about 60 percent of the cases where a labor union had been certified. (See Sen. Bill 1156 Analysis, *supra*, at p. 7 [finding that among the 428 companies with agricultural workers who had voted for UFW representation, only 185 of those companies had reached a collective bargaining agreement with their employees]; see also Governor's signing message to Leg. on Assem. Bill No. 2596 and Sen. Bill No. 1156 (Sept. 30, 2002), Sen. Recess J. (2001-2002 Reg. Sess.) p. 6227.)

These concerns prompted the Legislature in 2002 to add the MMC provisions to the ALRA. (§ 1164 et seq., added by Stats. 2002, ch. 1145, § 2, pp. 7401-7404.) The Legislature determined there was "a need . . . for a mediation procedure in order to ensure a more effective collective bargaining process between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the [ALRA], ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California's economic well-being by ensuring stability in its most vital industry." (Stats. 2002, ch. 1145, § 1, p. 7401.)

The MMC statute sets forth a process, known as compulsory interest arbitration, "in which the terms and conditions of employment are established by a final and binding decision of an arbitrator." (Fisk & Pulver, *First Contract Arbitration and the Employee Free Choice Act* (2009) 70 La. L.Rev. 47, 50 (Fisk & Pulver).) Unlike "grievance arbitration," which focuses on "construing the terms of an existing agreement and applying them to a particular set of facts," interest arbitration "focuses on what the terms of a new agreement should be." (*Local 58, Intern. Broth. of Elec. Workers, AFL-CIO v. Southeastern Michigan Chapter, Nat. Elec. Contractors Assn., Inc.* (6th Cir. 1995) 43 F.3d 1026, 1030.) The MMC process results in "quasi-legislative action" by which "[t]he terms of the 'agreement' determined by the arbitrator [are] imposed upon [the employer] by force of law." (*Hess, supra*, 140 Cal.App.4th at p. 1597.)

Either an agricultural employer or a union representative may invoke the MMC process by filing with the Board "a declaration that the parties have failed to reach a collective bargaining agreement and a request that the board issue an order directing the parties to mandatory mediation and conciliation of their issues." (§ 1164, subd. (a).) Labor organizations certified before January 1, 2003, like the UFW here, must establish the following conditions before filing the declaration: "(a) 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, (b) the employer has committed an unfair labor practice, and (c) the parties have not previously had a binding contract between them." (§ 1164.11.) Upon receipt of the declaration, "the board shall immediately issue an order directing the parties to" mediation before a neutral, agreed-upon mediator. (§ 1164, subd. (b).) Mediation then proceeds for 30 days, which can be extended by the mediator for an additional 30 days. (§ 1164, subd. (c).)

Within 21 days after the mediation period expires, "the mediator shall file a report with the board that resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement, including all issues subject to mediation and all issues resolved by the parties prior to the certification of the exhaustion of the mediation process. With respect to any issues in dispute between the parties, the report shall include the basis for the mediator's determination. The mediator's determination shall be supported by the record." (§ 1164, subd. (d).) In crafting a determination, the mediator "may consider those factors commonly

considered in similar proceedings, including: [¶] (1) The stipulations of the parties. [¶] (2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union's wage and benefit demands. [¶] (3) The corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements. [¶] (4) The corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed. [¶] (5) The average consumer prices for goods and services according to the California Consumer Price Index, and the overall cost of living, in the area where the work is performed." (§ 1164, subd. (e).)

The MMC statute establishes a two-tiered system of review. Within seven days, either party may petition the Board to review the mediator's report on the ground that one or more provisions are (1) "unrelated to wages, hours, or other conditions of employment ...," (2) "based on clearly erroneous findings of material fact," or (3) "arbitrary or capricious in light of the mediator's findings of fact." (§ 1164.3, subd. (a).) If no petition is filed, or if the Board finds that the petition has not made a prima facie case for review on the grounds set forth in subdivision (a), then the mediator's report becomes the final order of the Board. (*Id.*, subd. (b).) If the Board finds grounds to grant review, it shall issue a

decision concerning the petition and, upon finding a provision in the mediator's report to be unlawful on the grounds set forth in subdivision (a), shall require the mediator to modify the terms of the collective bargaining agreement, to meet with the parties for further mediation, and to submit a second report. (*Id.*, subd. (c).) Either party may petition the Board for review of the second report. (*Id.*, subd. (d).) Again, if no petition is filed, or if a petition is filed but does not state a prima facie case of a violation under subdivision (a), the report takes effect as an order of the Board. (*Ibid.*) If a petition is subject to review under subdivision (a), the Board shall determine the issues and issue a final order. (*Ibid.*) Either party also may petition the Board to set aside the report if "(1) the mediator's report was procured by corruption, fraud, or other undue means, (2) there was corruption in the mediator, or (3) the rights of the petitioning party were substantially prejudiced by the misconduct of the mediator." (*Id.*, subd. (e).)

Once the Board has issued a final order, a party may petition for writ of review in the Courts of Appeal or in this court. (§§ 1164.5, 1164.9.) Judicial review is limited to "determin[ing], on the basis of the entire record, whether any of the following occurred: [¶] (1) The board acted without, or in excess of, its powers of jurisdiction. [¶] (2) The board has not proceeded in the manner required by law. [¶] (3) The order or decision of the board was procured by fraud or was an abuse of discretion. [¶] (4) The order or decision of the board violates any right of the petitioner under the Constitution of the United States or the California Constitution." (§ 1164.5).

Soon after the Legislature enacted the MMC statute, agricultural employers challenged its constitutionality. In *Hess*, the Court of Appeal rejected claims that the MMC statutory scheme violated principles of due process and equal protection, interfered with the right of contract, invalidly delegated legislative authority, and was vague and overbroad. (*Hess*, *supra*, 140 Cal.App.4th at p. 1591.) Justice Nicholson dissented, contending that the law "delegated legislative power unconstitutionally and violated equal protection guarantees of the state and federal Constitutions." (*Id*. at p. 1611 (dis. opn. of Nicholson, J.); see *id*. at pp. 1612-1617.)

According to the UFW, the union "began renewing demands for bargaining with agricultural employers that had never agreed to contracts" after *Hess* upheld the MMC statute's constitutionality. This case arises from one of those renewed demands.

II.

Gerawan is a farming business that owns about 12,000 acres in Fresno and Madera Counties. It employs thousands of direct-hire workers to grow, harvest, and pack stone fruit and table grapes. In a 1990 secret election, Gerawan's employees voted to be represented by the UFW. After rejecting Gerawan's challenges to the election, the Board certified the UFW as the exclusive bargaining representative on July 8, 1992. (See *Gerawan Ranches* (1992) 18 ALRB No. 5.) The Board also affirmed an administrative law judge's finding that Gerawan had committed unfair labor practices during the election period. (*Ibid*.)

Several days later, Cesar Chavez, the UFW's founder, sent a letter to Gerawan requesting

negotiations, which Gerawan "formally accept[ed]." The UFW made a renewed request to bargain in November 1994, after which the parties held at least one negotiation session. The parties did not reach an agreement. After the negotiation session, according to a former Gerawan executive, the UFW "represented that it would revise its proposal ... and that it would contact Gerawan about future negotiations," but the "UFW never contacted Gerawan again concerning [those] negotiations."

For reasons not apparent in the record, neither the UFW nor Gerawan attempted to communicate or restart negotiations until October 12, 2012, when the UFW served Gerawan with a renewed demand to bargain. Gerawan asked the UFW to explain its absence between early 1995 and October 2012; the UFW refused. The parties then proceeded to negotiations, holding more than 10 bargaining sessions in early 2013. Having failed to reach a voluntary agreement, the UFW filed a declaration on March 29, 2013 with the Board requesting MMC. Gerawan opposed the request, claiming that the statutory prerequisites had not been met and that the UFW had abandoned its status as the bargaining representative. Several weeks later, the Board denied Gerawan's opposition and referred the parties to MMC. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 5.) The Board specifically rejected Gerawan's claim that the "UFW abdicated its responsibilities" and "forfeit[ed] its status as bargaining representative," noting that the Board had "considered and rejected this type of 'abandonment' argument" in the past. (*Id.* at pp. 3-4, citing *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4; *Pictsweet Mushroom Farms* (2003) 29

ALRB No. 3; *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5.) Because the Board declined to consider Gerawan's abandonment argument, it took no evidence and made no findings concerning the UFW's alleged absence.

The parties thereafter agreed on an experienced mediator, Matthew Goldberg, and conducted several mediation sessions in the summer of 2013. The voluntary mediation failed to produce an agreement. As required by section 1164, subdivision (a), Goldberg then conducted a number of on-the-record hearings and submitted a report resolving the disputed terms to the Board on September 28, 2013. Gerawan objected to Goldberg's report "both generally and as to its particular terms." In light of these objections, the Board remanded six provisions to the mediator for further proceedings. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 16.) The parties reached agreement on the remanded provisions, and Goldberg issued a second report incorporating the agreed-upon provisions. Neither party objected to the second report, and it took effect as the Board's final order on November 19, 2013. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 17; see § 1164.3.)

Gerawan filed a petition for review of the Board's final order to the Court of Appeal under section 1164.5, claiming that the order was invalid because the MMC statute is unconstitutional. Gerawan argued that the statute violated equal protection and due process, invalidly delegated legislative power, and constituted an unconstitutional taking of private property. Gerawan also reiterated that the Board's order should be set aside because the UFW abandoned

its status as the employees' certified bargaining representative after a "nearly two-decade absence." The Court of Appeal granted Gerawan's request to stay the Board's final order pending the appeal.

The Court of Appeal held that the MMC statute was facially unconstitutional because it "violates equal protection of the law and improperly delegates legislative authority." As to equal protection, the court adopted the reasoning of the Hess dissent: Within the class of employers covered by the MMC process, " 'each employer will be subjected to a different legislative act, in the form of a [collective bargaining agreement]. Thus, similarly situated employers are treated dissimilarly.' " In the court's view, the MMC statute's "discrimination ... is intentional because the mediator has no power to extend the enactment to other agricultural employers. . . . [and] the discrimination is arbitrary because there are no standards" ensuring that mediators will reach similar decisions when considering similarly situated employers. The court acknowledged that section 1164 provides factors to guide the mediator's decisionmaking, but held that the factors failed to "cure the fundamental equal protection violation" because "[i]nevitably, each imposed [collective bargaining agreement] will still be its own set of rules applicable to one employer, but not to others."

The court further concluded that the MMC statute unconstitutionally delegates legislative authority because it empowers the mediator "to establish employment terms that will be imposed by the force of law ... without any definite policy

direction, goal or standard." Because the section 1164.3, subdivision (e) "factors alone are not enough," the law "fails to supply the necessary guidance to either the mediator or the Board." Further, the court held, "the delegation of powers under the MMC statute also lacks the necessary procedural safeguards or mechanisms to assure a fair and evenhanded implementation of the legislative mandate to impose a [collective bargaining agreement]." The court did not resolve Gerawan's other constitutional claims.

Despite holding the MMC statute "constitutionally invalid," the Court of Appeal also decided "the statutory issues as an alternative basis for [its] ruling." The court concluded that "abandonment may be raised defensively in response to a union's demand to invoke the substantial legal measures of the MMC process," notwithstanding the Board's longstanding position that "abandonment does not exist unless a union is either *unwilling* or *unable* to continue to represent the subject employees." The court recognized that under its precedent holding that "a rebuttable presumption exists that a certified union continues to enjoy majority support by the employees," an employer may not refuse to bargain under the ALRA by contending that the union has forfeited its representative status. But because "the MMC process differs materially from bargaining and is largely a postbargaining process," the court continued, "the employer's continuing duty to bargain is *not* an impediment" to an "employer's ability to defend a union's MMC request." The court thus held that the Board abused its discretion by ordering MMC without considering Gerawan's claim of union abandonment.

III.

We now consider Gerawan's claims that the MMC statute (1) violates substantive due process by imposing interest arbitration without the employer's consent, (2) violates equal protection under the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution, and (3) unconstitutionally delegates legislative power. Although we typically decide statutory claims before deciding constitutional claims, we discuss Gerawan's constitutional claims first because the Court of Appeal held the statute facially unconstitutional in addition to resolving Gerawan's statutory claim. Were we to hold that abandonment is a defense under the MMC statute, our holding would have no import in light of the Court of Appeal's decision without a determination that the statute is constitutional. And were we to hold that abandonment is not a defense under the MMC statute, we would likewise need to address Gerawan's constitutional claims.

At the outset, it is important to note that the Court of Appeal held the statute *facially* unconstitutional. Gerawan has likewise characterized its challenge as a facial attack on the MMC statute and has not articulated an as-applied challenge based on the specific terms of the contract imposed by the Board's final order. "The standard for a facial constitutional challenge to a statute is exacting." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218.) Under "the strictest requirement for establishing facial unconstitutionality," the challenger must

demonstrate that "the statute 'inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.' " (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126, quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 181 (*Brown*).) We have sometimes applied a more lenient standard, asking whether the statute is unconstitutional "in the generality or great majority of cases." (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 673 (*San Remo*).) In claiming that the MMC statute is unconstitutional in all cases, Gerawan attempts to meet the strictest requirement. But we need not decide which test applies because, as explained below, the statute is not facially invalid under either test.

A.

Gerawan's lead argument in its briefing is that compulsory interest arbitration in the private sector is categorically impermissible because it forces employers into arbitration without their consent. This is essentially a claim that the MMC statute violates substantive due process. Although Gerawan raised various due process challenges below, the Court of Appeal declined to address them and instead found the statute unconstitutional on equal protection and nondelegation grounds. Nevertheless, since the ALRB and the UFW respond to Gerawan's substantive due process argument in detail here, we address the claim.

Gerawan acknowledges that interest arbitration has "emerged as a fairly common feature of public sector labor relations at the federal, state, and local levels." (Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*

(1984) 98 Harv. L.Rev. 351, 372; see Fisk & Pulver, *supra*, at pp. 50-51.) But Gerawan contends that no state has ever imposed compulsory interest arbitration on private employers because doing so would be unconstitutional. Gerawan places significant emphasis on a trilogy of cases from the 1920s that held unconstitutional a Kansas statute authorizing a three-judge industrial court to arbitrate employment disputes and impose wages and other terms of employment. (See *Wolff Co. v. Industrial Court* (1923) 262 U.S. 522 (*Wolff*); *Dorchy v. Kansas* (1924) 264 U.S. 286; *Wolff Packing Co. v. Indus. Court* (1925) 267 U.S. 552.)

In *Wolff*, the high court concluded that the statute violated "the liberty of contract" under the Fourteenth Amendment. (*Wolff*, *supra*, 262 U.S. at p. 544.) The court relied on precedent that had located "the right of the employer on the one hand, and of the employee on the other, to contract about his affairs" in substantive due process. (*Id.* at p. 534, citing *Adkins v. Children's Hospital* (1923) 261 U.S. 525 (*Adkins*).) As we have explained, "this restrictive view of the police power was completely repudiated" by the high court a decade later. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 155 (*Birkenfeld*); see *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 400 [overruling *Adkins*]; Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"* (2010) 119 Yale L.J. 1474, 1543 [*Wolff*'s "anchorage in Fourteenth Amendment economic due process, never secure, has altogether washed away"].) Thus, Gerawan's claim that private-sector interest arbitration offends substantive due process is

unpersuasive. (See *Hess*, *supra*, 140 Cal.App.4th at pp. 1598-1601.)

Gerawan also relies on *Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1 (*Jones*) and *Porter Co. v. NLRB* (1970) 397 U.S. 99 (*Porter*), where the high court interpreted the NLRA to prohibit compulsory arbitration. But the high court resolved these decisions on statutory grounds and said nothing about compulsory arbitration's constitutionality. (See *Jones*, at p. 45; *Porter*, at pp. 104-109.)

The rareness of interest arbitration in the private sector likely stems from the high court's determination that the NLRA, which preempts most state labor regulation, does not authorize compulsory arbitration. Contrary to what Gerawan contends, there is no indication in the high court's case law that compulsory arbitration in areas *not* covered by the NLRA, such as agricultural labor relations, would be unconstitutional. Seeing no authority to support Gerawan's substantive due process claim, we decline to find compulsory interest arbitration categorically unconstitutional here.

B.

The Court of Appeal held that the MMC statute "on its face violates equal protection principles" under both the federal and state Constitutions. We conclude that the MMC is not facially invalid on equal protection grounds because the Legislature had a rational basis for enacting the MMC statute to facilitate collective bargaining agreements between agricultural employers and employees.

" '[I]n areas of social and economic policy,' " this court interpreting California's equal protection clause,

like the United States Supreme Court interpreting the federal equal protection clause, has said that " '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 (*Warden*), quoting *FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313 (*Beach Communications*), italics omitted.) Although some cases raising federal and state equal protection challenges may require a bifurcated analysis (see, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 843-844), Gerawan argues, and we agree, that the federal and state standards operate the same way here.

"[U]nder the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative." (*Warden*, *supra*, 21 Cal.4th at p. 644.) Making such regulatory distinctions " 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.' " (*Beach Communications*, *supra*, 508 U.S. at pp. 315-316.) Where "[a]n administrative order [is] legislative in character," as is the case with a Board order under the MMC statute, it "is subject to the same tests as to validity as an act of the

Legislature." (*Knudsen Creamery Co. v. Brock* (1951) 37 Cal.2d 485, 494; see 2 Cal.Jur.3d (2017) Administrative Law § 360.) Accordingly, we apply the same rational basis test to a final order by the Board imposing the mediator's report as we would apply to a legislative act imposing the same.

Gerawan does not contend that the Legislature lacked a rational basis for applying the MMC statute only to agricultural employers who fail to reach a first collective bargaining agreement. Gerawan concedes, and we agree, that "differentiat[ing] between those employers with an existing [collective bargaining agreement] and those without ... may bear a rational relationship to the statutory purpose of promoting collective bargaining." "First contracts create particularly complicated bargaining situations because the parties have less information about each other's bargaining behavior than in more established relationships.... Unions face the added difficulties of navigating the immature relationship between leadership and the rank and file membership and pacifying more hostile employers who are more likely to 'bust the union' because they are not used to having to negotiate the terms and conditions of employment.... The difficulties involved in first contract negotiations have effects beyond the first contract because they set the tone for the ongoing union-management relationship." (Fisk & Pulver, *supra*, at p. 54.)

These concerns were the impetus for the MMC statute's enactment. The Legislature was aware that the ALRA had failed to promote collective bargaining agreements, finding that almost 60 percent of union

representation elections did not result in a first contract. (See Sen. Bill 1156 Analysis, *supra*, at p. 7.) In light of the "peculiar problems with the collective bargaining process between agricultural employers and agricultural employees" (*Hess*, *supra*, 140 Cal.App.4th at p. 1604), the Legislature reasonably could have concluded that a mediation process followed by binding arbitration in the event of a bargaining impasse would "correct" the ALRA's failure and facilitate the adoption of first contracts (Sen. Bill 1156 Analysis, *supra*, at p. 7). The Legislature also reasonably could have believed that facilitating first contracts furthers the goal of "ensuring stability" in the agricultural industry. (Stats. 2002, ch. 1145, § 1, p. 7401; see Weiler, *supra*, at p. 409 ["[F]irst-contract arbitration attempts to do more than simply settle a past dispute: it also seeks to install the union firmly within the plant and to . . . allow[] employees to experience life under a collective agreement, a contract one hopes is attractive enough to warrant renewal."].)

We reject Gerawan's argument that the MMC process is unconstitutionally arbitrary because it allows a "self-interested union to compel the regulation of individual employers of its choosing." The statute permits either the union representative or the employer to file a declaration with the Board requesting MMC. (§ 1164, subd. (a).) Even if unions are more likely to demand MMC than employers, the Legislature empowered *the Board*, not the parties, to assess whether the statutory prerequisites are met before it orders MMC. The parties must have never had a contract, they must have "failed to reach agreement for at least one year" after the initial

request to bargain, and the employer must have committed an unfair labor practice. (§ 1164.11; see § 1164, subd. (a).) That determination is then subject to judicial review. (§ 1164.5.) In light of these criteria and the Board's role in determining whether they are met, the fact that the MMC process is initiated by a party does not make it arbitrary or irrational.

Gerawan's primary equal protection argument is not that the MMC statutory scheme treats classes of employers differently, but that it discriminates against *each* individual agricultural employer *within* the covered class of employers. The Court of Appeal accepted this argument, concluding that "[t]he necessary outworking of the MMC statute is that each individual employer (within the class of agricultural employers who have not entered a first contract) will have a distinct, unequal, individualized set of rules imposed on it.... This is ... 'the very antithesis of equal protection.' " The Court of Appeal and Gerawan invoke the principle that "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.' " (*Engquist v. Oregon Dept. of Agriculture* (2008) 553 U.S. 591, 601 (*Engquist*).)

The high court first articulated the "class of one" theory of equal protection in *Village of Willowbrook v. Olech* (2000) 528 U.S. 562 (*Olech*). There, Grace Olech claimed that the village violated equal protection by conditioning her connection to the municipal water supply on the Olechs granting the village a 33-foot easement, while only requiring a 15-foot easement

from other property owners seeking access to the same water supply. (*Id.* at p. 563.) Olech alleged that the easement demand was " 'irrational and wholly arbitrary,' " and was "motivated by ill will resulting" from previous litigation. (*Ibid.*) The high court recognized that "successful equal protection claims [can be] brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (*Id.* at p. 564.)

But laws regulating a small number of individuals, or even a class of one, are not necessarily suspect. As the high court has explained, "[t]he premise that there is something wrong with particularized legislative action is of course questionable. While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action.... Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid." (*Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 239, fn. 9.) Rather, such regulations violate equal protection only "if arbitrary or inadequately justified." (*Bank Markazi v. Peterson* (2016) 578 U.S. __, __, fn. 27 [136 S.Ct. 1310, 1327, fn. 27], citing *Olech*, *supra*, 528 U.S. at p. 564.)

In *Engquist*, the high court held that the " 'class-of-one' theory of equal protection has no place in the public employment context." (*Engquist*, *supra*, 553 U.S. at p. 594.) Although it relied in part on the distinction between the government "as employer as opposed to sovereign," the court also stressed the "core

concern of the Equal Protection Clause as a shield against arbitrary classifications." (*Id.* at p. 598.) Unlike the easement decision in *Olech*, the court explained, "[t]here are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." (*Id.* at p. 603.)

Although *Engquist*'s holding was limited to the public employment context, our Courts of Appeal have concluded that "its reasoning applies more broadly." (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 859 (*Las Lomas*); see *Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 595 ["individualized discretionary decisions will not support a class of one claim"].) The Ninth Circuit has also read *Engquist* to foreclose class of one claims against any "forms of state action that 'by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.' " (*Towery v. Brewer* (9th Cir. 2012) 672 F.3d 650, 660.) Other courts have held that although "*Engquist* does not bar all class-of-one claims involving discretionary state action," its reasoning may still be "properly applied outside of the employment context." (*Analytical Diagnostic Labs, Inc. v. Kusel* (2d Cir.

2010) 626 F.3d 135, 142; see *Hanes v. Zurick* (7th Cir. 2009) 578 F.3d 491, 495.)

Applying *Engquist*'s reasoning, the ALRB argues that the MMC process is "an inherently individualized process" and thus cannot be subject to a class of one challenge. We decline to address whether a class of one claim may be brought under the equal protection clause because even assuming that such a claim may be brought here, we conclude that the MMC statute does not facially violate equal protection.

To succeed on a class of one claim, a plaintiff must establish that "(1) the plaintiff was treated differently from other similarly situated persons, (2) the difference in treatment was intentional, and (3) there was no rational basis for the difference in treatment." (*Las Lomas*, *supra*, 177 Cal.App.4th at p. 858, citing *Olech*, *supra*, 528 U.S. at p. 564.) There is no question that differences in treatment among agricultural employers under the MMC statute is "intentional" (*Las Lomas*, at p. 858), since the point of the scheme is to make agreements tailored to the parties' individualized circumstances and relationships. But Gerawan has failed to satisfy either of the other two requirements.

We find unpersuasive Gerawan's claim that the MMC statute is unconstitutionally arbitrary because of the "lack of any nexus between the statutory purpose and the distinctions drawn by any individual mediator." The purpose of the MMC statute is to promote collective bargaining and ensure stability in the agricultural labor force. (Stats. 2002, ch. 1145, § 1, p. 7401.) The statute accomplishes its purposes by empowering mediators to make individualized

determinations regarding the terms of particular collective bargaining agreements. These individualized determinations are rationally related to the Legislature's legitimate interest in ensuring that collective bargaining agreements are tailored to the unique circumstances of each employer. As the Board explains, "[c]ontract terms appropriate for a 25-employee family farm may make little sense at a 5,000-employee agricultural corporation, and reasonable wages and benefits will necessarily vary across company size, crop, and geographic region."

The discretion afforded to the mediator under the MMC statute is channeled by section 1164's statutory factors. As noted, the statute instructs the mediator to "consider those factors commonly considered in similar proceedings, including: [¶] (1) The stipulations of the parties. [¶] (2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union's wage and benefit demands. [¶] (3) The corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements. [¶] (4) The corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed. [¶] (5) The average consumer prices for goods and services according to the California Consumer Price

Index, and the overall cost of living, in the area where the work is performed." (§ 1164, subd. (e).)

These statutory factors serve to further the MMC's purposes while minimizing arbitrary or irrational differences between the collective bargaining agreements imposed by the MMC process on similarly situated agricultural employers. (See *Hess*, *supra*, 140 Cal.App.4th at p. 1604 ["These requirements reasonably ensure that contracts of different employers will be similar."].) We relied on similar reasoning in rejecting an equal protection claim in *People v. Wilkinson* (2004) 33 Cal.4th 821. There, we held that the exercise of a prosecutor's charging discretion did not violate equal protection principles in part because "numerous factors properly may enter into a prosecutor's decision to charge under one statute and not another, such as a defendant's background and the severity of the crime." (*Id*. at p. 838; see *RUI One Corp. v. City of Berkeley* (9th Cir. 2004) 371 F.3d 1137, 1154 [rejecting equal protection challenge to City's expansion of coverage of living wage ordinance to "only a handful of employers" based on geographic, employer-size, and revenue criteria].)

We note that section 1164, subdivision (e) provides that the mediator "may consider" these statutory factors. In *Hess*, the court concluded that in this context the statute's reference to " 'may' means 'must' " because " ' "[w]ords permissive in form ... are considered as mandatory" ' " when duties of public entities like the Board are at issue. (*Hess*, *supra*, 140 Cal.App.4th at p. 1607.) Neither Gerawan nor the Court of Appeal assigns any significance to the statute's use of the word "may," and the Court of

Appeal simply assumed that a mediator "*shall* consider this list of factors." (Italics added.) We need not decide how to interpret "may" as used in section 1164, subdivision (e), because Gerawan's argument is that even if the mediator does consider the statutory factors, the factors themselves do not sufficiently constrain the mediator's discretion. As explained, we reject that argument.

Gerawan further argues that "[b]ecause the statute does not pass any judgments as to the *sort* of terms that would foster collective bargaining and stability, a mediator could consider one employer's wages with relation to 'comparable firms' and choose to impose a wage increase, a wage decrease, or no change at all." The Court of Appeal took the same view, posing a hypothetical in which mediators impose collective bargaining agreements on three similar employers with "different terms ... result[ing] in different wages and a different impact on the profit margin for each employer."

Arbitrary treatment is of course possible under the MMC statute, just as it is possible with respect to a host of governmental functions that involve discretionary decisionmaking. But in order to succeed on a facial challenge, it is not enough to show that *some* hypothetical applications of the MMC statute might result in arbitrary or discriminatory treatment. Instead, Gerawan must show that the statute "inevitably pose[s] a present total and fatal conflict" with equal protection principles (*Brown*, *supra*, 29 Cal.3d at p. 181) or, at the least, that the statute violates equal protection "in the *generality* or *great*

majority of cases." (*San Remo*, *supra*, 27 Cal.4th at p. 673.)

Gerawan has raised no as-applied challenge in this case, so we need not resolve whether an as-applied class of one challenge is cognizable in this context. Gerawan does not claim to have evidence that it was treated differently by the mediator or the Board from similarly situated agricultural employers that have undergone the MMC process, or that a similarly situated agricultural employer even exists. Indeed, Gerawan does not mention any specific terms of the mediator's report in its equal protection argument. And Gerawan concedes that the mediator was unable to find any agricultural employer that was sufficiently similar in terms of farm operations upon which to model the proposed collective bargaining agreement. Gerawan instead chose to focus solely on the asserted facial unconstitutionality of the MMC statute. Simply hypothesizing, as the Court of Appeal did, that differential treatment among similarly situated agricultural employers is possible is not enough to declare the MMC statute facially unconstitutional. In sum, the statute does not facially violate equal protection principles.

C.

The Court of Appeal also held that the MMC statute improperly delegates legislative authority in violation of the California Constitution. We disagree.

"[A]lthough it is charged with the formulation of policy," the Legislature "properly may delegate some quasi-legislative or rulemaking authority." (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299.) "For the most part,

delegation of quasi-legislative authority ... is not considered an unconstitutional abdication of legislative power." (*Ibid*.) "The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse." (*People v. Wright* (1982) 30 Cal.3d 705, 712-713 (*Wright*).) Accordingly, "[a]n unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." (*Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190 (*Carson*); *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 491-492; see Kugler v. Yocum (1968) 69 Cal.2d 371, 384 (Kugler) ["Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation.' "].)

The MMC process does not suffer from either defect. First, the Legislature did not leave the resolution of fundamental policy issues to others. In *ALRB I*, we held that an ALRB regulation providing farm labor organizers a qualified right of access to agricultural employers' premises did not constitute an unconstitutional delegation of legislative power. (*ALRB I*, *supra*, 16 Cal.3d at p. 419.) We concluded that "the 'fundamental policy determination' was made by the Legislature when that body decided, after much study and discussion, to grant to agricultural workers throughout California the rights of self-

organization and collective bargaining so long denied to them under federal law." (*Ibid.*) Because the access regulation "merely implement[ed]" the statutory program, "it [did] not amount to a 'fundamental policy determination.' " (*Ibid.*)

The same is true here. The Legislature made the fundamental policy determination that the MMC process was necessary "in order to ensure a more effective collective bargaining process between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the [ALRA]." (Stats. 2002, ch. 1145, § 1, p. 7401.) It did so in response to evidence showing that the ALRA had failed in its goal of promoting the adoption of collective bargaining agreements by agricultural employers. The Legislature then made a variety of subsidiary policy decisions concerning the necessary procedures, the factors channeling the mediator's discretion, the preconditions for invoking the MMC process, and the extent of review by the Board and the courts. (§§ 1164, 1164.3, 1164.5, 1164.11.) The Legislature tasked the mediator with resolving the precise terms concerning "wages, hours, or other conditions of employment" in a single collective bargaining agreement. (§ 1164.3, subd. (a)(1).) But even with regard to those terms, the mediator's role is limited to resolving only *disputed* terms. (§ 1164, subd. (d).)

Thus, the nondelegation argument here is even weaker than the one we rejected in *ALRB I*, which concerned a statewide access regulation. As Gerawan concedes, the policy decisions made by the mediator relate only to *the parties*' "economic relations" and rights. In authorizing the mediator and the Board to

decide the precise contours of an individual collective bargaining agreement, the MMC statute does not confer "unrestricted authority to make fundamental policy determinations" that must be left to the Legislature. (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 816.) In *Brown*, we dismissed an unlawful delegation challenge to statutes that allowed a memorandum of understanding between the Governor and an employee representative to supersede certain Government Code sections governing public employment. (See *Brown*, *supra*, 29 Cal.3d at p. 201.) We observed that the statutes "do not involve fundamental policy determinations, but rather relate to the working details of the wages, hours and working conditions of the employees covered by the act." (*Ibid.*) The Legislature "may declare a policy, fix a primary standard, and authorize" mediators "to determine the application of the policy or standard to the facts of particular cases" without violating the nondelegation doctrine. (*Birkenfeld*, *supra*, 17 Cal.3d at p. 167.)

Second, the MMC statute does not "fail[] to provide adequate direction for [its] implementation." (*Carson*, *supra*, 35 Cal.3d at p. 190.) The Legislature indicated that the mediator, in resolving disputed issues, "may consider those factors commonly considered in similar proceedings," including the parties' stipulations; the employer's financial condition; corresponding terms in comparable collective bargaining agreements, firms, or industries; the average consumer prices for goods and services; and the overall cost of living. (§ 1164, subd. (e).) The Court of Appeal concluded that these statutory factors do not cure the delegation problem because they do

"not provide the mediator with any policy objective to be carried out or standard to be attained once those factors have been considered." But we have previously rejected the argument that such a "listing of factors does not adequately inform [the administrative authority] just how the presence of the factors under particular circumstances is to be translated." (*Birkenfeld*, *supra*, 17 Cal.3d at p. 168.)

In *Birkenfeld*, we considered a constitutional challenge to a Berkeley charter amendment establishing residential rent control. The plaintiffs argued that the charter amendment's provisions for adjusting maximum rents "faile[d] to provide sufficient standards for the guidance of the rent control board ... and thereby constitute[d] an unlawful delegation of legislative power." (*Birkenfeld*, *supra*, 17 Cal.3d at p. 167.) In dismissing this challenge, we emphasized that the amendment directed the rent control board to consider a nonexclusive list of factors when reviewing petitions for rent adjustments. (*Id*. at pp. 167-168.) And we noted that the board was "given other significant guidance by the charter amendment's statement of purpose" because "[s]tandards sufficient for administrative application of a statute can be implied by the statutory purpose." (*Id*. at p. 168.) "By stating its purpose and providing a nonexclusive illustrative list of relevant factors to be considered," we concluded, "the charter amendment provides constitutionally sufficient legislative guidance to the Board." (*Ibid*.)

Gerawan contends that *Birkenfeld* is distinguishable because the rent control scheme there provided a "discernible statutory objective" to guide

the board's consideration of the statutory factors. But in *Birkenfeld*, the charter amendment's stated purpose was simply "counteracting the ill effects of 'rapidly rising and exorbitant rents exploiting [the housing] shortage.' [Citation.]" (*Birkenfeld*, *supra*, 17 Cal.3d at p. 168.) From that stated purpose, we implied "a standard of fixing maximum rent levels at a point that permits the landlord to charge a just and reasonable rent." (*Ibid*.) Likewise, the MMC statute expressly states its purpose—"to ensure a more effective collective bargaining process between agricultural employers and agricultural employees" (Stats. 2002, ch. 1145, § 1, p. 7401)—from which we can imply a standard of reaching just and reasonable collective bargaining agreements based on relevant considerations such as the nonexclusive list of factors set forth in section 1164, subdivision (e). This implied standard provides sufficient legislative direction to the mediator.

Gerawan's argument that the Legislature should determine "the specific formula or objective pursuant to which the delegee would operate" fares no better. In the rent control context, we have said the fact that an "ordinance does not articulate a formula for determining just what constitutes a just and reasonable return does not make it unconstitutional." (*Carson*, *supra*, 35 Cal.3d at p. 191; see *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 768; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 680.) Similarly, the high court has held in the ratemaking context that "[t]he Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas." (*Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315

U.S. 575, 586.) The Legislature here was not required to provide a specific formula for mediators to follow in resolving disputed terms of individual collective bargaining agreements. It is sufficient that the MMC statute sets forth a nonexclusive list of factors for the mediator to consider when developing a fair and reasonable agreement based on the parties' individualized circumstances. The Legislature has given the mediator constitutionally "adequate direction." (*Carson*, at p. 190.)

This conclusion is consistent with substantial precedent rejecting similar nondelegation challenges to compulsory interest arbitration in the public employment context. In *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, we rejected a nondelegation challenge to a Vallejo city charter provision that permitted an arbitral board to resolve disputed terms of employment after considering " 'all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition.' " (*Id.* at p. 622.) We held that so long as "the arbitrators do not proceed beyond the provisions of the Vallejo charter, there is no unlawful delegation of legislative power." (*Ibid.*, fn. 13.)

"Other jurisdictions have sanctioned their compulsory interest arbitration schemes even though presented with less precise or even non-explicit standards for decision" than the type of factors set out in the MMC statute. (*City of Detroit v. Detroit Police Officers Ass'n* (1980) 408 Mich. 410, 464-465; see, e.g., *Fraternal Order of Police Lodge No. 165 v. City of Choctaw* (Okla. 1996) 933 P.2d 261, 267-268

(*Choctaw*); *Superintending School Committee of City of Bangor v. Bangor Ed. Ass'n* (Me. 1981) 433 A.2d 383, 387 (*City of Bangor*); *City of Richfield v. Local No. 1215, Intern. Ass'n of Fire Fighters* (Minn. 1979) 276 N.W.2d 42, 47; *Division 540, Amalgamated Transit Union, AFL-CIO v. Mercer County Improvement Authority* (1978) 76 N.J. 245, 252-254; *Harney v. Russo* (1969) 435 Pa. 183, 189.) Other compulsory arbitration statutes provide "a well-settled list of factors" that closely resembles that set forth in section 1164, subdivision (e). (Fisk & Pulver, *supra*, at p. 66 [citing statutes].) "Formulation of rigid standards for the guidance of arbitrators in dealing with complex and often volatile issues would be impractical, and might destroy the flexibility necessary for the arbitrators to carry out the legislative policy of promoting the improvement of the relationship between public employers and their employees." (*City of Bangor*, at p. 387.)

Gerawan does not dispute these authorities but contends that "[t]he delegation issues present here are not as problematic where the employer is a public entity." It is not clear why that is so. With regard to certain constitutional rights such as free speech and workplace privacy, the state may have "significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." (*Engquist*, *supra*, 553 U.S. at p. 599; see *Garcetti v. Ceballos* (2006) 547 U.S. 410; *National Aeronautics and Space Admin. v. Nelson* (2011) 562 U.S. 134; *Connick v. Myers* (1983) 461 U.S. 138.) But whether a statute impermissibly delegates legislative power does not turn on that distinction. Whether the law at issue regulates public employees,

private employees, or nonemployment matters, the test is the same: Has the Legislature "provide[d] an adequate yardstick for the guidance of the administrative body empowered to execute the law"? (*Clean Air Constituency v. California State Air Resources Bd.*, *supra*, 11 Cal.3d at p. 817.) As explained above, the MMC statute provides such guidance.

In addition to sufficiently clear standards, a statute delegating legislative power must be accompanied by " 'safeguards adequate to prevent its abuse.' " (*Kugler*, *supra*, 69 Cal.2d at p. 376; see *Birkenfeld*, *supra*, 17 Cal.3d at p. 169.) The Board and the UFW contend that the MMC statute's two-tiered system—administrative review by the Board, followed by judicial review by the Courts of Appeal—constitutes an adequate safeguard against "improper [collective bargaining agreement] terms or mediator misconduct." While conceding that judicial review can serve as a safeguard, Gerawan claims that the review contemplated by the MMC statute is "deferential in name, but illusory in fact." The Court of Appeal likewise determined that the Board review process requires "virtually a rubberstamp approval to the mediator's reported [collective bargaining agreement] as long as the terms thereof have at least a small kernel of plausible support."

We agree with the Board and the UFW that the statute provides numerous procedural safeguards throughout the MMC process to protect the parties from arbitrary or unfair action. The parties at the very beginning must agree on a neutral mediator; if not, the mediator will be selected from the Board's list

of nine mediators. (§ 1164, subd. (b).) A mediator who demonstrates "bias, prejudice, or interest in the outcome of the proceeding" shall be disqualified. (Cal. Code Regs., tit. 8, § 20404, subd. (a).) Either party may petition the Board to review the mediator's final report, and the Board must order the mediator to modify any provisions that are "unrelated to wages, hours, or other conditions of employment," "based on clearly erroneous findings of material fact," or "arbitrary or capricious in light of the mediator's findings of fact." (§ 1164.3, subd. (a); see *id.*, subd. (c).) Further, either party can petition for the Board to set aside the mediator's report and appoint a new mediator where it is established that the report was "procured by corruption, fraud, or other undue means," or where the party's rights were "substantially prejudiced by the misconduct of the mediator." (*Id.*, subd. (e).) If dissatisfied with the Board's decision, either party may then petition for judicial review. (§ 1164.5.) The court has the power to reverse the Board's order if it determines "on the basis of the entire record" that the Board acted in excess of its jurisdiction or not in the manner required by law, that the Board's order was "procured by fraud or was an abuse of discretion," or that the Board's order violated the petitioner's constitutional rights. (*Id.*, subd. (b).)

These safeguards are constitutionally adequate to protect parties and prevent misconduct, favoritism, or abuse of power by the mediator. Indeed, other courts have upheld the constitutionality of compulsory interest arbitration schemes even where the statutes "expressly provided" that the arbitrator's determination "was final and unappealable." (*Mt. St.*

Mary's Hospital v. Catherwood (1970) 26 N.Y.2d 493, 514 (conc. opn. of Fuld, C.J.), citing *City of Washington v. Police Dept. of City of Washington* (1969) 436 Pa. 168; *Fairview Hospital Ass'n v. Public Bldg. Service and Hospital and Institutional Emp. Union Local No. 113 A.F.L.* (1954) 241 Minn. 523.) Moreover, this case itself shows that the review process is not a mere "rubberstamp." Here the parties jointly selected a mediator, and the mediator conducted several on-the-record hearings before submitting a final report to the Board fixing the terms of the parties' collective bargaining agreement. After Gerawan objected to the terms of the final report, the Board remanded six disputed provisions to the mediator for further consideration. The parties then resolved those contested terms with the mediator's assistance. Gerawan might not agree with the outcome of the MMC process, but that does not mean it was denied "suitable safeguards" to protect it from any abuses of that process. (*Wright*, *supra*, 30 Cal.3d at p. 712.)

Gerawan argues that the MMC statute's judicial review is additionally ineffective because a court would be unable "to assess whether ex parte or 'off-the-record' communications 'decisively influenced' the mediator's decisions." But as the Board explains, ALRB regulations require the mediator to cite evidence in the record to support his or her final report and prohibit the mediator from basing any findings or conclusions on "off the record" communications. (Cal. Code Regs., tit. 8, § 20407, subd. (a)(2).) Further, the regulations allow a party to file with the Board "declarations that describe pertinent events that took place off the record" in case of any alleged misconduct or improper factfinding. (*Id*., § 20408, subd. (a).)

Gerawan did not do so here. The ALRB regulations provide additional safeguards against unfairness or favoritism.

In sum, the Legislature resolved the fundamental policy issues and provided sufficient guidance and procedural safeguards in the MMC statute. The MMC statute does not unconstitutionally delegate legislative authority.

IV.

We next consider whether agricultural employers may defend against a union's MMC request by showing that the union abandoned its status as bargaining representative. As noted, "[a]n agricultural employer or a labor organization *certified as the exclusive bargaining agent* of a bargaining unit of agricultural employees" may file a declaration with the Board requesting MMC. (§ 1164, subd. (a), italics added.) There is no dispute that Gerawan's employees elected the UFW as their certified representative in 1992 and that no subsequent valid election or decertification has taken place. But Gerawan contends, and the Court of Appeal agreed, that it is entitled to argue that the UFW forfeited its certification—and thus its ability to invoke the MMC process—because it had been absent from 1995 to 2012. Because the MMC statute relies entirely on the preexisting ALRA certification procedures, we first recount that statutory backdrop before addressing whether such a defense is available.

Section 1156 provides that "[r]epresentatives designated or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be

the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining." (§ 1156.) Agricultural employers may not "refuse to bargain collectively in good faith with labor organizations certified" pursuant to section 1156. (§ 1153, subd. (e).) Further, under the ALRA, "unlike the NLRA, an exclusive bargaining representative may be designated only on the basis of a secret representation election, and not by the presentation of union authorization cards or any other less reliable method sanctioned under federal law." (*Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 859.) To that end, the ALRA makes it unlawful for an employer to "recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified" through the procedure for a secret election. (§ 1153, subd. (f).)

Soon after the ALRA's enactment, the Board considered whether an employer has a continuing duty to bargain with a union certified as the exclusive bargaining representative where an agreement has not been reached by the end of the initial year of certification. (*Kaplan's Fruit & Produce Co. Inc.* (1977) 3 ALRB No. 28 (*Kaplan's Fruit*).) The employers in that case had pointed to section 1155.2, which provides that if the Board finds that the employer had failed to bargain in good faith with the certified union, then the Board may "extend the certification for up to one additional year, effective immediately upon the expiration of the previous 12-month period following initial certification." (§ 1155.2, subd. (b).) "[I]f 'certification' lapses after one year," the employers argued, their "duty to bargain [under

section 1153, subd. (e)] must also lapse." (*Kaplan's Fruit*, at p. 2.) The Board rejected that argument, relying on NLRB precedent holding that " 'a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues.' " (*Ibid.*, quoting *Terrill Machine Co.* (1969) 173 NLRB 1480.) Certification under the ALRA, the Board explained, creates a "duty to bargain" that has no time limit, as well as an "election bar," set out in section 1156.6. (*Kaplan's Fruit*, at pp. 2-3.) Section 1155.2's extension procedure concerns only the election bar, which seeks "to bind employees to their choice of bargaining agent for a period of time sufficient to allow the bargaining relationship to mature and bear fruit"; it does not concern the employer's duty to bargain. (*Kaplan's Fruit*, at p. 4.)

The Board also based its decision on the policies underlying the ALRA. Accepting the argument that an employer's bargaining obligation lapsed one year after certification would "in effect require annual elections at every organized ranch in the State." (*Kaplan's Fruit*, *supra*, 3 ALRB No. 28 at p. 2.) This would "strike at the Act's central purpose of bringing 'certainty and a sense of fairplay' " to agricultural relations by "inhibit[ing] good faith bargaining" and "promot[ing] strikes by placing the union under great time pressure to obtain an agreement before its certification lapses." (*Id.* at pp. 5-6.) The Board concluded that the Legislature could not have intended "to make the process of collective bargaining into a kind of sporting event in which the parties play against each other and against a clock at the same time." (*Id.* at pp. 6-7.) In *Montebello Rose Co. v.*

Agricultural Labor Relations Bd. (1981) 119 Cal.App.3d 1 (*Montebello*), the court upheld the Board's interpretation that "the employer's duty to bargain ... continues until such time as the union is officially decertified as the employee bargaining representative pursuant to the provisions of sections 1156.3 or 1156.7." (*Id.* at pp. 23-24.) This interpretation "appear[ed] to be true to the underlying purpose of the [ALRA] as a whole — to promote stability in the agricultural fields through collective bargaining." (*Id.* at p. 29.)

The Court of Appeal in *F & P Growers Assn. v. Agricultural Labor Relations Bd.* (1985) 168 Cal.App.3d 667 (*F & P Growers*) considered a related question: whether an employer may refuse to bargain with a union representative when it reasonably believes that the union has lost the support of a majority of its employees. (*Id.* at pp. 670-671.) Agreeing with the Board, the court held that an employer could not raise a "good faith doubt of majority support" defense under the ALRA, even though NLRB precedent provided such a defense under the NLRA. (*Id.* at p. 678; see *Nish Noroian Farms* (1982) 8 ALRB No. 25.) In so holding, the court pointed to several critical differences between the ALRA and NLRA. First, although the NLRA permits employers to "voluntarily recognize and bargain with a labor union that has demonstrated its majority status by means other than an election" (*F & P Growers*, *supra*, at p. 674, citing *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575), the ALRA specifically prohibits an employer from bargaining with a nonelected union (§ 1153, subd. (f)). Second, whereas the NLRA permits employers to petition to

conduct an election for a representative, the ALRA allows only employees or labor unions to petition for an election. (Compare 29 U.S.C. § 159(c)(1)(B) with Lab. Code, § 1156.3.) Third, under the ALRA, only employees or labor organizations can move to decertify a union representative. (*F & P Growers*, at pp. 675-676, citing § 1156.7.)

These differences, the court explained, "show[ed] 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 p. 676.) Permitting an employer to "rely on its good faith belief in order to avoid bargaining with an employee chosen agricultural union" would allow the employer to "do indirectly ... what the Legislature has clearly shown it does not intend the employer to do directly." (*Id*. at pp. 676-677.) The court observed that unique features of "the California agricultural scene"—such as "rapid turnover" of agricultural workers, many of whom are temporary noncitizens who do not speak English—gave "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." (*Id*. at p. 677.) The "legislative policy" of the ALRA, the court concluded, is that "the unions [should] be chosen solely by the employees and not the employers." (*Id*. at p. 678.)

In accordance with this precedent, the Board has consistently determined that an employer may not refuse to bargain with a union on the ground that it has "abandoned" its status as representative. (See

Dole Fresh Fruit Company, *supra*, 22 ALRB No. 4; *Bruce Church, Inc.* (1991) 17 ALRB No. 1; *Lu-Ette Farms, Inc.* (1982) 8 ALRB No. 91.) Under these decisions, a union, once certified, remains the employees' exclusive bargaining representative until it is decertified or until the union is unwilling or unable to represent the bargaining unit. Following the MMC statute's enactment in 2003, the Board has continued to apply this "certified until decertified" rule in deciding that employers may not raise union abandonment as a defense to requests for MMC. (See *Gerawan Farming*, *supra*, 39 ALRB No. 5 at pp. 3-4; San Joaquin Tomato Growers, Inc., supra, 37 ALRB No. 5 at pp. 3-4; *Pictsweet Mushroom Farms*, *supra*, 29 ALRB No. 3 at pp. 10-11.)

The Court of Appeal did not dispute the validity of the precedent above or the "well-settled rule" that "an employer must continue to bargain in good faith with the originally certified union." But it held that employers may raise an abandonment defense against a union's request for MMC because "the MMC process differs materially from bargaining and is largely a postbargaining process."

In evaluating this argument, we note that although "we take ultimate responsibility for the interpretation of a statute, we accord significant weight and respect to the longstanding construction of a law by the agency charged with its enforcement." (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1082.) Here, the Board, as the agency charged with the ALRA's administration, "is entitled to deference when interpreting policy in its field of expertise." (*J. R. Norton*, *supra*, 26 Cal.3d at p. 29.) We must give

significant weight to its determination that under the ALRA, employers may not invoke abandonment as a defense to the MMC process. (See *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325 ["[T]he administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous."].)

Moreover, "when the Legislature amends a statute, we presume it was fully aware of the prior judicial construction." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572.) Likewise, " '[t]he Legislature is presumed to be aware of a long-standing administrative practice…. If the Legislature, as here, makes no substantial modifications to the [statute], there is a strong indication that the administrative practice [is] consistent with the legislative intent.' " (*Thornton v. Carlson* (1992) 4 Cal.App.4th 1249, 1257 (*Thornton*); see *In re Dannenberg, supra*, 34 Cal.4th at p. 1082; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 21 (conc. opn. of Mosk, J.).) At the time of the MMC statute's enactment, the Legislature was aware that both the Board and the courts had consistently affirmed the ALRA's "certified until decertified" rule. In adding the MMC provisions to the ALRA statutory scheme, the Legislature included no provisions concerning certification or abandonment; it merely provided that the labor union must be "certified as the exclusive bargaining agent," thus incorporating the existing ALRA certification procedures. (§ 1164, subd. (a).) The Legislature offered no indication that it intended the MMC statute to depart from more than two decades of precedent and provide employers with a novel abandonment defense.

As noted, the Board rejected the abandonment defense in MMC proceedings after the MMC statute's enactment in 2002. (*San Joaquin Tomato Growers, Inc.*, *supra*, 37 ALRB No. 5 at pp. 3-4; *Pictsweet Mushroom Farms*, *supra*, 29 ALRB No. 3 at pp. 10-11.) Yet in subsequent amendments to the MMC statute, the Legislature took no action to modify or overrule the Board's interpretation. (See Stats. 2003, ch. 870, § 1; Stats. 2011, ch. 697, § 4.) This provides additional evidence that the Board's construction of the MMC statute is consistent with the Legislature's intent. (*See Thornton*, *supra*, 4 Cal.App.4th at p. 1257.)

The Court of Appeal's contention that the MMC process falls "outside the ordinary bargaining context" lacks support in the MMC statute. Rather, the text and structure of the statute indicate that the MMC process is a continuation of the ordinary bargaining process. The Legislature enacted the MMC statute in order to "ensure a more effective *collective bargaining process* between agricultural employers and agricultural employees" (Stats. 2002, ch. 1145, § 1, p. 7401, italics added), and the MMC process begins only after a union representative or an employer makes "a renewed demand *to bargain*" (§ 1164, subd. (a), italics added). Moreover, the MMC statute requires that the parties, with the assistance of the mediator, conduct considerable negotiation before the interest arbitration phase. (§ 1164, subd. (c).) In many cases, the parties may reach a voluntary agreement on all or most of the disputed terms before the mediator writes a final report or before the ALRB issues its final order.

Further, compulsory interest arbitration is not wholly distinct from "normal" bargaining because it

imposes contract terms on the parties. The *availability* of interest arbitration, as an ultimate recourse, is itself a bargaining tool that the Legislature believed would facilitate resolution of disputes and consummation of first agreements. (Stats. 2002, ch. 1145, § 1, p. 7401; Sen. Bill 1156 Analysis, *supra*, at p. 7.) Other courts have similarly described interest arbitration "not as a substitute for collective bargaining, but as an instrument of the collective bargaining process." (*City of Bellevue v. International Assn. of Fire Fighters, Local 1604* (Wash. 1992) 831 P.2d 738, 742; see *Borough of Lewistown v. Pennsylvania Labor Relations Bd.* (Pa. 1999) 735 A.2d 1240, 1244 ["[T]he collective bargaining process under Act 111 includes binding interest arbitration where impasse is reached in negotiations."]; *Choctaw, supra*, 933 P.2d at p. 267 ["This bargaining process now includes the right to binding mandatory interest arbitration …."].)

Seizing on a single sentence in the Board's 1977 decision in *Kaplan's Fruit*, the Court of Appeal suggested that the "Board's own precedent reflects [that] any process by which the parties are *compelled* to *agree* to imposed terms ... does not fit into the parameters of bargaining under the ALRA." But *Kaplan's Fruit* does not stand for that broad principle. In the course of holding that employers have a continuing duty to bargain with a union representative, the Board merely described the contemporary state of the law, which at that time did not provide for interest arbitration: "Nothing we declare in this opinion alters the statutory protection given to employers. Their duty to bargain, no matter how long its duration, does not compel them to agree

to a proposal." (*Kaplan's Fruit*, *supra*, 3 ALRB No. 28 at p. 7.) When the Legislature later enacted the MMC statute, it expanded the "duty to bargain" to include the MMC process.

Finally, even if the MMC process "differs materially from bargaining," as the Court of Appeal found, neither Gerawan nor the Court of Appeal has identified any statutory language, legislative history, or other evidence suggesting that the Legislature intended "bargaining" to be treated differently from so-called "postbargaining." Whether abandonment should be recognized as a defense in the latter context but not the former is a question for the Legislature, not the courts.

Our conclusion is consistent with the purposes of the ALRA and the MMC statute. The ALRA created a state policy "to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, ... and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives." (§ 1140.2.) "[T]he 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 ... [and] remove the employer from any peripheral participation." (*F & P Growers*, *supra*, 168 Cal.App.3d at pp. 676-677.) Allowing an employer like Gerawan to avoid MMC by purporting to assert the interests of its employees in claiming that the union representative had abandoned its employees would permit the employer to "do indirectly ... what the Legislature has

clearly shown it does not intend the employer to do directly." (*Id*. at p. 677.)

Indeed, the very purpose of the MMC statute was to revive long-dormant relationships between agricultural employers and labor unions in order to facilitate the adoption of first collective bargaining agreements. The Legislature was troubled by employers' "continued refusal[s] ... to come to the bargaining table once an election has occurred," which caused employees "to languish without the negotiated contracts they have elected to secure." (Sen. Bill 1156 Analysis, *supra*, at p. 7.) Thus, the MMC statute was enacted with an understanding that the MMC process would be available to unions that had long ago reached an impasse with employers and were unable to resume negotiations—in other words, unions that are likely to have less of a presence at the employer *precisely* because no collective bargaining agreement yet exists.

In the face of the strong legislative policy against employer participation in the union selection process, Gerawan argues that "the employer's ability to raise the abandonment defense [against the MMC statute] is ... the only way to protect the workers' right to choose." The Court of Appeal similarly concluded that "employees' right to a representative of their own choosing would be seriously jeopardized in the situation of abandonment by a union where ... the absentee union suddenly reappeared on the scene to demand the MMC process."

But the ALRA contains a comprehensive set of protections for employees who no longer wish to be represented by the certified labor union. The employees or a rival labor union may petition for a

new election to decertify or replace the existing union representative. (§§ 1156.3, 1156.7.) "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 about whether it is bargaining with the true representative of its employees." (*Montebello*, *supra*, 119 Cal.App.3d at p. 28.) Indeed, Gerawan's employees *did* file a petition to decertify the UFW. Although the Board later set aside that decertification effort because it found that Gerawan "unlawfully inserted itself into the campaign" (*Gerawan Farming, Inc.* (2016) 42 ALRB No. 1, p. 8), the fact that the employees mounted such an effort demonstrates that employees have recourse beyond an employer's ability to raise an abandonment defense.

The Court of Appeal opined that the "rapid timeframe" of the MMC process would mean that decertification "would often be too late." But the ALRA requires that the Board set an election within seven days from receiving a decertification petition. (§ 1156.3, subd. (b).) By contrast, a union representative generally may not request MMC until 90 days after its renewed demand to bargain, and even after that, the statute requires at least 30 days of mediation. (§ 1165, subds. (a), (c).) Employees thus have a considerable amount of time in which to deliberate and organize for purposes of decertification. In this case, for example, the UFW filed its renewed demand to bargain on October 12, 2012, and the mediator did not issue his final report until almost one year later, on September 28, 2013. Moreover, an initial collective bargaining agreement does not last forever. The contract imposed by the Board's final order here, for example, has a three-year term. If the employees are dissatisfied

with either the collective bargaining agreement or their union's representation, then they can petition to decertify the union in the third year of that term. (§ 1156.7, subd. (c).)

An additional protection against unexplained union absences is that "a union disclaimer of interest or union defunctness" terminates the union's certification as bargaining representative. (*San Joaquin Tomato Growers, Inc., supra*, 37 ALRB No. 5 at p. 3; *Pictsweet Mushroom Farms, supra*, 29 ALRB No. 3 at p. 6.) Thus, under the Board's precedent, employees are entitled to select a new union representative when its existing representative has suffered an "institutional death" and is therefore unable to represent the employees. (P*icstweet Mushroom Farms, supra*, 29 ALRB No. 3 at p. 6.)

Finally, under the ALRA, an agricultural employer can file an unfair labor practice charge against a certified union representative who "refuse[s] to bargain collectively in good faith." (§ 1154, subd. (c).) In addition, the Board has held that the "[f]ailure of a union to respond within a reasonable time will constitute a waiver of the right to bargain over a proposed change in terms and conditions of employment." (*Dole Fresh Fruit Company, supra*, 22 ALRB No. 4 at p. 18.) An employer thus has multiple options to defend against "what may appear to be a derelict or defunct incumbent union." (*Id.* at p. 16.) What an employer cannot do under the ALRA is unilaterally declare that it will refuse to engage with the union because it believes the union has abandoned its employees. This is true whether in response to an initial demand to bargain, a renewed demand to

bargain, or a request to refer the parties to MMC. In all cases, the ALRA reserves the power to select the union representative to the employees and labor organizations alone.

In sum, we hold that an employer may not defend against a union's MMC request by challenging the union's certification as bargaining representative on the basis of abandonment. The Board did not abuse its discretion when it declined to consider Gerawan's abandonment argument.

CONCLUSION

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with our opinion.

LIU, J.

WE CONCUR:

CANTIL-SAKAUYE, C. J.
CHIN, J.
CORRIGAN, J.
CUÉLLAR, J.
KRUGER, J.
KLINE, J*

* Presiding Justice of the Court of Appeal, First Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution

Appendix B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

No. F068526

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39 ALRB No. 17

GERAWAN FARMING, Inc.,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent;

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

No. F068676

Super. Ct. No. 13CECG01408

GERAWAN FARMING, Inc.,

Plaintiff and Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Defendant and Respondent;

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest and Respondent.

Filed May 14, 2015

OPINION

Agricultural employer Gerawan Farming, Inc. (Gerawan) and United Farm Workers of America (UFW) have never reached mutually acceptable terms to enter a collective bargaining agreement (CBA) regarding Gerawan's agricultural employees. UFW was certified as the employees' bargaining representative in 1992, but after engaging in initial discussions with Gerawan, disappeared from the scene for nearly two decades. In late 2012, UFW returned and both parties renewed negotiations. A few months later, at UFW's request, the Agricultural Labor Relations Board (the Board) ordered the parties to a statutory "Mandatory Mediation and Conciliation" (MMC) process pursuant to Labor Code section 1164 et seq.[1] Under the MMC process, if a 30-day mediation period does not succeed in producing a CBA by voluntary agreement, the mediator decides what the terms of the CBA should be and reports that determination to the Board. Once the mediator's report becomes the final order of the Board, the report establishes the terms of an imposed CBA to which the parties are bound. (See §§ 1164, 1164.3.) Here, following the Board's final order adopting the mediator's report, Gerawan petitioned this court for review under section 1164.5, challenging the validity of the order and the MMC process on both statutory and constitutional grounds.[2] Among Gerawan's

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[1] Unless otherwise indicated, all further statutory references are to the Labor Code.

[2] Gerawan makes many of the same arguments in its related appeal, *Gerawan Farming, Inc. v. ALRB*, case No. F068676, which we have consolidated herewith for purposes of this opinion.

claims is the contention that UFW's lengthy absence resulted in an abandonment of its status as the employee's bargaining representative.

We agree with Gerawan's statutory argument that it should have been given an opportunity to prove abandonment to the Board once UFW requested the MMC process. More fundamentally, we agree with Gerawan's constitutional arguments that the MMC statute violates equal protection principles and constitutes an improper delegation of legislative authority. Accordingly, the Board's order, *Gerawan Farming, Inc.* (2013) 39 ALRB No. 17, is set aside.

FACTS AND PROCEDURAL HISTORY

Gerawan Farming

Gerawan is a family owned farming business that has been in operation since 1938. Gerawan grows, harvests and packs stone fruit and table grapes on about 12,000 acres of farmland located in Fresno and Madera Counties, employing several thousand direct-hire workers and farm labor contractor employees.[3]

As was the case in the proceedings below, Gerawan's petition for review presents a description of its operations and business model, presumably

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The appeal in case No. F068676 is from the superior court's denial of a petition for writ of mandate by which Gerawan sought to set aside the Board's order directing the parties to the MMC process. We discuss case No. F068676 herein following our discussion of the issues raised in the petition for review (i.e., case No. F068526).

[3] In a brief filed with the Board, Gerawan estimated that in 2012 it employed approximately 5,100 direct-hire workers, plus an additional 6,300 farm labor contractor employees.

because of its concern that such practices would be impeded by the CBA established under the MMC process. We summarize that description here, not to agree or disagree, but simply to accurately portray Gerawan's stated perspective. According to Gerawan, since the 1980's it has placed a major emphasis on quality control and on keeping well-trained, productive employees. To ensure the quality of its produce, it has developed unique interactive methods to maintain quality control at each step of the harvesting and packing process, including an ability to respond to problems in any individual worker's performance in real time. Allegedly, throughout the process, individual workers are notified of any problems, are given additional training or instruction and, if necessary, receive corrective action. Additionally, Gerawan asserts that to retain good workers it has consistently paid its direct-hire employees substantially more than the average industry wage, with many being compensated on a sliding-scale system (within a targeted per hour range) based on quality and productivity. In Gerawan's view, these operational features have been and still are central to its ongoing success, but would be hampered or prevented by the imposed CBA.[4]

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[4] The mediator's report to the Board stated that Gerawan's position (i.e., that UFW's proposals would result in lower quality or productivity by interfering with Gerawan's business model) was not adequately substantiated: "The Company predicts, without any evidentiary support, that there will be a cost in terms of lower productivity, morale, retention, and competitiveness if many of the Union's proposals are implemented, because this business model will be disrupted."

UFW's Certification in 1992

On July 8, 1992, following a runoff election in 1990, UFW was certified as the exclusive bargaining representative for Gerawan's agricultural employees. On July 21, 1992, UFW sent a letter to Gerawan requesting negotiations. On August 13, 1992, Gerawan accepted UFW's request to begin bargaining and invited UFW to submit any proposals it wished to make. UFW did not send a proposal to Gerawan until November 22, 1994. In February 1995, the parties held one introductory negotiating session.[5] After that, UFW did not contact Gerawan again until late 2012.

UFW's Reappearance in 2012 and the Renewal of Bargaining

On October 12, 2012, UFW sent a letter reasserting its status as the certified bargaining representative for Gerawan's agricultural employees and demanded that Gerawan engage in negotiations. Gerawan responded by letter dated November 2, 2012, expressing its willingness to bargain in good faith, but also raising a number of questions and concerns based on UFW's lengthy absence from the scene. An explanation of UFW's absence was requested, but UFW refused. Nonetheless, the parties proceeded with negotiations. Between January 17, 2013 and March 29, 2013, the parties held 10 or more bargaining sessions.

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[5] According to Gerawan's negotiator, the February 1995 session focused on introductions and on deficiencies in UFW's proposal. The session ended with an understanding UFW would make a revised proposal and would contact Gerawan about future negations. Neither of these things happened.

MMC Process Ordered by the Board

On March 29, 2013, UFW filed a declaration with the Board requesting that the Board issue an order referring the parties to the MMC process pursuant to section 1164 et seq. Gerawan filed an answer objecting to UFW's request on the grounds that the requirements of sections 1164 and 1164.11 were not satisfied and UFW had abandoned its status as the employees' bargaining representative. On April 16, 2013, the Board rejected Gerawan's arguments and ordered the parties to begin the MMC process.

Gerawan filed a petition for a writ of mandate in the superior court, asking the court to set aside the Board's order sending the parties to the MMC process. The superior court denied the petition.[6]

A mediator was impaneled in May 2013 and conducted several mediation sessions with the parties. After the voluntary mediation phase of the MMC process was exhausted without any agreement being reached on the terms of a CBA, the mediator conducted *on the record* hearings in which he received testimony and evidence and made rulings on objections.[7] Thereafter, the mediator alone crafted the subject CBA. On September 28, 2013, the mediator

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[6] Gerawan appealed from the superior court's denial of its petition for writ of mandate. As noted, we have consolidated that separate appeal herewith.

[7] The mediator excluded Gerawan's employees from attending the *on the record* portion of the MMC proceedings. The Board ruled that such exclusion was proper. Gerawan filed a declaratory relief action in superior court, challenging the exclusion on constitutional grounds. That matter is not part of the present appeal.

submitted his report (i.e., his determination of the CBA's terms) to the Board.

The Board Adopts the Mediator's Report

Gerawan filed a petition with the Board objecting to the mediator's report, both generally and as to its particular terms. The Board granted review and remanded the matter back to the mediator as to six issues. After further meetings were held with the parties, the mediator issued a second report to the Board dated November 6, 2013. On November 19, 2013, the Board adopted the mediator's second report and it became the final order of the Board as set forth in *Gerawan Farming, Inc.*, *supra*, 39 ALRB No. 17, the legal effect of which was to establish the mediator's proposed CBA (as reported) as the final order of the Board. (See § 1164.3.)

The Prior Decertification Election

Two weeks beforehand, on November 5, 2013, with the Board's authorization, Gerawan's employees held an election to decide whether to decertify UFW as their bargaining representative. The ballots were impounded by the Board and have not yet been counted, pending the Board's resolution of claims of misconduct relating to the election. Shortly after the employees' votes were cast, Gerawan requested that the Board stay the MMC proceedings until the outcome of the election was known. The Board denied the stay request on November 14, 2013, without explanation.[8] Thus, it is undisputed that when the

[8] On November 13, 2013, senior UFW officials made improper ex parte communications to senior Board counsel on matters that were before the Board in regard to Gerawan and UFW, including

Board adopted the mediator's report on November 19, 2013, and thereby approved the CBA as determined by the mediator, it did so despite the intervening decertification election, which may have ousted UFW.

Gerawan's Petition for Review

On December 16, 2013, Gerawan filed a petition for review (or more specifically, a petition for a writ of review) to this court, seeking our review under section 1164.5 of the Board's final order in *Gerawan Farming, Inc.*, *supra*, 39 ALRB No. 17. In its petition, Gerawan contends that the Board's order was invalid on various statutory and constitutional grounds. The statutory grounds focus on Gerawan's claims that the criteria for ordering the parties to the MMC process were not satisfied, including because UFW allegedly abandoned its status as the employee's bargaining representative. In its constitutional arguments, Gerawan asserts the MMC process violates guarantees of equal protection and due process, and also constitutes an improper delegation of legislative powers. Furthermore, Gerawan maintains that the right to freedom of contract prevents the State from imposing a CBA by administrative fiat.

Upon our consideration of the petition, the parties' briefing, and the Board's certified record, we

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the decertification vote and UFW's desire to immediately enforce the mediator's CBA. The ex parte communications were disclosed by the Board to all parties herein by letter dated November 19, 2013. In light of the ex parte communications, Gerawan asked the Board to vacate its final order. We have not been made aware of the Board's response (if any) to that request. Gerawan does not raise the ex parte communications or the Board's handling of same as issues herein.

issued a writ of review and formally notified the parties of our review of *Gerawan Farming, Inc.*, *supra*, 39 ALRB No. 17, pursuant to section 1164.5.

DISCUSSION

In addressing the contentions raised in Gerawan's petition for review (case No. F068526), our approach will be to discuss the statutory issues first and the constitutional questions second. Lastly, we will briefly address the separate appeal filed by Gerawan (case No. F068676), which has been consolidated herewith.

THE STATUTORY ISSUES

Inasmuch as we will conclude that the MMC statute unconstitutionally deprives Gerawan of equal protection and unconstitutionally delegates legislative authority, we could confine our opinion to a discussion of those issues alone. However, the parties have extensively briefed other issues relating to statutory interpretation and application of the MMC statute. We are not the highest court of review and hence do not presume to have the last word on this subject. We deem it appropriate to address the following statutory issues should they become relevant following a higher court ruling or a future attempt by the Legislature to enact another version of the MMC statute. Additionally, we reach the statutory issues as an alternative basis for our ruling; that is, even if the MMC statute were constitutionally sound, we would still conclude under the *statutory* arguments that the Board abused its discretion. For the sake of efficiency, we place our discussion of the statutory issues first because doing so will provide a thorough overview of the MMC statute (i.e., how it works and its purpose),

which will give helpful background to our consideration of the constitutional issues.

I. Overview of the Statutory Framework

The Labor Code provisions creating the MMC process (§§ 1164-1164.13; the MMC statute) were added in 2002 as a new chapter (ch. 6.5) to the part of the code dealing with agricultural labor relations (div. 2, pt. 3.5), commonly known as the Agricultural Labor Relations Act (§ 1140 et seq.; the ALRA). (See Stats. 2002, ch. 1145, § 2.) Therefore, to understand how the MMC statute fits within its larger statutory framework, we begin with a brief description of the ALRA.

A. The ALRA

In 1975, the California Legislature enacted the ALRA "to provide for collective-bargaining rights for agricultural employees" (§ 1140.2) by putting into place a system of laws generally patterned after the National Labor Relations Act (29 U.S.C. § 151; the NLRA). (*J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 8 (*J.R. Norton Co.*); see § 1148 [in implementing the ALRA, the Board follows applicable precedents of the NLRA].) The ALRA declares it is the policy of the State of California "to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing … for the purpose of collective bargaining or other mutual aid or protection." (§ 1140.2.)[9] As noted by our Supreme Court, "[a]

[9] The same employees also have the right "to refrain from any or all of such activities …." (§ 1152.)

central feature in the promotion of this policy is the [ALRA's] procedure for agricultural employees to elect representatives 'for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.' (*Id.*, § 1156 et seq.)" (*J.R. Norton Co.*, *supra*, at p. 8.) Under that election procedure, if a proper petition has been filed, the Board directs that an election be held by a secret ballot vote of employees to determine an issue of employee representation, such as whether a particular labor organization shall be the employees' bargaining representative.[10] (§§ 1156, 1156.3.) Except in certain runoff elections, every ballot "shall provide the employee with the opportunity to vote against representation by a labor organization by providing an appropriate space designated 'No Labor Organizations.'" (§ 1156.3, subd. (c).) After the election, the Board "shall certify" the result unless it determines based on a sustained election challenge "that there are sufficient grounds to refuse to do so." (§1156.3, subd. (e)(2) [stating grounds for such refusal].)

If a labor organization (i.e., a union)[11] is certified as the winner of such an election and thus becomes the employees' bargaining representative, certain legal consequences follow. First, a statutory bar exists to holding another representation election for at least the initial one-year certification period. (§§ 1155.2,

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[10] A similar procedure exists by which the agricultural employees may vote to decertify a labor organization, so that it is no longer their representative. (§ 1156.7.)

[11] The terms "union" and "labor organization" are used synonymously herein.

subd. (b), 1156.5, 1156.6.) Second, a duty to bargain is created, which is owed by the employer to the union and vice versa. (§§ 1152, 1153, subd. (e), 1154, subd. (c).) However, unlike the election bar, the duty to bargain does not expire with the initial one-year period. That is because a union's status as the employees' certified bargaining representative continues beyond the one-year period for purposes of extending the parties' duty to bargain. (*Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 24-26, 29 (*Montebello Rose*) [affirming ALRB's conclusion that a certified union continues to enjoy that status after the initial certification year expires, based in part on NLRB precedent that there is a presumption of continuing majority status]; *F&P Growers Assn. v. Agricultural Labor Relations Bd.* (1985) 168 Cal.App.3d 667, 672 (*F&P Growers*) [noting "'rebuttable presumption'" under ALRA that a union continues to have majority support after initial one-year period].)[12] Consequently, it has been held that once a union is certified as the bargaining representative of an employer's agricultural employees, the employer's duty to bargain with that union continues until the union is replaced or decertified through a subsequent election pursuant to sections 1156.3 or 1156.7. (*Montebello Rose*, *supra*, at pp. 23-24, 29 [approving statutory interpretation adopted by the Board in

[12] Although section 1155.2, subdivision (b), refers to an initial one-year period of certification (and allows for a one-year extension thereof), that time limitation has been held to relate only to the election bar, not to the duty-to-bargain aspect of certification. (*Montebello Rose*, *supra*, 119 Cal.App.3d at pp. 24-30.)

Kaplan's Fruit & Produce Co., Inc. (1977) 3 ALRB No. 28 (*Kaplan's*)]; *Adamek & Dessert, Inc. v. Agricultural Labor Relations Bd.* (1986) 178 Cal.App.3d 970, 983 (*Adamek & Dessert, Inc.*); *Bruce Church, Inc.* (1991) 17 ALRB No. 1, p. 13 [stating principle adhered to by the Board that "a Union remains the certified representative until decertified"]; *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, p. 7 [same].)[13]

In summary, the ALRA recognizes, protects and promotes agricultural employees' right to collective bargaining (§ 1140.2), and in the furtherance of that right the ALRA requires the agricultural employer and the employees' certified representative to bargain collectively in good faith (§§ 1153, subd. (e), 1154, subd. (c)). The ALRA defines the parties' mutual obligation to bargain collectively in good faith as follows: "[T]o bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel

[13] A third consequence of certification is that no CBA may be negotiated or entered into by the employer with any other (not currently certified) labor organization. (§ 1153, subd. (f).) The ALRA further declares that only a certified labor organization may be a party to a legally valid CBA. (§ 1159.)

either party to agree to a proposal or require the making of a concession." (§ 1155.2, subd. (a).)

When an employer or labor organization fails to bargain in good faith as required, or when other unfair labor practices (or ULP's) as defined in the ALRA have occurred, recourse to the Board is provided and the Board is empowered to issue orders or take remedial action to effectuate the purposes of the ALRA. (§§ 1160-1160.9; see, e.g., *Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 229-230 [discussing Board's remedial authority relating to ULP's].)

B. The MMC Statute

In 2002, the Legislature made the following legislative declaration and findings: "[A] need exists for a mediation procedure in order to ensure a more effective collective bargaining process between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the [ALRA], ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California's economic well-being by ensuring stability in its most vital industry." (Stats. 2002, ch. 1145, § 1.) To that end, the Legislature enacted the MMC statute in 2002 (Stats. 2002, ch. 1145, § 2, as amended by Stats. 2002, ch. 1146, § 1), creating a binding interest arbitration procedure (what we have called the MMC process) that may be ordered by the Board as a means to establish the terms of an initial CBA where the parties failed to reach an agreement. (*Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140

Cal.App.4th 1584, 1591, 1597 (*Hess*).)[14] Proponents of the law asserted that such measures were necessary because, after unions were certified to represent agricultural employees, many employers "refused to agree to the terms of [CBA's]." (*Hess*, *supra*, at p. 1593.)

The heart of the MMC process is described in section 1164. Pursuant to subdivision (a) of that section, the employer or the certified labor organization may seek to initiate the MMC process by filing a declaration with the Board requesting such relief. The declaration must show that the statutory requirements for ordering the parties to the MMC process have been met, and it may only be filed after the relevant time period specified in the statute has expired. (§ 1164, subd. (a); see Cal. Code Regs., tit. 8, § 20400.) In this regard, the precise wording of section 1164, subdivision (a), is in part as follows: "An agricultural employer or a labor organization certified as the exclusive bargaining agent of a bargaining unit of agricultural employees may file with the board, at any time following (1) 90 days after a renewed demand

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[14] As *Hess* noted, the MMC process (also called "interest arbitration") does not involve "interpreting an existing agreement to resolve a dispute," but "determining what the terms of a new agreement should be." (*Hess*, *supra*, 140 Cal.App.4th at p. 1597.) Thus, despite the law's use of the term "'mediator,'" the process "amounts to compulsory interest arbitration." And, although section 1164 refers to the end result being a "'collective bargaining agreement,'" there "is no agreement," since the employer in that case (as here) did not agree to be bound by its terms nor to submit the matter to interest arbitration. (*Hess*, *supra*, at p. 1597.) Rather, "[t]he terms of the 'agreement' determined by the arbitrator were imposed upon Hess by force of law." (*Ibid*.)

to bargain by an agricultural employer or labor organization certified prior to January 1, 2003, *which meets the conditions specified in Section 1164.11*, (2) 90 days after an initial request to bargain by an agricultural employer or labor organization certified after January 1, 2003, … a declaration that the parties have failed to reach a [CBA] and a request that the board issue an order directing the parties to mandatory mediation and conciliation of their issues." (Italics added.)

As the italicized language above states, section 1164.11 sets forth additional conditions that must be satisfied (as prerequisites to the MMC process) if the certification occurred prior to January 1, 2003. Section 1164.11 states: "A demand made pursuant to paragraph (1) of subdivision (a) of Section 1164 may be made only in cases which meet all of the following criteria: (a) 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, (b) the employer has committed an unfair labor practice, and (c) the parties have not previously had a binding contract between them."

When a declaration pursuant to subdivision (a) of section 1164 is filed with the Board and shows that the statutory requirements for ordering the MMC process are satisfied, the Board "shall immediately issue an order directing the parties to [MMC] of their issues,"[15]

[15] The Board also considers the *answer* (if any) filed by the other party to the collective bargaining relationship. Pursuant to California Code of Regulations, title 8, section 20401, subdivision (a), the other party is permitted to file an answer to

whereupon steps are taken to select a mediator. (§ 1164, subd. (b).) Upon his or her appointment, the mediator promptly begins a 30-day mediation process seeking to resolve issues by voluntary agreement.[16] (§ 1164, subd. (c).) If that mediation process is deemed exhausted (i.e., no CBA is reached), then, "[w]ithin 21 days, the mediator shall file a report with the board that resolves all of the issues between the parties and establishes the final terms of a [CBA] …." (§ 1164, subd. (d).) The mediator's report to the Board must include "the basis for the mediator's determination" and "shall be supported by the record." (*Ibid.*)

In resolving disputed issues and deciding what the CBA's terms should be, the mediator "may consider those factors commonly considered in similar proceedings, including: (1) The stipulations of the parties. [¶] (2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union's wage and benefit demands. [¶] (3) The corresponding wages, benefits, and terms and conditions of employment in other [CBA's] covering similar agricultural operations with similar labor requirements. [¶] (4) The corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the

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the declaration within three days of service of the declaration, identifying any statements in the declaration that are disputed.

[16] The mediator may extend the 30-day mediation period for an additional 30 days on agreement of the parties. (§ 1164, subd. (c).)

employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed. [¶] (5) The average consumer prices for goods and services according to the California Consumer Price Index, and the overall cost of living, in the area where the work is performed." (§ 1164, subd. (e).)

Within seven days of the filing of the mediator's report, either party may petition the Board for review of the report. (§ 1164.3, subd. (a).) The grounds for such review are that a provision of the CBA set forth in the mediator's report is (1) unrelated to wages, hours, or other conditions of employment, (2) based on clearly erroneous findings of material fact, or (3) arbitrary or capricious in light of the mediator's findings of fact. (*Ibid.*) If a prima facie case for review is not shown, or if no petition is filed, the report becomes the final order of the Board. (§ 1164.3, subd. (b).) If the Board determines that a prima facie case for review is shown, it may grant review of the report. (*Ibid.*) If, upon review, the Board finds that one or more grounds for review have been established, it will order the mediator to modify the problematic terms of the CBA. (*Id.*, subd. (c).) In that case, the mediator meets with the parties again and files a second report with the Board. (*Ibid.*) As before, the parties may petition the Board for review of the second report. (*Id.*, subd. (d).) If no petition is filed, the second report takes effect as the final order of the Board. (*Ibid.*) If a petition is filed but a prima facie showing is not made, the Board "shall issue an order confirming the mediator's report and order it into immediate effect." (*Ibid.*) If the Board accepts review and finds that the second report is defective, it will determine the

remaining issues itself and issue a final order. (*Ibid.*)[17]

Section 1164.5 provides for judicial review of the Board's final order. That section states: "Within 30 days after the order of the board takes effect, a party may petition for a writ of review in the court of appeal or the California Supreme Court." (*Id.*, subd. (a).) Appellate review is limited to the grounds specified in section 1164.5, but those grounds include, inter alia, a consideration of whether the Board acted in excess of its powers, whether it failed to proceed in the manner required by law, whether the Board's order or decision "was an abuse of discretion," and/or whether the Board's order or decision "violate[d] any right of the petitioner under" the federal or state constitutions. (*Id.*, subd. (b)(1)-(4).)

II. Standard of Review and Rules of Statutory Construction

Having introduced the MMC statute, we next consider the nature of the statutory claims raised in Gerawan's petition. In a nutshell, Gerawan argues the Board did not follow the law when it ordered the parties to the MMC process because several of the statutory requirements for such an order (set forth in

[17] The parties also have a right to file a petition to set aside the mediator's report on the ground that (1) the mediator's report was procured by corruption, fraud, or other undue means, (2) there was corruption in the mediator, or (3) the rights of the petitioning party were substantially prejudiced by the misconduct of the mediator. If any of these grounds are found to exist, the Board will vacate the report, order the selection of a new mediator, and the mediation process starts over. (§ 1164.3, subd. (e).)

sections 1164 and 1164.11) allegedly were not met. According to Gerawan, the Board adopted erroneous interpretations of the statutory provisions at issue, causing it to incorrectly conclude that the statutory requirements were satisfied. Additionally, Gerawan asserts the Board improperly rejected its argument that UFW abandoned its status as the employees' bargaining representative and, therefore, lacked standing to invoke the MMC process under section 1164.

It is clear that Gerawan's claims involve questions of law relating to statutory construction. The rules governing statutory construction are well settled. "We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 (*Nolan*).) In that case, "no court need, or should, go beyond that pure expression of legislative intent. [Citation.]" (*Green v. State of California* (2007) 42 Cal.4th 254, 260.) "If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.)

However, when the language of the statute "is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public

policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*Nolan*, *supra*, 33 Cal.4th at p. 340.) Using these extrinsic aids, we "'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*People v. Sinohui* (2002) 28 Cal.4th 205, 212.)

Where judicial interpretation is required, courts give deference to an agency's reasonable interpretation of the statutory enactment that the agency has been entrusted by law to enforce. (*Montebello Rose*, *supra*, 119 Cal.App.3d at p. 24.) Nevertheless, it is fundamental in statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*J.R. Norton Co.*, *supra*, 26 Cal.3d at p. 29.) Thus, while an administrative agency is entitled to deference when interpreting policy in its field of expertise, it cannot alter or amend the statute that it is interpreting, or enlarge or impair its scope. (*Ibid.*; *Adamek & Dessert, Inc.*, *supra*, 178 Cal.App.3d at p. 978.)

To the above, we add the following basic precepts regarding a court's role in the interpretation of statutes. As expressed in *Cadiz v. Agricultural Labor Relations Bd.* (1979) 92 Cal.App.3d 365, at page 372: "The guiding principle of interpretation was laid down by the Legislature in Code of Civil Procedure section 1858: 'In the construction of a statute or instrument, the office of the Judge is simply to ascertain and

declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.' That prime rule of construction has been adopted and restated by the cases." Furthermore, it is not a court's function to second-guess the policy choices or wisdom of particular legislation: "'Courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature.' [Citations.]" (*Ibid.*)

III. Requirements of Section 1164.11

Gerawan contends that two of the conditions for relief stated in section 1164.11 were not shown by UFW and, therefore, the Board should not have ordered the parties to the MMC process. Under that section, where the union's certification occurred prior to January 1, 2003, no demand to the Board may be made for referral to the MMC process unless the following criteria are met: "(a) 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, (b) the employer has committed an unfair labor practice, and (c) the parties have not previously had a binding contract between them." (§ 1164.11; cf. § 1164, subd. (a)(1).) Specifically, Gerawan argues that the requirements of criteria (a) and (b) of section 1164.11 (hereafter sections 1164.11(a) and 1164.11(b)) were not established based on Gerawan's proposed interpretations of those provisions. As explained below, we reject Gerawan's arguments regarding the construction of the statutory

language and conclude that the Board followed the clear and unequivocal terms of section 1164.11 when it held that the requirements thereof were met.

A. The Parties Failed to Reach Agreement for at Least One Year

Section 1164.11(a) states a requirement for seeking the MMC process in cases involving pre-2003 certifications 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*." (Italics added.) In the proceedings before the Board, Gerawan insisted this language meant there had to be "'a good faith and sustained effort'" at negotiation for at least a one-year period. It further argued that since UFW did not make such a showing, the Board was constrained to deny UFW's request. The Board disagreed. It explained that section 1164.11(a) does not contain any language requiring proof of one year of sustained and active bargaining, but only that "the parties failed to reach an agreement for at least one year" after the initial request to bargain, which the Board found to be the case.

In its opening brief herein, Gerawan argues the Board erred because the provision should be construed to specifically require a showing that the parties "actively attempt[ed] to bargain for at last one year," since "one cannot 'fail' to reach an agreement if one does not try." We reject Gerawan's proposed interpretation. The plain language of section 1164.11(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. The provision makes no mention of the particular

circumstances surrounding the parties' failure to agree. Contrary to Gerawan's suggestion, nothing in section 1164.11(a) mandates an affirmative showing of active and/or sustained bargaining over a one-year period. "When the language of a statute is clear, we need go no further." (*Nolan*, *supra*, 33 Cal.4th at p. 340.) Whether or not it would have been wise to include a threshold requirement that before a party may invoke the MMC process, the party must demonstrate there was one year of sustained bargaining, the Legislature did not do so in the particular provision under consideration here. One may argue it *should have*, but we are constrained by the fact that it did not. That ends the matter, since it is not our function to insert what the Legislature has omitted, nor may we, "under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.' [Citation.]" (*People v. Leal* (2004) 33 Cal.4th 999, 1008.)

Although, as Gerawan points out, other provisions of the ALRA obligate the parties to bargain in good faith (e.g., §§ 1153, subd. (e), 1154, subd. (c), 1155.2, subd. (a)), those provisions do not alter the plain meaning of what must be shown under section 1164.11(a).[18] Even if, based on the general bargaining obligation, the parties should have engaged (or

[18] Of course, if a labor union refuses to bargain in good faith, including a failure to respond to the employer within a reasonable time or other dilatory or evasive action, the employer can raise the union's failure in a ULP charge pursuant to section 1154, subdivision (c). (See *Dole Fresh Fruit Co.* (1996) 22 ALRB No. 4, pp. 22-25.) "[T]he duty to bargain is not unilateral, neither are the Board's processes." (*Id.*, p. 23, fn. omitted.)

attempted to engage) in active and/or sustained bargaining during the one-year period specified in section 1164.11(a), the latter provision does not require that such conduct be affirmatively demonstrated as part of the necessary prima facie showing to request the MMC process.[19]

In this case, it is not disputed that UFW's initial request to bargain was made in 1992. Additionally, UFW followed up its request by making a contract proposal to Gerawan in 1994, and one bargaining session occurred between the parties in early 1995. Insofar as the parties have still not reached agreement, the discrete statutory requirement set forth in section 1164.11(a) was clearly satisfied.

Gerawan's Further Arguments Do Not Persuade Us to Depart From the Plain Meaning of Section 1164.11(a)

Having upheld the plain meaning of section 1164.11(a), we briefly explain why we have not accepted Gerawan's arguments that we should depart from the statute's clear and literal terms.

In essence, Gerawan asserts that if the statute were treated as simply a passage-of-time requirement, it would lead to absurd results and contravene the overall legislative purposes of the ALRA and MMC statutes. To avoid that outcome, Gerawan argues that

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[19] Consistent with our conclusion as to the plain meaning of this provision, we observe that each of the conditions set forth in sections 1164 and 1164.11 appear to be matters that are ordinarily capable of being readily and quickly ascertained (rather than debatable factual matters that might have to be litigated), which comports with the Legislature's apparent wish to create an expedited process, at least in the usual or typical case.

we should construe the provision to include an active or sustained bargaining requirement, even if that is not its plain meaning. (See, e.g., *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340 [stating rule that a court need not follow the plain meaning of a statute when to do so would frustrate the manifest purpose of the legislation as a whole or lead to absurd results]; *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [stating rule that plain meaning may be disregarded only when that meaning is repugnant to the general purview of the act or for some other compelling reason].) In this regard, it is pointed out that the ALRA (of which the MMC statute is a part) has a purpose to promote good faith bargaining between the employer and the employees' chosen representative so they may potentially reach a mutually acceptable agreement, which purpose is supported by the duty to bargain collectively in good faith (see §§ 1140.2, 1155.2, subd. (a)). According to Gerawan, if the Board's interpretation[20] were correct, a union could make an initial request to bargain and then simply wait out the clock or engage in surface bargaining until enough time had passed to demand the MMC process (i.e., precisely what Gerawan contends happened here). Allegedly, a union in that situation would have no incentive to make voluntary concessions or otherwise engage in serious or genuine efforts to reach an agreement. In short, Gerawan maintains that the Board's interpretation would lead to absurd results at odds with the legislative purposes by (1) undermining a union's incentive to bargain in

[20] That is, a literal reading of the statute according to its plain meaning, as we have adopted herein.

good faith and (2) potentially forcing employers to undergo the MMC process without a sustained period of good faith bargaining for an entire year.

While Gerawan's arguments identify significant concerns as to the potential impacts of section 1164.11(a), we believe they 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. (See *Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698 [absurdity exception to plain meaning rule "should be used most sparingly by the judiciary and only in extreme cases else we violate the separation of powers principle of government"].) Among other things, Gerawan's analysis of the statutory purposes fails to adequately account for the fact that the ALRA was amended by the MMC statute. The Legislature determined that the ALRA, in its original form, was not adequately fulfilling its purposes. (Stats. 2002, ch. 1145, § 1; *Hess*, *supra*, 140 Cal.App.4th at p. 1600.) New measures were deemed necessary because it was perceived that many employers were unwilling to enter into an initial CBA. (*Hess*, *supra*, at p. 1593.) Therefore, the MMC statute was enacted as an amendment to the ALRA to create a "one-time" compulsory process to bring about an initial CBA between parties who have never entered into such an agreement, where certain statutory conditions were met. (*Hess*, *supra*, at pp. 1600-1601 [noting the purpose "to change attitudes toward collective bargaining by compelling the parties to operate for at least one term" with an imposed CBA].) Among those statutory conditions is the one now before us—the passage of the one-year time period

described in section 1164.11(a). In that provision, the Legislature specified that expiration of the one-year time period without a CBA (i.e., "the parties have failed to reach agreement for at least one year after" the union's initial request to bargain) was one of the threshold requirements for seeking a referral to the MMC process in cases involving pre-2003 certifications. Evidently, the Legislature believed that if more than one year elapsed without a CBA being reached, that fact reasonably indicated the MMC process was appropriate, assuming that the other requirements were also met. Viewed in light of the entire statutory context, we are unable to conclude that the one-year provision of section 1164.11(a), when accorded its plain and literal meaning, would substantially frustrate the main purpose of the ALRA *as amended by the MMC statute*, or otherwise lead to absurd results.

In a further effort to support its position on this issue, Gerawan notes that the Board's own past decisions had, on at least two occasions, expressed an understanding of the relevant statutory provisions that sounded remarkably similar to Gerawan's position. (See *Pictsweet Mushroom Farms*, *supra*, 29 ALRB No. 3, p. 12 [to be sent to MMC process, employer "must have been through a period of bargaining for a year without having reached a contract"]; *D'Arrigo Bros. Co.* (2007) 33 ALRB No. 1, p. 7 [MMC process may not be invoked unless parties have attempted to negotiate on their own for the statutory period].)[21] However, it appears that such

[21] Also, the Governor's written signing message indicated that the bill's (the MMC statute's) provisions would "'Appl[y] to first

comments were made by the Board in connection with tangential issues, and that once the Board directly considered the present issue of statutory construction, it followed the plain meaning (see, e.g., *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, p. 3). In any event, we are bound to do so here.[22]

Still, the Board's earlier comments about the import of the relevant statutory provisions provide some evidence that Gerawan's proposed construction is not mere wishful thinking on its part. There 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 be a prerequisite to commencing the latter. But such argument is more properly presented to the Legislature, whose exclusive function is to enact statutes such as those at issue here. Moreover, if we were to adopt Gerawan's interpretation, what additional specific language would we incorporate into the statute: sustained bargaining, active bargaining, actual bargaining, attempted bargaining? Would we likewise be expected to delineate how much or what quality of bargaining effort would constitute

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contracts only,'" and as to pre-2003 certifications, "'[t]he parties must have attempted to negotiate for one year ….'" (Historical and Statutory Notes, 44A West's Ann. Lab. Code (2011 ed.) foll. § 1164, p. 401.)

[22] We must ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*J.R. Norton Co.*, *supra*, 26 Cal.3d at p. 29.) Although an administrative agency is entitled to deference when interpreting policy in its field of expertise, it cannot alter or amend the statute that it is interpreting, or enlarge or impair its scope. (*Ibid.*; *Adamek & Dessert, Inc.*, *supra*, 178 Cal.App.3d at p. 978.)

sustained, active, actual, or attempted bargaining? And if there was no bargaining during the one-year period under any definition, would it matter why there was no bargaining, or whose fault, if any, it was for the parties' failure to reach an agreement? These are some of the prickly questions that would be raised if this court, or any court, felt inclined to impose additional substantive requirements beyond those specified in the statute before the Board could refer a case to the MMC process. The nature of these quandaries reinforces our concern that, if we went down that path, we would be intruding into the legislative arena. We decline to do so. As was aptly stated by another Court of Appeal: "[E]xcept in the most extreme cases where legislative intent and the underlying purpose are at odds with the plain language of the statute, an appellate court should exercise judicial restraint, stay its hand, and refrain from rewriting a statute to find an intent not expressed by the Legislature." (*Unzueta v. Ocean View School Dist.*, *supra*, 6 Cal.App.4th at p. 1700.)

B. The Employer Committed a ULP

Gerawan also challenges the Board's conclusion that section 1164.11(b) was satisfied in this case. Section 1164.11(b) states an additional requirement to invoking the MMC process in cases involving pre-2003 certifications that "*the employer has committed an unfair labor practice*." (Italics added.) The Board held that this requirement was met as a result of two 1992 cases in which Gerawan was found to have committed ULP's: "The cases identified by the UFW in its declaration, *Gerawan Ranches* (1992) 18 ALRB No. 5 and *Gerawan Ranches* (1992) 18 ALRB No. 16, which

involved multiple ULP's committed in connection with the elections that resulted in the certification of the UFW, including a refusal to bargain over unilateral changes made in the post-election, pre-certification period, meet the requirement of … section 1164.11[(b)] that the employer 'committed an unfair labor practice.'"

Gerawan contends the Board erred because the two cases relied upon by the Board allegedly did not come within the scope of this provision. According to Gerawan, the cases did not qualify because the particular conduct constituting the ULP's (1) occurred prior to the date of UFW's certification and (2) did not involve a finding that Gerawan resisted CBA negotiations with UFW after that union was certified. We reject Gerawan's assertion that section 1164.11(b) is limited solely to postcertification conduct or to special types of ULP's in relation to the union. The actual language of the provision is clear and explicit, stating simply that "the employer has committed an unfair labor practice"; it contains no hint of the additional requirements or limitations urged by Gerawan. (§ 1164.11(b).) As with the requirement contained in section 1164.11(a), we follow the plain meaning with respect to section 1164.11(b). "If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs." (*Wells v. One2One Learning Foundation*, *supra*, 39 Cal.4th at p. 1190.) We conclude the Board correctly interpreted and applied this provision.

IV. Requirements of Section 1164 and the Abandonment Issue

Pursuant to section 1164, a union must be "*certified as the exclusive bargaining agent of* [*the*]… *agricultural employees*" to have the right to petition the Board for an order directing the parties to commence the MMC process. (§ 1164, subd. (a), italics added.) In the proceedings below, Gerawan challenged UFW's standing as the employees' certified bargaining representative on the ground that such status was forfeited by abandonment based upon UFW's nearly two-decade absence. The Board summarily rejected the abandonment claim, relying on its prior holdings on that issue. (*Gerawan Farming*, *Inc.*, *supra*, 39 ALRB No. 5, pp. 3-4.)

As reflected in its prior holdings, the Board's position is that abandonment does not exist unless a union is either *unwilling* or *unable* to continue to represent the subject employees. (*Bruce Church, Inc.*, *supra*, 17 ALRB No. 1, p. 13.) Further, the Board has elaborated in its holdings that a union will only be found unwilling to represent the employees where it has expressly disclaimed or abdicated its status as the employees' bargaining representative, and a union will only be found unable to carry out its responsibilities if it has become defunct as an organization. According to the Board, aside from these narrowly defined grounds for abandonment, a union's status as the employee's certified bargaining representative continues unabated until that union is replaced or decertified by a subsequent election. (See, e.g., *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5, pp. 3-4; *Pictsweet Mushroom Farms*,

supra, 29 ALRB No. 3, pp. 7, 14; *Dole Fresh Fruit Co.*, *supra*, 22 ALRB No. 4, pp. 12-13; *Bruce Church, Inc.*, *supra*, p. 13.)[23] Additionally, according to the Board's analysis, "what may appear to an employer to be abandonment may be overcome by the union's demonstration that it is in fact able and willing to continue to represent employees." (*Dole Fresh Fruit Co.*, *supra*, p. 12; see *Pictsweet Mushroom Farms*, *supra*, p. 14.) Since at the precise time that UFW sought to invoke the MMC process it was purportedly able and willing to resume its representation of Gerawan's employees, any past prolonged absence on the part of UFW would be, under the Board's view, irrelevant.

Gerawan contends the Board reversibly erred in disallowing the abandonment theory in the context of the MMC process. Among other things, Gerawan points out that under well-established case law, after the initial one-year period there is a rebuttable presumption that a union continues to be supported by a majority of employees. Since there is such a presumption, Gerawan asserts it is reasonable to consider whether there are circumstances (such as those present here) in which the presumption may be overcome. Additionally, Gerawan points out that the forfeiture of rights by abandonment is a recognized legal principle that should be given application here as in other cases. As to the employer's continuing duty to bargain, Gerawan does not dispute that such a duty exists, but notes the MMC process is qualitatively

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[23] Thus, the Board's position on abandonment is sometimes referred to by the parties as an application of the general principle that a union is *certified until decertified*.

different than consensual bargaining as defined in the ALRA (see § 1155.2, subd. (a)) because, under the MMC process, voluntary negotiations quickly give way to a compulsory procedure that will mandate the imposition of a CBA by administrative edict. For these and other reasons, Gerawan maintains that when a union files a request to the Board for an order to commence the MMC process, the employer may defensively challenge the union's presumed status as the "labor organization certified as the exclusive bargaining agent of [the] bargaining unit" (§ 1164, subd. (a)) by showing that the union forfeited that status through abandonment.

After carefully considering the matter, we believe that Gerawan's position is largely correct. Without disturbing the well-settled rule that an employer's duty to bargain is a continuing one, we conclude that abandonment may be raised defensively in response to a union's demand to invoke the substantial legal measures of the MMC process. Allowing such a challenge would not add to the MMC statute's express provisions, but would simply permit the employer to *negate* a statutory element of section 1164—that is, the union's representative status, which is a qualification for MMC relief. We now proceed to explain our conclusion.

A. Prior Judicial Construction of Statutory Terminology

A foundational step in our analysis of this difficult issue is to consider prior judicial construction of the statutory concept of a union's certification status. When the Legislature enacts a statute, it is presumed to have knowledge of the existing judicial decisions

construing the statute or related statutes and to have enacted new statutes or amendments in light of those decisions. (*People v. Giordano* (2007) 42 Cal.4th 644, 659; *People v. Yartz* (2005) 37 Cal.4th 529, 538; *Scottsdale Ins. Co. v. State Farm Mutual Automobile Ins. Co.* (2005) 130 Cal.App.4th 890, 900.) Furthermore, where the language of a statute uses terms that have been judicially construed, courts generally presume that the Legislature intended the terms to have the same precise meaning as was placed on them by the courts. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046.) "When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature intended the same construction, unless a contrary intent clearly appears." (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060.)

Here, in light of the particular judicial decisions that have explained and fleshed out the meaning of a union's certification status under the ALRA, we do not operate on a blank slate and neither did the Legislature when it enacted the MMC statute in 2002. To the contrary, such prior judicial construction of the ALRA clearly set the stage for the Legislature's usage of the certification terminology in section 1164, subdivision (a).

A key decision construing the meaning and implications of a union's certification status under the ALRA was *Montebello Rose*, *supra*, 119 Cal.App.3d 1. In that case, the issue to be determined on appeal was "whether an employer's duty to bargain with the certified employee representative continues beyond

the initial certification year absent an extension of the certification period as provided in section 1155.2, subdivision (b) ...." (*Id.* at p. 6.)[24] The employer had argued that it could not have violated the duty to bargain in good faith with the union because the union's certification period had lapsed; that is, the one-year period of certification specified under section 1155.2, subdivision (b), had expired and no extension had been granted under that section. (*Montebello Rose*, *supra*, at pp. 23-24.) We disagreed with the employer's argument and concluded that, for the reasons set forth in the Board's decision in *Kaplan's*, *supra*, 3 ALRB No. 28, an employer's duty to bargain continues beyond the initial certification year. (*Montebello Rose*, *supra*, at pp. 29-30.)

Our conclusion in the *Montebello Rose* case was based on two principal grounds. The first was that analogous NLRA precedent had held that after the initial certification year expired, there was a rebuttable presumption that a certified union continued to enjoy majority support. (*Montebello Rose*, *supra*, 119 Cal.App.3d at p. 24.) Since no section of the ALRA negated this rule, the presumption of a union's continuing majority status was held applicable

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[24] Section 1155.2, subdivision (b) provides: "Upon the filing by any person of a petition not earlier than the 90th day nor later than the 60th day preceding the expiration of the 12-month period following initial certification, the board shall determine whether an employer has bargained in good faith with the currently certified labor organization. If the board finds that the employer has not bargained in good faith, it may extend the certification for up to one additional year, effective immediately upon the expiration of the previous 12-month period following initial certification."

to the ALRA. (*Montebello Rose*, *supra*, at p. 24; see § 1148 [the Board must follow "applicable" precedents of the NLRA].) On this point, we agreed with the Board's analysis in *Kaplan's* that after the one-year period expired, certification lapsed for the purpose of the election bar, but not for the purpose of the bargaining duty. (*Montebello Rose Co*., *supra*, at pp. 24-25.) Thus, the application of the rebuttable presumption rule to the ALRA system did not conflict with section 1155.2, subdivision (b).[25]

The second ground for our holding in *Montebello Rose* was the fact that, as was recognized in *Kaplan's*, a number of agricultural policy considerations supported the conclusion that an employer's duty to bargain did not lapse at the end of the certification year. Among these policy considerations were the following: (1) good faith bargaining takes time to nurture; (2) if the process had to be compressed into one year, time pressures might lead to unnecessary strikes and other unrest; (3) once the one-year period lapsed, it would be difficult to hold another election until at least the next peak season, which would seriously impair the employees' right to be represented by a union; and (4) it would create an unreasonable burden to require annual or biannual elections whenever the parties failed to reach an agreement within the initial certification year.

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[25] We noted further that, in *Kaplan's*, the Board had stated in deciding this issue "'[t]he balance to be struck is between the employees' right to reject the incumbent union and the need for stability in the bargaining relationships. The employer's "right" not to bargain is no part of the equation.'" (*Montebello Rose*, *supra*, 119 Cal.App.3d at p. 25, quoting from *Kaplan's*, *supra*, 3 ALRB No. 28, p. 4.)

(*Montebello Rose*, *supra*, 119 Cal.App.3d at p. 25.) As to the latter consideration, we cited with approval the Board's reasoning in *Kaplan's* that, where the union was still acting on behalf of the employees, there was "no need to conduct a ritual reaffirmance of a union's certification where the employees are satisfied with their representative." (*Montebello Rose*, *supra*, at pp. 25-26.) A final consideration was that the Legislature "could not have intended to 'make the process of collective bargaining into a kind of sporting event in which the parties play against each other and against a clock at the same time, with the employees' right to effective representation as the stakes [citation].'" (*Id.* at p. 26.)

Our holding in *Montebello Rose* gave deference to *Kaplan's* "somewhat strained" interpretation of the ALRA because it appeared to be true to the underlying purpose of the ALRA as a whole: It would promote stability in the agricultural fields through collective bargaining; it would avoid a beat the clock approach to collective bargaining, and it would allow the time necessary for the nurturing of the bargaining process. (*Montebello Rose*, *supra*, 119 Cal.App.3d at p. 29.) We therefore "approve[d] *Kaplan's* on the employer's duty to bargain beyond the initial certification year." (*Id.* at pp. 29-30.)

A second case, *F&P Growers Assn.*, *supra*, 168 Cal.App.3d 667, involved the issue of whether the rebuttable presumption rule may be used by an employer as a basis for refusing to bargain with an originally certified union. In *F&P Growers*, the employer refused to continue bargaining with the originally certified union in that case, the UFW,

because allegedly "objective criteria revealed that a majority of employees in the bargaining unit no longer supported the UFW ...." (*Id.* at p. 670.) The employer had argued that since the NLRA's rebuttable presumption rule had been found applicable to the ALRA, related NLRA precedents likewise should be adopted—including the rule allowing an employer to refuse to bargain with a certified union if the employer had a good faith belief that the union had lost its majority support. (*F&P Growers*, *supra*, at pp. 672-677.) In its discussion of that issue, the Court of Appeal acknowledged that prior ALRA judicial (and Board) precedent had adopted the NLRA rule that "a year after certification, there is a rebuttable presumption that a union continues to be supported by a majority of employees" (*F&P Growers*, *supra*, at p. 672), but concluded that the loss-of-majority support defense to bargaining with a particular union was clearly *inapplicable* to the ALRA because of important differences between the ALRA and the NLRA. (*F&P Growers*, *supra*, at pp. 674-676.) For example, the NLRA permitted an employer to bargain with a union that had demonstrated its majority status by means other than an election, but the ALRA only allowed an employer to bargain with a union that had won an election. Moreover, the NLRA permitted employers to petition for an election, but the ALRA did not allow employers to file election petitions regarding the certification or decertification of a union. (*F&P Growers*, *supra*, at pp. 674-678.) As noted in *F&P Growers*, these distinctive provisions of the ALRA indicated the Legislature did not intend for an agricultural employer to participate in deciding whether or not it shall bargain with a particular

union, or to have influence over the selection or deselection of a union. Such choices were left solely to the employees, and were removed from the employer. (*F&P Growers*, *supra*, at pp. 677-678.) For these reasons, the Court of Appeal held that employers could not refuse to bargain with a particular union based on a good faith belief in loss-of-majority status, since that would allow employers to do indirectly (i.e., effectively decertify a union) what the Legislature had removed from the employer's purview. (*Id*. at p. 677.)

To recapitulate what we have said thus far, when the Legislature used ALRA certification terminology in the MMC statute (i.e., "a labor organization certified as the exclusive bargaining agent" of the agricultural employees, § 1164, subd. (a)), it did so with an understanding of the nature and import of the certification status as previously judicially construed. That prior judicial construction included the rulings in the *Montebello Rose* case, discussed above, that (1) after the initial one-year period, certification expires for the purpose of the election bar, but continues for the purpose of the employer's duty to bargain and (2) after the initial one-year period, a rebuttable presumption exists that a certified union continues to enjoy majority support by the employees.[26] It also included the clarification given in *F&P Growers* that, notwithstanding the adoption of

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[26] We recognize the one-year period may be extended for an additional year in certain circumstances (see § 1155.2, subd. (b)). In the interest of brevity and ease of expression, our discussion has sometimes omitted qualifying statements such as "unless extended for an additional year under section 1155.2, subdivision (b)."

the rebuttable presumption rule, the ALRA did not permit an employer to refuse to bargain in good faith with the originally certified union based on a belief that the union had lost its majority status. Since no contrary intention was indicated in the MMC statute, we conclude that the Legislature intended to adopt the same meanings and implications of the certification status (i.e., its nature and duration) as was decided by said prior judicial construction.[27] This conclusion provides us with the basic framework for understanding the statutory certification[28] concept as we proceed to navigate through an analysis of the abandonment issue.

B. The Duty to Bargain Does Not Prevent Raising Abandonment Issue at the MMC Stage

As an initial premise for its position, Gerawan contends that the continuing duty to bargain did not prevent it from asserting, as a defense to the MMC process, that UFW abandoned its status as certified bargaining representative of its agricultural employees. We agree with that contention. The decisions in *Montebello Rose* and *F&P Growers* addressed the situation of employers who had refused to continue bargaining and, therefore, those cases are distinguishable. The rule that an employer must continue to bargain in good faith with the originally certified union is not affected or impaired by allowing

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[27] For this reason, we reject Gerawan's contention that after one year, UFW's certification lapsed for all purposes under section 1155.2, subdivision (b).

[28] For convenience, we sometimes refer to this as the union's representative status.

an employer to raise the issue of abandonment in response to a request to commence the MMC process. That is because, aside from a brief 30-day period of bargaining at the outset (§ 1164, subd. (c)), the MMC process brings an end to voluntary negotiation and mutual consent, which are the hallmarks of bargaining under the ALRA (§ 1155.2, subd. (a) [good faith bargaining does not compel agreement or require either party to make a concession]), as it shifts to a compulsory legal process whereby a CBA will simply be imposed by the force of law. Indeed, as the Board expressly recognized in *Kaplan's*, *supra*, 3 ALRB No. 28 at page 7, the rule that certification continued beyond the first year for purposes of the employer's duty to bargain did not "alter[] the statutory protection given to employers" because "[t]heir duty to bargain, no matter how long its duration, does not compel them to agree to a proposal or require them to make a concession." Thus, as the Board's own precedent reflects, any process by which parties are *compelled* to *agree* to imposed terms—which is the crux of the MMC process—does not fit into the parameters of bargaining under the ALRA. Accordingly, since the MMC process differs materially from bargaining and is largely a postbargaining process, the employer's continuing duty to bargain is *not* an impediment to our recognition of the employer's ability to raise, at that stage, a defense that the union forfeited its representative status by abandonment.

For the same reasons, the so-called "certified until decertified" rule does not preclude abandonment from being raised at the MMC stage, because that rule has its application to cases within the bargaining context to enforce the employer's continuing duty to bargain.

(See *Montebello Rose*, *supra*, 119 Cal.App.3d at pp. 23-24 ["employer's **duty to bargain** does not lapse after one year but continues until such time as the union is officially decertified as the employee bargaining representative"], boldface added; *F&P Growers*, *supra*, 168 Cal.App.3d 667 at p. 672 ["an employer's **duty to bargain** does not lapse after one year even in the absence of an extension"], boldface added; *Adamek & Dessert, Inc.*, *supra*, 178 Cal.App.3d at p. 983 ["the company has a **duty to bargain** with the union until the union is decertified through a second election"], boldface added.) Because the principal purpose of that rule is to prevent employers from refusing to bargain with a certified union (*Montebello Rose*, *supra*, at pp. 23-30*; F&P Growers*, *supra*, at pp. 671-677; *Kaplan's*, *supra*, 3 ALRB No. 28, pp. 4-8), the reasons for the rule or its strict application would seem to be largely absent outside of the bargaining context.

Accordingly, we agree with Gerawan's initial premise that the present case did *not* involve (1) the employer's continuing duty to bargain *or* (2) the corresponding rule that certification continues for purposes of the duty to bargain. Since these considerations did not come into play, it follows that Gerawan was not precluded on either of these grounds from asserting, as a defense to UFW's request to commence the MMC process, that the union had abandoned its representative status. Rather, as will be seen, that door was open.

C. Legal Support for Abandonment Theory

Keeping in mind the particular procedural and factual context of our discussion, we proceed to discuss whether there is adequate legal justification for

allowing an abandonment theory in this case. We conclude that there is.

Preliminarily, we note that the Board has itself accepted the proposition that a union may be found to have abandoned its representative status under the ALRA. In its prior holdings, the Board has stated that such abandonment takes place where the union is either unwilling or unable to continue in its responsibilities to represent the employees. (*Dole Fresh Fruit Co.*, *supra*, 22 ALRB No. 4, pp. 12-13; *Bruce Church, Inc.*, *supra*, 17 ALRB No. 1, p. 13 ["the Board has defined abandonment as a showing that the Union was either unwilling or unable to represent the bargaining unit"].) Thus, at least *in principle*, the Board has recognized that a union may be deemed to have abandoned its certification or representative status. *However*, the Board has also narrowly circumscribed the factual grounds for finding a union's unwillingness or inability to situations involving either (1) an express disclaimer or (2) union defunctness. (*San Joaquin Tomato Growers, Inc.*, *supra*, 37 ALRB No. 5, p. 4; *Dole Fresh Fruit Co.*, *supra*, 22 ALRB No. 4, pp. 12-13; *Bruce Church, Inc.*, *supra*, 17 ALRB No. 1, p. 13.) While, as explained below, we disagree with the Board's rigid limitation on the factual grounds for abandonment,[29] we note at this juncture that our conclusion allowing an abandonment claim premised on *other* conduct (such as a union's long-term absence) does not adopt an

[29] See footnote 31, *post*, regarding another of the Board's limitations on the abandonment defense that we reject in the present context.

entirely new theory into the ALRA, but merely expands on an already existing one.[30]

The first and most compelling reason for allowing an abandonment claim in the context of this case is that doing so upholds the core legislative purposes of the ALRA, of which the MMC statute is a part. As we have explained above, the present case is not about the employer's continuing duty to bargain *or* the union's certification within the bargaining context. Once those potential concerns are placed to the side, what emerges is that the main statutory purposes of the ALRA are furthered by the decision we reach herein. In contrast, the Board's blanket rule disallowing an abandonment claim in the circumstances of this case would eviscerate important ALRA policy and, therefore, we do not follow it. (*J.R. Norton Co.*, *supra*, 26 Cal.3d at p. 29 [Board's blanket rule regarding make whole remedy erroneous because it "eviscerates important ALRA policy and fundamentally misconstrues the nature of and legislative purpose behind such relief"]; *Harry Carian Sales v. Agricultural Labor Relations Bd.*, *supra*, 39 Cal.3d at p. 223 [statutes "'must be given such interpretation as will promote rather than defeat the general purpose and policy of the law'"].)

A fundamental purpose of the ALRA is to provide for and protect the right of agricultural employees "to full freedom of association, self-organization, and

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[30] In addition to the reasons for our decision that are discussed below, we note the Board's insistence that the factual basis for abandonment must be restricted to express disclaimer and institutional defunctness appears, at least in the present MMC context, to be arbitrary.

designation of representatives of their own choosing" for the purpose of collective bargaining. (§ 1140.2; see § 1152.) As stated by our Supreme Court, "the NLRA and ALRA purpose is not exclusively to promote collective bargaining, but to promote such bargaining by the employees' *freely chosen* representatives." (*J.R. Norton Co.*, *supra*, 26 Cal.3d at p. 34; see *N.L.R.B. v. Mid-States Metal Products, Inc.* (5th Cir. 1968) 403 F.2d 702, 704 [NLRA is primarily a grant of rights to *employees* rather than a grant of power to unions].)

It is clear that the employees' right to a representative of their own choosing would be seriously jeopardized in the situation of abandonment by a union where, as here, the absentee union suddenly reappeared on the scene to demand the MMC process. A union that has had little or no contact with the employees or the employer over many years (here, decades) would be unlikely to have an adequate working knowledge of the employees' situation or their wishes. From the employees' standpoint, that union would be reappearing on the scene as something of a stranger. Most importantly, during the union's long absence, the employees' working conditions, wages and attitude toward the union (if they even knew they had a union) may have significantly changed over the years. Indeed, it may be the case that the employees do not want to be represented by that union or any other union, which Gerawan asserts was the situation here. Against that potential backdrop is the prospect that, in the MMC process, a CBA will be imposed whether the employees want it or not; and it will be imposed with the formerly absent union, whether the employees want its representation or not. For these reasons, as the

present case illustrates, where 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 that stage, because only that result will preserve the ALRA's purpose of protecting the employees' right to choose.[31]

The usual answer that the employees could mount a decertification effort against the returning union is not adequate in the circumstances under consideration. First, because of the union's absence from the scene, the employees would be at a disadvantage, since they would have no time-tested relationship with the union from which to base a decision on whether or not to seek decertification. Second, in light of the rapid time frame in which an absentee union may return to the scene and invoke the MMC process (see § 1164, subd. (a) [90 days after renewed demand to bargain]), it is reasonably likely that the MMC process would be commenced long before the employees would be able to disseminate

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[31] In light of the consequences at stake when an MMC request is made, and the need to protect the employees' right to a representative of their own choice, we find the Board's blanket rule that as long as the reappearing union is able and willing to resume its representation of employees at the time of the MMC request, any past abandonment (no matter how egregious) is irrelevant (see, e.g., *Dole Fresh Fruit Co.*, *supra*, 22 ALRB No. 4, p. 12), to be wholly arbitrary and untenable. For the reasons stated, a union's mere reappearance coupled with an MMC request cannot undo the negative effect of its long-term absence or disappearance, but in fact may exacerbate the problems created thereby; and, in any event, the Board's blanket rule cannot be reasonably justified in this context.

adequate information, organize a decertification drive, petition for and hold an election, and obtain the Board's certification thereof. Realistically, a decertification option would often be too late to stop the MMC process.

We add that if the Board were unable to consider an employer's claim of union abandonment when deciding on whether to grant a union's request to commence the MMC process, many of the strong policy considerations enumerated in *Montebello Rose*, *supra*, 119 Cal.App.3d, which were found to be "true to the underlying purpose of the [ALRA] as a whole … to promote stability in the agricultural fields through collective bargaining" (*id.* at p. 29), would be undermined or compromised. Instead of promoting the policy that nurturing the bargaining process requires (in addition to good faith effort) the passage of considerable time (*ibid.*), the Board would have to disregard a union's longtime abandonment of the bargaining relationship. Instead of avoiding a destabilizing, beat-the-clock approach to bargaining (*id.* at pp. 25, 29), the Board would be forced to reward that approach by sending the parties to the MMC process once the 90-day period of section 1164, subdivision (a), expired, even if the union had only recently returned from a long-term absence and made no serious economic proposals. Finally, instead of there being an ongoing union relationship with the employees within which a "ritual reaffirmance" of the union's certification status would be unnecessary since it could be safely assumed "the employees are satisfied with their representative" (*Montebello Rose*, *supra*, at pp. 25-26), at the moment of the MMC request by a formerly absent union, that objective

basis for presuming the existence of employee support for the union would not be there. These policy objectives, and the negative effect on them if we were to adopt a different result, further demonstrate the soundness of our conclusion that the employer may raise abandonment defensively in response to an MMC request before the Board.

A second reason for recognizing an abandonment claim in the present case is the impact of the rebuttable presumption rule. As we have noted above, *Montebello Rose* found a rebuttable presumption exists that a union continues to enjoy majority status after its initial certification year. (*Montebello Rose*, *supra*, 119 Cal.App.3d at p. 24; see *F&P Growers*, *supra*, 168 Cal.App.3d at p. 672.) The adoption of a rebuttable presumption rule in the ALRA statutory scheme implies that there may be some circumstances, however rare or exceptional, in which an employer may be permitted to show the union has lost its representative status. We believe that such an occasion existed here, where Gerawan sought to oppose the MMC request by showing UFW forfeited its representative status through abandonment. Although *F&P Growers* held an employer could not refuse to bargain with a particular union based on a good faith belief that the union lost its majority support, that holding related to the continuing duty to bargain and did not address situations or proceedings outside the ordinary bargaining context such as the MMC process. We believe there is a meaningful distinction between an employer who affirmatively refuses to bargain with a union, and an employer who is willing to bargain in good faith but who seeks to defend itself against a union's apparently

unwarranted demand to commence the MMC process. In the latter case, we hold the union's representative status may be challenged by the employer.

We understand that showing abandonment of a union's representative status and overcoming the presumption of majority support are not precisely the same things. Although the two concepts substantially overlap in cases such as this one, they are not identical: Abandonment focuses on the union's conduct, while overcoming the presumption focuses on the employees' support (or lack thereof) for the union. But the two concepts are closely related in the present case, because abandonment of the sort that arguably occurred here would tend to support an inference of a lack of majority support. (See, e.g., *Dole Fresh Fruit Co.*, *supra*, 22 ALRB No. 4 at pp. 13-16 [noting that in NLRA, abandonment is a factor in determining whether union lacked majority support]; cf. *N.L.R.B. v. Flex Plastics, Inc.* (6th Cir. 1984) 726 F.2d 272, 275 [union inactivity as to employees a factor in lack of majority support defense, but all the circumstances must be considered]; *Pennex Alum. Corp.* (1988) 288 NLRB 439, 442 [same].) Thus, the same evidence might be introduced in support of either or both theories. Moreover, both concepts are analogous because they share the same function or purpose of challenging the union's status as bargaining representative. In light of the commonalities of the two theories, we hold that the impact of the rebuttable presumption rule (in the MMC context here) was that it opened the door to asserting either or both of them. That is, since the employer could have sought to overcome the presumption in that setting, it likewise was free to assert abandonment there.

Finally, without discounting the unique aspects of labor law under the ALRA, we note that our conclusion is consistent with general principles of law applied in analogous situations. It is not unusual for courts to look to comparable legal concepts for guidance, especially in resolving difficult issues. (See, e.g., *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 472-473, 476 [analogizing union's exclusive bargaining agent status to state-granted franchise].) As pointed out by Gerawan, since a union's status as exclusive bargaining representative is analogous to other public grants of a monopolistic power or franchise, it is reasonable to suppose that its status may similarly be subject to being lost by abandonment. (See, e.g., *Tehama v. Pacific Gas & Elec. Co.* (1939) 33 Cal.App.2d 465, 471 [a franchise may be lost by subsequent abandonment]; *County of L.A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 384 [privilege of a public franchise lasts only so long as holder meets the obligations in consideration of which the right was granted]; *County of Kern v. Pacific Gas & Electric Co.* (1980) 108 Cal.App.3d 418, 423 [a franchise may terminate on failure to provide services in consideration of which the right was granted]; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, *supra*, at pp. 472-473, 476 [state-granted utilities franchise analogous to a union's monopolistic power].) Additionally, we observe there is an established principle in the common law that rights may be forfeited by abandonment or waiver. (See, e.g., *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 890 [easement rights may be lost by abandonment]; *Lohn v. Fletcher Oil Co., Inc.* (1940) 38 Cal.App.2d 26, 30 [abandonment of contract rights implied from acts of

parties]; cf. 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, §§ 16-19, pp. 302-308 [defense of laches applicable to certain claims where there has been prejudicial delay].) While we do not directly rely on these analogous legal theories in reaching our conclusion that an employer may raise union abandonment in defense of the MMC process, we believe they provide additional substantiation of that outcome by showing the broad legal acceptance for the abandonment concept, including in the comparable situation of a publically granted franchise.

D. Conclusion Regarding Abandonment

In accordance with the forgoing, we hold that an employer, in defending against a union's request to institute the MMC process, may challenge the union's status as the employees' bargaining representative by raising a claim of abandonment based on the union's conduct, such as long-term absence or disappearance from the scene, long-term failure to carry out its duties, and/or lack of meaningful contact with the employees and the employer over an unreasonably long period of time.[32] The gist of the defense is that by virtue of such longstanding absence, lack of contact, etc., the union has effectively abdicated its statutory

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[32] We note the Board has suggested in its holdings that abandonment might conceivably be found in exceptional circumstances where a union was "'totally absent from the scene'" (*Dole Fresh Fruit Co.*, *supra*, 22 ALRB No. 4, p. 18) or "effectively left the scene altogether" (*Bruce Church, Inc.*, *supra*, 17 ALRB No. 1, p. 13). The Board has also stated that it has "an obligation to … be alert to situations in which the certified labor organization rests on its bargaining rights, as such neglect serves to erode and undermine the right to be represented that is granted to employees." (*Dole Fresh Fruit Co.*, *supra*, p. 24.)

role by gross abandonment thereof. As we have stated throughout this opinion, we have reached this holding within the peculiar context of this case—namely, the employer's ability to defend a union's MMC request. Our opinion is intended to be limited to that context.

As our ruling makes clear, the Board applied the wrong legal standard when it held that abandonment could not be based upon factors such as those present in this case. Further, because the Board summarily rejected the viability of Gerawan's abandonment claim, it never adequately considered the import of Gerawan's evidentiary showing on that issue. It follows that the Board abused its discretion when it ordered commencement of the MMC process without properly considering Gerawan's claim of union abandonment. Since the Board improperly sent the parties to commence the MMC process, the Board's subsequent order premised thereon in *Gerawan Farming, Inc.*, *supra*, 39 ALRB No. 17 (to approve the mediator's report) is rendered invalid.

Generally speaking, when the Board applies the wrong standard, we return the case to the Board so that it can apply the proper standard. (*J.R. Norton Co.*, *supra*, 26 Cal.3d at pp. 38-39.)[33] "'It is a guiding principle of administrative law … that "an

[33] Even if it might be proper (hypothetically) to decide the issue of abandonment as a matter of law on appeal, we would decline to do so in this case because (1) it does not appear that all the relevant facts were presented by both sides, (2) it is unclear whether the facts are undisputed, and (3) remand is preferable because the Board is the tribunal vested with the discretion to make such determinations in the first instance in ALRA statutory proceedings.

administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." [Citations.]'" (*J.R. Norton Co.*, *supra*, at p. 39.)

If we followed this general rule here, we would remand the present matter to the Board for new proceedings to be conducted on the issue of abandonment in accordance with the principles set forth herein, to allow the Board to determine, based on the totality of the union's conduct and any other relevant circumstances, the question of whether UFW abandoned its status as the employees' bargaining representative. Here, however, remand is not available because, as discussed below, the MMC statute is constitutionally invalid. As a result, the appropriate disposition concerning the Board's statutory error and abuse of discretion is to simply set aside and reverse the Board's approval of the mediator's report in *Gerawan Farming, Inc.*, *supra*, 39 ALRB No. 17.

THE CONSTITUTIONAL ISSUES

Gerawan raises several constitutional challenges to the MMC statute, including that the law is invalid under the protections afforded to the liberty of contract by substantive due process, fails to comply with equal protection principles, unlawfully delegates legislative powers, violates procedural due process, and constitutes a taking of private property without just compensation. As explained below, we conclude the MMC statute violates equal protection of the law and improperly delegates legislative authority. Since

we hold the MMC statute is constitutionally deficient on these two grounds, we find it unnecessary to address the several additional arguments made by Gerawan that the MMC statute is unconstitutional. (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230 [courts refrain from rendering unnecessary constitutional law decisions].)

V. Equal Protection of the Laws

Gerawan attacks the validity of the MMC statute on the ground that it violates the constitutional requirement of equal protection of the laws.

The equal protection clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall … deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1.) The California Constitution expressly provides the same guarantee. (Cal. Const., art. I, § 7, subd. (a).) In essence, equal protection of the law means that all persons who are similarly situated with respect to a law should be treated alike under the law. (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439; *Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526, 1534.) "Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. [Citation.]" (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 10.)

"The general rule is that legislation is presumed to be valid and will be sustained if the classification

drawn by the statute is rationally related to a legitimate state interest. [Citations.] When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, [citations], and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." (*Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at p. 440; accord, *FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313-314.)

As Justice Robert Jackson explained many years ago: "[C]ities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants *except upon some reasonable differentiation fairly related to the object of regulation*. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those 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. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." (*Railway Express v. New York* (1949) 336 U.S. 106, 112-113, italics added (conc. opn. Jackson, J.), cited with approval in *Hays v. Wood* (1979) 25 Cal.3d 772, 786-787.)

The same rational basis standard is applied for purposes of the equal protection provision of the California Constitution. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482*; County of L.A. v. Southern Cal. Tel. Co.*, *supra*, 32 Cal.2d at pp. 389-390.) This deferential standard "'invests legislation involving such differentiated treatment with a presumption of constitutionality and "requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." [Citation.]'" (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641.) "Past decisions also establish that, under the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative." (*Id.* at p. 644, citing *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483, 489 ["Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."].)

A key principle that must be applied in the present analysis is that "[a]n administrative order, legislative in character, is subject to the same tests as to validity as an act of the Legislature. [Citations.]" (*Knudsen Creamery Co. v. Brock* (1951) 37 Cal.2d 485, 494 (*Knudsen Creamery Co.*).) As the majority opinion in *Hess* correctly observed, the action of the Board in approving a final CBA submitted by the mediator is

essentially *legislative* in character: "There can be no doubt that the compulsory interest arbitration scheme provides for quasi-legislative action. Although the statutes refer to the end result as a 'collective bargaining agreement,' there is no agreement. In this case Hess not only did not agree to be bound by the terms of employment imposed by the mediator, it did not agree to submit to interest arbitration at all. The terms of the 'agreement' determined by the arbitrator were imposed upon Hess by force of law. [¶] The statutory scheme is not quasi-judicial. An administrative action is quasi-judicial, or quasi-adjudicative, when it consists of applying existing rules to existing facts. [Citation.] The creation of new rules for future application, such as is done here, is quasi-legislative in character. [Citation.] This is so even though the action is, as here, taken in an individual case. [Citation.]" (*Hess*, *supra*, 140 Cal.App.4th at pp. 1597-1598.) Accordingly, when under the MMC statute the Board approves or adopts a mediator's report (such as the one in this case regarding Gerawan) and thereby establishes an enforceable CBA as to a particular employer and union, the resulting CBA is legislative or regulatory in character and is "subject to the same tests as to validity as an act of the Legislature" (*Knudsen Creamery Co.*, *supra*, at p. 494), including the test of constitutionality under the equal protection clause.

Here, in attacking the MMC statute on equal protection grounds, Gerawan makes essentially the same argument that Justice Nicholson made in his dissenting opinion in *Hess*. In Justice Nicholson's dissent, he gave the following explanation of why he

believed the MMC statute violated equal protection principles:

"I assume, for the sake of argument, that treatment of an agricultural employer that does not reach agreement with the union on an initial collective bargaining agreement can be different from the treatment of an agricultural employer that reaches an agreement with the union on an initial collective bargaining agreement because of the state's interest in promoting collective bargaining agreements. Here, however, the disparate treatment is not just between employers with initial collective bargaining agreements and employers without such agreements. Application of … section 1164 and the related statutes results in disparate treatment *within* the class of employers without an initial collective bargaining agreement because the agreement imposed on each employer in this class will be different. While the legitimate state interest that I assume for argument exists may justify disparate treatment between classes, it cannot justify disparate treatment within the class. (*Cleburne v. Cleburne Living Center*, [*Inc.*,] *supra*, 473 U.S. at p. 439.)

"[S]ection 1164 sets forth the classification at issue in this case: agricultural employers who, for whatever reason, do not agree to the terms of an initial [CBA]. Within this class, the law does not treat the individual employers similarly. Instead, each employer will be subjected to a different legislative act, in the form of a [CBA]. Thus, similarly situated employers are treated dissimilarly.

"Beyond the classification set by … section 1164, there is no rational way to break the agricultural

employers down into smaller groups. The statute makes no such attempt, except, of course, to break it down so that every agricultural employer is the one and only member of the class. *This means of classification, however, is the very antithesis of equal protection.* 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. (See *Hays v. Wood*, *supra*, 25 Cal.3d at pp. 786-787.)

"'"'[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" [Citations.]' (*Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564.) Here, the discrimination—that is, holding Hess, and no other agricultural employer, to the terms of a private legislator's decision—is intentional because the mediator has no power to extend the enactment to other agricultural employers. The mediator could have had no intent other than to impose a [CBA] enforceable only as to Hess and no other agricultural employer. Furthermore, 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 under … section 1164 and the related statutes. Enforcement of the mediator's decision violates equal protection principles and, therefore, should be set aside." (*Hess*, *supra*, 140 Cal.App.4th at pp. 1615-1617, italics added (dis. opn. of Nicholson, J.).)

Gerawan urges us to adopt Justice Nicholson's reasoning. To further make its point, Gerawan focuses on one single aspect of any CBA that is imposed on an employer pursuant to the MMC process—namely, wages. In this regard, Gerawan argues as follows: "The State has the right to establish a minimum wage for *all* employers or for *all* employers in a particular industry. But the State cannot constitutionally set different minimum wages for different companies [in the same industry] without a rational reason for doing so. Because the MMC Statute by design … sets different minimum wages for different companies [in the same industry], it must be struck down as unconstitutional. [¶] Indeed, the whole point of the MMC Statute is to single out one employer and create a special set of rules for that employer alone."

We think the force of Gerawan's argument is magnified when it is considered that a CBA is not a limited document confined to wages only, but it covers a wide array of various rights, duties and relationships: "The [CBA] states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The [CBA] covers the whole employment relationship." (*Inlandboatmens Union of Pacific v. Dutra Group* (9th Cir. 2002) 279 F.3d 1075, 1079, quoting *Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 578-579.) Since a CBA is a diverse set of rules covering the whole employment relationship, *that* is the nature of what is being imposed in each case under the MMC process.

The response given by the *Hess* majority opinion (*Hess*, *supra*, 140 Cal.App.4th at p. 1604), and argued now by the Board and UFW, is that the factors set forth in section 1164, subdivision (e), ensure that similarly situated employers will be treated alike. Section 1164, subdivision (e) states: "In resolving the issues in dispute, the mediator may[34] consider those factors commonly considered in similar proceedings, including: (1) The stipulations of the parties. [¶] (2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union's wage and benefit demands. [¶] (3) The corresponding wages, benefits, and terms and conditions of employment in other [CBA's] covering similar agricultural operations with similar labor requirements. [¶] (4) The corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed. [¶] (5) The average consumer prices for goods and services according to the California Consumer Price Index, and the overall cost of living, in the area where the work is performed." According to the *Hess* majority opinion, "[t]hese requirements reasonably ensure that contracts of different employers will be

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[34] To prevent the required criteria from being rendered "illusory," the Court of Appeal in *Hess* construed the word "'may'" as meaning "'must.'" (*Hess*, *supra*, 140 Cal.App.4th at p. 1607.)

similar" and, therefore, no equal protection violation was found. (*Hess*, *supra*, at p. 1604.)

We fail to see how the statutory factors listed in subdivision (e) of section 1164 cure the fundamental equal protection violation pointed out by Justice Nicholson in *Hess*. The requirement that every mediator conducting the MMC process shall consider this list of factors in making his or her various decisions as to the multiple terms and conditions of a particular CBA to be imposed on an individual employer does not even come close to ensuring that similarly situated employers will receive the same or similar results under the law. It only means that such factors will in fact be considered and that the particular determinations of the mediator must have some minimal support in the record. (§ 1164, subds. (d), (e).) 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 such matters as wages, benefits, working conditions, hiring, disciplinary and termination procedures, union dues, union membership requirements, duration of the CBA, and other terms and conditions of employment and/or of the employer-union relationship. Thus, the necessary outworking of the MMC statute is that each individual employer (within the class of agricultural employers who have not entered a first contract) will have a distinct, unequal, individualized set of rules imposed on it.[35]

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[35] Although the *process* might be roughly the same in each case, we keep in mind that the administrative result ordered by the Board in each case (i.e., *each CBA*) would have to be considered for equal protection purposes.

This is, as Justice Nicholson succinctly put it, "the very antithesis of equal protection." (*Hess*, *supra*, 140 Cal.App.4th at p. 1616.)[36]

Additionally, the results would not only be unequal, but also arbitrary. Because of the differences of each employer and the subjectivity of a process whereby the only objective standard or goal to be met in the MMC statute is *to resolve issues* so that a first contract may be imposed (see § 1164, subd. (d)), it would appear to be unavoidable that even similar employers will be subject to significantly different outcomes. [37] Since the factors in subdivision (e) of

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[36] We distinguish the situation in which a local municipality (i.e., a city or a county) requires by ordinance that compulsory interest arbitration be used to resolve an impasse with certain public employees such as firefighters or police officers (or with the unions representing them), since in those cases there is essentially only one employer.

[37] This is illustrated by the following scenarios.In Case A, an employer and a union cannot agree to the terms of a CBA and the matter undergoes the MMC process before Mediator X. The mediator receives evidence that employer currently pays wages that are *slightly below the industry average* in the same geographic area, and that employer consistently earns *profits at the high end of the industry range.* Mediator X then drafts a CBA, which includes a wage increase requiring employer to pay *wages greater than the industry average* and which, in turn, *reduces employer's profits to the local industry average.*

In Case B, Mediator Y receives evidence that is substantially identical to that in Case A. Mediator Y then drafts a CBA, which includes a *slight wage increase to bring wages to the industry average*, which, in turn, *reduces employer's profits* but its profits remain above the local industry average.

In Case C, Mediator Z receives evidence that is substantially identical to that in Cases A and B. Mediator Z then drafts a CBA, which makes *no change to the existing wages* being paid.

section 1164 are broad and varied enough to permit a mediator to select from among a wide range of potential CBA terms that he or she may think best (as long as minimal support for the decision is provided), the risk is simply too great that results will be based largely on the subjective leanings of each mediator or that arbitrary differences will otherwise be imposed on similar employers in the same classification—particularly as there is no objective standard toward which the mediator is required to aim.[38]

In so holding, we disagree with the Board and UFW that the MMC statute is analogous to a rent control ordinance where one apartment building in a municipality may be granted a right to charge a higher rent than another (i.e., different results would be acceptable as long as they were rationally based). In the case of a rent control ordinance, a local board or commission attempts to determine a rent ceiling or a rent adjustment based upon an administrative standard (such as a "'fair and reasonable return on

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Accordingly, the CBA's wage term has *no effect on the Employer's profits.*

Since there is no standard as to whether wages are to be paid or profits earned at an industry average or within a certain industry range, the CBA's issued by Mediators X, Y and Z are each supportable by the evidence received. Yet, each CBA contains different terms based on the same evidence and results in different wages and a different impact on the profit margin for each employer.

[38] The instant case is an example of this very problem. The record showed that Gerawan paid its employees the highest average wages among its closest competitors; yet, the mediator elected to impose a wage increase in any event. The decision was justified by weighing and considering a wide variety of factors.

investment'") by using a specified formula or a list of factors. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679-681; *Kavanau v. Santa Monica Rent Control Bd*. (1997) 16 Cal.4th 761, 768-769.) Here, in contrast, there is a broad range of factors but no standard. Moreover, we believe the inequality and arbitrariness of the MMC process are on a far grander scale than might occur under an inadequately worded rent control law because, unlike the case of rent control (which only decides on a single term of a broader contractual relationship), here the Board, through the mediator, establishes the *entire* CBA.

For all of the above reasons, we agree with Justice Nicholson's dissent in *Hess* that the MMC statute on its face violates equal protection principles.

VI. Improper Delegation of Legislative Authority

Gerawan argues that the MMC statute invalidly delegates legislative authority in violation of the California Constitution.

An unconstitutional delegation of authority occurs when a legislative body "(1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." (*Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190.) "'This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental 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.' [Citation.] [¶] The doctrine prohibiting delegations of legislative power does not

invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse. [Citations.] The Legislature must make the fundamental policy determinations, but after declaring the legislative goals and establishing a yardstick guiding the administrator, it may authorize the administrator to adopt rules and regulations to promote the purposes of the legislation and to carry it into effect. [Citations.] Moreover, standards for administrative application of a statute need not be expressly set forth; they may be implied by the statutory purpose. [Citations.]" (*People v. Wright* (1982) 30 Cal.3d 705, 712-713.)

In *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, the California Supreme Court held that the rent control scheme at issue in that case gave adequate guidance in its delegation of authority to the rent control board because, in addition to providing a nonexclusive list of relevant factors to be considered by the board in determining adjustment of maximum rents, the stated purpose of the charter amendment furnished an implied standard for the board to apply. (*Id*. at p. 168.) "[T]he charter amendment's purpose of counteracting the ill effects of 'rapidly rising and exorbitant rents exploiting [the housing] shortage' [citation] implies a standard of fixing maximum rent levels at a point that permits the landlord to charge a just and reasonable rent and no more." (*Ibid*.)

Applying the above principles, we agree with Gerawan that the MMC statute improperly delegated legislative authority. Although the MMC statute enumerates several factors for the mediator to

consider when making his or her various decisions about the terms of what will become a compelled CBA (§ 1164, subd. (e)), it does not provide the mediator with any policy objective to be carried out or standard to be attained once those factors have been considered. Since there is no goal to aim for, no one would ever know if the mediator hit the correct target or even came close. As was observed by Justice Nicholson in his dissent in *Hess*: "Even though under the statute at issue the mediator must make factual findings and those findings must be supported by the record, there is no way to determine whether the facts found by the mediator support the decision unless one knows what basic public policy the mediator must vindicate." (*Hess*, *supra*, 140 Cal.App.4th at p. 1612.)

Additionally, unlike the *Birkenfeld* case, the legislative purpose of the MMC statute fails to supply the necessary guidance to either the mediator or the Board. The stated purpose of the MMC statute is to "ensure a more effective collective bargaining process between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the [ALRA], ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California's economic well-being by ensuring stability in its most vital industry." (Stats. 2002, ch. 1145, § 1.) Justice Nicholson is correct that "[t]his pronouncement [is] so general it fail[s] to provide any actual guidance." (*Hess*, *supra*, at p. 1612.) In short, no implied standard is discernable in the MMC statute.

For this reason, the difference between the present case and *Birkenfeld* is substantial. In *Birkenfeld*, because there was an implied standard that the rent control board was to implement—a just and reasonable rental amount based on several factors—the rent control board had sufficient direction and guidance regarding the responsibility delegated to it. (*Birkenfeld*, *supra*, 17 Cal.3d at p. 168-169.) In other words, there was a particular destination the rent control board was supposed to reach, and a reasonable roadmap for getting there. In theory, at least, all of the information gathered in the rent control proceeding could be weighed and considered in making the ultimate determination of a just and reasonable rental amount and, once so determined, the amount of rent that could permissibly be charged was thereby established. In contrast under the MMC statute, there is no particular destination that is supposed to be reached by the mediator, no particular determination that is to be made, and nor is any direction given as to the mediator's task or purpose other than to impose a CBA on the parties after considering the listed factors.

We may further illustrate the lack of adequate standards under the MMC statute by posing a few questions with no discernable answers. Other than to create and impose an agreement, what is the mediator's precise purpose, goal or aim under the MMC statute? Is it to raise workers' wages? Is it to improve working conditions? Is it to impose on the grower any and all union demands the mediator deems *reasonable* and which the mediator believes the grower can *afford* and, if so, how are *reasonable* and *afford* defined? Is it to ensure that wages paid are at

least industry average for comparable work? Is the mediator's starting point to determine a *minimum*, fair profit margin for the grower and then to determine in what amount the workers are to be compensated without compromising that margin; or is it to first determine a *minimum* amount the workers are to be compensated without regard to grower profit margins? By posing these questions, we are not saying that any of our questions embody wise or legitimate statutory objectives. We are simply pointing out that we cannot tell what the mediator's task is supposed to be under the MMC statute, and these questions serve to highlight a number of hypothetical possibilities without in any way approving of them. The bottom line is this: In the MMC statute, the Legislature has delegated broad legislative authority to the mediator and the Board under the MMC process, but has not provided adequate standards to guide and direct the use of that delegated authority or prevent its misuse.

Finally, the delegation of powers under the MMC statute also lacks the necessary procedural safeguards or mechanisms to assure a fair and evenhanded implementation of the legislative mandate to impose a CBA. *Birkenfeld* held that even if there is "legislative guidance by way of policy and primary standards," it is not enough if the Legislature fails to establish safeguards or mechanisms to protect against unfairness or favoritism. (*Birkenfeld*, *supra*, 17 Cal.3d at p. 169.) Here, in addition to the lack of standards, we do not see how the highly deferential and limited review the Board undertakes of a mediator's report under the MMC statute could be deemed a realistic safeguard against unfairness or favoritism. For the most part, the Board *must* approve the mediator's

report as the final order of the Board unless a challenged CBA provision is either (i) "unrelated to wages, hours or other conditions of employment," (ii) "based on clearly erroneous findings of material fact," or (iii) "arbitrary and capricious" in light of the mediator's findings of fact. (§ 1164.3, subd. (a).) In practical effect, this means 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, are not wholly arbitrary, and the mediator has considered the factors listed in section 1164, subdivision (e). Except in perhaps the most egregious instances of overreaching, the Board's hands would be tied and the report would have to be approved. In light of the mediator's considerable range of power to determine all aspects of a compelled CBA, which would include a broad array of important economic terms and relationships, such a highly deferential and narrow review mechanism would not be able to meaningfully protect the parties against favoritism or unfairness in regard to the determination of the CBA's terms.

Potentially compounding the problem further is the fact that a mediator's report to the Board may not necessarily provide a complete or adequate record of the rationale for the mediator's various decisions concerning the terms of the CBA. During the voluntary mediation phase of the MMC process, the mediator may have received ex parte or confidential communications, and may have been decisively influenced by what was said to him during that private phase of the proceedings. Although we do not say that merely having the same mediator conduct the voluntary mediation phase *and* the involuntary

binding interest arbitration phase is a violation of due process, we do believe it is another factor that may hinder the effectiveness of the review mechanism provided in the MMC statute. Information divulged in the voluntary mediation phase would not likely make its way into the report or otherwise come to the Board's attention, nor would it likely become part of the record brought before the Court of Appeal when judicial review of the Board's decision is requested under section 1164.5. For all of the above reasons, we conclude that in its delegation of legislative authority to the mediator and the Board, the MMC statute did *not* provide an adequate procedural mechanism to protect the parties from favoritism or unfairness in the MMC process.

In summary, the MMC statute grants to the mediator and the Board the power to establish employment terms that will be imposed by the force of law (i.e., to legislate) with regard to a particular employer (i.e., create and compel an entire CBA) without any definite policy direction, goal or standard that is supposed to be reached or implemented. The law presents factors, but factors alone are not enough. Additionally, there are no adequate mechanisms or safeguards in place under the MMC statute to protect against favoritism in the use of such delegated power. We conclude the MMC statute involves an unconstitutional delegation of legislative authority, because it leaves the resolution of fundamental policy issues to others and it fails to provide adequate direction and safeguards for the implementation of that policy.

THE CONSOLIDATED CASE (CASE NO. F068676)

VII. Denial of Writ Relief Affirmed on Narrow Grounds

After the Board initially ordered Gerawan and UFW to commence the MMC process, Gerawan filed a petition for writ of mandate in the superior court challenging the validity of the Board's order. In that petition to the trial court, and in the points and authorities filed in support of said petition, Gerawan raised the same statutory issues and many of the same constitutional issues that were presented in the instant petition for review to this court, which we have granted (i.e., case No. F068526, decided above). The particular statutory issues raised by Gerawan in the trial court petition for writ of mandate were that the Board erroneously construed the criteria of sections 1164 and 1164.11 and wrongly concluded that such criteria were satisfied in this case, which errors included the Board's improper refusal to allow Gerawan to prove that UFW had abandoned its status as the employees' bargaining representative. The constitutional issues raised in the trial court petition for writ of mandate focused on due process challenges to the MMC statute, including a claim that the MMC statute violates due process because of its use of a single mediator to handle both mediation and arbitration, especially where that person would be privy to ex parte discussions with the parties that are off the record. In seeking a writ of mandate in the trial court, the petition also contended that section 1164.9 did not preclude the trial court from hearing the matter.

The trial court allowed Gerawan's petition for writ of mandate to proceed (rejecting the Board's

argument that section 1164.9 precluded it from exercising jurisdiction), but the court ultimately denied the relief sought in Gerawan's petition. The primary ground for the trial court's denial of relief was that the matter had not reached sufficient administrative finality to warrant writ relief, because the Board's order was merely "the first step in a multi-step process which culminates in a final order from the [Board]. [Citation.]" That being the case, the trial court also found that it would be speculative at that point to conclude that definite harm would result if the court did not issue a writ. The trial court further noted there were administrative and judicial remedies provided, including a provision for judicial review at the end of the administrative process. The trial court did not reach the constitutional due process issue, because it did not appear to be ripe. For these and other reasons, the trial court concluded that the issuance of a writ of mandate was not procedurally necessary or appropriate, especially due to lack of administrative finality, and the petition was denied.[39]

Gerawan appealed from the trial court's denial of the petition for writ of mandate, which we have ordered consolidated with the instant petition for

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[39] In so holding, the trial court further noted that, in any event, there was no abuse of discretion evident, because it appeared to the court that all the statutory criteria necessary for the commencement of the MMC process were satisfied. Although this particular ground for the trial court's ruling (i.e., that the statutory criteria were all satisfied) was incorrect in view of our conclusion above relating to the abandonment issue, as explained below we will affirm the trial court's result (the denial of the writ), even though we do not agree with this ground stated by the trial court.

review. Since we have addressed and resolved the statutory issues above (in connection with the petition for review), it is unnecessary to do so again. As to the constitutional issues, we have concluded above that the MMC statute violates equal protection of the law and the prohibition against improper delegation of legislative powers. In light of that ruling, it is unnecessary to address the additional claims of constitutional law defects regarding the MMC statute. (See *Santa Clara County Local Transportation Authority v. Guardino*, *supra*, 11 Cal.4th at p. 230 [courts refrain from rendering unnecessary constitutional law decisions].)

In addition to the fact that our ruling in the petition for review (above) has rendered the specific relief sought in the petition for writ of mandate unnecessary and largely moot, we note further that it appears Gerawan had an adequate remedy within the context of the administrative process (i.e., the petition for review) in this particular case and, therefore, a clear basis for the trial court's denial of extraordinary relief existed. That is, the same essential statutory and constitutional challenges to the MMC process could have been, and actually were, adequately raised by Gerawan in its petition for review, which we have heard and considered. Hence, in this particular instance at least, Gerawan had an adequate remedy.[40] (Code Civ. Proc., § 1086 [extraordinary writ relief is

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[40] We do not decide whether, or in what circumstances, a party may be permitted to seek a writ of mandate in the trial court in this context. Thus, we leave unanswered the question of whether section 1164.9 precluded the petition for writ of mandate in the trial court.

properly denied where the party has an adequate remedy].) On the narrow ground that an adequate remedy existed, we affirm the denial of the writ petition in the trial court. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366, 370-371 [writ correctly denied where another adequate remedy present].)

DISPOSITION

The Board's order in *Gerawan Farming, Inc.*, *supra*, 39 ALRB No. 17 (case No. F068526) is reversed and set aside. In light of the above ruling, the trial court's denial of the writ in case No. F068676 is affirmed. Costs are awarded to Gerawan.

_____

KANE, J.

WE CONCUR:

_____

HILL, P.J.

_____

LEVY, J.

Appendix C

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

No. 2013-MMC-003

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39 ALRB No. 17

GERAWAN FARMING, Inc.,

Employer,

and

UNITED FARM WORKERS OF AMERICA,

Petitioner.

Filed November 19, 2013

DECISION AND ORDER

The United Farm Workers of America ("UFW") filed a declaration on March 29, 2013 requesting Mandatory Mediation and Conciliation ("MMC") with the employer, Gerawan Farming, Inc. ("Gerawan"), pursuant to Labor Code section 1164, subdivision (a)(1). On April 16, 2013, the Board issued *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, finding that all statutory prerequisites had been met and referring the parties to the MMC process. The parties met with mediator Matthew Goldberg on several occasions in June and August of this year, but were unable to voluntarily agree to all terms of a collective bargaining agreement. Accordingly, pursuant to the authority of Labor Code section 1164, subdivision (d), the mediator

issued a report, dated September 28, 2013, fixing the terms of a collective bargaining agreement.

On October 15, 2013, Gerawan filed a Petition and Brief in Support for Request for Review of the Mediator's Report. In its petition, Gerawan contested the propriety of numerous provisions in the collective bargaining agreement fixed by the mediator. Gerawan also reiterated various arguments that the Board previously addressed and rejected in *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5 and in *Gerawan Farming, Inc.* (2013) 39 ALRB No. 13.

In *Gerawan Farming, Inc.* (2013) 39 ALRB No. 16, the Board granted review as to six provisions of the mediator's report and remanded the matter to the mediator, in accordance with Labor Code section 1164.3, subdivision (c), to meet with the parties as necessary to address those provisions and issue a second report. In all other respects, the Board found that Gerawan failed to show that the mediator's findings of material fact were clearly erroneous, or that the provisions fixed in his report were arbitrary or capricious in light of his findings of fact.

The parties subsequently met among themselves and with the mediator and were able to agree on all six of the provisions remanded by the Board. The mediator issued his second report, dated November 6, 2013, incorporating the agreed upon provisions. No party filed a request for review of the mediator's second report.

ORDER

Pursuant to Labor Code section 1164.3, subdivision (d), the mediator's second report shall take immediate effect as a final order of the Board. The

findings and conclusions of the Board set forth in *Gerawan Farming, Inc.* (2013) 39 ALRB No. 5, *Gerawan Farming, Inc.* (2013) 39 ALRB No. 11, *Gerawan Farming, Inc.* (2013) 39 ALRB No. 13 and Gerawan Farming, Inc. (2013) 39 ALRB No. 16 are incorporated herein by reference. Those orders, together with the Order herein, shall constitute the final order of the Board subject to review pursuant to Labor Code section 1164.5.

DATED: November 19, 2013

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1

…

No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

…

STATE OF CALIFORNIA LABOR CODE SECTIONS 1164-1164.13

Section 1164

(a) An agricultural employer or a labor organization certified as the exclusive bargaining agent of a bargaining unit of agricultural employees may file with the board, at any time following (1) 90 days after a renewed demand to bargain by an agricultural employer or a labor organization certified prior to January 1, 2003, which meets the conditions specified in Section 1164.11, (2) 90 days after an initial request to bargain by an agricultural employer or a labor organization certified after January 1, 2003, (3) 60 days after the board has certified the labor organization pursuant to subdivision (f) of Section 1156.3, or (4) 60 days after the board has dismissed a decertification petition upon a finding that the employer has unlawfully initiated, supported, sponsored, or assisted in the filing of a decertification petition a declaration that the parties have failed to reach a collective bargaining agreement and a request that the board issue an order directing the parties to

mandatory mediation and conciliation of their issues. "Agricultural employer," for purposes of this chapter, means an agricultural employer, as defined in subdivision (c) of Section 1140.4, who has employed or engaged 25 or more agricultural employees during any calendar week in the year preceding the filing of a declaration pursuant to this subdivision.

(b) Upon receipt of a declaration pursuant to subdivision (a), the board shall immediately issue an order directing the parties to mandatory mediation and conciliation of their issues. The board shall request from the California State Mediation and Conciliation Service a list of nine mediators who have experience in labor mediation. The California State Mediation and Conciliation Service may include names chosen from its own mediators, or from a list of names supplied by the American Arbitration Association or the Federal Mediation Service. The parties shall select a mediator from the list within seven days of receipt of the list. If the parties cannot agree on a mediator, they shall strike names from the list until a mediator is chosen by process of elimination. If a party refuses to participate in selecting a mediator, the other party may choose a mediator from the list. The costs of mediation and conciliation shall be borne equally by the parties.

(c) Upon appointment, the mediator shall immediately schedule meetings at a time and location reasonably accessible to the parties. Mediation shall proceed for a period of 30 days. Upon expiration of the 30-day period, if the parties do not resolve the issues to their mutual satisfaction, the mediator shall certify that the mediation process has been exhausted. Upon

mutual agreement of the parties, the mediator may extend the mediation period for an additional 30 days.

(d) Within 21 days, the mediator shall file a report with the board that resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement, including all issues subject to mediation and all issues resolved by the parties prior to the certification of the exhaustion of the mediation process. With respect to any issues in dispute between the parties, the report shall include the basis for the mediator's determination. The mediator's determination shall be supported by the record.

(e) In resolving the issues in dispute, the mediator may consider those factors commonly considered in similar proceedings, including:

(1) The stipulations of the parties.

(2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union's wage and benefit demands.

(3) The corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements.

(4) The corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed.

(5) The average consumer prices for goods and services according to the California Consumer Price Index, and the overall cost of living, in the area where the work is performed.

Section 1164.3

(a) Either party, within seven days of the filing of the report by the mediator, may petition the board for review of the report. The petitioning party shall, in the petition, specify the particular provisions of the mediator's report for which it is seeking review by the board and shall specify the specific grounds authorizing review by the board. The board, within 10 days of receipt of a petition, may accept for review those portions of the petition for which a prima facie case has been established that (1) a provision of the collective bargaining agreement set forth in the mediator's report is unrelated to wages, hours, or other conditions of employment within the meaning of Section 1155.2, (2) a provision of the collective bargaining agreement set forth in the mediator's report is based on clearly erroneous findings of material fact, or (3) a provision of the collective bargaining agreement set forth in the mediator's report is arbitrary or capricious in light of the mediator's findings of fact.

(b) If it finds grounds exist to grant review within the meaning of subdivision (a), the board shall order the provisions of the report that are not the subject of the petition for review into effect as a final order of the board. If the board does not accept a petition for review or no petition for review is filed, then the mediator's report shall become a final order of the board.

(c) The board shall issue a decision concerning the petition and if it determines that a provision of the collective bargaining agreement contained in the mediator's report violates the provisions of subdivision (a), it shall, within 21 days, issue an order requiring the mediator to modify the terms of the collective bargaining agreement. The mediator shall meet with the parties for additional mediation for a period not to exceed 30 days. At the expiration of this mediation period, the mediator shall prepare a second report resolving any outstanding issues. The second report shall be filed with the board.

(d) Either party, within seven days of the filing of the mediator's second report, may petition the board for a review of the mediator's second report pursuant to the procedures specified in subdivision (a). If no petition is filed, the mediator's report shall take immediate effect as a final order of the board. If a petition is filed, the board shall issue an order confirming the mediator's report and order it into immediate effect, unless it finds that the report is subject to review for any of the grounds specified in subdivision (a), in which case the board shall determine the issues and shall issue a final order of the board.

(e) Either party, within seven days of the filing of the report by the mediator, may petition the board to set aside the report if a prima facie case is established that any of the following have occurred: (1) the mediator's report was procured by corruption, fraud, or other undue means, (2) there was corruption in the mediator, or (3) the rights of the petitioning party were substantially prejudiced by the misconduct of the

mediator. For the sole purpose of interpreting the terms of paragraphs (1), (2), and (3), case law that interprets similar terms used in Section 1286.2 of the Code of Civil Procedure shall apply. If the board finds that any of these grounds exist, the board shall within 10 days vacate the report of the mediator and shall order the selection and appointment of a new mediator, and an additional mediation period of 30 days, pursuant to Section 1164.

(f) Within 60 days after the order of the board takes effect, either party or the board may file an action to enforce the order of the board, in the superior court for the County of Sacramento or in the county where either party's principal place of business is located. No final order of the board shall be stayed during any appeal under this section, unless the court finds that (1) the appellant will be irreparably harmed by the implementation of the board's order, and (2) the appellant has demonstrated a likelihood of success on appeal.

Section 1164.5

(a) Within 30 days after the order of the board takes effect, a party may petition for a writ of review in the court of appeal or the California Supreme Court. If the writ issues, it shall be made returnable at a time and place specified by court order and shall direct the board to certify its record in the case to the court within the time specified. The petition for review shall be served personally upon the executive director of the board and the nonappealing party personally or by service.

(b) The review by the court shall not extend further than to determine, on the basis of the entire record, whether any of the following occurred:

(1) The board acted without, or in excess of, its powers or jurisdiction.

(2) The board has not proceeded in the manner required by law.

(3) The order or decision of the board was procured by fraud or was an abuse of discretion.

(4) The order or decision of the board violates any right of the petitioner under the Constitution of the United States or the California Constitution.

(c) Nothing in this section shall be construed to permit the court to hold a trial de novo, to take evidence other than as specified by the California Rules of Court, or to exercise its independent judgment on the evidence.

Section 1164.7

(a) The board and each party to the action or proceeding before the mediator may appear in the review proceeding. Upon the hearing, the court of appeal or the Supreme Court shall enter judgment either affirming or setting aside the order of the board.

(b) The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable, apply to proceedings instituted under this chapter.

Section 1164.9

No court of this state, except the court of appeal or the Supreme Court, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the board to

suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the board in the performance of its official duties, as provided by law and the rules of court.

Section 1164.11

A demand made pursuant to paragraph (1) of subdivision (a) of Section 1164 may be made only in cases which meet all of the following criteria: (a) 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, (b) the employer has committed an unfair labor practice, and (c) the parties have not previously had a binding contract between them.

Section 1164.12

To ensure an orderly implementation of the mediation process ordered by this chapter, a party may not file a total of more than 75 declarations with the board prior to January 1, 2008. In calculating the number of declarations so filed, the identity of the other party with respect to whom the declaration is filed, shall be irrelevant.

Section 1164.13

The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.