No. 17-_____

In the Supreme Court of the United States

TRI-FANUCCHI FARMS,

Petitioner,

–v–

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the structure of the make-whole remedy under the California Agricultural Labor Relations Act deny agricultural employers equal access to California courts in order to obtain declaratory relief of their legal obligations because of the exposure to large money damages?

2. Does the serious deterrent impact of the Agricultural Labor Relations Act's make-whole remedy on judicial review violate California agricultural employers' due process rights as California employers must expose themselves to potentially millions of dollars in damages just to obtain declaratory relief where other litigants can simply file an action for declaratory relief?

3. Does imposition of the make-whole remedy by the Agricultural Labor Relations Board without an evidentiary hearing violate California agricultural employer's due process rights?

PARTIES TO THE PROCEEDING PURSUANT TO RULE 14.1(b) AND RULE 29.6

Petitioner Tri-Fanucchi Farms is an agricultural employer operating in the Central Valley of California. Petitioner is a limited liability company registered in California and has no parent corporation or publicly held company owning 10% or more of its stock.

Respondent the Agricultural Labor Relations Board is an agency of the state of California that oversees the California Agricultural Labor Relations Act (Cal. Lab. Code §§ 1140 *et. seq.*).

Real Party in Interest is the United Farm Workers of America.

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INTRODUCTION

This case presents the United States Supreme Court the opportunity to address the constitutionality of the controversial make-whole remedy provided under California's Agricultural Labor Relations Act ("ALRA" or "the Act"). The facts and circumstances of this case demonstrate the true danger to agricultural employers' rights to equal protection and due process provided under the United States Constitution. The concerns expressed more than a century ago by this Court in *Ex parte Young*, 209 U.S. 123 (1908) are real and California agricultural employers are being denied meaningful access to the state judicial courts. In particular, the ALRA's make-whole remedy as drafted, as well as the Agricultural Labor Relations Board's ("ALRB") broad application of the make-whole award, penalize employers who in good faith seek judicial review of ALRB administrative positions on the employer's legal obligations under the Act.

In the present case, the United Farm Workers of America ("UFW") demanded Petitioner Tri-Fanucchi Farms ("Tri-Fanucchi") engage in collective bargaining after the union had been absent from Tri-Fanucchi's operations and engaged in no efforts to bargain for approximately twenty-four (24) years. Tri-Fanucchi responded that it believed that the UFW had forfeited its status as bargaining representative of its employees by abandoning the employees for over two decades, and that Tri-Fanucchi was going exercise its statutory right to seek judicial review of the ALRB's administrative position on union abandonment. In order for Tri-

Fanucchi to seek judicial review of the ALRB's position, it was required to refuse to bargain, thus committing an unfair labor practice and exposing itself to the ALRA's make-whole remedy. Tri-Fanucchi took the position that the UFW's abandonment of the bargaining unit for over two decades was antithetical to ALRA policy to enable agricultural employees to designate "representatives <u>of their own choosing</u> . . . for the purpose of <u>collective bargaining</u> or other mutual aid or protection," or "to refrain from any and all such activities . . . " (Cal. Lab. Code[1] § 1140.2 [emphasis added] and Lab. Code § 1152.)

Without providing Tri-Fanucchi the opportunity to set forth a defense or present evidence of its good faith in pursuing judicial review, the ALRB took the position that Tri-Fanucchi's refusal to bargain as a means of seeking judicial review was not justifiable in light of ALRB precedent, and that make-whole relief was appropriate "[b]ased on [its] review of the facts and circumstances and equities in this case." *Tri-Fanucchi Farms*, 40 ALRB No. 4, p.20 (2014).

Similar to the statute at issue in *Ex parte Young*, 209 U.S. 123, Tri-Fanucchi's only means to secure judicial review of the ALRB's administrative position on what Tri-Fanucchi believed to be long term abandonment by the union was to refuse to bargain and become subject to an unfair labor practice, and thus make-whole liability. At the purported hearing on the unfair labor practice, the ALRB did not provide Tri-Fanucchi with an evidentiary hearing to contest

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[1] All further code references in the petition will be to the California Labor Code as Lab. Code.

whether the UFW was the rightful representative of its employees after years of abandonment. Tri-Fanucchi's only option to test the validity of the ALRB's abandonment holding was to obtain a judicial decision on the condition that if it was unsuccessful, it would be subject to enormous make-whole liability. As this Court concluded in *Ex parte Young*, when a law imposes damages "so severe as to intimidate the company. . . from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of the laws which deeply affect its rights." *Ex parte Young*, 209 U.S. 123, p. 147.

As this petition demonstrates, the ALRA make-whole remedy is constitutionally flawed in that it amounts to an unreasonable restraint on an agricultural employer's right to seek judicial review of its statutory obligations in violation of equal protection rights. Tri-Fanucchi was faced with the unconstitutional dilemma all California agricultural employers face: challenge the ALRB's construction of the ALRA and risk hundreds of thousands of dollars in make-whole, or forego its statutory and constitutional right to judicial review of its statutory obligations under the ALRA and bargain with a union it believes is not the chosen representative of its employees. The equal protection rights of the agricultural employer who seeks to challenge the validity of the ALRB's administrative precedent are adversely affected insofar as the only means of obtaining judicial review is by refusing to bargain, thereby exposing themselves to exorbitant make-whole liability.

The ALRA further provides the ALRB with almost unfettered discretion to issue the make-whole remedy, which without judicial review for arbitrary administrative action, violates agricultural employers' due process constitutional guarantees. As demonstrated by the ALRB's application of make-whole in Tri-Fanucchi's case, the ALRB's imposition of make-whole without providing the Tri-Fanucchi the opportunity to present a defense or put on evidence of the basis of its good faith belief that the UFW was no longer the bargaining representative of its employees, denied Tri-Fanucchi a meaningful opportunity to be heard in violation of the Due Process Clause.

Petitioner respectfully requests the Court grant this petition for review as the equal protection and due process rights of California agricultural employers have been both denied and adversely affected.

OPINIONS BELOW

(1) Order, Supreme Court of California, Case No. S227270 (Nov. 27, 2017) (App.1a).

(2) Opinion, State of California Court of Appeal for the Fifth Appellate District, Case No. F069419 (May 14, 2015). (App.21a).

(3) Decision and Order, State of California Agricultural Labor Relations Board; *Tri-Fanucchi Farms*, 40 ALRB No. 4 (April 23, 2014). (App.49a).

(4) Decision of the Administrative Law Judge in the Matter of: Tri-Fanucchi Farms and United Farm Workers of America, State of California Agricultural Labor Relations Board. (App.72a).

JURISDICTION

The Judgment of the California Supreme Court was entered on November 27, 2017. (App.1a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **Cal. Lab. Code § 1160.3**

  If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part.

- **U.S. Const. amend. XIV, § 1**

  [N]or shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual & Procedural Background

1. Petitioner's History with the United Farm Workers Union

Tri-Fanucchi is a family-owned farming operation that has been operating in Kern County, California for decades. Petitioner maintains approximately thirty-five (35) year round employees and hires several hundred seasonal employees through various labor contractors. Certified Record of the Proceedings, "CR" 22-23.

In 1977, Tri-Fanucchi's agricultural employees elected the UFW to be their collective bargaining representative. After the UFW was certified as the employees' representative by the Board, the parties engaged in some initial bargaining sessions. CR 22-23. After polling its employees and believing they no longer wanted the UFW to represent them, Tri-Fanucchi refused to bargain with the UFW in 1984 on the good faith belief that the UFW no longer had majority support. CR 23. The UFW brought an unfair labor practices complaint and the Board held in the UFW's favor. *Ibid.* The Board's findings were ultimately affirmed by the California Fifth District Court of Appeal in a nonpublished decision. *Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.* (Nov. 21, 1987, F008776 [nonpub. opn.].

In 1988, Tri-Fanucchi informed the UFW that it was willing to engage in bargaining and resume contract negotiations with the UFW. CR 23. The UFW responded that it would arrange bargaining dates as soon as its negotiator returned from vacation. *Ibid.* For reasons unexplained by the UFW, the UFW negotiator never responded and the UFW disappeared from the scene and no bargaining occurred for approximately twenty-four (24) years. *Ibid.*

The next time the UFW contacted Tri-Fanucchi was September 28, 2012, when the UFW sent a letter demanding that bargaining be restarted and requesting certain information from Tri-Fanucchi. CR 439-440. Tri-Fanucchi responded on October 19, 2012, advising the UFW that it believed the UFW's twenty-four (24) year absence resulted in an abandonment of its status as the employees' bargaining representative and thus, the UFW was no longer the employee's bargaining representative of their choosing. Tri-Fanucchi further explained that it was seeking judicial review of the issue, and that its refusal should be viewed as a "technical refusal to bargain" until the Board's administrative position on the issue of abandonment was addressed by the courts. CR 441. Tri-Fanucchi's position was based in good faith: its current workforce did not know the UFW, did not select UFW to represent the workers' interests, and Tri-Fanucchi's employees had no reason to believe the UFW represented them due to the UFW's twenty-four (24) year absence.

2. Hearing on the Unfair Labor Practice Claim: ALRB Assesses the Make-Whole Remedy Without an Evidentiary Hearing

On March 7 and April 16, 2013, UFW filed charges with the Board on the grounds that Tri-Fanucchi had engaged in unfair labor practices by refusing to bargain and by refusing to provide information relevant to bargaining. CR 1-6. On September 5, 2013, the Board's general counsel ("General Counsel") filed a consolidated administrative complaint ("Complaint") against Tri-Fanucchi arguing that Tri-Fanucchi's refusal to bargain and provide information constituted unfair labor practices in violation of the ALRA, Cal. Lab. Code § 1153, subdivisions (1) and (e). CR 7-12. Additionally, the General Counsel requested the Board award make-whole relief against Tri-Fanucchi pursuant to Cal. Lab. § 1160.3. *Ibid.*

Tri-Fanucchi filed an answer to the Complaint on October 8, 2013. CR 91-96. The Answer admitted to the underlying facts alleged in the Complaint, but maintained that UFW was no longer the chosen bargaining representative of their employees because it had forfeited its representative status by completely abandoning the bargaining unit for twenty-four (24) years. CR 94.) Tri-Fanucchi again asserted that its refusal to bargain was in good faith for the purpose of obtaining judicial review of the important labor relations issue of long-term union abandonment. CR 96.

Before the scheduled hearing by the administrative law judge ("ALJ") on October 21, 2013, the General Counsel submitted a motion in limine requesting that all evidence related to Tri-Fanucchi's abandonment defense be excluded on the basis that the defense is not recognized by Board precedent. CR 123-128. The ALJ granted the motion in limine, which he treated as a motion to strike or a judgment on the pleadings related to Tri-Fanucchi's abandonment defense and related equitable defenses. CR 166-167. Having rejected Tri-Fanucchi's asserted defenses to the duty to bargain, the ALJ addressed the merits of the Complaint, <u>refused to allow Tri-Fanucchi to have an evidentiary hearing</u> to cross-examine UFW subpoenaed witnesses regarding whether the UFW had completely abandoned its employees during the twenty-four (24) years, and held that Tri-Fanucchi's refusal to bargain and turn over information constituted unfair labor practices. Transcript of Oct. 21, 2013 Hearing ("TR") 21:13-22:7; CR 158. The ALJ also found that Tri-Fanucchi's refusal to bargain as a means of seeking judicial review of the Board's administrative action was not justifiable in light of Board precedent, and thus awarded make-whole relief against Tri-Fanucchi[2]. CR 161. Tri-Fanucchi was provided no opportunity to present evidence to support its position that its refusal to bargain was in good faith based on credible evidence that it honestly believed the UFW was no longer the bargaining representative of its employee's choice, as opposed to a dilatory tactic solely intended to stifle employee organization that would support the award of make-whole.

On November 20, 2013, Tri-Fanucchi filed with the Board fifteen (15) "exceptions" to the ALJ's decision. CR 388-421. On April 23, 2014, the Board issued its decision in agreement with the ALJ, finding that Tri-Fanucchi's refusal to bargain with the UFW and to provide information constituted violations of Cal. Lab. § 1153, subdivisions (a) and (e). CR 393-394. The Board denied Tri-Fanucchi's contention that the UFW's complete abandonment was a defense to its duty

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[2] Under the make-whole remedy, the ALRB will determine what contract Tri-Fanucchi should have entered into with the UFW and the monetary impact could be hundreds of thousands of dollars.

to bargain, as well as similar equitable defenses based on the twenty-four (24) years of total inactivity by the UFW. CR 395-400.

With regard to the ALJ's make-whole award, the Board held that make whole relief awarded against Tri-Fanucchi was proper. Remarkably, without ever having held an evidentiary hearing as to Tri-Fanucchi's basis for believing the UFW was no longer the bargaining representative of its employees, the Board asserted the make-whole relief was appropriate "[b]ased on [its] review of the facts and circumstances and equities in this case." (*Tri-Fanucchi Farms*, 40 ALRB No. 4 at p. 20. Without providing Tri-Fanucchi the opportunity to present any evidence in its defense, the Board could not have reviewed the "facts and circumstances" of Tri-Fanucchi's case to determine whether the make-whole remedy was appropriate.

3. Tri-Fanucchi Seeks Judicial Review of ALRB's Position on Abandonment

On May 23, 2014, Tri-Fanucchi filed a petition for writ of review to the California Court of Appeal, Fifth District seeking review of the Board's decision in *Tri-Fanucchi Farms*, 40 ALRB No. 4 (2014). On February 10, 2015, the Fifth District Court of Appeal issued a writ of review.

The Court of Appeal affirmed the portion of the Board's decision that rejected Tri-Fanucchi's defenses to the duty to bargain and held that Tri-Fanucchi had committed unfair labor practices for refusing to bargain with the UFW and refusing to provide information. The court deferred to the Board's position that past conduct by the UFW indicating abandonment—

i.e. UFW absence, failure to carry out its duties, and lack of contact with the employees and the employer for more than twenty-four (24) years—did not create a legal basis for Tri-Fanucchi to refuse to bargain with the UFW. *Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.*, 236 Cal.App.4th 1079, 1084 (2015).

The Court of Appeal reversed the make whole relief award imposed by the Board against Tri-Fanucchi. The Court held that Tri-Fanucchi's advancement of the abandonment defense plainly furthered the purpose of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue, and thus the Board prejudicially erred when it ordered make whole relief against Tri-Fanucchi. *Tri-Fanucchi Farms*, 236 Cal.App.4th at pp. 1097-1098. As the Court of Appeal saw it, "the Board's decision to impose make whole relief was based solely on its legal valuation or value judgement that Fanucchi litigation of the abandonment issue herein—which was premised on UFW's 24-years of inactivity—did not further the policies and purposes of the ALRA. *Id.* at p. 260.

Tri-Fanucchi filed a Petition for Review to the California Supreme Court of the lower court's rejection of the abandonment and unclean hands defenses. The ALRB similarly filed a Petition for Review regarding the lower court's rejection of the make whole relief against Tri-Fanucchi. The California Supreme Court granted both petitions on August 19, 2015.

On November 27, 2017, the California Supreme Court issued its opinion in *Tri-Fanucchi Farms v. Agricultural Labor Relations Board*, 3 Cal.5th 1161 (2017), holding that the Court of Appeal correctly rejected Tri-Fanucchi's assertion of an abandonment defense. As to the issue of the make-whole remedy, the California Supreme Court overturned the Court of Appeal's judgment reversing the ALRB's determination that Tri-Fanucchi should pay its employees make-whole relief. Despite the record demonstrating the ALRB never held an evidentiary hearing affording Tri-Fanucchi the opportunity to explain its good faith belief that the UFW was no longer the bargaining representative of its employees choosing, the California Supreme Court held the ALRB properly exercised its discretion in imposing make-whole relief because the "Board's order assessed the particular circumstances of this case and was not made in a conclusory fashion." *Tri-Fanucchi Farms*, 3 Cal.5th at p. 1171.

With regard to Tri-Fanucchi's claim that imposition of the make-whole award under the conditions of this case seriously deters agricultural employers from seeking judicial review, the California Supreme Court dismissed it with little regard. *Tri-Fanucchi Farms*, 3 Cal.5th at p. 1172. The California Supreme Court suggested that Tri-Fanucchi's goal of seeking judicial review of what it believed to be arbitrary administrative action in contradiction of the ALRA's public policy of encouraging collective bargaining with the employee's freely chosen representative—*i.e.* the Board's apparent endorsement of the union's long-term total abandonment of its bargaining unit—was not "especially compelling" to warrant judicial review. *Tri-Fanucchi Farms*, 3 Cal.5th at p. 1172.

As set forth herein, this Court has jurisdiction to review the judgment of the California Supreme Court upholding the Board's imposition of the make-whole award on a writ of certiorari. Petitioner Tri-Fanucchi Farms respectfully requests this Court grant its petition to answer the important Constitutional questions presented by California's make-whole remedy under the Agricultural Labor Relations Act which does not allow agricultural employers direct access to the trial courts and only limited access to appellate courts by way of a discretionary petition for review.

ARGUMENT

I. THE MAKE-WHOLE REMEDY AMOUNTS TO AN UNREASONABLY RESTRAINT ON AN AGRICULTURAL EMPLOYER'S RIGHT TO JUDICIAL REVIEW AND/OR DECLARATORY RELIEF OF ITS LEGAL OBLIGATIONS IN VIOLATION OF EQUAL PROTECTION RIGHTS

A. The ALRA Make-Whole Remedy

The ALRA was enacted in California in 1975 to fill the gap caused by the National Labor Relations Act's ("NLRA") exclusion of agriculture from its coverage. The California Legislature modeled the ALRA after the NLRA, and created ALRB with authority and responsibilities comparable to those exercised by the National Labor Relations Board ("NLRB"), as the agency in charge of the ALRA's implementation and administration. *J.R. Norton Co. v. Agricultural Labor Relations Bd.*, 26 Cal.3d 1, 8 (1979). The ALRA empowers the ALRB "to prevent any person from engaging in any unfair labor practice" and authorized the Board to issue complaints, hold hearings, and remedy unfair labor practices. Cal. Lab. Code §§ 1160, 1160.2

& 1160.3. The ALRA declares that the ALRA "shall follow the applicable precedents of the National Labor Relations Act, as amended." Cal. Lab. Code § 1148.

While many provisions of the ALRA mirror the NLRA, some substantive provisions deviate. One such divergence from the NLRA is the express grant of statutory authority given to the ALRB to order the make-whole remedy when an employer engages in the unfair labor practice of refusing to bargain in good faith. Cal. Lab. Code § 1160.3. Under the ALRA, once a union has been certified by the ALRB, the only way an employer can seek judicial review of the ALRB's administrative action is by refusing to bargain, thus coming an unfair labor practice. Cal. Lab. Code § 1160.3 gives the Board authority, upon finding an unfair labor practice by an employer, to take "affirmative action, including . . . making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain . . . ." The ALRB's award of make-whole covers the entire period from the initial refusal to bargain until the commencement of good faith bargaining. According to the ALRB, the goal behind the make-whole remedy is compensation to employees for their losses resulting from the employer's refusal to bargain and to encourage collective bargaining by "removing the profit" the employer is said to realize when he refuses to bargain in good faith. *Adam Dairy dba Rancho Do Rios*, 4 ALRB No. 24, p. 9 (1978). In other words, make-whole relief was designed to compensate employees for losses incurred as a result of the delays in the collective bargaining process. *See J.R. Norton Co.*, 26 Cal.3d 1 at pp. 27, 36 (1979).

In *J.R. Norton*, the California Supreme Court noted that in the legislative testimony before the Senate committee reviewing the bill, then-Secretary of Agriculture and Services Rose Elizabeth Bird testified "that the provision authorizes the Board to award make-whole damages only when the Board has determined that an employer refused to bargain and acted in bad faith." The words 'when the board deems such relief appropriate,' according to her testimony, were intended to convey the notion that the Board must carefully evaluate the asserted grounds for ordering make-whole relief; such an evaluation necessarily requires the Board to examine the facts and equities of each particular case." *J.R. Norton Co.*, 26 Cal.3d at p. 38 [emphasis added].)

Although the phrase "when the board deems such relief is appropriate" appears to temper the Board's power to issue the make-whole remedy, history has revealed that it rarely has had the intended impact. While the drafters of the ALRA never intended the ALRB to use the make-whole remedy in every refusal to bargain case[3], soon after the ALRA's enactment in 1975, the ALRB imposed a "blanket rule" applying the make-whole remedy in all "technical refusal to bargain"[4] cases. *J.R. Norton Co.*, 26 Cal.3d 1 (1979).

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[3] The Agricultural Labor Relations Act of 1975—La Esperanza De California Para El Futuro, Santa Clara Law Review, V. 15, No.4, Art. 1, Herman M. Levy, January 1, 1975.

[4] A "technical refusal to bargain" occurs when an employer refuses to bargain, committing an unfair labor practice, simply to obtain judicial review of an ALRB order certifying a union because the ALRA does not allow for immediate judicial review otherwise. (*J.R. Norton Co. v. Agricultural Labor Relations Bd.*, 26 Cal.3d 1, 27 (1979).

In *J.R. Norton Co.*, the California Supreme Court rebuked the ALRB's policy of awarding make-whole as a per se remedy for all technical refusals to bargain. *Id.* at pp. 27-28. The California Supreme Court recognized that the rule "places burdensome restraints on those who legitimately seek judicial resolution of close cases in which a potentially meritorious claim could be made that the NLRB or the ALRB abused its discretion. It thereby impairs the important interest served by the provision in both acts for a check on arbitrary administrative action." *Id.* at p. 33.

Recognizing the potential deterrent impact the make-whole remedy has on meritorious judicial review of the ALRB's administrative action, the California Supreme Court suggested the critical inquiry in awarding make-whole is "what circumstances the employees' losses are compensable under the [ALRA] in light of the tension between the interest in avoiding unnecessary delays and the need to provide a check on arbitrary ALRB action . . . " *J.R. Norton Co.*, 26 Cal.3d at p. 36. The California Supreme Court adopted the following standard: "the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in reasonable good faith that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted." *Id.* at p. 39.

Instead of following the California Supreme Court's suggestion, the ALRB adopted its own standard for determining when the make-whole remedy is appropriate. This standard is referred to as the *F & P Grow-*

ers standard, named after the California appellate case endorsing it. The ALRB asserts that it will "consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the [ALRA], the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain." *F & P Growers Assn. v. Agricultural Labor Relations Board*, 168 Cal.App.3d 667, 682 (1985).

In *Tri-Fanucchi Farms v. Agricultural Labor Relations Board*, 3 Cal.5th 1161 (Nov. 27, 2017) the California Supreme Court held that the F & P Growers standard applies to nontechnical refusals to bargain like Tri-Fanucchi's refusal in the present case. Instead of demanding the ALRB consider the standard the Supreme Court adopted in *J.R. Norton* to look at the "totality of the employer's conduct" to determine whether it "litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative," the California Supreme Court endorsed the ALRB's administrative action in the present case of failing to provide the agricultural employer the opportunity to put forth any evidence demonstrating its good faith belief that the union was no longer the chosen representative of its employees. Instead, the California Supreme Court held that the Board's remedial order was "an appropriate exercise of its discretion under the ALRA" because it was not "'a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.'" (*Tri-Fanucchi Farms*, 3 Cal.5th at p. 1173, citing *Carian v. Agricultural Labor Relations Bd.*, 36 Cal.3d 654, p. 674 (1984).)

To summarize, under the current state of California law, the ALRB has broad discretion, subject to very limited judicial review, to impose the potent remedy of make-whole against an agricultural employer who in good faith challenges what it believes to be arbitrary administrative action without an evidentiary hearing, so long as the ALRB finds that the employer's position did not further the policies and purposes of the Act.

B. The NLRB Refuses to Impose the Makewhole Remedy, Recognizing Its Potential Deterrent and Punitive Impact

California Courts have consistently held that when interpreting the ALRA's remedial provision, it is necessary to examine the remedial provision in the NLRA as they have been interpreted by the courts. *Carl Joseph Maggio, Inc. v. Agric. Labor Relations Bd.*, 154 Cal.App.3d 40, p. 55 (1984), *citing* Cal. Lab. Code § 1148; *Triple E Produce Corp. v. Agricultural Labor Relations Bd.*, 35 Cal.3d 42, p. 48 (1983); *Highland Ranch v. Agricultural Labor Relations Bd.*, 29 Cal.3d 848, pp. 855-856 (1981).

The ALRB's power under Cal. Lab. § 1160 "to prevent any person from engaging in any unfair labor practice" is identical to that of the NLRB under section 10(a) of the NLRA. (29 U.S.C. § 160(a).) Unlike the ALRA, the statute empowering the NLRA to issue remedial orders does not expressly provide the NLRB with the authority to issue the make-whole remedy against employers. Section 10(c) of the NLRA provides, in relevant part, that when the NLRB determines a party has committed an unfair labor practice, it shall issue an order "requiring such a person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act." (29 U.S.C. § 160(c).)

Despite some federal appellate court authority holding that the NLRB has the authority to issue the make-whole order in cases involving employers' refusal to bargain, the NLRB has continuously declined to award make-whole on the grounds that it lacked authority under the NLRA. *Int'l Union of Electrical, Radio and Machine Workers v. NLRB* ("*Tiidee Products*"), 426 F.2d 1243 (D.C. Cir. 1970). In *Tiidee Products*, the court held statutory authority was located in section 10(c) of the NLRA (29 U.S.C. § 160(c)), which commanded the National Labor Relations Board "to take such affirmative action . . . as will effectuate the policies of this subchapter." *Id.* at p. 1248. The court perceived that the make-whole remedy was necessary in certain cases to afford employees a remedy against unwarranted delay resulting from an employer's refusal to bargain. *Id.* at pp. 1249-1250.

Nonetheless, the NLRB has consistently taken the position that because the United States Supreme Court has construed the NLRA to preclude the NLRB from requiring either party in collective bargaining to agree to a specific substantive contractual provision (*see Porter Co. v. N.L.R.B.*, 397 U.S. 99 (1970)), the NLRB likewise lacks authority to impose a make-whole remedy based upon its determination of what wages and other benefits the parties would probably have agreed upon. *Ex-Cell-o Corp.*, 185 N.L.R.B. 107 (1970), rev'd (D.C. Cir. 1971) 449 F.2d 1046; *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972). In reaching this conclusion, the NLRB relied on the language of section 8 (a) of the NLRA, which provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession," and as such, the NLRB is precluded from awarding the make-whole remedy. *J.R. Norton*, 26 Cal.3d, pp.34-35.) Significantly, the ALRA contains the identical language in Cal. Lab. Code § 1155.2(a) that the obligation to bargain under the ALRA "does not compel either party to agree to a proposal or require the making of a concession."

In concluding that it did not have authority to grant make-whole relief, the NLRB also acknowledged the potential deterrent impact of the make-whole remedy in discouraging employers from seeking appeals in good faith. *Ex-Cell-O Corp.*, 185 NLRB No. 20, at p. 3. The NLRB stated that when the wrongful refusal to bargain "is, at most, a debatable question, though ultimately found wrong, the imposition of a large financial obligation on such a respondent may come close to a form of punishment for having elected to pursue a representation question beyond the Board and to the courts . . . ." *Ibid.* The NLRB recognized the tension between a "desirability of a compensatory remedy" and the risk that the make-whole award under certain circumstances would be punitive. *Ibid.*

Despite the NLRB's caution that the make-whole remedy conflicts with the clear no-concession language of the statute and the potential deterrent and punitive impact of the remedy, as discussed above, the ALRB and the California Supreme Court have interpreted the ALRB's discretion to issue the make-whole remedy extremely broad and effectively deny California agricultural employer access to the judicial system.

C. The Equal Protection Rights of Agricultural Employers Who Seek to Challenge the Validity of the ALRB's Administrative Action Are Adversely Affected Insofar as the Only Means of Obtaining Judicial Review of the Employer's Objections Is by Refusing to Bargain, Which in Turn Exposes the Employer to Exorbitant Make-Whole Liability Just to Obtain a Declaratory Judgment

The threat of make-whole liability felt by the employer while it pursues its objections to the ALRA's administrative action constitutes an impermissible burden upon the right to judicial review and deprives the employer of equal protection of law. The burdens include the high cost of litigation in addition to the amount of the make-whole award, which in Tri-Fanucchi's case is estimated to be in the hundreds of thousands of dollars. In the present case, Tri-Fanucchi was faced with the unconstitutional burden of the dilemma of bargaining with a union that it in good faith believed was no longer the freely chosen representative of its employees or risk a substantial penalty for committing an unfair labor practice. The make-whole remedy thus impairs the important interest served by judicial review of unfair labor practice convictions in the ALRA as a check on arbitrary administrative action. Cal. Lab. Code § 1158. The right to judicial review "is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, p. 661 (1915).

In *Ex parte Young*, 209 U.S. 123 (1908), this Court considered a statue that required a railway to defy the maximum rates imposed by the governing commission in order to secure judicial review of those rates. Failure on appeal meant the railway would be subject to a felony charge and substantial penalties. This Court recognized that when a state legislature, "'in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.'" *Ex parte Young*, 209 U.S. 123, p. 146, citing *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, p. 102 (1872). In reaching its decision that the effect of the state at issue was to impose an unconstitutional burden upon the right to review, the Court observed that "to impose the burden of obtaining a judicial decision on such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts . . . ." *Ex parte Young*, 209 U.S. 123, p. 148.

This Court's holding in *Ex parte Young*, 209 U.S. 123 is equally compelling in the present case. Tri-Fanucchi's only means to secure judicial review of the ALRB's administrative position on what Tri-Fanucchi believed to be long term abandonment by the union was to refuse to bargain and become subject to an unfair labor practice, and thus make-whole liability. At the purported hearing on the unfair labor practice, the ALRB did not provide Tri-Fanucchi with an evidentiary hearing to contest whether the UFW was the rightful representative of its employees after years of abandonment. The ALRB provided Tri-Fanucchi no opportunity to produce evidence to support its position or explain its case at the hearing on its unfair labor practice charge. Instead, the ALJ treated the General Counsel's motion in limine as a motion to strike or a judgment on the pleadings related to Tri-Fanucchi's abandonment defense and related equitable defenses. CR 166-167. Tri-Fanucchi's only option to test the validity of the ALRB's abandonment holding was to obtain a judicial decision on the condition that if it was unsuccessful, it would be subject to enormous make-whole liability. As this Court concluded in *Ex parte Young*, when a law imposes damages "so severe as to intimidate the company . . . from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of the laws which deeply affect its rights." *Ex parte Young*, 209 U.S. 123, p. 147.

The ALRB and Supreme Court's application of the make-whole remedy also deprives an agricultural employer of equal protection on the laws of the State of California related to equal access to the court system. It is also an important distinction to note that California superior courts are courts of general jurisdiction, meaning that any person in California can bring a declaratory relief action asking the court to resolve questions related to the party's legal rights or obligations. Cal. Civil Code § 1060. In order for an agricultural employer to seek a judicial review as to his obligations under the ALRA, it is faced with the burden of a make-whole order that could reach hundreds of thousands of dollars. Such burdensome restraints on those who legitimately seek judicial resolution of administrative policy positions have a serious deterrent impact.

The make-whole remedy is also an unlawful impediment to an agricultural employer's First Amendment right to use litigation as a means for achieving lawful objectives. This court recognized in *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415 (1963) that seeking legal redress for what they believe to be infringements on their rights is a constitutionally guaranteed right. Judicial review of one's rights is a mode of expression protected by the First and Fourteenth Amendments. *Id.* at 429. Since the right to pursue legal redress by way of litigation is protected by the First Amendment, "it may not constitutionally be conditioned upon the payment of a tax or fee." *Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663, p. 665 (1966) [state law that conditioned the right to vote in state elections on payment of a tax was held to violate Equal Protection Clause]. The ALRA's make-whole remedy, along with the ALRB's broad application, cannot foreclose on the exercise of an agricultural employer's constitutional right to seek judicial review of its rights under the ALRA by conditioning such review on payment of the potentially excessively large make-whole liability.

This Court has routinely acknowledged the importance of judicial review as a check on arbitrary administrative action in the context of labor legislation. The imposition of make-whole relief undermines the purpose of the ALRA, and the NLRA, to promote collective bargaining by the employees' freely chosen representatives to the extent that it discourages employers from exercising their right to judicial review of arbitrary ALRB action. *J.R. Norton*, 26 Cal.3d 1, p. 33-34. As this Court expressed in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1979), "courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." *Id.* at p. 490. The ALRA also provides for review and enforcement of ALRB orders by the courts near duplicate to the NLRA regulations. Cal. Lab. Code § 1160.3, *see* NLRA § 10(c), 29 U.S.C. § 160(c).)

II. THE STATUTE PROVIDING THE ALRB WITH DISCRETION TO ISSUE THE MAKE-WHOLE REMEDY IS UNCONSTITUTIONAL PER SE AND AS APPLIED BY THE ALRB AS IT DEPRIVES AGRICULTURAL EMPLOYER'S OF DUE PROCESS OF LAW

A. The Make-Whole Remedy Under the ALRA Is Unconstitutional as Drafted in That It Denies Agricultural Employers of Meaningful Review in Violation of Due Process Standards

The Constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty and property. The Due Process Clause of the Fifth Amendment, ratified in 1791, restricts the powers of the federal government and applies only to actions by it. The Due Process Clause of the Fourteenth Amendment, ratified in 1868, declares, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" (§ 1).

Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved. *Hagar v. Reclamation Dist.*, 111 U.S. 701, p. 708 (1884). "Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by any public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Id.* at p. 708; *accord*, *Hurtado v. California*, 110 U.S. 516, p. 537 (1884).

The procedures under which the ALRB may order the make-whole remedy are constitutionally flawed. Although the ALRA purports that it does not impose automatic make-whole remedy in every situation the employer refuses to bargain, the ALRB's application and wide-spread use of the make-whole remedy demonstrates that agricultural employers are denied meaningful review consistent with due process standards. The ALRA requires the ALRB consider the appropriateness of the make-whole remedy before imposing it. Cal. Lab. Code § 1160.3. However, the ALRA sets forth no considerations the ALRB must analyze before ordering make-whole, thus giving the ALRB free-reign to issue make-whole whenever it chooses.

In *J.R. Norton*, the California Supreme Court attempted to temper the ALRB's wide-spread use of the make-whole remedy by establishing the standard for appropriateness, holding that the ALRB must determine from "the totality of the employer's conduct" whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in reasonable good faith. *J.R. Norton*, 26 Cal.3d 1, p. 39. This type of review guarantees that employers are provided an additional layer of process prior to the issuance of make-whole. However, the California Supreme Court changed its course in *Tri-Fanucchi*, now holding that the employer's rationale for challenging the ALRB's administrative position is not a consideration the ALRB must assess before awarding make-whole. *Tri-Fanucchi Farms*, 3 Cal.5th 1161, p. 1170. Instead, the only consideration is whether the ALRB believes the employer's litigation position furthers the policies and purposes of the act. *Id.* at p. 1170.

The fact that the ALRA does not require the ALRB to take into consideration the employer's rationale for seeking judicial review of its legal obligations before ordering make-whole makes the ALRA indistinguishable from the statue at issue in *Ex parte Young.* This Court has held that no *Ex parte Young* problem exists where instead of automatic penalties, the penalties depend on the party's rationale for challenging the administrative action. For example, in *Reisman v. Caplin*, 375 U.S. 440, pp. 446-447 (1964), this Court found that a tax statute requiring taxpayers to appear in court subject to contempt does not present an *Ex parte Young* issue because criminal sanctions and fines do not apply when summonses are contested in good faith. In *Thunder Basin Coal v. Reich*, 510 U.S. 200, p. 218 (1994), this Court determined the Mine Safety Act's procedures for imposing penalties were not comparable to *Ex parte Young* because the Act directs the Commission exercise discretion by considering several specifically enumerated factors before assessing penalties. The ALRA places no similar restraints on the ALRB when awarding make-whole.

The procedures for awarding the make-whole remedy under the ALRA violate agricultural employers' right to due process under the Fifth Amendment.

B. The Make-Whole Remedy as Applied by the ALRB Is Unconstitutional in That It Denies Agricultural Employers of Meaningful Review in Violation of Due Process Standards

This Court has stressed the dignitary importance of procedural rights is the worth of being able to defend one's interests even if one cannot change the result. *Carey v. Piphus*, 435 U.S. 247, pp. 266-67 (1978); *Marshall v. Jerrico, Inc.*, 466 U.S. 238, p. 242 (1980); *Nelson v. Adams*, 529 U.S. 460 (2000). The "Constitution does require [ ] an opportunity granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings . . . . In short, within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, pp. 378-379 (1971) [internal quotes and citations omitted].

Tri-Fanucchi was never afforded a proper opportunity to respond to the claim that make-whole was appropriate under the circumstances of this case. The ALJ granted the General Counsel's motion in limine, which he treated as a motion to strike or a judgment on the pleadings related to Tri-Fanucchi's abandonment defense and related equitable defenses. CR 166-167. Having rejected Tri-Fanucchi's asserted defenses to the duty to bargain, the ALJ refused to allow Tri-Fanucchi to have an evidentiary hearing, and held that Tri-Fanucchi's refusal to bargain and turn over information constituted unfair labor practices. TR 21: 13-22:7; CR 158. Without having provided Tri-Fanucchi an opportunity to defend its decision to seek judicial review of the ALRB's administrative action, the ALJ awarded make-whole on the sole basis that Tri-Fanucchi's abandonment defense was not justifiable in light of the very ALRB precedent that Tri-Fanucchi was challenging. CR 161. The ALRB rubberstamped the ALJ's determination, claiming the make-whole award was appropriate "[b]ased on [its] review of the facts and circumstances and equities in this case." (*Tri-Fanucchi Farms*, 40 ALRB No. 4, p.20 (2014).)

However, the undisputed record demonstrates that the ALJ nor the ALRB were aware of the facts and circumstances and equities of this case because Tri-Fanucchi was not provided an opportunity to present evidence. If given the opportunity to present any evidence at the hearing before the ALJ to defend against the award of make-whole, Tri-Fanucchi could have presented credible evidence to support its position that its refusal to bargain was in good faith and that it decision to challenge the ALRB's administrative precedent was based on an honest belief that the UFW's long-term abandonment of the bargaining unit proved it was no longer the freely chosen representative of its employees. If given the opportunity to be heard on its defense, the totality of the facts and circumstance and equities in this case may have changed the ALJ and the ALRB's determination of whether make-whole was appropriate.

As demonstrated by the procedural record in this case, the make-whole remedy as applied by the ALRB denied Tri-Fanucchi the most fundamental right of due process—the right to be heard in one's defense. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, p. 315 (1950). The mere gesture of a hearing without the opportunity to present a defense is not due process. *Ibid.*

CONCLUSION

As demonstrated herein, the ALRA make-whole award presents seriously constitutional defects that require examination by this Court. The threat of make-whole liability felt by the employer while it pursues its legitimate objections to the Board's administrative action constitutes an impermissible burden upon the employer's right to judicial review and deprives the employer of equal protection of law and due process. Furthermore, the ALRB's widespread and broad application of make-whole liability, coupled with its failure to provide the employer with a meaningful hearing to defend against make-whole, constitutes a breach of the employer's due process rights. For these reasons and more, the NLRB has refused to assert make-whole liability to employers refusing to bargain in violation of the NLRA.

Petitioner respectfully requests the Court grant this petition for review.

Respectfully submitted,

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