SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
DAVID A. SCHWARZ, Cal Bar No. 159376
dschwarz@sheppardmullin.com
BARBARA E. TAYLOR, Cal Bar No. 166374
btaylor@sheppardmullin.com
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067-6055
Telephone: 310.228.3700
Facsimile: 310.228.3701

BARSAMIAN & MOODY
A Professional Corporation
RONALD H. BARSAMIAN, Cal Bar No. 81531
ronbarsamian@aol.com
SETH G. MEHRTEN, Cal Bar No. 292843
smehrten@theemployerslawfirm.com
1141 West Shaw Avenue, Suite 104
Fresno, California 93711
Telephone: 559.248.2360
Facsimile: 559.248.2370

ROLL LAW GROUP P.C.
KRISTINA M. DIAZ, Cal Bar No. 151566
Kristina.Diaz@Roll.com
11444 W. Olympic Boulevard
Los Angeles, California 90064
Telephone: 310.966.8400
Facsimile: 310.966.8810

Attorneys for Wonderful Nurseries LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF KERN

WONDERFUL NURSERIES LLC,

Petitioner/Plaintiff,

v.

AGRICULTURAL LABOR RELATIONS BOARD; VICTORIA HASSID in her official capacity as Chair of the Agricultural Labor Relations Board; ISADORE HALL III, BARRY BROAD, RALPH LIGHTSTONE, and CINTHIA N. FLORES, in their official capacities as Members of the Agricultural Labor Relations Board; SANTIAGO AVILA-GOMEZ, in his official capacity as Executive Secretary of the Agricultural Labor Relations

Case No. _

VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR:

(1) VIOLATION OF DUE PROCESS (Facial Challenge) [Cal. Const., art. I, § 7, U.S. Const., amend. XIV]) - Causes of Action 1-2;

(2) VIOLATION OF DUE PROCESS (As Applied Challenge) [Cal. Const., art. I, § 7] – Cause of Action 3;

(3) VIOLATION OF SEPARATION OF POWERS & JUDICIAL POWERS

Board; YESENIA DE LUNA, in her official capacity as Regional Director of the Agricultural Labor Relations Board; and DOES 1 through 100 inclusive,

Respondents/Defendants,

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

CLAUSE (Cal. Const., art. III, § 3 & art. VI, § 1) – Cause of Action 4;

(4) VIEWPOINT DISCRIMINATION (Cal. Const., art. I, §§ 2(a) & 3 , U.S. Const., amend. I) – Causes of Action 5-6;

(5) VIOLATION OF THE RIGHT TO SECRET BALLOT (Cal. Const., art. II, § 7) – Cause of Action 7;

(6) WRIT OF MANDATE (Code Civ. Proc. §§ 1085, 1094.5 and/or 1102) – Cause of Action 8;

(7) DECLARATORY RELIEF (Code of Civ. Proc. § 1060) – Cause of Action 9

TABLE OF CONTENTS

Petitioner and Plaintiff Wonderful Nurseries LLC ("Wonderful" or "Petitioner") for its Verified Petition and Complaint alleges as follows:

I. INTRODUCTION

1. This action challenges 2023 amendments to California law that radically change the process for recognizing unions as the exclusive bargaining representative of agricultural workers. Unions no longer need participate in genuine, secret ballot elections. Instead, they may privately collect and submit "authorization cards" with workers' signatures as proof of majority support. As long as the union presents cards signed by the sufficient number of current employees, the union is certified by the State as the employees' exclusive bargaining agent. Neither the employer nor *even the employees themselves* may challenge the validity of the cards or the integrity of the process by which they were collected before the union is certified. Because the statute withholds from the employer the evidence of proof of majority support, the employer cannot meet its burden to overcome the presumptive validity of the cards in any post-certification objections hearing, since it cannot rebut what it cannot see.

2. The 2023 amendments *require* the California Agricultural Labor Relations Board (the "Board" or "ALRB") to immediately recognize a union based on a showing that at least 50 percent of current employees during "peak season" signed authorization cards. (Lab. Code §§ 1156.37, subd. (a), (b)(1).). Section 1156.37 refers to this as a "majority support election." (*Id.*, at § 1156.37, subd. (f)(1)). To our knowledge, this so-called "Majority Support Petition" ("MSP") process is the only State-mandated "election" procedure that allows a candidate to exercise unfettered and unsupervised control over the solicitation, gathering, and casting of "ballots."

3. Under the MSP statutory scheme, the union is certified *before* the employer has any opportunity to object to the Board's expedited, *ex parte* determination of majority support. The certification is based on the ALRB Regional Director's "Tally Report," which reflects nothing more than a perfunctory comparison of the names on the authorization cards and the employer's current payroll roster. This "certify first, investigate

later" approach inverts the secret ballot election process, whereby a union will not be recognized as the workers' bargaining representative until (a) an election is conducted, (b) the ballots are counted, and (c) any objections to the election itself (or individual ballot challenges) are resolved through an evidentiary hearing conducted by the Board before any decision is made to certify or not certify the union. (Compare Lab. Code § 1156.3 *et seq*.)

4. The absence of pre-enforcement review has immediate consequences. If the union submits cards on behalf of a nominal majority, the union is recognized and the employer must promptly negotiate a collective bargaining agreement, or "CBA." Otherwise, the Board shall impose one, pursuant to a compulsory contracting process known euphemistically as "Mandatory Mediation and Conciliation," or "MMC," codified as Labor Code section 1164 *et seq*. Judicial review of the terms of the state-dictated agreement is strictly circumscribed.

5. As a matter of law, no matter how strong the employer's challenge to the validity of the cards or how the union solicited signatures, the recognition of the union may not be stayed pending discretionary administrative review of the employer's challenges. Even where review is granted, the union's recognition is presumed to be correct, because the Board's majority support findings are deemed "final," and by statute are immunized from judicial review.

6. The facts of this case demonstrate the constitutional folly of certifying a union with ***no*** investigation of the proof of majority support. In this case, the respondent union ***alleged*** that it had collected and submitted cards signed by a razor-thin majority (51%, or seven cards) of Wonderful's current employees. The union was able to make that showing only by persuading the Board's Regional Director to exclude certain employees as members of the bargaining unit.

7. In response, Wonderful promptly submitted over 140 declarations (over 20% of all current employees) stating unambiguously that they did *not* wish to be represented by the union. Many stated that they had been led to believe that signing the cards was necessary to recover $600 in federal COVID-19 relief funds of which they were

already entitled. Others stated that UFW representatives told them their signatures would *not* to be used to install the union against their wishes. Virtually every declarant told the Board that they did not want the UFW to bargain on their behalf. But the Regional Director deemed all that evidence irrelevant as a matter of law and beyond the scope of its authority to do anything under the new statutory scheme, which precludes any pre-certification challenge to the cards' validity.

8. The Board specifically recognized that the declarations raised significant concerns about whether the cards submitted by the union in fact demonstrate majority support but refused to stay the effectiveness of the union's certification – and the process and deadlines imposed on employer that compel it to enter into negotiations with the union or to have an agreement imposed upon it by administrative fiat – pending the Board's review of that question through an administrative evidentiary hearing.

9. By interposing the union between the farm owner and its farm workers, the certification fundamentally alters virtually every aspect the employer-employee relationship – including hiring, firing, layoffs, seniority rights, grievance and arbitration procedures, the right to boycott or strike, or even whether the employer must fire a farm worker should he refuse to pay union dues or agency fees. The grant of bargaining exclusivity empowers the union to subordinate the individual rights of workers to the collective interests of the bargaining unit. Where a union enjoys majority support, the State can claim that the sacrifice of individual workers' labor rights is necessary to enable the union to promote the best interests of the general workforce. There is every indication here, however, that the UFW does not enjoy majority support. Quite the contrary, the workers have never had an opportunity to cast a secret ballot vote, and have been barred from intervening in these proceedings. (See Exhibit 28.)

10. Wonderful now is facing the prospect of being ordered into MMC 90 days after the UFW's initial demand to bargain, or as soon as by **June 3, 2024**.[1] Yet, the Board has repeatedly rebuffed Wonderful's requests to stay that deadline, even after administratively delaying the evidentiary hearing on Wonderful's election objections for over a month. According to the Board, the MSP statute does not give it the discretion to stay the certification. (See Exhibit 15, at p. 6; see also Exhibits 27 & 28.)

11. The MSP statute scheme violates the federal and state constitutions, including the right of both the employer and its farm workers not to be compelled to associate with a union not legitimately chosen by a majority of its employees. Most immediately, it deprives employers of due process, including the right to a pre-deprivation hearing into the merits of the union's claim to majority support ***before*** being compelled into a State-imposed collective bargaining "agreement." Having been compelled into a constitutionally unlawful procedure that imposes a constitutionally illegitimate certification, Wonderful has no meaningful way to obtain plain, speedy, or complete relief other than through an order of this Court declaring that, on its face, section 1156.37 is unconstitutional.

12. There are other infirmities well. The statute violates the state constitutional mandate of a secret election. The limited form of post-deprivation judicial review – including the barriers to judicial review and the prohibition on reviewing the state's determination that the cards show majority support – violates both due process and the separation of powers, as an unconstitutional seizure of judicial power.

---

[1] If the employer fails to enter into CBA within 90 days after the union's initial demand to bargain, the Board must order the employer into MMC at the union's request, wherein the Board will dictate the terms of that "contract" by arbitral decree, ***even if the union never engages in any negotiations*** (as is, to date, the case here). The MMC contract is immediately enforceable, and is subject only to discretionary and limited Board and judicial review. As a condition to appeal the Board's final order, the employer must post a bond equal to the "entire economic value" of the MMC contract. Should the certification later be revoked and the MMC contract voided, the MMC statute provides the employer no remedy at law for compensatory damages.

13. Wonderful has a "beneficial interest" in obtaining a judicial determination, including "whether it will be subject to an unfair labor practice complaint should it refuse to bargain with the union" and whether it is subject to the "many other obligations under the agreement which would be affected should the union be []certified." (*Cadiz v. Agricultural Labor Relations Bd.* (1979) 92 Cal.App.3d 365, 379-80; see also Code Civ. Proc. § 1086.) Wonderful is no more required to wait until its injury is fully realized than it may be compelled to submit to an unconstitutional procedure in the first place.

14. Accordingly, Wonderful respectfully requests that the Court: *First*, grant Wonderful's petition for a writ of mandamus and/or a writ of prohibition, directing Respondents (**a**) to stay the underlying MSP proceedings, *In the Matter of Wonderful Nurseries LLC (Employer), and United Farm Workers of America (Petitioner)*, ALRB Case No. 2024-RM-002 (Mar. 4, 2024) (the "Election Proceedings"); (**b**) to suspend the legal effect of the "Certification of Investigation of Validity of Majority Support Petition and Proof of Support," issued in the Election Proceedings (the "Certification"); (**c**) to cease and desist from initiating or continuing any proceedings pursuant to section 1156.37, or in the alternative, to issue an alternative writ to require Respondents to reverse its Order denying Wonderful's Motion to Stay the Certification, or to show cause on or before **June 3, 2024**, why it has not.

15. *Second*, to grant Wonderful preliminary and permanent injunctive relief, and a judgment declaring (**a**) Labor Code section 1156.37 violates the Due Process Clause of the California and U.S. Constitutions; (**b**) Labor Code section 1156.37(e)(2) violates the separation of powers, Cal. Const., art. III, § 3, the Judicial Powers Clause, Cal. Const., art. VI, § 1, Cal. Const., art. I, § 2(a), § 3, and the U.S. Const., First and Fourteenth Amendments; (**c**) the MSP statute violates the right to ballot secrecy, Cal. Const., art. II, § 7; and (**d**) Labor Code section 1156.37 generally, and section 1156.37(e)(2) in particular, each being constitutionally invalid, cannot be severed from the remainder of section 1156.37, thus requiring the entire statute to be declared unconstitutional.

II. THE PARTIES

16. Petitioner and Plaintiff Wonderful Nurseries LLC is a Delaware limited liability company with agricultural operations in Wasco, Shafter, and McFarland, California, all of which are in Kern County. Wonderful Nurseries produces grapevines and trees for sale to commercial agricultural producers through cane cutting, bareroot vine harvesting, grafting, potting, irrigation, sorting and grading, shipping, and more. The UFW designated farm workers performing work for Wonderful Nurseries LLC as the bargaining unit for purposes of its MSP "election."

17. Respondent and Defendant California Agricultural Labor Relations Board is a state agency with its principal office in Sacramento, California.

18. Respondent Victoria Hassid is Chairperson of the ALRB. Isadore Hall III, Barry Broad, Ralph Lightstone, and Cinthia N. Flores are members of the ALRB. In their official capacities, each member of the Board is responsible for the exercise of statutory powers vested in the Board, *inter alia*, "to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists, to direct an election by a secret ballot pursuant to the provisions of Chapter 5 (commencing with Section 1156), and to certify the results of such election, or to certify a labor organization pursuant to Section 1156.37 and to investigate, conduct hearings and make determinations relating to unfair labor practices." (Lab. Code § 1142, subd. (b).)

19. Santiago Avila-Gomez is Executive Secretary of the ALRB. The Executive Secretary is appointed by the Board, and has been delegated by the Board "such powers as it deems appropriate" to perform its statutory functions in connection with the administrative determinations, certification, and investigation of the MSP. (Lab. Code §§ 1142, subd. (b), 1145.) On behalf of the Board, Executive Secretary Avila-Gomez issued and signed on March 4, 2024 the certification of the UFW. (See Exhibit 10.)

20. Yesenia De Luna is a Regional Director of the Board. The Regional Director is appointed by the Board, and has been delegated by the Board "such powers as it deems

appropriate" to perform its statutory functions to investigate and to make findings and determinations under section 1156.37(e), subject to Board review. (Lab. Code §§ 1142, subd. (b), 1145.)

21. Each of these individuals is named in his or her official capacity as Board members, officers, or personnel of the ALRB.

22. The true names and capacities of defendants DOES ONE through ONE HUNDRED are unknown to Petitioner, and Petitioner will seek leave of court to amend this Petition and Complaint to allege such names and capacities as soon as they are ascertained.

23. Real Party in Interest United Farm Workers of America is a labor organization, as that term is defined in Labor Code section 1140.4(f), with its principal place of business in Keene, California, in the County of Kern in the State of California.

III. JURISDICTION AND VENUE

24. This Court has jurisdiction over this action pursuant to Code of Civil Procedure sections 526 (injunction), 1085 *et seq.* (writ of mandate), 1060 *et seq* (declaratory relief), and 1102 *et seq*. (writ of prohibition).

25. Although Board certification orders are not subject to direct judicial review, there are recognized exceptions. (See Lab. Code § 1158; *Nishikawa Farms, Inc. v. Mahony* (1977) 66 Cal.App.3d 781; *Cadiz, supra,* 92 Cal.App.3d 365.) Two exceptions apply here: (1) "'substantial showing that Board action has violated the constitutional rights of the complaining party'"; and (2) "'the fact of a statutory violation cannot be seriously argued and where the deviation resulted in a deprivation of a 'right' guaranteed by the Act.'" (*Nishikawa Farms, supra,* 66 Cal.App.3d at p. 788, quoting *Boire v. Miami Herald Publishing Co.* (5th Cir. 1965) 343 F.2d 17, 21.)

IV. STATUTORY BACKGROUND

A. The Pre-Amendment Statutory Scheme

26. Since its enactment in 1975, the ALRA made 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 ballot election. (Lab. Code § 1153, subd. (f)). The statutory scheme reflects the state constitutional right to a secret ballot. (Cal. Const., art. II, § 7 ["Voting shall be secret."].)

27. "A secret ballot election under the ALRA is intended to embody and reflect the workers' fundamental right to choose concerning a question of representation. That right is at the heart of what the ALRA is designed to protect and promote." (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2018) 23 Cal.App.5th 1129, 1240 (*Gerawan II*), citing *J.R. Norton, supra,* 26 Cal.3d at p. 30.) Under this settled regime, challenges to an election were resolved ***prior*** to recognition of the union, (Lab. Code § 1156.3 *et seq*.), to assure farm workers, employers, and the public that the choice of representative truly reflects the will of the majority, as opposed to a collusive arrangement between an employer and a union of its choosing.[2]

28. The NLRA also mandates that the certification of a union must be based on the results of a secret ballot election. (See NLRA, 29 U.S.C. § 159, subd. (c) ["[I]f … a question of representation exists, [the Board] shall direct an election by secret ballot and shall certify the results thereof."].) Section 9(c) of the NLRA reflects Congress' longstanding view that an election is "the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." (*NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 602-603 (*Gissel*).)

[2] To obtain a secret ballot election, the petitioning union was required to make a "showing of interest" that a majority of the currently employed employees during the "peak season" of employment desired an election. (Lab. Code § 1156.3 subd. (a); *Gerawan Farming II, supra*, 23 Cal.App.5th at p. 1142.) This "is merely an administrative screening mechanism to assist the Board in determining whether there is a bona fide question of representation that would warrant the time and expense of conducting an election." (*Id.*, at p. 1231, citing *Nishikawa Farms, supra*, 66 Cal.App.3d at p. 793.) Because "it is the election which decides the substantive issue whether or not the union or another labor organization, if any, actually represents a majority of the employees involved in a representation case," (*Nishikawa Farms* at p. 791, cleaned up), the Board does not "look behind the signatures on the petition, to determine if they really represented the employees' wishes." (*Gerawan II*, *supra*, at p. 1231, fn. 117.)

29. In stark contrast, "card check" allows the unsupervised solicitation of unverified card signatures alleged to reflect majority assent to union representation. In a secret election, employees make their decision in private – apart from both representations by and the prying eyes of their employer and union officials.

30. Because of the prospect that card checks would not in fact correctly reflect employees' intentions, they have long been strongly disfavored in labor law. "We would be closing our eyes to obvious difficulties" presented by so-called "card check" methods of union recognition "if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes."(*Gissel, supra,* at p. 604.)

31. While card authorizations signed by a majority of the bargaining unit is a means for employers to *voluntarily* recognize a union under the NLRA, "card check" has never been used as a substitute or alternative to a secret ballot election under the federal scheme. Even then, the Supreme Court acknowledged the necessity of investigating any "alleged irregularity in the solicitation of the cards" *before* an employer may be ordered to recognize and to bargain with a union. (*Id*., at p. 602-03.) Thus, an employer may not be compelled to bargain with a union "simply because he refused to rely upon cards, rather than an election, as the method of determining the union's majority." (*Aaron Bros. Co.* (1966) 158 NLRB 1077, 1078.)

32. More to the point, the California Supreme Court has held that while card authorizations may be used to demonstrate majority support in order to certify a union where employer misconduct renders slight the possibility of a free and fair rerun election, the employer is entitled to pre-deprivation review of that evidence. It has the right to ask questions to determine the authenticity of signatures to challenge their validity *before* it is ordered to recognize and bargain with the union. (See *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 233 (*Harry Carian*) ["Evidence of a card majority is clearly both material and relevant to the propriety of a bargaining order and therefore the authorization cards

were properly admitted into evidence."]; see also *id*. at p. 233, fn.19 ["[Employer] vigorously litigated the validity of the cards at the hearing [and] also had full opportunity to challenge both the validity of the cards . . . in its exceptions to the ALJ's decision. Under these circumstances, [employer] was not denied due process."].)

B. The 2023 Amendments (aka "Card Check")

33. In 2023, the Legislature amended the Act to (1) impose card check as an alternative to the secret ballot election, and (2) to eliminate the adjudication for pre-recognition challenges.

(1) The MSP Certification Process

34. Pursuant to subdivision (a) of section 1156.37, "[a] labor organization may become the exclusive representative . . . by filing a Majority Support Petition … alleging that a majority of the employees . . . wish to be represented by that organization." The Majority Support Petition must allege (1) that the number of farm workers currently the current calendar year;" (the "peak season" requirement) (2) that no representation election has been conducted among the employer's farm workers within the last 12 months (the "election bar"); and (3) that the employer is not currently a party to an existing CBA (the "contract bar"). (Lab. Code § 1156.37, subd. (b).)

35. The "proof of majority support" is based on a comparison of "authorization cards, petitions, or other appropriate proof of majority support of the currently employed employees, as determined from the employer's payroll immediately preceding the filing of the Majority Support Petition." (Lab. Code § 1156.37, subd. (c).) Within 48 hours after personal service of the MSP, the employer must provide "a complete and accurate list of the full names, current street addresses, telephone numbers, job classifications, and crew or department of all currently employed employees in the bargaining unit employed as of the payroll period immediately preceding the filing of the petition." ((Lab. Code § 1156.37, subd. (d).)

36. The MSP statute itself is silent as to the procedures, safeguards, or protections regarding the solicitation, collection, or authentication of authorization cards.[3] The MSP statute does not require that the authorization card be dated, or place any time limits or expiration date on the validity of the authorization. It does not require the employee to identify his or her employer. Other than to expressly authorize the union to solicit and collect authorization cards or petition signatures, section 1156.37 provides *no* checks on the solicitation of authorizations, the form or content of the card, the authentication of signatures (for example, by notarization), or any requirement to disclose the legal consequences of signing.

37. Upon receipt of the MSP, the Board is required to "immediately commence an investigation regarding the validity of the petition and the proof of support submitted," in order to "make an administrative determination" within five days receipt of the MSP as to whether the labor organization has provided proof of majority support. (Lab. Code., § 1156.37, subd. (e)(1).)[4] The statute states: "In making this determination, the board shall

[3] In contrast, secret ballot elections "shall be conducted under the supervision of the appropriate regional director, (Regs., § 20350, subd. (a)); the parties may, subject to timely objection, designate election observers of their own choosing, (*id*., § 20350, subd. (b)), provided that they must be non-supervisory employees of the employer, and that they do not engage in any campaign activities. (*Ibid*.). Eligibility requirements and ballot challenges are also subject to detailed rules, including the grounds to dispute the eligibility of any person to cast a ballot, (*id*., § 20355, subd. (a)), such as whether the "prospective voter was employed or the prospective voter's employment was willfully arranged for the primary purpose of voting in the election in violation of Labor Code section 1154.6." (*Id*., § 20355, subd. (a)(4)). These procedures describe the process for determining whether a prospective voter may be given a ballot, as well as the sequestration of challenged ballots. (See generally *id*., §§ 20355, 20360.).

[4] The abbreviated time frame and in the narrow focus of the investigation underscores the expedited, summary nature of the certification process. On the other hand, the statute does not specify an "expiration" date for the use of the cards. The only reference in the statute concerning the dating of the cards relates to situations where two or more labor organizations are seeking to represent the same bargaining unit through a Majority Support Petition. Per section 1156.37, subdivision (i), "the most recent proof of support shall prevail." It is unclear how this applies where both unions submit cards signed over a period

compare the names on the proof of support submitted by the labor organization to the names on the list of currently employed employees provided by the employer." (*Ibid*.) The only "investigation" required is to count up the cards.

38. Under the MSP procedures, the union's one-sided, untested, *ex parte* proffer of "majority support" is *conclusive* for purposes of issuing the certification. There is no right to a "post-election" hearing, unless the objecting party meets its "heavy burden" of showing not only "an error, impropriety, or misconduct occurred sufficient to warrant revocation of the labor organization's certification," but that the improprieties "were 'sufficiently material to have affect the outcome of the process." (Ex. 15, at p. 10].)

39. The statute does not require that only original cards be submitted in support of the petition, making the detection of forgeries especially problematic. The only mention of "discrepancies" regarding the identity of card signatories is that they may be *ignored* by the Board, so long as the name on the card can be matched with other information on the employer's current payroll roster, or other "evidence submitted by the *labor organization* or employee." (Lab. Code § 1156.37, subd. (e)(1), emphasis added.)[5] The only "misconduct" expressly mentioned in the MSP statute is *employer* misconduct that "would render slight the chances of a new majority support campaign reflecting the free and fair choice of employees." (Lab. Code § 1156.37, subd. (j).)

40. Under the MSP procedures, the union is certified ***before*** the employer has any opportunity to object to the Board's determination of majority support. The MSP

---

of time, or would take into whether the more "recent" signatures are of dubious origin or were obtained by unlawful means.

[5] To take one example: 36 employees on Wonderful's current employee roster are named Hernandez, and 26 are named Marquez. The risk of misattributing a signature by a former (or seasonal) Wonderful employee or third party contract laborer with the same name is not insignificant. The risk of misidentifying (or misrepresenting) a signatory is reduced dramatically where the employer is permitted to examine the cards and to authenticate the signatures through handwriting exemplars or testimony, as is permitted under the NLRA. The MSP statute forecloses the ability of the employer or the IHE to test the authenticity of these signatures, because section 1156.37(e)(2) ostensibly bars disclosure of the identity of the card signature to the employer as well as to other employees. (See Ex.

"election" itself is a summary, highly expedited, *ex parte* procedure. There is no pre-certification hearing. The employer (unlike the union) is not permitted to inspect the union's proof of majority support. The only information provided is the Regional Director's "Tally Report," which is based on a simple numerical comparison of the signatures on the authorization cards and the names on the employer's current payroll roster.

41. The Board has not adopted implementing regulations for Labor Code section 1156.37, though concedes the need for such rules.[6] The MSP statute itself is silent as to the procedures, safeguards, or protections regarding the solicitation, collection, or authentication of authorization cards.[7]

(2) The Effect Of Certification

42. The certification also triggers an expedited compulsory contracting process, known as Mandatory Mediation and Conciliation ("MMC"). (Lab. Code § 1164 *et seq*.) If the employer fails to enter into collective bargaining agreement ("CBA") within 90 days after the union's initial demand to bargain, the union may compel the employer into MMC, wherein the Board will dictate the terms of that "contract" by arbitral decree, *even if the*

[6] On March 8, 2024, the Office of Administrative Law ("OAL") published Notice of Rulemaking Action by the Board, commencing the 45-day public notice and comment period regarding draft regulations issued by the Board on October 4, 2023. (Cal. Reg. Notice Register, 2024, No. 10-Z, p. 249 [Exhibit 13].)

[7] In contrast, secret ballot elections "shall be conducted under the supervision of the appropriate regional director, (Regs., § 20350, subd. (a)); the parties may, subject to timely objection, designate election observers of their own choosing, (*id*., § 20350, subd. (b)), provided that they must be non-supervisory employees of the employer, and that they do not engage in any campaign activities. (*Ibid*.). Eligibility requirements and ballot challenges are also subject to detailed rules, including the grounds to dispute the eligibility of any person to cast a ballot, (*id*., § 20355, subd. (a)), such as whether the "prospective voter was employed or the prospective voter's employment was willfully arranged for the primary purpose of voting in the election in violation of Labor Code section 1154.6." (*Id*., § 20355, subd. (a)(4)). These procedures describe the process for determining whether a prospective voter may be given a ballot, as well as the sequestration of challenged ballots. (See generally *id*., §§ 20355, 20360.).

union never engages in any good faith negotiations (as is, to date, the case here). The MMC contract is immediately enforceable, and is subject only to discretionary and limited Board and judicial review. As a condition to appeal the Board's final order, the employer must post a bond equal to the "entire economic value" of the MMC contract. Should the certification later be revoked and the MMC contract is voided, the MMC statute provides the employer no remedy at law for compensatory damages.

43. As a "bargaining tool," the threat of MMC is intended to exert pressure on an employer to either make bargaining concessions, or to have the contract terms imposed by force of law. (*Gerawan Farming, Inc. v. ALRB* (2017) 3 Cal.5th 1118, 1153 (*Gerawan I*). Short of conceding to the union's bargaining demands, there is no statutory mechanism by which the employer may opt-out or to avoid its coercive effects. The possibility that the union certification may eventually be revoked is of little consequence in light of MMC's immediate impact on the associational rights of Wonderful or its farm workers, "for the value of a sword of Damocles is that it hangs—not that it drops." (Cf. *Arnett v. Kennedy* (1974) 416 U.S. 134, 231 (dis. opn. of Marshall, J.).)

(3) The "Majority Support" Determination

44. Upon receipt of the MSP, the Board is required to "immediately commence an investigation regarding the validity of the petition and the proof of support submitted," in order to "make an administrative determination" within five days receipt of the MSP as to whether the labor organization has provided proof of majority support. (Lab. Code., § 1156.37, subd. (e)(1).)[8] The statute states: "In making this determination, the board shall

[8] The abbreviated time frame and in the narrow focus of the investigation underscores the expedited, summary nature of the certification process. On the other hand, the statute does not specify an "expiration" date for the use of the cards. The only reference in the statute concerning the dating of the cards relates to situations where two or more labor organizations are seeking to represent the same bargaining unit through a Majority Support Petition. Per section 1156.37, subdivision (i), "the most recent proof of support shall prevail." It is unclear how this applies where both unions submit cards signed over a period of time, or would take into whether the more "recent" signatures are of dubious origin or were obtained by unlawful means.

compare the names on the proof of support submitted by the labor organization to the names on the list of currently employed employees provided by the employer." (*Ibid.*) The only "investigation" required is to count up the cards.

45. Section 1156.37(e)(2) requires that the Board return to the petitioning union "invalid" authorization cards "with an explanation as to why each proof of support was found to be invalid." (Lab. Code § 1156.37, subd. (e)(2).) "If the board determines that the labor organization has not submitted the requisite proof of majority support, the board shall notify the labor organization of the deficiency and grant the labor organization 30 days from the date it is notified to submit additional support." (*Ibid.*) "If the board determines that the labor organization has submitted proof of majority support . . . , it shall immediately certify the labor organization." (*Id.*, § 1156.37, subd. (e)(1).) This immediately triggers the employer's duty to bargain, (see *id.*, § 1156.37, subd. (e)(3).) Citing subdivision (e)(3), the Board has rejected Wonderful's requests for a stay (or, alternatively, that the Board suspend the running of the time period before the union may invoke MMC), because section 1156.37 "creates no process by which to stay the certification," or provides any "mechanism for a party to request the Board stay the certification," it is "unable to refuse to give effect to the process set forth in statute by the Legislature." (*See* Exhibit 15.)

46. Section 1156.37(e)(2) states that "the board's determination of whether a particular proof of support is valid shall be final and not subject to appeal or review" by precluding judicial review of the Board's finding of majority support as well as judicial review of the proof *itself* "[t]o protect the confidentiality of the employees whose names are on authorization cards or a petition." (Lab. Code, § 1156.37, subd. (e)(2).) According to the Board, the cards are confidential and are exempt from disclosure. (See Ex. 34.) Moreover, the Board takes the position that the employees themselves are not entitled to

know whether their own authorization cards were deemed by the Board to be "valid" proof of majority support. (*Id*.)[9]

(4) The Post-Certification MSP "Election" Objection Hearing

47. Pursuant to subdivision (f) of section 1156.37, within five days after the majority support election is certified, "any person" may object to the certification on one or more of four grounds. (Lab. Code § 1156.37, subd. (f)(1).) These include: the majority support election "was conducted improperly," (*id*., § 1156.37, subd. (f)(1)(C), and "[i]mproper conduct affected the results of the majority support election." (*Id*., § 1156.37, subd. (f)(1)(D).)[10] The Board may revoke the certification if it finds that any of these allegations are true. (*Id*., § 1156.37, subd. (f)(2).)[11]

48. "Upon receipt of a petition objecting to certification, the board may administratively rule on the petitioner's objections or may choose to conduct a hearing to rule on the petitioner's objections." (Lab. Code § 1156.37, subd. (f)(2).) The Board is required ("shall conduct") the hearing within 14 days of the filing of an objection, "unless an extension is agreed to by the labor organization." (*Ibid*.) The MSP procedures to not specify by when the hearing must be completed, by when the hearing examiner must submit his or her findings of fact and conclusions of law, or when the Board must rule on any exceptions to the IHE's report.

---

[9] The Board has thus far refused to even rule on Wonderful's April 18, 2024 request to review the authorization cards it deemed to be the "valid" proof of majority support. (See Ex. __; see also Ex 29 [Board directing request to be filed with the IHE].)

[10] The two other are "(A) Allegations in the Majority Support Petition were false;" and "(B) The board improperly determined the geographical scope of the bargaining unit."

[11] However, the statute also provides an alternate route a labor organization to be designated as the exclusive representative, even where its certification is revoked. Under section 1156.37(j), a union may still be certified if employer misconduct during the union's MSP "campaign" "would render slight the chances of a new majority support campaign reflecting the free and fair choice of employees." The statute does not define the term "Majority Support Petition campaign" or provide any guidelines as to when that "campaign" is deemed to have started, or how it is to be conducted.

49. The MSP statute does, however, explicitly state that post-certification proceedings "shall not diminish the duty to bargain or delay the running of the 90-day period" between the union's initial demand to bargain and its right to invoke the MMC process, pursuant to Labor Code section 1164(a). (Lab. Code § 1156.37, subd. (f)(3).)

(5) The Post-Certification MSP "Election" Objection Hearing

50. The 2023 amendments also require that as a condition to obtain judicial review of a final Board order where a monetary remedy is imposed pursuant to Labor Code section 1160.8, an employer (but not a labor organization) "shall first post a bond with the board in the amount of the entire economic value of the order." (Lab. Code § 1160.11, subd. (a).)

51. The amendments also added section 1160.10, which permits the Board to impose civil penalties up to $25,000 or each unfair labor practice violation by an employer *and* to impose personal liability on the employer's directors or officers under specified circumstances. The civil penalty provisions and bond requirements apply only to employers, not unions, even though the ALRA expressly prohibits certain unfair labor practices by labor organizations. (See Lab. Code § 1154.)

52. The certification following the objections hearing process is not normally subject to direct judicial review. (*J.R. Norton, supra*, 26 Cal.3d at p. 18.) An employer who wishes to challenge the order certifying the union must first engage in a "technical refusal to bargain," in violation of section 1153(e). (*Id.*, at p. 28.) Once the Board finds the employer has committed an unfair labor practice and enters an order requiring it to cease and desist from the practice, the order is subject to judicial review pursuant to Labor Code section 1160.8. That section explicitly permits an election to be "reviewed as provided in section 1158." In other words, the employer must risk significant financial penalties, as

well as endure substantial delay, to challenge the Board's refusal to revoke the certification. [12]

V. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The UFW's MSP "Campaign" To Induce Card Signatures

53. On information and belief, the UFW began to collect signatures from Wonderful's workers on or before May 15, 2023.

54. As stated by over one hundred Wonderful workers who signed sworn declarations ("Employee Declarants"), in furtherance of that campaign, UFW organizers went to worker's homes and invited workers to meetings. Employee Declarants specifically identified Erika Navarette, a UFW Third Vice-President, as leading meetings where misrepresentations were made to workers to induce them to sign authorization cards, in some instances by Ms. Navarette herself. (The UFW has confirmed her involvement in signature gathering in pleadings filed with the Board. (*See* Exhibit **, p. 5, fn. 2.)

55. Employee Declarants stated that to induce them to sign authorization cards, UFW organizers made misrepresentations, and in some cases encouraged signatures to be forged. Based on the 140+ sworn declarations submitted to the Regional Director (the "Employee Declarants") more than one-third of the authorization cards submitted by the UFW were obtained based on misrepresentations and/or omissions by union representatives as to the intended use of these cards.

[12] As the California Supreme Court has explained, "deleterious delays in bargaining would be more likely to occur if direct judicial review of [ALRB] determinations were permitted [citations]. It would thwart the purpose of this review procedure if the employer could altogether circumvent it by raising frivolous challenges to elections before courts reviewing final NLRB or ALRB orders, without any risk of being held liable for the losses to employees that result therefrom." (*J.R. Norton Co., supra*, 26 Cal.3d at pp. 32-33.) These concerns, of course, presuppose that the underlying election was conducted pursuant to procedural and substantive safeguards, and that the objecting parties were permitted a chance to challenge the results *before* the union was recognized.

56. Over 100 Employee Declarants stated that the UFW had obtained their signatures based on UFW representatives telling them that their signatures were needed to obtain or confirm a $600 payment. However, this one-time relief payment of $600 was already available to agricultural workers under the USDA Farm & Food Worker Program.

57. Some Employee Declarants stated that a UFW representative expressly told them or led them to believe that they needed to provide their signature to receive money for COVID relief.

58. Employee Declarants stated that during the process of obtaining signatures, UFW representatives falsely assured workers that their signatures were only going to be used to obtain funds and were not a vote for the union.

59. Some Employee Declarants reported that the UFW, after obtaining their signature to enable them to procure the $600, requested that they sign further documentation to obtain a "rainy day fund" of $1,500; in some cases after obtaining signatures for the alleged $1,500 fund, the UFW informed workers that they did not qualify for the fund or the fund was no longer available.

60. Three Employee Declarants stated that the UFW induced signatures to be forged: (1) a UFW representative came to the worker's home while he was away and told the worker's wife to sign the authorization card for him; (2) a UFW representative when to the home of a couple who worked for Wonderful, and had the wife sign an authorization card for herself and for her husband, telling her to "sign differently" than her own signature on her husband's card; and (3) a UFW representative waited outside the home of a couple who were Wonderful workers and told the wife to sign one card for herself and one for her husband.

61. Over 100 Employee Declarants stated they wanted to revoke their cards or did not want the UFW to represent them.

62. Some Employee Declarants reported that the UFW harassed them in an effort to obtain their signature, saying they felt threatened by, intimidated by, scared of, and/or stalked by the UFW.

63. Some Employee Declarants stated they had contact with Board personnel ***prior*** to certification to express concerns about the cards they had signed.

B. The "Tally" Proceedings

64. On Friday, February 23, 2024, at approximately ___ p.m., the UFW filed with the Board a MSP, alleging that there were 350 employees in the bargaining unit, and that the MSP was "accompanied by evidence of support by a majority of the employees currently employed in the unit as required by Section 1156.37(c) of the Act." (Exhibit 1.) According to the Regional Director, "[a]ccompanying the MSP, the UFW submitted 423 authorization cards." (Exhibit 8.) The RD advised that Wonderful's Response would be due on Monday, February 26, 2024.

65. On Monday, February 26, 2024, Wonderful filed its Employer's Response to Petition for Certification. (Exhibit 2.) Wonderful's response pointed out serious deficiencies or errors in the MSP, including: (1) the proposed bargaining unit did not include all of Wonderful's employees in California, and specifically in Kern County; (2) the unit designation omitted employees; (3) and that 688 employees were employed in the payroll period immediately following the filing of the Majority Support Petition, i.e., nearly *twice* the size of the bargaining unit as estimated by the UFW in its petition. (*Ibid.*) Wonderful also filed the eligibility list containing the names, address and phone number for all agricultural employees employed during the eligibility period, payroll records for all agricultural employees employed during the eligibility period, and signature exemplars.

66. On February 29, 2024, and then on March 1, 2024, Wonderful lodged 148 employee declarations with the Regional Director. (Exhibit 6.) Wonderful also asked the Board to issue an administrative determination at the end of the five-day initial tally period that the UFW had not provided proof of majority support. (Exhibit 5.) That letter explained, citing Labor Code section 1156.37(e)(4), that this administrative determination was necessary to provide the Board with time to investigate the UFW's misconduct, the revocation of authorization cards, and the overall substance of the employee declarations. (*Ibid.*)

67. On Friday afternoon, March 1, 2024, the Board (through its Regional Director) rejected Wonderful's request that the signature exemplars previously submitted by Wonderful be used to verify workers' signatures on authorization cards, stating: "[N]either the Act, regulations, nor proposed regulations require or contemplate a procedure whereby the Regional Director must compare signatures of workers to make her determination as to the showing of majority support." (Exhibit 7.)

68. On Friday, March 1, the Regional Director issued the Tally Report, which found that the UFW had provided 327 authorization cards, as support for its Majority Support Petition out of the 640 employees that the Regional Director determined were eligible. (Exhibit 8.) The Regional Director concluded: "The requirements set forth in Labor Code section 1156.37, subdivision (b) are met. The Regional Director finds proof of majority support." (Exhibit 8.)

69. Although the Regional Director's Tally is deliberately vague as to what the Regional Director meant by stating that the MSP was "accompanied" by 423 signatures, 181 of these authorization cards were provided *after* the MSP was submitted, between February 27 and March 1, 2024. (Exhibit 8.) If the Regional Director determined that the MSP was not supported by the requisite proof of majority support, she was required to "notify the labor organization of the deficiency and grant the labor organization 30 days from the date it is notified to submit additional support." (Lab. Code § 1156.37(e)(4).) (If the Regional Director notified the UFW of the deficiencies in its proof of majority support, Wonderful was not informed.)

70. The Tally Report moreover does not even acknowledge the sworn statements submitted by Wonderful, because (as the Regional Director confirms) the MSP procedure does not allow farm workers the opportunity to question the validity or use of their own authorization cards, even where (as was the case here) a farm worker alleges that his signature was forged or obtained through fraud.

71. The MSP statute does not authorize the Board to make employee eligibility determinations as part of the pre-certification administrative determination of proof of

valid majority support. Nevertheless, the Regional Director, at the UFW's request, determined that 33 individuals "possessed supervisory authority and thus should not be included in the bargaining unit," and that an additional "seven (7) individuals "lacked a community of interest with other Wonderful Nurseries employees." And therefore should also be excluded. (Exhibit 8.)

72. The Regional Director did not provide any explanation to Wonderful as to why authorization cards may have been deemed invalid proof; it is not clear whether she complied with section 1156.37(e)(2) to provide such explanation to the UFW. It is not known whether the Regional Director considered the 148 declarations at all in making the requisite statutory determination as to the validity of the proof.

C. The Certification And Wonderful's Requests For A Stay

73. On Saturday, March 2, 2024, Wonderful filed with the Board a Motion for Immediate Stay of Certification Pending Investigation into the 148 Employee Declarations Lodged with the Regional Director. (Exhibit 9.) It filed a Supplemental Briefing in support of this motion the following day.

74. On Monday morning, March 4, 2024, the Board issued its "Certification of Investigation of Validity of Majority Support Petition and Proof of Support – Majority Support Established." (Exhibit 10.) That evening, the UFW made a demand on Wonderful to bargain over the terms of a CBA. (Exhibit 11.)

75. On March 6, 2024, the Board issued an Administrative Order denying Wonderful's Motion for Immediate Stay of Certification. (Exhibit 12.) The Board referred to its recent denial of a stay in another case, noting that section 1156.37(e)(3) "states the Board must immediately certify a labor organization if majority support is found" and "does not provide a mechanism for a party to request the Board stay the certification." (*Id.*, at p. 2.) While acknowledging that "Wonderful's allegations … are serious in nature and, if supported by proper evidence, would constitute a cognizable objection to the UFW's certification under section 1156.37, subdivision (f)(1)(4)," the Board held that the

"objections process to be the proper avenue by which Wonderful may raise its claims." (*Id.*, at p. 3)

76. On March 11, 2024, Wonderful filed its Election Objections Petition, along with a renewed motion to stay the legal effects of the Certification. (Exhibit 14.) As it explained:

> The Employee Declarants state that they do not wish to be represented by the UFW, and that they rescind, revoke, and withdraw their authorization cards granting their permission for the union to act as their bargaining representative in negotiating an employment contract. These sworn declarations are reasons sufficient for the Board to have determined that the proof of majority support was invalid. [T]he Employee Declarants have a statutory and constitutional right to withdraw or rescind their authorization, and may do so by communicating that decision to the Board prior to certification, which they did before the certification issued. That right must be honored by the Board, regardless of whether the Employee Declarants were misled, misunderstood, or simply changed their mind.

(Exhibit 14 at pp. 10:18-11:11].)

77. On March 18, 2024, the Board again denied Wonderful's request for a stay. (Exhibit 15 at pp. 2, 6-7). Although again acknowledging the "seriousness of the allegations presented by Wonderful," the Board held that "[t]he statute creates no process by which to stay the certification," "revocation of a certification issued by the Board is subject to the objections procedure set forth in subdivision (f) of section 1156.37," which is post-certification, and "[w]e are unable to refuse to give effect to the process set forth in statute by the Legislature." (*Id.* at p. 6). The Board cited "legislative history" for the proposition that "the purpose of this law is to 'streamline the process for agricultural workers to choose a collective bargaining representative,'" and cited a Senate committee "finding" that "'[t]he obvious culprit of declining union organizing is an agricultural industry that is openly and consistently hostile to organizing and a legal system only too willing to support this over the rights of workers.'" (*Id.* at p. 7.)

78. Board also dismissed Wonderful's objections Nos. 4-6, 9-12, and 14-16 (Exhibit 15 at pp. 19-27), and set for a hearing Wonderful's objections Nos. 1, 2, 3, 7, 8, and 13. (*Id.* at pp.12-19).[13]

D. The Election Objections Set for Hearing

79. In setting objections for hearing, the Board made two significant rulings: (1) that "a presumption of validity [be] accorded a certification issued upon a finding of majority support"; and (2) that there is a presumption of the validity of authorization cards. (Exhibit 15 at pp. 7, 10, 17). On March 25, 2024, Wonderful filed a motion for reconsideration of these "presumption" rulings. (Exhibit 22.) On March 27, 2024, the Board denied Wonderful's motion. (Exhibit 24.)

80. The Board set six objections for hearing. **Objection No. 1** is based on workers having revoked their authorization cards prior to certification. (Exhibit 14 at pp. 16-22.) The Board characterized this as a "question of first impression under Labor Code section 1156.37." (Exhibit 15 at p. 12.) The Board declined to rule on this issue, stating: "Beyond the threshold legal question whether employee revocations are permitted in this process, fact-intensive inquiries are necessary to determine whether the revocation requests as expressed by the employees are valid and adequately convey the employees' free choice." (*Id.* at p. 13.) This highlights the disparate approach of the Board to accept authorization cards on their face, but to delve into the circumstances of the revocations.

[13] The Board dismissed objections based on: their being encompassed by other objections (Nos. 4, 5, 6); disagreement with Wonderful on the Regional Director's discretion to make eligibility determinations in conducting an investigation (No. 9); the Board's inability to declare a statute unconstitutional (Nos. 10, 16); the UFW's "erroneous allegation" of the size of the bargaining unit not "to have affected the process or the outcome of it" (No. 11); the lack of evidence to show that removal of 33 individuals from the eligibility list based on "supervisory status was incorrect"; no "prejudicial error" and "no evidence" that the Regional Director's consideration of authorization cards submitted after the MSP was filed "affected the outcome of the proceeding" (No. 14); and there being no evidence, but only "conclusory assertions" that the Regional Director was biased in favor of the UFW (No. 15).

81. **Objection No. 2** is based on the UFW's improper conduct tainting the entire majority support petition process by submitting at least 148 signatures obtained through "fraud, duress, trickery, and other unlawful conduct." (Exhibit 14 at pp. 23-26.) The Board concluded Wonderful "has submitted sufficient evidence to support a prima facie showing of union misconduct which, if true, would affect the outcome of this process." (Exhibit 15 at p. 15.) This is the same evidence submitted to the Regional Director before certification, which only confirms the absurdity of ignoring such evidence to accept authorization cards at face value as proof of majority support.

82. **Objection No. 3** is based on the Regional Director's failure to consider the employee declarations submitted before determining majority support to exist. (Exhibit 14 at pp. 26-30.) The Board noted that the Regional Director had failed to identify in its tally "how many (if any) authorization card from the Employee Declarants were produced by the UFW to the region, and how many (if any) of those were included among the cards deemed valid to establish majority support." (Exhibit 15 at pp. 12-16.) The Board noted that it could not decide these objections until "development of a proper record." (*Id.* at pp. 14, 16].) While it may well be appropriate for the Board to defer a final decision until "development of a proper record," it is not appropriate for the Board to delay in the absence of a stay.

83. **Objection No. 7** is based on the Regional Director's failure to compare signatures on authorization cards to signature exemplars provided by Wonderful. (Exhibit 14 at pp. 39-41.) The Board noted "[t]he regional director's tally filing does not state whether the regional director used or relied upon signature exemplars provided by Wonderful in any circumstance," and also "acknowledge[d] Wonderful produced at least several employee declarations alleging signatures on authorization cards obtained by the UFW were the product of forgery." (Exhibit 15 at p. 17.)

84. **Objection No. 8** is based on the Regional Director having exceeded her authority to unilaterally make eligibility determinations and remove workers from the majority support count. (Exhibit 14 at pp. 41-42.) Although the Board stated the Regional

Director has authority to remove workers from the eligibility list, it conceded that the "process by which such eligibility determinations are made in the context of investigating a majority support petition remains a pending question." (Exhibit 15 at p. 18.) Even if the statute permits the Regional Director to make eligibility determinations, then this further confirms that the Regional Director was also required to consider Wonderful's evidence of the UFW's fraud or the workers' revocation of their authorization.

85. **Objection No. 13** is based on the Regional Director having, without authority to do so, removed seven workers from the eligibility list because of a purported lack of "community of interest." (Exhibit 14 at p. 52-53.) The Board noted that in addition to Wonderful's factual and legal arguments, "a determinative number of employees are subject to the region's unit appropriateness determination." (Exhibit 15 at p. 19.)

E. The Board Defers The Evidentiary Hearing While Refusing Wonderful's Request For A Stay Pending The Continuance

86. On March 19, 2024, the UFW filed a motion for a Board order requiring Wonderful to disclose the worker declarations to UFW's counsel. (Exhibit 16.)

87. On March 21, 2024, the UFW filed a motion for stay of the objections hearing pending completion of the investigation of ULPs (filed by the UFW on March 1, 2024) being investigated by the Board's General Counsel. (Exhibit 18.)[14] Also on March 21, Wonderful submitted a letter to the Regional Director asking her to confirm whether the total number of authorization cards submitted was 423 and whether, prior to the Vote Tally, she compared the names on authorization cards to the names of the employees submitted declaration and, if so, how many of the cards she found valid had been signed by declarants. (Exhibit 17.) On March 22, 2024, Wonderful filed an opposition to the UFW's

[14] Three of the UFW's charges became the subject of a complaint issued by the ALRB's General Counsel: Wonderful "urge[d] employees to reject representation by UFW" (Charge No. 2024-CE-013), "coerced employees into signing [an] anti-union petition to revoke support for the UFW" (Charge No. 2024-CE-014), "misrepresented to … workers the UFW deducts $200 a paychecks" (Charge No. 2024-CE-015). (Exhibit 29 at ¶¶1-3, 4-22.)

motion for stay. (Exhibit 20.) Also on March 22, the Board denied, without prejudice, the UFW's motion for an order requiring Wonderful to produce employee declarations, on the ground that the motion should have been submitted to the IHE. (Exhibit 19.)

88. On March 24, the Board's General Counsel filed a motion to stay the hearing relating to Objection Nos. 1 – 3 to allow the General Counsel time to investigate overlapping ULPs. (Exhibit 21.)

89. On March 25, 2024, an initial conference was held in the objections hearing, at which the Board set the evidentiary portion of the hearing to commence on April 9, 2024. During that conference, the IHE granted the UFW's request for an interim protective order, including that even exemplars of authorization cards be treated as confidential, pending the UFW filing a written motion. On March 26, 2024, the UFW filed a motion for a protective order, seeking only "blank," i.e., unsigned, card be used that the hearing. (Exhibit 22.) On March 27, 2024, Wonder filed an opposition to that motion. (Exhibit 26.)

90. On March 27, 2024, the IHE issued an order staying the entire objections hearing for thirty days, until April 26, 2024, to allow the General Counsel time to investigate "overlapping" ULPs. (Exhibit 25.) Wonderful "timely filed" an interim appeal, asking the Board to reverse the IHE's grant of the General Counsel's continuance. (Exhibit 27 at p. 2.)

F. The Board Reverses The IHE's Continuance Of The Hearing

91. On April 12, 2024, the Board granted Wonderful special permission to appeal the IHE's ruling, and reversed the IHE's order staying the objections hearing. The Board further ordered that objections hearing to recommence without delay. (Exhibit 27.)

92. The Board again denied Wonderful's renewed motion to stay the Certification, stating " we do not agree with Wonderful's claims it necessarily is prejudiced by the fact it now is under an obligation to bargain with the UFW while at the same time contesting the validity of its certification." (Exhibit 27 at p. 9.) It explained: "The situation is not unlike that when a union is certified following a secret ballot election

under section 1156.3 and an employer engages in a "technical" refusal to bargain. In such circumstances, an employer who violates its bargaining duty to undertake a challenge to the union's certification ***does so at its own risk and will be subject to an unfair labor practice order, and all available remedies, if its endeavor is unsuccessful***." (*Ibid.*) In other words, in order to seek to vindicate its constitutional rights (and those of its workers), Wonderful must expose itself to the certainty of enforcement orders, along with the possibility of civil penalties and substantial monetary damages, including make whole remedies (and interest), should it not prevail.

93. The evidentiary hearing began on Tuesday, April 23, 2024.

G. The Board Delays And Defers Ruling On Wonderful's Request To Review The Authorization Cards

94. On April 18, 2024, Wonderful submitted to the Board a "Request for Review of Regional Director's Determination of Proof of Majority Status." (Exhibit 31.) On May 3, 2024, Wonderful submitted a request to the Board for a status update as to when the Board would rule on this request, given its importance to the ongoing hearing and Wonderful's ability to prepare its case-in-chief. Exhibit 31. On May 10, 2024—22 days after Wonderful's request—the Board declined to rule on the merits on the purported ground that "Wonderful's motion is not properly directed to the Board," but should have been submitted to the IHE, and dismissed the motion without prejudice. This is a procedural ruling that could have been immediately made; instead, the Board acted in a dilatory manner to wait over three weeks to issue a ruling. Given that the hearing is ongoing and there is no guarantee when the IHE would rule on a re-submitted motion, it would be futile to wait until a ruling from the IHE to present for judicial review the issue of whether the MSP statute precludes access to proof of majority support.

95. On April 22, 2024, Wonderful submitted a motion *in limine* for an order directing the Regional Director to produce to the IHE each authorization card deemed valid proof and allow for the efficient retrieval of cards immediately following the testimony of a farm worker witness at the election objection proceedings to which an

authorization card might relate. (Exhibit 30.) On May 6, 2024, the IHE denied Wonderful's motion in limine, and granted in part and denied in part the UFW's motion for disclosure of employee declarations to the UFW, which had been submitted on March 20. (Exhibit 33.)

96. On April 16, 2024, 13 Wonderful workers sought to intervene in the objections proceeding, made a Public Records Act request to the Board, seeking: (1) the 327 authorization cards deemed to be valid proof of majority support; (2) the authorization cards of the 13 proposed worker-intervenors; and (3) documents or communications relating to whether the authorization cards of the 13 proposed intervenors were deemed valid. (Exhibit **.) On May 10 (after delaying the response the response deadline by two weeks), the Board refused to disclose the authorization cards, taking the position that: (1) the 327 cards (and the identities of the signatories) were confidential and exempt from disclosure under Labor Code section 1156.37, subdivision (e)(2); (2) (2) that the cards of the 13 proposed worker-intervenors were confidential for the same reason, and are exempt from disclosure **even to themselves** absent written demand or "express consent" of the workers, in writing, to provide the cards to their counsel; and (3) that the employees were not even entitled to know whether their cards (which they had asked to be revoked) were counted as part of the valid proof of majority support; the Board cited various disclosure exemptions, including (oddly) attorney work product. In other words, the Board refuses to tell the farm workers whether their card was used to impose the UFW on the bargaining unit.

97. The denial of the employees' Public Records Act requests for the authorization cards is consistent with the plain language of the MSP statute, which deems "confidential" the identities of card signatories whose authorizations supported the certification. If the workers themselves are not permitted to know whether their cards were deemed valid, there is no doubt that the employer will also be denied that information. Wonderful sought that information nearly one month ago; to date, the Board has delayed even providing a substantive denial, though based on how it treated the

workers' disclosure requests, there ought to be no doubt that the Board will deem the statute's confidentiality mandate as permitting only the Board (and the UFW) to know which cards comprised the showing of majority support.

98. Nearly one month ago, Wonderful asked the Board if it could revie

H. The Board Denies The Farm Workers' Request To Intervene

99. On April 22, 2024, the IHE issued an order denying the request of the National Right to Work Legal Defense Foundation, Inc., on behalf of thirteen Wonderful workers, to intervene in the election objection proceedings. (Exhibit 28.) On May 6, 2024, the Board denied, on the merits, these workers' appeal of the IHE's order. Exhibit 33.

I. The UFW Asks For Face-To-Face Bargaining And Holds Over Wonderful The Prospect Of MMC

100. On May 2, 2024, the UFW asked Wonderful to for dates to schedule face-to-face bargaining. Exhibit** [5/2/24 ltr]. On May 4, 2024, Wonderful asked the UFW whether it "intend[ed] to file for MMC in early June" or was "willing to negotiate towards resolution of the bargaining issues"; on May 8, 2024, the UFW replied by not directly answering the question posed, stating "of course we would like to negotiate but if there is not a real good faith effort by the company, then we will not hesitate in filing for mediation." Exhibit 31.

VI. THE LEGAL AND PRACTICAL CONSEQUENCES OF CERTIFICATION

101. The certification of a labor organization is akin to the grant of a monopoly right to a public utility or common carrier, whereby the state designates the union as the workers' exclusive bargaining representative. (See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 481-82 (*Gay Law Students*), quoting *James v. Marinship Corp.* (1944) 25 Cal.2d 721, 731; see also *J. I. Case Co. v. NLRB* (1944) 321 U.S. 332, 335 [likening terms of collective bargaining agreement to "to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service].)

102. "The [grant of the monopoly right] extinguishes the individual employee's power to order his own relations with his employer, and creates a power vested in the chosen representative to act in the interests of all employees. . . . . The employee may disagree with many of the union decisions but is bound by them." (*NLRB v. Allis-Chalmers Mfg. Co.* (1967) 388 U.S. 175, 180; see also *Porter v. Quillin* (1981) 123 Cal.App.3d 869, 874, citing *J. I. Case, supra,* 321 U.S. 332 ["Normally, the collective agreement takes precedence over any conflicting individual contract of employment. . . [A] union has the authority to bind the members of the bargaining unit to the terms of a collective agreement, whether or not they are members of the union, and whether or not they were employed in the bargaining unit at the time the agreement was entered into or ratified"].)

103. First, and most immediately, the certification requires the employer to recognize and to bargain with the exclusive representative of the employees. The employer may no longer enter into individual employment contracts or directly negotiate terms and conditions of employment with its workers. Instead, an employer must bargain with the certified union. (*Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 882 ["Individual contracts, no matter what the circumstances which justify their execution, may not interfere with the terms of the collective agreement."].) And the union must bargain for all employees in the bargaining unit. The contract rights of workers are immediately curtailed. Among other rights, the union can bargain away the workers' right to strike, or right to refuse to cross a lawful picket line.

104. Second, the certification bars for twelve months the right of workers to petition for a decertification election. (See Lab. Code § 1156.37, subd. (l), incorporating § 1156.5, subd. (a) ["The board shall not direct an election in any bargaining unit where a valid election has been held in the immediately preceding 12-month period."].) Third, the initial demand to bargain triggers the 90-day period, after which (assuming a collective bargaining agreement is not reached), the Board may, upon demand of the union, compel the employer into the MMC process. Fourth, once the MMC contract is imposed by the

State, the employees may not petition for a decertification election until no earlier than 90 days before the expiration of the MMC contract.

105. Because the certification interposes the union between management and labor, it fundamentally alters the legal and economic relationships between farm workers and their employer. The grant of power to the union necessarily diminishes the workers' freedom to order its own contractual relationship because it compels the employee to be subject to, and bound by, the terms and conditions negotiated by the union. As alleged, the legal consequences of certification implicate liberty and property interests protected under the U.S. and California Constitutions.

A. Compelled Association

106. The certification forces Wonderful to associate with the UFW against its will. (*Janus v. American Federation of State, County, and Mun. Employees, Council 31* (2018) 585 U.S. 878, 892 (*Janus*) ["[f]reedom of association . . . plainly presupposes a freedom not to associate]; see also *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 623 ["[i]nfringements on [the right to associate for expressive purposes] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"].)

107. The certification also deprives employers the freedom to associate with its employees. Any "direct dealing" between workers and the employer may be deemed an unfair labor practice, as would "solicitation of grievances" by the employer. Both types of charges presume that the union has majority support, and that the unfair labor practices undermine that support, thus diminishing the stature and efficacy of the union in the eyes of workers. Once a CBA is negotiated (or is imposed via MMC), it sets the terms of employment for all employees in the bargaining unit, even those who refuse union membership and do not support the union.

108. Thus, Wonderful's farm workers, if they wish to remain employed, are immediately compelled to associate with the UFW, whether or not certification is later

revoked. The only means by which they can dissociate with the union is to petition for a decertification election. Even then, the MSP statute bars decertification elections for at least 12 months after certification. (See Lab. Code §§ 1156.37, subd. (l), 1156.6.) Where the compelled association violates the First Amendment, even a delay of one day constitutes constitutional injury. (See also *Lopez v. Shiroma* (E.D. Cal. July 24, 2014), Case No. 1:14-CV-00236-LJO-GSA, 2014 WL 3689696, at p. *9 [refusal of the ALRB to count impounded ballots following a decertification election stated a claim under the First Amendment for compelled association], citing *Ellis v. Bhd. Of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees* (1984) 466 U.S. 435, 455 ["But by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree."]), affd in part, revd in part on other grounds, and remanded (9th Cir. 2016) 668 Fed. Appx. 804.)

109. The associational rights impaired by the certification potentially go well beyond the subordination of the individual's economic interests to the collective. CBAs between agricultural employers and the UFW invariably include a so-called "union security" clause – a provision in union contracts which require the employer to fire any worker who refuses to surrender a portion of his wages to the union as "agency fees."[15] Because the Board deems union security clauses to be a standard or "typical" provision in virtually every union agreement, the employer's refusal to accede to this clause has been held to constitute bad faith bargaining. (See *Gerawan III, supra,* 52 Cal.App.5th at p. 184.)

[15] See *Gerawan Farming, Inc.* v. *ALRB* (2020) 52 Cal.App.5th 141, 169 (*Gerawan III*) (quoting testimony by UFW First-Vice President Elenes) ("Well, obviously ... we have an obligation to represent all employees .... And again, all our contracts have some type of union security language that indicates that the employees are either going to pay agency fees or going to pay dues, membership dues. And obviously we need that to be able to collect dues, be able to collect agency fees so that we can fund the work that we're going to have to do to administer the contract and continue improving the conditions of other farm workers.")

110. MMC contracts also invariable include security agreement provisions. (See *Gerawan III, supra,* 52 Cal.App.5th at p. 183, fn.19 [noting that "[t]he [MMC] mediator found that union security clauses were the rule rather than the exception in agricultural labor contracts."].)[16] It is not speculative to assume that, whether through consensual bargaining or via the MMC contracting process, the UFW will demand that the CBA include a union security agreement, and along with it the right to compel an employer to fire any worker who refuses to pay dues or agency fees, and that the Board will deem the employer's failure to agree to that term to be in bad faith.

111. Thus, the Certification compels Wonderful to associate with the UFW, whether or not the UFW was legitimately chosen by Wonderful's employees. At the same time, the Act forecloses any avenues for direct judicial review of the certification itself. The only way the *employer* can challenge the Certification is to commit a "technical refusal to bargain," *i.e.*, an unfair labor practice under the ALRA, and then petition for review of the final Board order imposing liability for the bargaining violation. (See Lab. Code § 1158; *United Farm Workers* v. *Superior Court* (1977) 72 Cal.App.3d 268, 273 (*UFW II*) ["Under the Act, the only way *judicial* review of the Board's decisions can be obtained is through an unfair labor practice proceeding"].)[17] This, in turn, forces the

[16] In one MMC proceeding, the MMC mediator dictated the terms of an initial CBA that held in abeyance the effective date of a union security clause based on his concerns that, given the years'-long absence of the UFW in representing the bargaining unit, the employees "may or may not" wish to be represented by the UFW. The Board rejected this as irrelevant for purposes of fixing the terms of a CBA. Citing the so-called "certified until decertified" rule, the Board concluded that "[o]nce a union is certified as the bargaining representative, it retains that status unless and until the bargaining unit employees choose to remove or replace it through a Board-conducted election." (*Arnaudo Brothers, L.P.* (2014) 40 ALRB No. 7, pp. 6-7.)

[17] The Board made this exact point in denying Wonderful's request to abate the hearings for so long as it remained continued at the request of the ALRB General Counsel. (See Exhibit 27 at p. 9, fn. 5 [a "'technical'" refusal to bargain arises where an employer refuses to bargain with a certified union in order to obtain judicial review of the election proceeding, which itself is not subject to direct review"].)

employer to remain locked in a relationship with a union that may not be of the workers' choosing, while at the same time puts the employer to the constitutionally intolerable choice between challenging the Certification (thereby exposing it to significant financial peril) and compliance with a Certification imposed without due process of law.

B. The Certification Impairs The "Fundamental Right" Of Farm Workers To Organize And To Freely Choose Their Bargaining Representative

112. The certification immediately bars the right of farm workers to petition the Board for a decertification election for at least 12 months. This direct impingement on employees' associational rights may be countenances provided that the union was legitimately chosen by majority rule.

113. In upholding the NLRA against a due process challenge, the U.S. Supreme Court held that laborers have a "fundamental right" under the U.S. Constitution to organize and select representatives of their own choosing. (*NLRB* v. *Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 33, citing *American Steel Foundries v. Tri-City Council* (1921) 257 U.S. 184, 209 [the employees' right of self-organization was "essential to give laborers opportunity to deal on an equality with their employer"]; accord *County Sanitation Dist.* v. *L.A. Cty. Employees* (1985) 38 Cal.3d 564, 588, fn. 37, 596 (conc. opn., Bird, C.J.).)[18] This right of self-determination "'is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, and it is not dependent upon the existence of a labor controversy between the employer and his employee.'" (*County Sanitation Dist.,*

[18] Congress did not create this "fundamental right" when it enacted the NLRA; rather, it "safeguarded" existing constitutional protections against state interference in the associational rights of workers. (*Jones & Laughlin, supra,* 301 U.S. at pp. 33-34; see also *Amalgamated Workers v. Edison Co.* (1940) 309 U.S. 261, 263-64.) The Court explained that "[e]mployees have as clear a right to organize and select their representatives for lawful purposes as the [employer] has to organize its business and select its own officers and agents." (*Id.,* at p. 264.) Thus, the NLRA's prohibition against government interference in the exercise of those choices by employees or their employer, "'instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.'" (*Jones & Laughlin, supra,* at p. 34, quoting *Texas N.O.R. Co.* v. *Ry. Clerks* (1930) 281 U.S. 548, 570.)

supra at pp. 587-88, quoting *In re Blaney* (1947) 30 Cal.2d 643, quoting *Steiner* v. *Long Beach Local No. 128* (1942) 19 Cal. 2d 676, 682.)[19]

114. Conversely, there could be "no clearer abridgement" of free choice than to grant exclusive bargaining status to a union "selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." (*Int'l Ladies' Garment Workers' Union* v. *NLRB* (1961) 366 U.S. 731, 737.) Regulations that infringe on the freedom not to associate or that compel association may be justified only "to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." (*Smith v. Regents of University of California* (1993) 4 Cal.4th 843, 853, internal quotation marks omitted.) Assuming that the State may place any limitations on the employee's right to withdraw his or her support for a union, "the resulting burden on freedom of association requires that the procedure be carefully tailored to minimize the infringement." (*Ibid*.)

C. Freedom of Contract

115. Because the employer may no longer negotiate the terms of its economic relationship directly with workers, or otherwise bypass the union as the exclusive bargaining agent without exposing itself to a ULP charge, the certification interferes with the fundamental liberty interest of both Wonderful and its employees to determine their own economic relationship.[20] As just explained, that interference may go so far as to

---

[19] The state Constitution also guarantees speech, associational, and political rights in comparable, but independent, provisions. (See Cal. Const., art. I, §§ 2, subd. (a), 3; see *id.*, art. I, § 24 ["Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"].)

[20] "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." (*Truax v. Raich* (1915) 239 U.S. 33, 41(citations omitted); see also *Conn* v. *Gabbert* (1999) 526 U.S. 286, 291-92 ["the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment"]; *Ry. Employees' Dep't* v. *Hanson* (1956) 351 U.S. 225, 234 ["[T]he right to work, which the Court has frequently

require the employer to fire workers unwilling to hand over a portion of their wages to the UFW. (See *Pasillas* v. *ALRB* (1984) 156 Cal.App.3d 312, 348, fn. 21 [noting that, depending on the union security provisions in a CBA, "loss of employment and good standing could mean loss of a worker's fundamental right to work for a living"); see also *Truax* v. *Raich* (1915) 239 U.S. 33, 38 ["[T]he right to hold specific employment and to follow a chosen profession free from governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."]; see also *Greene* v. *McElroy* (1959) 360 U.S. 474, 492.)[21]

116. Even a successor employer, while not bound by an existing contract unless it adopts or assumes the contract, *is* bound by the bargaining obligation created by certification and imposed by operation of law. (See *Gerawan Farming, Inc*. (2013) 39 ALRB No. 16.) A certification naming a predecessor employer also binds a successor employer for purpose of the MMC statute. (See *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, as described below, see Paragraphs *post*.)

D. Fundamental Property Interests

117. "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." (*Lynch v. Household Finance Corp.* (1972) 405 U.S. 538, 552.). The state-mandated physical invasion of one's property is, without more, a blatant impairment of a fundamental property right and personal liberty. "[W]hen a statute or regulation impairs a fundamental personal liberty, the state has the burden of showing that the measure is necessary to promote a compelling governmental interest, and that there are no reasonable alternative

---

included in the concept of 'liberty' within the meaning of the Due Process Clauses may not be denied by the Congress."].)

[21] Wonderful has standing to seek redress for any injury due not only to direct violations of its own rights, but due to injuries it suffers as a consequence of the deprivation of constitutional rights of its employees. (See, e.g., *Truax, supra,* 239 U.S. at pp. 38-39; *Chas. Wolff Packing Co.* v. *Indus. Court* (1923) 262 U.S. 552.)

means of accomplishing that goal." (*ALRB v. Superior Court* (1976) 16 Cal.3d 392, 409, collecting cases.)

118. The certification directly infringes the property rights of farm owners. For example, a certified union is permitted to "take access" to the property of an agricultural employer, , so long as just compensation is paid. (See Regs., § 20900, subd. (e)(1)(C); *Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063, 2072 (*Cedar Point Nursery*) ["The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking."].) Interference with the union's right of access may constitute an unfair labor practice, thus exposing the employer to sanctions for non-compliance. (See Regs., § 20900, subd. (e)(5)(C).)

E. Forced Contracting Under The MMC Statute

119. Another expected (and almost certainly inevitable) consequence that follows UFW certification is the compelled imposition of a State-drafted CBA via the MMC (Mandatory Mediation and Conciliation) compulsory contracting process. (See Lab. Code § 1164 *et seq*.)[22] Under Labor Code section 1164(a), the union may compel the employer into the MMC process 90 days after an initial request to bargain. (See Paragraphs , *ante* [the UFW demanded bargaining the day certification issued, copying the state mediation service which provides referrals for third-party neutrals who preside over the MMC proceedings.].)

120. MMC is a highly expedited, compulsory contracting process, whereby a Board-appointed "mediator" decides the terms of a collective bargaining agreement between the union and the employer, which then becomes an enforceable order of the Board. The terms of that "contract" are subject to limited, discretionary administrative review. By its own terms, the MMC contract may be imposed on an employer by a final Board order as soon as 60 to 90 days after the parties are directed into the process.

[22] Only the employer and the union, not the workers, are parties to MMC, (see Lab. Code § 1164.5, subd. (a)), and have not been permitted to intervene. (See *Gerawan Farming* (2013) 39 ALRB No. 11.)

121. Labor Code section 1164(b) requires the party compels into MMC to pay for one-half of the cost of the mediator's hourly rate. This violates due process, since MMC is not a matter of agreement, but is imposed by force of law. (*California Teachers Assn.* v. *State of California* (1999) 20 Cal.4th 327, 354-55, 357 (*California Teachers*) [invalidating provision requiring dismissed or suspended public teachers to pay for one-half the public cost of the administrative law judge in unsuccessful legal challenges as in "total and fatal conflict with controlling constitutional principles and is invalid on its face."].)

122. The MMC process directly interferes with "freedom of contract."[23] It compels by arbitral decree one employer and its workers to enter into the state's notion of a proper "contract" applicable to them and no one else. Decrees that impose special restrictions or obligations on particular individuals as a consequence of the application, not of law and legal processes, but of arbitrary coercion, "depriv[e] citizens of life, liberty, or property." (*BMW of North America, Inc.* v. *Gore* (1996) 517 U.S. 559, 587 (1996) (conc. opn. Breyer, J.).)

123. Although the employer (or labor organization) may seek judicial review of the final order, the parties are required to immediately implement the terms of the "contract" imposed under MMC. (See Lab. Code § 1164.3, subd. (f)(2).) The filing of a petition for review does not stay the final Board order unless the court finds, "by clear and convincing evidence," that the petitioner will be irreparably harmed by the implementation of the Board's order and a likelihood of success on appeal. (Lab. Code § 1164.3, subd. (f)(3).)[24] A bond must be posted by the party seeking review "in the amount

---

[23] See, e.g., *H. K. Porter Co.* v. *NLRB* (1970) 397 U.S. 99, 108 ("While the parties' freedom of contract is not absolute under the [NLRA], allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.")

[24] The Board made this exact point in denying Wonderful's request for a stay. (See Exhibit 27 at p. 10 ["In addition, an employer's challenge to a union's certification will not impede or delay operation of the ALRA's MMC processes."].)

of the entire economic value of the contract as determined by the board as a condition to filing a petition for a writ of review." (Lab. Code § 1164.5(d).) "[T]he 'entire economic value of the contract' means the difference between the employees' existing wages and economic benefits and those set forth in the contract." (*Ibid.*)

124. While the California Supreme Court upheld the MMC statute against constitutional challenge, the property and liberty abridgements relating to the forced contracting process are nevertheless implicated under the MSP procedures, insofar as the lack of procedural due process protections under section 1156.37 exposes both employer and employees to a constitutionally intolerable risk of the infringement or deprivation of liberty and property interests protected under the U.S. and California Constitutions.

FIRST CAUSE OF ACTION

VIOLATION OF DUE PROCESS UNDER THE STATE CONSTITUTION

(Due Process)

(Cal. Const., art. I, § 7)

125. Petitioner incorporates by reference and realleges each allegation set forth in Paragraphs 1 through 124 above.

126. Article I, section 7, subdivision (a) of the California Constitution states: "A person may not be deprived of life, liberty, or property without due process of law …."

A. Due Process Requires A Right To Be Heard *Before* The State May Impose A Union On Employers And Their Workers

127. "[T]he central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard." (*Fuentes v. Shevin* (1972) 407 U.S. 67, 80 (*Fuentes*), cleaned up.). "A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." (*Armstrong v. Manzo* (1965) 380 U.S. 545, 552, citation omitted; accord, *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1072 (*Ryan*).)

128. "The right to *prior notice and a hearing* is central to the Constitution's command of due process. 'The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property . . . '" (*United States v. James Daniel Good Real Property* (1993) 510 U.S. 43, 53, italics added, quoting *Fuentes, supra,* 407 U.S. at pp. 80-81.) This applies even to temporary deprivations of property, (*Fuentes, supra,* 407 U.S. at p. 85 [temporary, nonfinal taking of property is nonetheless a "deprivation" within the meaning of the Fourteenth Amendment]; *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 308 (*Kash Enterprises*) [same]), as well as to "takings of all non 'de minimis' property interests." (*Kash Enterprises, supra,* at p. 308.)

129. Absent some kind of emergency circumstances, due process generally requires an agency to provide the opportunity for a hearing *before* it acts. (See *Leslie's Pool Mart, Inc. v. Department of Food & Agriculture* (1990) 223 Cal.App.3d 1524, 1531-35 [hearing required before seizure of unregistered pool chemical with no showing of exigent circumstances]; *Menefee & Son v. Department of Food & Agriculture* (1988) 199 Cal.App.3d 774 [even without emergency circumstances, hearing required before seizure and destruction of crops treated with unauthorized poisons].)

130. It is only under the most exigent of circumstances that important governmental interests may justify the postponement of notice and hearing until after the initial "taking" has occurred. (See, e.g., *Calero-Toledo* v. *Pearson Yacht Leasing Co.* (1974) 416 U.S. 663, 676-680 [seizure of vessel used to smuggle drugs]; *North American Cold Storage Co.* v. *Chicago* (1908) 211 U.S. 306 [seizure of contaminated food]; *Ewing* v. *Mytinger & Casselberry* (1950) 339 U.S. 594 [seizure of misbranded drugs].) No extraordinary circumstances are present that would justify the summary deprivation of Wonderful's rights, particularly since the UFW had been collecting cards for at least one year before filing its MSP, and without any Board supervision. There is no risk of dissipation of assets or removal of property from the jurisdiction, considerations which may justify a brief

deprivation, based on a genuine apprehension of the eventual inability to (e.g.) recover a debt. There is no requirement (or any conceivable basis to assert) that "streamlining" the certification process is necessary (or even relevant) to forestall a concrete and imminent threat to union support.[25]

131. As the U.S. Supreme Court explained in *Mathews v. Eldridge* (1976) 424 U.S. 319 (*Mathews*), "'due process is flexible and calls for such procedural protections as the particular situation demands.' Accordingly, resolution of the issue whether the administrative procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected." (*Id*. at p. 334, quoting *Morrissey v. Brewer*, (1972) 408 U.S. 471, 481; accord, *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 561.)

132. In *California Teachers*, which also involved a ***facial*** procedural due process challenge to a state statute, the California Supreme Court explained:

> The balancing analysis set forth in cases such as *Mathews*, requires an *examination of procedures* to determine whether they assure a minimum overall standard of fairness in the particular context. "[P]rocedural due process rules are shaped by the *risk of error inherent* in the [truthfinding process as applied to the] *generality of cases*, not the rare exceptions." (*Mathews*, *supra*, at p. 344.) In considering facial challenges to procedural schemes, the United States Supreme Court balances the competing interests to ascertain whether the procedures meet due process requirements — *not simply whether there are instances falling within the scheme in which a particular result would be constitutionally permissible*. (*California Teachers, supra*, 20 Cal.4th at p. 347, italics added.)

[25] While the UFW filed a battery of unfair labor practice charges, each one of those charges misconduct which allegedly occurred *after* it filed the MSP. The UFW alleges, among other things, that Wonderful "coerced" employees to revoke their authorization cards, or were otherwise subjected to "captive audience" meetings in the aftermath of the filing of the majority support petition. Even if these allegations were true (and both Wonderful and its employees vigorously dispute the charges), the evidence based on the evidence offered in support of the petition, including the validity of the cards ***at the time they were signed***. The timing of *when* the certification issues is not relevant to whether the UFW made the required showing of majority support at the time it filed the petition.

133. Thus, in analyzing Lab. Code § 1156.37 for due process sufficiency, the court must consider how it operates in most cases. It may not "ignore the actual standards contained in a procedural scheme and uphold the law simply because in some hypothetical situation it might lead to a permissible result." (*Id*.)

134. Under *Mathews*, the constitutional sufficiency of a governmental scheme that affects property interests should be resolved by considering three factors: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews*, *supra*, 424 U.S. at p. 335.)

135. California courts interpreting our State Constitution's Due Process Clause add a fourth consideration: "the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." (*Ryan*, *supra*, 94 Cal.App.4th at pp. 1071-72, cleaned up; see also *id*., at p. 1069, fn.16 [noting "the federal analytical approach for determining whether a due process liberty interest is at stake thus fails to take in account that the touchstone of due process is protection of the individual against arbitrary action of government"].)

B. Section 1156.37 Abridges Liberty And Property Interests Of Farm Owners And Farm Workers

136. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'liberty' or 'property.'" (*Amer. Mfrs. Mut. Ins. Co. v. Sullivan* (1999) 526 U.S. 40, 59.) As alleged, there is no doubt but that the legal

consequences of certification implicate liberty and property interests protected under the U.S. and California Constitutions.

137. Even when the complained-of deprivation does not involve a fundamental constitutional right, the government must still provide parties with fair procedures, an unbiased decision maker, a hearing, and a meaningful opportunity to respond before liberty or property interests are abridged. (*Goldberg* v. *Kelly* (1970) 397 U.S. 254, 269; see also *Gibson v. Berryhill* (1973) 411 U.S. 564, 579 [stating principles of fairness are equally applicable to administrative as well as judicial proceedings].)

138. Here, however, the MSP statute abridges fundamental rights, including the freedom of speech and association, to access our courts, and (under our State Constitution) the right to a secret ballot, a safeguard adjunct to the constitutional right to vote. (See Cal. Const., art. II, § 7 ["Voting shall be secret."].)

139. Section 1156.37 violates these fundamental protections against government interference in how employers and farm workers choose to define our personal and economic lives, including with whom we may associate, and how we exercise statutory rights intended to vindicate that freedom to choose. But the MSP statute also violates the structural safeguards in our State Constitution, including the separation of powers, which in this case include the protections against section 1156.37(e)(2)'s unconstitutional seizure of judicial power.

140. ***First***, section 1156.37(e) fails to provide any due process safeguards to minimize the risk that a union will be impressed upon the nonconsenting majority of farm workers and their employer. ***Second***, the employer may not challenge the proof of majority support because the MSP statute bars the employer (but not the union) from seeing the authorization cards purportedly "to protect the confidentiality of the employees whose names are on the authorization cards." (Lab. Code § 1156.37, subd. (e)(2).) ***Third***, even if Wonderful were permitted to challenge the validity of the card signatures, the MSP statute bars judicial "appeal or review" of the board's determination as to whether a particular proof of support is valid. (Lab. Code § 1156.37, subd. (e)(2).) ***Fourth***, the MSP

statute directly undermines the California Constitution's protection of the secret ballot, a safeguard adjunct to the constitutional right to vote. (See Cal. Const., art. II, § 7 ["Voting shall be secret."].)

141. According to the Board, the MSP procedures enacted in order to allow for a more effective response to a "agricultural industry is openly and consistently hostile to organizing." (Exhibit 15.) This is textbook viewpoint discrimination, since it justifies the need to deny employers access to the same information available to unions because of industry hostility to unions in general and union organizing in particular.

142. The same analysis cited by the Board also justifies "card check" as an appropriate legislative response to the "legal system [is] only too willing to support [employers] over the rights of workers." (*Ibid*.) This finding is supported by citation to *Cedar Point Nursery v. Hassid*, the 2021 U.S. Supreme Court constitutional challenge by California agricultural employers to the ALRB's access rules. Legislation which justifies employer access to an administrative record based on a Supreme Court decision which would deny union access for organizing purposes would seem to be "tit-for-tat" retaliation. A finding which labels agricultural employers as "obvious culprits" for the failure of union organizing and which justifies the denial of judicial review because a farmer successfully obtained redress in the Supreme Court fits the definition of a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial" – in other words, a bill of attainder. (See *Nixon v. Adm'r of Gen. Servs*. (1977) 433 U.S. 425, 468 (*Nixon*).) However described, section 1156.37(e)(2), "viewed in terms of the type and severity of burdens imposed, reasonably can[not] be said to further nonpunitive legislative purposes." (*Nixon*, *supra*, at p. 473.)

C. The Private Interests Of Employers And Farm Workers Affected By The Deprivation Are Significant

143. There is no doubt that the Board's determination to impose the certification dramatically altered the status quo. (Compare *American Corporate Security, Inc. v. Su* (2013) 220 Cal.App.4th 38, 47 [agency's determination without a hearing that "reasonable

cause" exists to commence a superior court enforcement action does not violate due process because the action *merely initiates a proceeding* in which the person is accorded all due process rights].) As alleged, the interposition of the union between an employer and its workers directly implicates fundamental right.

144. The deprivation involves fundamental liberty and property interests affecting Wonderful and hundreds of its employees – some of whom complained to the very agency now ordering them to surrender over their bargaining rights to the UFW – by compelling them into a relationship with a union based on an "administrative determination" entirely dependent on card authorizations submitted by a self-interested party, without any pre-deprivation checks on the authenticity of the proof of majority support, and with no means for the employer to review the evidence.

145. Without question, however, the most direct infringement on the employer's liberty interest is to deny it access to the evidence necessary to challenge the certification and then to foreclose judicial review of the Board's determination. Section 1156.37(e)(2) bars employers from obtaining access to the very evidence used to certify the union, thereby hobbling (if not eviscerating) the right to meet the allegations in support of the UFW's majority support petition. This is, without question, a due process violation of the first order, because it goes to the ability of a party facing the deprivation of a liberty or property interest to defend himself. There could be no greater risk of an erroneous determination than to deny the right to defend oneself.

146. In *Harry Carian*, the California Supreme Court held due process requires the admissibility of authorization cards in order to permit the employer to challenge the propriety of a certification and bargaining order. (*Harry Carian, supra,* 39 Cal.3d at p. 233.) The Court concluded that the Board may issue based on a finding that "'the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that the employee sentiment *once expressed through cards* would, on balance, be better

protected by a bargaining order.'" (*Id.*, at pp. 232-233, quoting *Gissel, supra,* at pp. 614-615, italics added.)

147. The Supreme Court rejected the employer's due process challenge to the use of authorization cards as the basis to demonstrate majority support, precisely because the employer:

> vigorously litigated the validity of the cards at the hearing HCS vigorously litigated the validity of the cards at the hearing before the ALJ. HCS also had full opportunity to challenge both the validity of the cards and the propriety of the bargaining order in its exceptions to the ALJ's decision. Under these circumstances, HCS was not denied due process. (*Harry Carian, supra,* 39 Cal.3d at p. 234, fn.19.)

148.

D. The Risk Of An Erroneous Pre-Hearing Deprivation Of Rights Is Substantial

149. Even if certification is subsequently revoked, the risk of erroneous deprivation of rights, including disenfranchisement of hundreds of Wonderful farm workers, is substantial.

(1) The Lack of Any Meaningful Pre-Certification Investigation

150. The "investigation" and "administrative determination" required by the statute is limited to whether the requirements of subdivision (b) are met and there is proof of majority support. (Lab. Code § 1156.37, subd. (e)(1).) This determination is to be based on nothing more than a comparison of names on the authorization cards to names on the payroll records provided by the employer. (*Ibid.)*[26] In other words, the sufficiency of the "proof" comes down to accepting at face value the MSP's allegation that authorization cards constitute valid evidence of majority support based on the comparison of names on the cards to names on the payroll roster. As the facts of this case demonstrate, the absence

[26] Although the statute does not require (or even allow) additional eligibility determinations (such as whether an employee is a statutory supervisor), the Regional Director has done so in the underlying proceeding (and in prior proceedings) at the request of the union.

of any pre-certification investigation into allegations of misconduct creates myriad opportunities for fraud and abuse of the process.

151. For example, while the names on a card may "match" the payroll roster, this does not rule out forgery, or that the signatory had asked the union to not use his card or to rescind or return it. Because the MSP procedures do not require the worker to be notified whether, when, or as to which employer the card may be used, a worker may not find out until *after* the union is certified that his card used without his consent or even in direct contradiction of his stated wishes.

(2) The Lack of Any Verification or Authentication of the Proof of Majority Support

152. As illustrated by the erroneous factual allegations (and accompanying invalid proof of support) in the UFW's MSP, the union is under no obligation to provide verified proof of the authenticity of the cards, such as notarized signatures. The provenance of the cards themselves is unknown. The cards are not shown to the person best situated to recognize the names and to identify the signatures on the cards other than the employee who signed the card – i.e., the employer. By shielding signatory identities from employers, two basic checks against misuse of cards – employee verification and employer authentication – is eliminated.

153. In this case, the UFW's allegation of the size of the bargaining unit—350—was so wildly inaccurate that the Board, while declining to dismiss the petition (as would be required under law), commented on the "dramatically inconsistent" and "erroneous allegation," and for good reason: According to the Board, the UFW provided 423 card authorizations in support of the MSP, i.e., roughly *130%* of what the union represented to be the entire bargaining unit. In the face of these red flags, the Board took no action to verify signatures prior to certifying the bargaining unit. For example, the statute does not require the Board to obtain or to review signatures against exemplars provided by the employer. In this case, exemplars were provided by Wonderful. The Regional Director chose not to use them to conduct even a superficial examination for forgeries.

(3) The *Ex Parte* Nature of the Pre-Certification "Investigation"

154. The *ex parte* nature of the administrative determination (including any witness statements, credibility determinations, or other documentation obtained by the Regional Director) means that it cannot be tested through examination of the evidence before issuance of the certification. (See *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 170-172 (conc. opn. of Frankfurter, J.) ["[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it."].)

155. "The second major defect which often inheres in the *ex parte* issuance of a restraining order affecting First Amendment rights relates to the framing of such orders. Even if some form of restraining order is warranted, the fact that only the party seeking to circumscribe First Amendment activity is present to assist in the drafting of the order may result in an injunction which sweeps more broadly than necessary and violates First Amendment liberties." (*United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 909 (*UFW I*).) This case illustrates the inherent risk associated with refusing to give the employer an opportunity to be heard before the Board certified the union based on substantial evidence that the proof of majority support was untrustworthy.

156. The risk of an erroneous determination due to the *ex parte* presentation of the proof of majority support is magnified by the risk of bias on the part of the party proffering that evidence. (See *UFW I, supra*, 14 Cal.3d at p. 908, fn.4 ["The possible bias of parties signing verified complaints and affidavits in labor dispute cases and the pro forma nature of their factual allegations have long been recognized by commentators as a source of procedural difficulty."], citing Frankfurter and Greene, The Labor Injunction (1930) at pp. 34-35, 65, 201 ["It becomes an impossible assignment when judges rely solely upon the complaint and affidavits of interested or professional witnesses."].)

(4) The Highly Expedited Nature of the Pre-Certification "Investigation"

157. The highly expedited nature of the pre-certification "investigation" magnifies the risk of an erroneous determination, even assuming the MSP statute permitted the Board to go beyond the limited inquiry specified under the law, which it does not. As already described, section 1156.37(e)(1) allows only 72 hours after receipt of the employee eligibility list to make the administrative determination. The failure by the Board to even acknowledge substantial evidence of union misconduct in connection with the solicitation of cards reflects the narrowness of the statutory remit as well as the lack of any discretion in conducting an investigation, assuming it had time to do so. (See *Kash Enterprises, supra,*19 Cal.3d 294 at p. 307, fn.7, cleaned up ["[I]n judging the constitutionality of the procedure established by the ordinance, we must look to the procedure dictated by the terms of the ordinance, and not to informal practices implemented at the discretion of municipal administrators. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard."].)

E. The Value Of Additional Or Substitute Safeguards

158. The *Mathews* balancing test requires the court to consider not only the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards." (*Mathews, supra,* 424 U.S. at p. 335.) Apart from the need to provide a prompt administrative resolution, but to make available immediate, post-deprivation judicial review in which the party which sought the deprivation has the burden of showing probable cause, (see *North Georgia Finishing, Inc. v, Di-Chem, Inc*. (1975) 419 U.S. 601, 611-612 (conc. opn. of Powell, J.)), safeguards may include the requirement that the posting of security by the party initiating the procedures, the availability of a legal remedy in the event of an unlawful deprivation, and the availability of immediate judicial review to challenge the interference with protected property or liberty interests.

(1) The Lack of Any Statutory Mechanism To Protect Against Irreparable Harm

159. In response to Wonderful's motions to defer the issuance of the certification (lodged on Saturday, March 2, 2024) and its motion to stay the legal effect of the certification (filed on March 4, 2024), the Board determined that because section 1156.37 "creates no process by which to stay the certification," the Board is "unable to refuse to give effect to the process set forth in statute by the Legislature." (Exhibit 15 at p. 6].) According to the Board, it (a) has no discretion to defer issuance of the certification in order to investigate allegations of fraud and forgeries that could be outcome determinative, or to stay the issuance of the certification (or suspend its legal effects) pending the resolution of the objection hearing; and (b) it is without *any* authority to extend the bargaining period before the UFW may invoke MMC. Thus, the MSP procedures do not provide for any *ex ante* mechanism that would allow the Board to mitigate the risk of irreparable harm, or otherwise abating the legal effect of the certification *before* it threatens to impose significant, non-recoverable costs and expenses on the employer and their employees.

160. In *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, the California Supreme Court held that the Berkeley rent control ordinance rent adjustment procedure denied due process to the landlords, because there was no provision under the law that would permit timely adjustments before the existing rent caps forced the property owners to sell (or to abandon) their properties rather than to maintain them at a loss. (See *id*. at p. 165.) The *Birkenfeld* Court held that "whether a regulation of prices is reasonable or confiscatory depends ultimately on the result reached, . . . *such a regulation may be invalid on its face when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties.* It is to the possibility of such facial invalidity that our present inquiry is directed." (*Ibid*.; see also *Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280, 286, fn. 5, citing *Birkenfeld* ["[C]ourts may review the facial validity of a rent control ordinance for *possible*

confiscatory effects *before* the ordinance has been allowed to become operative and actual rent ceilings imposed."].)

(2) The Lack of Any Expedited Procedure to Revoke the Certification

161. Section 1156.37(f)(2) fails to prescribe a deadline (or any guideline) for the completion of the evidentiary hearing before the IHE, a time limit for filing post-hearing exceptions briefs, or a date by which the Board must issue a decision. At the same time, section 1156.37(f)(3) provides that "[t]he filing of a petition objecting to a majority support election certification shall not diminish the duty to bargain or delay the running of the 90-day period or 60-day period set forth in subdivision (a) of Section 1164."

162. While the duration of the objections hearing is, to a large degree, dependent on the scale and complexity of the issues, the employer should not be forced to choose between truncating his right to present his case and risking the forfeiture of liberty and property interests due to the passage of time. It is not unusual (indeed, typical) for the Board to take anywhere from six to eighteen months before it issues an order and decision in representation proceedings involving secret ballot elections. On the other hand, the MMC process is governed by deadlines which the Board has held may not be extended or stayed. Thus, it is not unusual (indeed, typical) that a MMC contract may be imposed by the Board as soon as little as 60 days after the employer is ordered into MMC.[27]

[27] Under the MMC statute, the "mediator" shall be selected within seven days after the receipt of a list of mediators provided to the Board by the California State Mediation and Conciliation Service. (Lab. Code § 1164(b).) The "mediation" shall proceed for a period of 30 days, subject to agreement by the parties to extend the period for an addition 30 days. (*Id*., § 1164, subd. (c).) Thereafter, the mediator has 21 days to file his report with the Board that establishes the final terms of a collective bargaining agreement. (*Id*., § 1164, subd. (d).) The parties have seven days to petition the board to review the mediator's report. (*Id*., § 1164.3, subd. (a).) The Board must decide within 10 days whether to consider any objections to the report. (*Ibid*.) Assuming it decided to issue a decision, it has 21 days within which to issue an order requiring the mediator to modify the terms of the CBA. (*Id*., § 1164, subd. (c).) The final order of the Board imposing the CBA takes immediate effect, even if a party seeks judicial review. (*Id*., § 1164, subd. (f)(1).)

163. It is a fundamental precept of our due process jurisprudence that delay in obtaining a meaningful post-deprivation hearing is as important as the process due in that hearing. The due process violation incepted the moment the Board issued the certification without any hearing or opportunity to be heard. Any delay in the revocation of a certification that was based on the erroneous determination presents serious due process concerns. (See *Fuentes, supra,* 407 U.S. at p. 75 [overturning state replevin procedure that "eventually" allowed for post-deprivation hearing]; cf. *Mitchell v. W.T. Grant Co*. (1974) 416 U.S. 600, 610, 625 (*Mitchell*) (conc. opn. of Powell, J.) [upholding state sequestration procedure in part on grounds that party deprived could trigger an "immediate" hearing on legality of sequestration, "An opportunity for an adversary hearing must . . . be accorded promptly after sequestration"].)

164. To determine how long of a delay is justified in affording a post-deprivation hearing, courts "examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." (*Federal Deposit Ins. Corp. v. Mallen* (1988) 486 U.S. 230, 242.) In this case, each factor cuts decisively against further delay of the post-election proceedings without at least providing Wonderful a stay of the legal effect of certification.

165. *First*, Wonderful need not be forced to suffer further delays that "might itself effect the impermissible chilling of the very constitutional right it seeks to protect." (*Zwickler v. Koota* (1967) 389 U.S. 241, 252.) A facial challenge based on deprivation of First Amendment rights is uniquely suited for immediate judicial review, given that the immediate injury caused by their denial would be exacerbated by withholding court consideration. (See *Nat'l Park Hospitality Ass'n v. Dep't of Interio*r (2003) 538 U.S. 803, 808; see also *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n* (1983) 461 U.S. 190, 201.)

166. *Second*, the lack of any statutory mechanism for immediate judicial review deprives the employer of an expedited means to contest the validity of the certification

itself (as opposed to having to wait months, if not years, before a court may hear a challenge to the issuance of the certification. The MSP statute expressly forecloses judicial review as to the Board's individual determinations of the validity of the proof of support. That, standing alone, is reason enough to strike down the statute on due process grounds.

167. *Third,* an employer subjected to an illegitimate proceeding, it suffers a "hear-and-now injury," (*Seila Law LLC* v. *Consumer Financial Protection Bureau* (2020) 140 S. Ct. 2183, 2196), that "is impossible to remedy once the proceeding is over," regardless of the outcome of the administrative process. (*Axon Enter. v. Fed. Trade Comm'n* (2023) 143 S. Ct. 890, 895, 904 ["A proceeding that has already happened cannot be undone. Judicial review of Axon's (and Cochran's) structural constitutional claims would come too late to be meaningful."].)

(3) The Lack of Timely (or Any) Judicial Review

168. The NLRA, on which the ALRA is patterned, was upheld against a due process challenge based, in part, because the federal statutes provides "adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation." (*Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U.S. 41, 48-49; accord *California Coastal Farms, Inc. v. Doctoroff* (1981) 117 Cal.App.3d 156, 162, citing *Myers* ["Relief is available through the administrative process and ultimately by judicial review at the appeal court level."].)

169. It should be clear that the MSP statute largely forecloses judicial review of the Board's determination of majority support. (Lab. Code § 1156.37, subd. (e)(2).) To the extent judicial review is at all available, it may be obtained only by collaterally attacking the certification via unfair labor practice proceedings.

170. Thus, the employer must risk substantial financial liability (including "make whole" payments and interest for the failure to bargain in good faith, and civil penalties, (Lab. Code § 1160.10,) as a result of its "technical" refusal to bargain in order to attempt to obtain judicial review. Even then, the employer is not entitled to challenge the certification

by appeal of right, as is the case under the NLRA, but only by petitioning for a (discretionary) writ of review.

171. This puts the employer to the constitutionally intolerable choice between continuing to absorb nonrecoverable costs of compliance with an unlawfully issued certification, or to "bet the farm . . . by taking the violative action before testing the validity of the law." (*Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.* (2010) 561 U.S. 477, 490, citations and quotations omitted; see also *Ex parte Young* (1908) 209 U.S. 123, 146-148 [constitutional defective process that forced plaintiff to either obey the law and thereby forgoing any possibility of judicial review, or risk "enormous" and "severe" penalties, thus effectively cutting off all access to the courts].) Wonderful faces the same dilemma: to obtain judicial review of a constitutionally illegitimate process and the resultant certification, it must refuse to comply with the law in order to challenge it.

172. Under such circumstances, the opportunity to seek injunctive relief is insufficient to avoid or mitigate the due process violation because "the requisite certainty of relief" is lacking. (*Adams v. Department of Motor Vehicles* (1974) 11 Cal.3d 146, 156.)

F. The State's Interest in "Streamlining" the Issuance of the Certification Cannot Justify the Impairment of Wonderful's Constitutionally Protected Interests

173. The Government's interest in these proceedings is, self-evidently, to not only "process[] expeditiously" majority support petitions; the goal is to "streamline" ***the issuance of the certification itself*** based on a "presumption of validity accorded a certification issued upon a finding of majority support." (Exhibit 15 at p. 7].) A process that withholds evidence of proof of majority support will expedite the administrative process. The removal of judicial review of the findings of validity of that proof would also "streamline" the post-certification procedures. This would be at odds with a fundamental purpose of the Act, which "is not exclusively to promote collective bargaining, but to promote such bargaining by the employees' *freely chosen* representatives." (*J.R. Norton,*

supra, 26 Cal.3d at p. 34, emphasis original.) It would also deny due process to and disenfranchise farm workers.

SECOND CAUSE OF ACTION

VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

(Due Process)

(U.S. Const., 14th Amend., § 1)

174. Petitioner incorporates by reference and realleges each allegation set forth in Paragraphs 1 through 124 above.

175. Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend., § 1.)

176. For the same reasons set forth in Paragraphs 125-173 above, the MSP election and post-certification hearing procedures violate the Due Process Clause of the Fourteenth Amendment.

177. Petitioner therefore seeks declaratory, equitable, and injunctive relief to prevent Defendants from depriving it of the protections afforded to it under the Due Process Clause of the Fourteenth Amendment.

178. In addition, the infringement of constitutional rights was done under color of state law, thereby violating 42 U.S.C. section 1983.

THIRD CAUSE OF ACTION

VIOLATION OF THE DUE PROCESS UNDER THE STATE CONSTITUTION

(Lack of Adequate, Speedy, or Complete Judicial Review)

(As Applied Challenge -- Deprivation of Procedural Due Process)

(Cal. Const., art. I, §7)

(Cal. Const., art. I, §7)

179. Petitioner incorporates by reference and realleges each allegation set forth in Paragraphs 1 through124 above.

180. In addition to Wonderful's facial challenge, the Board applied the MSP statute in a manner that deprived Wonderful of procedural due process.

181. Procedural due process analysis under the State Constitution is broader than such analysis under the U.S. Constitution in that it does not require "establish[ing] a property or liberty interest as a prerequisite to invoking due process protection," but is "[f]ocused rather on an individual's due process liberty interest to be free from ***arbitrary*** adjudicative procedures. (*Ryan*, *supra*, 94 Cal.App.4th at p. 1069, emphasis added, citing *People v. Ramirez* (1979) 25 Cal.3d 260, 263-64, 268.) "The touchstone of due process is protection of the individual against arbitrary action of government." (*Id.*, at p. 267.)

182. The administrative determination of the "validity" of "majority support" required under the MSP statute limits the Board's investigation to "whether the requirements set forth in subdivision (b) are met by the petition"[28] and "whether the labor organization submitting the petition has provided proof of majority support [by] compar[ing] the names on the proof of support submitted by the labor organization to the names on the list of currently employed employees provided by the employer." (Lab. Code § 1156.37, subd. (e)(1).)

---

[28] These requirements are:

> (1) That the number of agricultural employees currently employed by the employer named in the Majority Support Petition, as determined from the employer's payroll immediately preceding the filing of the Majority Support Petition, is not less than 50 percent of the employer's peak agricultural employment for the current calendar year.
>
> (2) That no valid election has been conducted among the agricultural employees of the employer named in the Majority Support Petition within the 12 months immediately preceding the filing of the petition.
>
> (3) That the Majority Support Petition is not barred by an existing collective bargaining agreement.

(Lab. Code § 1156.37, subd. (b).)

183. Here, the Board acted arbitrarily in its treatment of evidence relevant to its "determination" as to the "validity" of the proof of majority support. The Board appears to have complied with the statutory limitation on its authority by refusing to consider evidence submitted pre-certification, in the form of handwriting exemplars and sworn declarations, indicating that the UFW engaged in improper conduct in soliciting signatures on authorization cards, including making misrepresentations to induce signatures and encouraging forgery. The Board appears not to have complied with the statutory limitation on its authority by, at the behest of the UFW, considering evidence to determine that 33 individuals "possessed supervisory authority and thus should not be included in the bargaining unit," and that an additional seven individuals "lacked a community of interest with other Wonderful Nurseries employees." (Exhibit 8.)

184. Thus, Board's exercise of its authority to conduct an investigation was arbitrary and capricious. The Board can either comply with the terms of the statute or, arguably, exercise discretion to investigate fully the evidence presented. But the Board cannot take a selective approach to what evidence to consider and what evidence not to consider to impermissibly bias the result in favor of one party. Yet that is exactly how the Board applied the MSP statute in this case.

185. Wonderful requests a declaration that the Board applied Labor Code section 1156.37(e)(1) in an unconstitutional manner and an injunction preventing the Board from enforcing the Certification with respect to Wonderful.

FOURTH CAUSE OF ACTION

VIOLATION OF THE STATE CONSTITUTION

(Separation of Powers and Judicial Powers Clause)

(Cal. Const., art. III, § 3 and art. VI, § 1)

186. Petitioner incorporates by reference and realleges each allegation set forth in Paragraphs 1 through 124 above.

187. The California Constitution prescribes the separation of powers. (Cal. Const. art. III, § 1 ["The powers of state government are legislative, executive, and judicial.

Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."].).

188. The Judicial Powers Clause of the California Constitution provides: "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const. art. VI, § 1.) "Agencies not vested by the Constitution with judicial powers may not exercise such powers." (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 356 (*McHugh*).)

189. An administrative agency "may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief only if the essential judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, *through review of agency determinations.*" (*Communities, supra,* 57 Cal.App.5th at p. 814, quoting *McHugh*, 49 Cal.3d at 372, emphasis added; internal quotation marks omitted.) *Communities* struck down a provision of the Public Utilities Code virtually identical to section 1156.37(e)(2) under the Judicial Powers Clause, based on its conclusion that the provision "is not susceptible to an interpretation that would render it constitutional." (See *id.* at p. 816 [invalidating Pub. Util Code § 25531, subd. (b), which states "[t]he findings and conclusions of the commission on questions of fact are final and are not subject to review, except as provided in this article."].)

190. Labor Code section 1156.37(e)(2) states: "To protect the confidentiality of the employees whose names are on authorization cards or a petition, the [board's] determination of whether a particular proof of support is valid shall be final and not subject to appeal or review."

191. Section 1156.37(e)(2)'s prohibition on judicial review of the facts (including findings of ultimate fact) determined by the Board divests the "essential" judicial power from the courts, whether by way of "appeal" or by way of "review," including through a petition, under Labor Code section 1158, to obtain judicial review of "the facts certified following an investigation pursuant to Section [1156.37]." Section 1156.37(e)(2) purports to preclude any judicial review of agency findings, whether subject to the substantial

evidence or independent judgment standard. As such, it constitutes "an unconstitutional seizure of judicial power." (*Communities, supra*, 57 Cal.App.5th at p. 814.)

192. Section 1156.37(e)(2) is unconstitutional on its face. State agencies have no authority to "cure" a facially unconstitutional statute by refusing to enforce its plain language to instead interpret the statute to avoid the constitutional infirmity. "While administrative interpretation may save an ambiguous statute, it cannot cure a facially invalid statute." (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 48-49.)

193. Subdivision (e)(2) of section 1156.37(e)(2) is not grammatically, functionally, or volitionally severable from section 1156.37. Therefore, the entire statute mut be declared invalid.

FIFTH CAUSE OF ACTION

VIOLATION OF THE STATE CONSTITUTION

(Viewpoint Discrimination)

(Cal. Const., art. I, §§ 2(a) & 3)

194. Petitioner incorporates by reference and realleges each allegation set forth in Paragraphs 1 through 124 above.

195. Article I of the California Constitution, section 2(a), provides that "[a] law may not restrain or abridge liberty of speech or press," and Section 3(a) guarantees the right to assemble and to petition.

196. Article I, section 3(b) of the California Constitution states:

> (b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority

> adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

197. Section 1156.37(e)(2), which (as applied by the Board) bars disclosure of authorization cards to employers. This contravenes the presumption of openness under the California Constitution with respect to right of access to information concerning the conduct of the people's business. Section 1156.37(e)(2) was adopted without the requisite findings demonstrating that the interest protected by the shielding the authorization cards from disclosure or without findings demonstrating the need for protecting that interest against disclosure, also in contravention of the California Constitution.

198. Section 1156.37(e)(2) also constitutes viewpoint discrimination, in that it bars disclosure to employers of information controlled by the State, while placing no such limitations on the incumbent union.

199. The UFW sponsored and promoted section 1156.37, and lobbied not only for card authorization as an alternative to secret ballot elections, but for a novel variant of card check that, unlike card authorizations proffered for voluntary recognition purposes under the NLRA, prohibits the state from sharing the names of those employees who signatures were submitted in support of the MSP with anyone but the union petitioning for recognition.

200. Because the Card Check statute does not require the union to notify the Board or the employer that it has "commenced" the majority support petition "campaign," it may gather card signatures without informing the employer, thereby limiting the employer's ability to know about the union's solicitation of support, or to permit the employer to engage with its employees about the pros and cons of unionization. The dissemination of such information by the employer is protected under ALRA. (See, e.g., Lab. Code § 1155 ["The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not

constitute evidence of an unfair labor practice under the provisions of this part, if such expression contains no threat of reprisal or force, or promise of benefit."].)

201. On the other hand, there are no checks on what the union might say in the course of soliciting signatures, including informing workers whether they can opt-out or withdraw his authorization, for example. Once the authorization cards are submitted, they are evidence of proof of majority support. Thus, by denying the employer access to these authorization cards, Wonderful is thrust into a Kafkaesque election "objections" process where the union is certified based on evidence that is shielded from the employer.

202. This constitutes naked viewpoint discrimination. Only the (now) incumbent union may know the identity of the employees. The stated purpose of protecting the identity of petitioning workers is implied premised on the belief that once revealed, the employees will be at risk of employer retaliation. While there is no finding that could support this conclusion, let alone a per se rule barring employer access to the proof of majority support, it also forecloses the ability of the employer to inquire whether the signatures were obtained through fraudulent or coercive conduct by union representatives.

203. While the First Amendment does not guarantee the public a right of access to sources of information within the government's control," (*Houchins v. KQED, Inc.* (1978) 438 U.S. 1, 15), the government may not discriminate among viewpoints in the provision of information. Once submitted to the Board as proof in support of the MSP, the card authorizations are no longer purely private communications between the farm worker and the UFW. They became evidence in an official proceeding whereby the ALRB determined whether to grant the UFW a monopoly over the bargaining rights of Wonderful's employees.

204. "[T]he Constitution protects the right to receive information and ideas." (*Stanley v. Georgia* (1969) 394 U.S. 557, 564.) It is also beyond dispute that "the First Amendment forbids a state from discriminating invidiously among viewpoints in the provision of information within its control." (*Boardman v. Inslee* (9th Cir. 2020) 978 F.3d 1092, 1098, cert. den., (2021) 142 S. Ct. 387.) The government may not restrict speech

"based on hostility -- or favoritism -- towards the underlying message expressed." (See *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 386.) Content-based discrimination triggers strict scrutiny. (See, e.g., *Reed v. Town of Gilbert* (2015) 576 U.S. 155, 169-70.) But a law that targets "particular views taken by speakers on a subject" is an even "more blatant" and "egregious" violation of the First Amendment. (*Rosenberger v. Rector & Visitors of Univ. of Va.* (1995) 515 U.S. 819, 829.)

205. A "speaker" and his "viewpoints" are so frequently "interrelated" that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." (*Citizens United v. Federal Election Comm'n* (2010) 558 U.S. 310, 340.) Moreover, "[s]peaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own.'" (*Nat'l Inst. of Family & Life Advocates v. Becerra* (2018) 585 U.S. 755, 778, quoting *Sorrell* v. *IMS Health Inc.* (2011) 564 U.S. 552, 580.)

206. These principles apply when the government discriminates in how it affords access to speech-enabling information. "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." (*Sorrell, supra,* 564 U.S. at p. 570.) Here, the critical speech-enabling information is in the exclusive control of the government and the incumbent union. While citizens may not have a First Amendment right to obtain every kind of information within the government's control, (See *McBurney v. Young* (2013) 569 U.S. 221, 232,) "it is an entirely different question whether a restriction … that allows access to [certain persons], but at the same time denies access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information," (*L.A. Police Dep't v. United Reporting Pub. Corp*. (1999) 528 U.S. 32, 42, (conc. opn. of Scalia, J.), 43 (conc. opn. of Ginsburg, J.) [government "could not" release information "only to those whose political views were in line with the party in power"].)

207. Section 1156.37(e)(2) limits access to critical speech-enabling information on an important matter of public concern to a single interested party, the incumbent unions. But here, the information is critical, not only to the employer's ability to speak, but to exercise its right to petition government through legal process. Which is precisely why the law was drafted to carve out the employer's access. When the Legislature did attempt to articulate a basis for prohibiting employer access to the evidence of majority support, and then to remove the right to obtain judicial review of the Board's determinations, it did so on the basis of the employer's views concerning unions in general and unionization in particular.

208. According to the Board, "[t]he Legislature clearly has expressed its intent in the statute that majority support petitions be processed expeditiously, with a presumption of validity accorded a certification issued upon a finding of majority support." (Exhibit 15 Order, at p. 7.) Citing legislative history, the Board explained that amendments were necessary to "streamline" the process by which labor organizations are certified under the ALRA, and justified enactment of AB 2183 on a finding that "'[t]he obvious culprit of declining union organizing is an agricultural industry that is openly and consistently hostile to organizing and a legal system only too willing to support this over the rights of workers." (*Ibid*., quoting Senate Committee on Labor, Public Employment and Retirement, at p. 6 (June 22, 2022), <https://billtexts.s3.amazonaws.com/ca/ca-analysishttps-leginfo-legislature-ca-gov-faces-billAnalysisClient-xhtml-bill-id-202120220AB2183-ca-analysis-351671.pdf> [claiming that "the foundation of the secret ballot union election process [was] to help protect agricultural employees from retaliatory actions by their employers."].)[29]

[29] As "illustrative" of employer "hostility" to union organizing, the same Senate Committee analysis characterized the U.S. Supreme Court's decision in *Cedar Point Nursery v. Hassid* (2021) 141 S. Ct. 2063, as "finding that union organizers can be excluded from the private property of agricultural employers." (Senate Committee on Labor, Public Employment and Retirement, at pp. 6-7.) *Cedar Point* held that an ALRB access regulation violated the U.S. Constitution by constituting a *per se* physical taking.

209. The State may not justify viewpoint discrimination based on speculation about how employers might use this information. "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" (*Turner Broadcasting System, Inc. v. Federal Communications Commission* (1994) 512 U.S. 622, 664, citation omitted.) "The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." (*Brown v. Ent. Merchants Ass'n* (2011) 564 U.S. 786, 799, citations omitted.) Even then, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." (*United States v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 818.)

210. There is zero evidence in the legislative record to support the claim that blanket confidentiality is needed to protect workers. Even if there was evidence to that effect, a law that regulates speech based on its potential "emotive impact" on the audience is content based. (See *Boos v. Barry* (1988) 485 U.S. 312, 321 (1988); see also *Turner Broad. Sys., supra,* 512 U.S. at 658, citation omitted [a law "concerned with the communicative impact of the regulated speech" was subject to strict scrutiny because *"the legislature's speaker preference reflects a content preference*."].)

211. This distinction thus places the employer at a disadvantage, but it also makes it all the more likely that the statute "reflect[s] the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." (*Turner Broad. Sys., supra,* 512 U.S. at p. 658.) In other words, it presumes that communications with the employer by the union is not only to be permitted, but is integral to the scheme, while communications with the same voter by the employer

---

The Senate committee analysis concludes that each of the three veto statements of prior legislative attempts to enact "card check" "imagine a kind of power parity between agricultural workers and agricultural employers [that] is not merely naïve; it is categorically ahistorical." (*Id*. at p. 8.)

is *detrimental* to the scheme, based on the unsubstantiated assertion that the employer is likely to harass or intimidate. If the denial of access to authorization cards were unrelated to the content of expression, "there would have been no perceived need" for the Legislature to protect farm workers from employers, and no one else. (*Ibid.*)

212. Section 1156.37(e)(2), as interpreted by the Board, constitutes a blatant form of viewpoint-based regulation of protected speech and is subject to strict scrutiny.

SIXTH CAUSE OF ACTION

VIOLATION OF THE FIRST AMENDMENT AND THE FOURTEENTH AMENDMENT

(Viewpoint Discrimination)

213. Petitioner incorporates by reference and realleges each allegation set forth in Paragraphs 1 through 124 above.

214. For the same reasons set forth in Paragraphs 193-212 above, Section 1156.37(e)(2), as interpreted by the Board, constitutes a blatant form of viewpoint-based regulation of protected speech in violation of the First Amendment, which is applicable to States through the Due Process Clause of the Fourteenth Amendment.

215. Petitioner therefore seeks declaratory, equitable, and injunctive relief to prevent Defendants from depriving it of the protections afforded to it under the Due Process Clause of the Fourteenth Amendment.

216. In addition, the infringement of constitutional rights was done under color of state law, thereby violating 42 U.S.C. section 1983.

SEVENTH CAUSE OF ACTION

VIOLATION OF THE STATE CONSTITUTION

(Right to Secret Ballot)

(Cal. Const., I, § art. II, § 7)

217. Petitioner incorporates by reference and realleges each allegation set forth in Paragraphs 1 through 124 above.

218. Section 1 of article I of the California Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

219. Section 7 of article II of the California Constitution states: "Voting shall be secret."

220. Article II, section 7 is neither qualified nor ambiguous. It applies to any election conducted under the supervision of the state and its political subdivisions. It applies to the choice of elected officials, as it does to ballot initiatives and tax measures. It applies to general elections, as well as to elections applicable to a subset of qualified voters. Although the Supreme Court has held that the requirement of secrecy does not invariably apply to elections outside these traditional electoral areas, (see *Greene v. Marin County Flood Control and Water Conservation District* (2010) 49 Cal.4th 277 (*Greene*),) the reasons undergirding the constitutional requirement for ballot secrecy applies equally to the choice of a bargaining representative in a state-supervised election.

221. Since the ALRA's enactment in 1975, the sole means by which a labor organization could achieve certification has been by secret ballot election. (See Lab. Code § 1159.) "'Above all else, [the ALRA] requires secret ballot elections in every instance.'" (*Harry Carian*, 39 Cal.3d at p. 222, quoting Hearing before Assem. Com. On Labor Relations (May 12, 1975) at p. 2.) "There seems to be no doubt that the ALRA expressly provides only one means (i.e., secret ballot elections) by which a union seeking to represent a group of workers can ordinarily obtain recognition, and that this was the intent of those who drafted the legislation." (*Id.* at p. 223.)

222. As in the political sphere, where "the choice of the voters in an election binds them for a fixed time" (*Brooks v. Labor Board* (1954) 348 U.S. 96, 99 (*Brooks*)), the framers of both the NLRA and the ALRA "ha[ve] seen fit to clothe the bargaining representatives with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." (*Steele v. Louisville Northern R.*

Co. (1944) 323 U.S. 192, 202.) This is to be achieved through the "solemn and costly occasion [of a secret ballot election], conducted under safeguards to voluntary choice." (*Brooks, supra,* 348 U.S. at p. 99.) In contrast, "[a] petition or a public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth." (*Id.*, at p. 100.)

223. Supervision over the choice of bargaining representative, like the choice of any other elected representative, is a state function. The election is presided over by the Board; the result is the grant by the Board of a monopoly right to the labor union to represent all workers. "'Where a union has, as in this case, attained a monopoly of the supply of labor … such a union occupies a quasi-public position similar to that of a public service business and it has certain corresponding obligations…. Its asserted right to choose its own members does not merely relate to social relations, it affects the fundamental right to work for a living.'" (*Gay Law Students, supra,* 24 Cal.3d at 481-82, quoting *James v. Marinship Corp.* (1944) 25 Cal.2d 721, 731.)

224. In enacting the ALRA, "[t]he *primary theme of [the Act] is self-determination by the workers.* Recognition cannot be obtained by recognitional strikes; it cannot be obtained by pressures on the growers through the secondary boycott; it cannot be obtained by sweetheart contracts.'" (*Harry Carian, supra,* 39 Cal.3d at p. 225, emphasis added.) "A secret ballot election under the ALRA is intended to embody and reflect the workers' fundamental right to choose concerning a question of representation. That right is at the heart of what the ALRA is designed to protect and promote." (*Gerawan II,* 23 Cal.App.5th at p. 1240.)

225. That right to choose is intended to benefit all workers, and not just those who submit authorization cards. Some farm workers may not be aware that the union is soliciting authorization cards from other members of the bargaining unit. Others may not learn of that fact until after the MSP petition is filed, or the certification is issued. Those that are aware of the union's solicitation efforts have no "no" vote, as they would in a

secret ballot election. They have no way of expressing their desire not to be represented by the union. They are nevertheless at risk of disenfranchisement precisely because they have no way of assuring themselves that those who signed an authorization card did so solely for the purpose of wanting the UFW to represent their interests at the bargaining table with Wonderful. There are none of the safeguards intended to give the employee the assurance of legitimacy obtained by a secret ballot election under the supervision of the state: that regardless of the outcome of the vote, the process provides the necessary guarantees that it reflect the will of the majority.

EIGHTH CAUSE OF ACTION

WRIT OF TRADITIONAL MANDATE

(Code of Civil Procedure §§ 1085, 1094.5, and/or 1102)

226. Wonderful incorporates by reference and realleges each allegation set forth in Paragraphs 1 through 124 above.

227. Pursuant to Code of Civil Procedure section 1085, the Court may compel a public agency to perform acts required by law, for failure to perform a mandatory duty, or for review of quasi-legislative action by a local agency. A writ of traditional mandamus "may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person." (Code Civ. Proc. § 1085, subd. (a).) The procedure set forth in section 1085 is used to review adjudicatory decisions when the agency is not required by law to hold an evidentiary hearing. (See *Scott B. v. Bd. of Trustees of Orange Cty. High Sch. of the Arts* (2013) 217 Cal.App.4th 117, 122-123.) A decision that was "arbitrary, capricious, or entirely lacking in evidentiary support" will not be upheld. (*Ibid.*) Pursuant to Code of Civil Procedure section 1086, "[t]he writ must be issued in all cases where there is not a plain, speedy, and

adequate remedy, in the ordinary course of law" based "upon the verified petition of the party beneficially interested."

228. Pursuant to Code of Civil Procedure section 1094.5, the Court may inquire into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer. (Code Civ. Proc. § 1094.5, subd. (a).) "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc. § 1094.5, subd. (b).)

229. Pursuant to Code of Civil Procedure section 1102, "a writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." Pursuant to Code of Civil Procedure section 1103(a), "[a] writ of prohibition may be issued by any court to an inferior tribunal or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Pursuant to Code of Civil Procedure section 1104:

> The writ must be either alternative or peremptory. The alternative writ must command the party to whom it is directed to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court at a time and place then or thereafter specified by court order why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained must be omitted.

230. Wonderful has a clear, present, and direct beneficial interest in, and right to, the Board's performance of its duties under section 1156.37(e) & (f) in a manner that is constitutional. Here, either section 1156.37(e) & (f) is unconstitutional on its face, or is being applied by the Board in an unconstitutional manner.

231. Given that the MSP statutory scheme does not provide an adequate means of review, mandate is appropriate. (See *Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 602 ["in the absence of a proper statutory method of review, mandate is the only possible remedy available to those aggrieved by administrative rulings of the nature here involved"].)

232. Wonderful requests an order directing the Board to halt the unconstitutional objections hearing, refrain from enforcing the Certification, and stay the legal effect of the Certification.

NINTH CAUSE OF ACTION

DECLARATORY RELIEF

(Code of Civil Procedure § 1060)

233. Wonderful incorporates by reference and realleges each allegation set forth in Paragraphs 1 through 124 above.

234. Code of Civil Procedure section 1060 authorizes this Court to render a declaratory judgment in cases of actual controversy relating to the legal rights and duties of the respective parties.

235. An actual and substantial controversy exists between Wonderful and the Board as to the parties' respective rights and duties concerning the certification of the UFW under Labor Code section 1156.37. Wonderful contends that the statute is unconstitutional. Wonderful is informed and believes that the Board denies that contention.

236. Wonderful desires a judicial determination of its rights, the Board's duties, and the constitutionality of Labor Code section 1156.37, and as to the constitutionality of sections 1160.10, 1160.11, and that part of section 1164(b) relating to the payment of the cost of mediation and conciliation.

237. A declaration is necessary and appropriate at this time so that Wonderful and the Board may be relieved from the uncertainty and insecurity giving rise to this controversy. A proper remedy to challenge an unconstitutional statute or regulation is an action for declaratory relief. (*Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 574.)

238. Notwithstanding anything to the contrary under law (see Civil Code section 3423 or Code of Civil Procedure section 526), an injunction may be granted "to prevent the execution of a public statute, by officers of the law, for the public benefit" where the statute is unconstitutional, or when the officer exceeds his powers. (See *Financial Indem. Co. v. Sup.Ct. (McConnell)* (1955) 45 Cal.2d 395, 402.)

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays:

1. As to the First through Ninth Causes of Action: for a declaratory and preliminary and permanent injunction relief, pursuant to Code of Civil Procedure sections 526 and 527(a), restraining the Board from enforcing certification of the UFW vis-à-vis Wonderful and to preserve the status quo that existed under California law at all times until the effective date of Labor Code sections 1156.37. As to the Tenth through Twelfth Causes of Action: for a declaration that Labor Code sections 1160.10 and 1160.11 are invalid on their face for violating the state and federal constitutional guarantees of equal protection.

2. As to the Thirteenth and Fourteenth Causes of Action: for a declaration that Labor Code section 1164(b)'s requirement that parties pay MMC mediation costs violates the Due Process Clause of the Fourteenth Amendment.

3. As to the Fifteenth Cause of Action, for an order requiring Defendants to rescind the Certification and, pursuant to Code of Civil Procedure section 1095, for actual damages and nominal damages of $1.00.

4. As to the Sixteenth Cause of Action, for a declaration that Labor Code sections 1156.37, 1160.10, and 1160.11 are unconstitutional on their face.

5. As to All Causes of Action: for recovery of attorney fees and costs, under Code of Civil Procedure section 1021.5, 42 U.S.C. § 1988, and any other relevant provision of law.

6. For such other and further relief as this court deems just and proper.

Dated: May 13, 2024

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
DAVID A. SCHWARZ

Attorneys for Wonderful Nurseries LLC