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# Some Reflections on Contemporary Issues in California Farm Labor

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## INTRODUCTION

The Agricultural Labor Relations Act of 1975, having just celebrated its 41st anniversary celebration, establishes a public policy which both promotes the process of collective bargaining as well as employee freedom of association.<sup>1</sup> The statute presupposes inequality between

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\* Copyright © 2017 William B. Gould IV. Charles A. Beardsley Professor of Law, Emeritus, Stanford Law School; Chairman of National Labor Relations Board, 1994–1998; Chairman of the California Agricultural Labor Relations Board, 2014–2017. The author resigned as Chairman of the ALRB on January 13, 2017. See Dan Morain, Opinion, *Brown Hands Out a Plum and Dims His Labor Legacy*, SACRAMENTO BEE, Jan. 19, 2017, at 1B, <http://www.sacbee.com/article127361979.html>. This article is based upon a paper delivered by the author at the California Agriculture: Water, Labor, and Immigration Symposium held on Friday, April 15, 2016 at the Kalmanovitz Appellate Courtroom at the University of California, Davis, School of Law. The author wishes to thank Eduardo Blanco, Senior Legal Advisor to the Chairman, Laura Heyck, Senior Board Counsel, ALRB, and Diego Vera, McGeorge Law School Intern Class of 2018 for their help in research and editing of this article. Much of my discussion about the new medical marijuana law is drawn from the *Cannabis: ALRB Statutory & Regulatory Issues for CDEFA Consideration Memorandum* to Amber Morris, Branch Chief, Medical Cannabis Cultivation Program, California Department of Food and Agriculture from Eduardo Blanco, Special Legal Advisor to Chairman Gould, August 10, 2016.

<sup>1</sup> The preamble to the Agricultural Labor Relations Act states that “[i]t is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and

employer and employee, a policy that has particular relevance to the contemporary agricultural employment relationship given (1) the substantial number of undocumented workers whose numbers are shrinking because the border with Mexico is sealed off, but who cannot yet use the bargaining power that a smaller group would normally have due to the consequent labor shortage; and (2) the rise in indigenous employees who are frequently illiterate in or unable to speak more than a rudimentary version of either Spanish or English. Given the decrease in farmworkers' real pay and benefits<sup>2</sup> — a decrease which appears to exceed even that of so many workers in other sectors of the economy who have seen their real wages decline — the inequality that the Legislature and the Governor devised a policy to remedy (at least, in part through the 1975 law) is both particularly surprising and troubling. Indeed, in 2016, California farm

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conditions of employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or in other mutual aid or protection." CAL. LAB. CODE § 1140.2 (West 2017). For comparable policy and language under the NLRA, see, for instance, William B. Gould, *Taft-Hartley Revisited: The Contrariety of the Collective Bargaining Agreement and the Plight of the Unorganized*, 13 LAB. L.J. 348, 348-49 (1962) (stating that the Act's policy is to encourage collective bargaining and to protect workers' full freedom of association); William B. Gould IV, *Why Labor Law Is Not Working*, SFGATE (Nov. 21, 2006, 4:00 AM), <http://www.sfgate.com/opinion/openforum/article/Why-labor-law-is-not-working-2484553.php>. Though the United States Supreme Court held shortly after the enactment of the ALRA that a state "was not constitutionally obliged to provide a procedure pursuant to which agricultural employees, through a chosen representative, might compel their employers to negotiate," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 313 (1979), the issue of state constitutional rights of farmworkers to organize and engage in the collective bargaining process is still very much alive. See Complaint at 9-10, *Hernandez v. New York*, No. 2143/2016 (N.Y. Sup. Ct. May 10, 2016); see also Marc Santora, *Sued, Cuomo Says He Supports New York Farmworkers' Right to Organize*, N.Y. TIMES (May 10, 2016), <http://www.nytimes.com/2016/05/11/nyregion/cuomo-says-he-supports-new-york-farmworkers-right-to-organize.html>. See generally Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729 (1987) (focusing on New Jersey's constitutional provision as it applies to organizational and bargaining activities of farmworker unions).

<sup>2</sup> See DON VILLAREJO, A NEW PARADIGM IS NEEDED FOR LABOR RELATIONS IN AGRICULTURE: CALIFORNIA AGRICULTURE AND FARM LABOR, 1975–2014 4-6 (2015), <http://www.cirsinc.org/phocadownload/a%20new%20paradigm%20is%20needed%20for%20labor%20relations%20in%20agriculture.pdf>. Ironically, this occurs simultaneously with the overriding problem confronting agricultural labor, i.e., the shortage of labor. MICHAEL A. CLEMENS ET AL., CTR. GLOB. DEV., SHARED BORDER, SHARED FUTURE: A BLUEPRINT TO REGULATE U.S.-MEXICO LABOR MOBILITY 14 (Ctr. Glob. Dev. ed., 2016), <http://www.cgdev.org/sites/default/files/CGD-shared-border-shared-future-report-eng1.pdf>.

workers cannot afford to eat the food that they grow, their near minimum wage income constituting a major factor in homelessness, diabetes and lack of health insurance.<sup>3</sup>

Born out of union upheaval, protest, and the ability of Cesar Chavez and others to galvanize farm workers through the United Farm Workers Union, the Agricultural Labor Relations Board was charged with the responsibility of holding secret ballot elections and hearing unfair labor practice charges. This is to take place under a statute, the ALRA, similar in some respects to the National Labor Relations Act,<sup>4</sup> from which the ALRB was obliged to follow “applicable precedents.”<sup>5</sup> With certain exceptions enacted after the turn of this century,<sup>6</sup> the

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<sup>3</sup> Thomas Fuller, *In a California Valley, Healthy Food Everywhere but on the Table*, N.Y. TIMES, Nov. 23, 2016, at A13 & A25.

<sup>4</sup> The Court of Appeals for the Ninth Circuit has said that the ALRA “in its form but not its scope, is nearly identical to the NLRA.” *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1264 (9th Cir. 1994). However, there has been a major difference between the NLRB and the ALRB since 2002 when the ALRB was made part of the Labor & Workforce Development Agency. See LITTLE HOOVER COMM’N, ONLY THE BEGINNING: THE PROPOSED LABOR & WORKFORCE DEVELOPMENT AGENCY 2, 5 (Little Hoover Comm’n ed., 2002), <http://www.lhc.ca.gov/studies/164/report164.pdf>. As Commissioner Richard R. Terzian said at the time “the inclusion of the Agricultural Labor Relations Board (ALRB) in the new agency . . . compromise[s] the independence of the ALRB.” *Id.* at 35. My own experience confirms the validity of this view — though not with regard to adjudication itself.

<sup>5</sup> CAL. LAB. CODE § 1148 (West 2017) (“The board shall follow applicable precedents of the National Labor Relations Act, as amended.”). My own views about the meaning of this language are set in *P&M Vanderpoel*, 40 A.L.R.B. No. 8, 34 n.19 (2014) (Chairman Gould concurring and dissenting); this position adheres to reliance upon precedent established by the Supreme Court, federal appeals courts as well as the NLRB. See *Bud Antle, dba Bud of California*, 18 A.L.R.B. No. 6, 16 (1992) (“NLRA precedent” includes court of appeals’ precedents) *rev’d* on other grounds, *Bud Antle v. Barbosa* 45 F.3d 1261 (9th Cir. 1994). The California Supreme Court has stated that the Board and the courts must look to “established administrative and judicial interpretations as persuasive indicants of the appropriate interpretation of state legislation.” *Highland Ranch v. Agricultural Labor Relations Bd.*, 633 P.2d 949, 953 (Cal. 1981); *accord Belridge Farms v. Agricultural Labor Relations Bd.*, 580 P.2d 665, 669 (Cal. 1979); *cf. Vista Verde Farms v. Agricultural Labor Relations Bd.*, 29 625 P.2d 263, 265 (Cal. 1981) (supporting the court’s interpretation of the ALRA by citing the NLRA and mentioning that the ALRA was modeled on it).

<sup>6</sup> See CAL. LAB. CODE §§ 1164-1164.13 (West 2017); *infra* notes 28–48.

basic statute has remained the same over these forty-one years.<sup>7</sup> But the reality of the law and its application have changed considerably.<sup>8</sup>

In the first part of this paper, I examine some of the current case activity, or lack thereof, before the Board during my Chairmanship that began in early 2014. Second, I discuss rulemaking initiatives undertaken by the Board to respond to the new emerging concerted activity cases which have nothing to do with unions. All of this has stepped into a vacuum that exists by virtue of an absence of union organizational efforts under this statute and the above mentioned legal, linguistic and cultural isolation, which is the lot of many agricultural workers here in California.

Third, I focus upon some of the efforts that are being undertaken to deal with the age old labor law problem which has received so much attention under the National Labor Relations Act (NLRA) as well as our own ALRA — the delay in the administrative and judicial process. Next, I examine the new California medical marijuana legislation and the Legislature's intent to bring it within the 1975 labor law framework. Finally, I discuss some aspects of the *Gerawan* litigation, both before the Board<sup>9</sup> and the case now pending before the Supreme Court of California.<sup>10</sup>

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<sup>7</sup> The best overview of the ALRA is set forth in Herman M. Levy, *The Agricultural Labor Relations Act of 1975 — La Esperanza de California para el Futuro*, 15 SANTA CLARA L. REV. 783, 785 (1975). Notwithstanding this hope, early cautionary comments were set forth in Varden Fuller & John W. Mamer, *Constraints on California Farm Worker Unionization*, 17 INDUS. REL. 143 (1978).

<sup>8</sup> See PHILIP L. MARTIN, *PROMISE UNFULFILLED: UNIONS, IMMIGRATION AND THE FARM WORKERS* 1-6 (2003). For other discussions of the evolution of both collective bargaining and labor law in California Agriculture, see, for instance, RICHARD ALATORRE & MARC GROSSMAN, *CHANGE FROM THE INSIDE: MY LIFE, THE CHICANO MOVEMENT, AND THE STORY OF AN ERA* (2016); FRANK BARDACKE, *TRAMPLING OUT THE VINTAGE: CESAR CHAVEZ AND THE TWO SOULS OF THE UNITED FARM WORKERS* (2011); CAREY MCWILLIAMS, *FACTORIES IN THE FIELDS: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA* (1999); DICK MEISTER & ANNE LOFTIS, *A LONG TIME COMING: THE STRUGGLE TO UNIONIZE AMERICA'S FARM WORKERS* (1977); ROBERT MITCHELL, *PEACE IN THE FIELDS: A STUDY OF THE PASSAGE AND SUBSEQUENT HISTORY OF THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT OF 1975* (1980); RONALD B. TAYLOR, *CHAVEZ AND THE FARM WORKERS* (1975).

<sup>9</sup> *Gerawan Farming Inc.*, 42 A.L.R.B. No. 1, 1 (2016). *Id.* at 73-81 (Gould, Chairman, concurring).

<sup>10</sup> *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 354 P.3d 301, 301 (Cal. 2015) (granting the petition for review on August 19, 2015).

## I. CASE ACTIVITY BEFORE THE BOARD

The most dramatic development and one which represents something of a break with the past, in California agricultural labor law, is that until May 18, 2016,<sup>11</sup> there was not one single representation petition filed calling for certification of a union as exclusive bargaining representative in the nearly three years that I have been Chairman. It is clear that union organizational activity in California agriculture is moribund.<sup>12</sup>

However, in fiscal year 2014–2015, fifty Notices of Intent to Take Access (NAs) were filed, as were three Notices of Intent to Organize (NOs).<sup>13</sup> The Board has previously held that access undertaken for the purpose of inspecting toilet facilities and to give the supervisor at Cal-OSHA a complaint constituted “an intentional and/or reckless disregard for the Board’s access rule.”<sup>14</sup> But, I am of the view that this line of authority was wrongly decided and believe that the notice can

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<sup>11</sup> On May 18, 2016, a representation petition was filed by the UFW seeking an election at Klein Management, Inc. located in McFarland, CA (Case No. 2016-RC-001-VIS). The election was held on May 21, 2016. The tally of ballots was: UFW: 347, No Union: 68.

<sup>12</sup> William B. Gould IV, Chairman, Agric. Labor Relations Bd., Keynote Speech at the Agricultural Personnel Management Association’s 36th Annual Forum 5 (Jan. 28, 2016) (on file with the UC Davis Law Review and the author).

<sup>13</sup> Any labor organization that has filed a valid NA within the past 30 days may file an NO which must be accompanied by authorization cards signed by 10% of the current agricultural employees of an employer. CAL. CODE REGS. tit. 8, § 20910(a) (2016). Under the terms of the Board’s access regulations, the right of access is specifically limited in purpose, in time and place, and in the number of organizers permitted to participate; and conduct is forbidden, other than speech, which is disruptive of the employer’s property or agricultural operations, including injury to crops or machinery. *Id.* §§ 20900-20901 (2016). The California Supreme Court held that “the access rule is not a deprivation of ‘fundamental personal liberties,’ but a limited economic regulation of the use of real property imposed for the public welfare.” Agric. Labor Relations Bd. v. Superior Court, 546 P.2d 687, 698 (Cal. 1976), *dismissed sub nom.* Pandol & Sons v. Agric. Labor Relations Bd., 429 U.S. 802, 802 (1976) (lack of a federal question). Today the regulation is under challenge under the Fourth Amendment and the Fifth Amendment. Cedar Point Nursery & Fowler Packing Co. v. Gould, No. 1:16-cv-00185-LJO-BAM, 2016 WL 1559271, at \*1 (E.D. Cal. Apr. 18, 2016). *See infra* notes 82–115.

<sup>14</sup> Kusumoto Farms, 23 A.L.R.B. No. 2, 1 (Mar. 11, 1997); *accord* Ramirez Farms, 23 A.L.R.B. No. 3, 2-3 (Mar. 11, 1997) (to the same effect); Navarro Farms, 23 A.L.R.B. No. 1, 2, 5, 7 (Mar. 3, 1997) (discussing condemnation of taking access for the purposes of inspecting facilities required under a different statutory scheme); *cf.* Gargiulo, Inc., 23 A.L.R.B. No. 5 (Apr. 25, 1997) (holding that organizer demonstrated intentional or reckless disregard for access regulation by leading a group of demonstrators onto the property of Gargiulo, Inc. that exceeded the limitations for the number of organizers authorized under the regulation).

be used to address employment conditions generally, consistent with ALRA protection of concerted as well as union activity.

Again, in 2015, none of this led to a representation petition, though it has been said that the access notices were obtained to address employment conditions rather than to engage in union organizational efforts. Recall that in the early days of the ALRA, the Board was conducting an average of four elections a day, given the upsurge of union organization activity.<sup>15</sup> This is particularly significant with the ALRA, in contrast to the NLRA. Under the former law, recognition cannot be obtained without certification, and thus is the exact mirror image of the extent of union organizing.<sup>16</sup> Again, certifications, like the phenomenon of union organizing, in contrast to the statute's beginnings, have completely disappeared — attributable no doubt to a

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<sup>15</sup> Philip Martin, *Labor Relations in California Agriculture: 1975-2000*, CHANGING FACE (Oct. 4, 2000), <https://migration.ucdavis.edu/cf/more.php?id=44> (“After five months of operation, the ALRB reported that by the end of January 1976 it received 604 election petitions, or an average of 4 a day, and conducted 423 elections involving over 50,000 workers; objections were filed in 80 percent of the elections. The ALRB received 988 ULP charges in its first five months of operation, almost 7 a day, and issued 254 charges, or almost 2 a day.”).

<sup>16</sup> Under section 1159 of the ALRA, only labor organizations certified pursuant to the representation procedures set forth in the statute may be parties to a valid collective bargaining agreement. The narrow exception to this rule is that the ALRB has the authority to issue a bargaining order as an extraordinary remedy where an employer's egregious unfair labor practices have made it impossible to hold a free and fair election. *Sales v. Agric. Labor Relations Bd.*, 703 P.2d 27, 42 (Cal. 1985). In 2011, the ALRA was amended to give the Board broader authority to issue bargaining orders, i.e., to certify the union where employer interference with an election not only warrants setting aside the election, but would render slight the chances of a new election reflecting the free and fair choice of employees. *See* CAL. LAB. CODE § 1156.3(f) (West 2017) (“Notwithstanding any other provision of law, if the board refuses to certify an election because of employer misconduct that, in addition to affecting the results of the election, would render slight the chances of a new election reflecting the free and fair choice of employees, the labor organization shall be certified as the exclusive bargaining representative for the bargaining unit.”). Under the NLRA, in contrast, recognition can be obtained without certification in a variety of ways. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (ruling that unfair labor practices, under some circumstances, can lead to mandatory recognition without certification); *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961) (addressing the circumstances under which an employer can recognize a union without certification); *see also, e.g., Levitz Furniture Co. of the Pac.*, 333 N.L.R.B. 717 (2001) (establishing different rules and standards through which an established relationship can be challenged through either a representation election or ULP litigation); *cf. Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974) (holding that an employer may refuse to recognize a union other than through certification). Under the Taft-Hartley amendments, employers as well as employees may file a certification petition. 29 U.S.C. § 159(c)(1)(B) (2012).

number of factors which have received much discussion.<sup>17</sup> Meanwhile, however, there have been a scattering of decertification petitions, the most prominent of which involves *Gerawan Farming, Inc.*<sup>18</sup> which has taken a number of forms.<sup>19</sup> (Decertification petitions are filed by employees where they wish to displace an incumbent union as the exclusive bargaining representative.<sup>20</sup>) In one case involving a different employer, the employees voted by about 2-1 to reject a decertification petition.<sup>21</sup> In another matter, the petition was dismissed on the grounds there was no bona fide question of representation given that an adequate showing of interest of employee support, i.e. fifty percent had not been made.<sup>22</sup> In yet another case, a petition to decertify was filed by individual employees and the UFCW, Local 5 intervened. The result was the certification of intervenor, UFCW Local 5 which obtained fifty out of seventy votes, seventeen going to the

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<sup>17</sup> See generally MIRIAM PAWEL, *THE CRUSADES OF CESAR CHAVEZ: A BIOGRAPHY* (2014) (documenting the life of Cesar Chavez and his career igniting the farmworkers social movement and the reasons for the movement's decline); MIRIAM PAWEL, *THE UNION OF THEIR DREAMS: POWER, HOPE, AND STRUGGLE IN CAESAR CHAVEZ'S FARM WORKER MOVEMENT* (2009) (evaluating the history of both Cesar Chavez and the United Farm Workers union and the hopes and aspirations of union activists, realized and unrealized).

<sup>18</sup> See Thomas Peele, *Ugly Labor Dispute Between Gerawan, ALRB Heads to State Supreme Court*, CAL. LAW. (Sept. 2015), <http://www.callawyer.com/2015/09/gerawan-alrb-dispute-over-farmworker-union-contracts-head-to-state-supreme-court/>.

<sup>19</sup> See *Lopez v. Shiroma*, No. 14-16640, 2016 WL 4791868, at \*1 (9th Cir. Sept. 14, 2016) (concerning Board's appeal from ruling on Board's motion to dismiss that denied Board immunity defenses in a 42 U.S.C. § 1983 action for alleged civil rights violations arising out of a representation election), *affg in part, rev'g in part* No. 1:14-CV-00236-LJO-GSA, 2014 WL 3689696 (E.D. Cal. July, 24, 2014); *Gerawan Farming, Inc.*, 42 A.L.R.B. No. 1, 1-3 (Apr. 15, 2016) (hearing on consolidated complaint pending hearing before ALJ); *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 354 P.3d 301, 301 (Cal. 2015) (raising various statutory and constitutional challenges to Board's Decision in 39 ALRB No. 17, where the Board approved an MMC contract between the Employer and the Union); *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 202 Cal. Rptr. 3d 713 (Ct. App. May 9, 2016) (appealing from the superior court order granting the Board's demurrer to Gerawan's complaint for declaratory and injunctive relief), *rev'g* No. 13-CECG-03374 (Cal. Super. Ct. filed Oct. 28, 2013) (concerning Gerawan's challenge to the Board's August 21, 2013 order that MMC proceedings are closed to the public). The most consequential decision was rendered by the Board involving *Gerawan* when it held that the employer had unlawfully assisted the decertification campaign. *Gerawan Farming, Inc.*, 42 A.L.R.B. No. 1, 2, 8 (Apr. 15, 2016).

<sup>20</sup> See CAL. LAB. CODE § 1156.7(c) (West 2017). Recall that under the NLRA an employer as well as employees may file such a petition. See *supra* note 16.

<sup>21</sup> See *Dole Berry North*, 39 A.L.R.B. No. 18, 2 (May 27, 2014).

<sup>22</sup> See *Papagni Fruit Co.*, Case No. 2015-RD-001-VIS (Sept. 25, 2015).

UFW and three to no union at all.<sup>23</sup> Finally, perhaps proving the proposition that turnabout is fair play,<sup>24</sup> the UFW intervened in a decertification filed to challenge Local 5 and obtained a majority of the votes itself!<sup>25</sup>

But, these developments do not completely reveal the full extent of union decline in agriculture. In 2014 and 2015, there was considerable litigation about “old certifications”, many of which were granted in the 70’s, 80’s, and even the 90’s, and, whether there was a continuing duty to bargain applicable to employers in the second decade of this century.<sup>26</sup> In many of these cases, the United Farm Workers disappeared as a bargaining representative for a substantial period of time and re-emerged anew as a bargaining representative in the 90’s or in this century. Because some of this behavior can be said to be attributable to obduracy on the part of employers and their surface bargaining with labor organizations, the Legislature, during the Davis Administration, enacted procedures providing for first contract interest arbitration<sup>27</sup> in the Mandatory Mediation Conciliation Act of

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<sup>23</sup> See *Mushroom Farms, Inc.*, Case No. 2015-RD-001-SAL (Jan. 19, 2016).

<sup>24</sup> See DUDLEY BRADSTREET, *THE LIFE AND UNCOMMON ADVENTURES OF CAPT. DUDLEY BRADSTREET* 216 (G.S. Taylor ed., 1755).

<sup>25</sup> *Hiji Bros. & Seaview Growers, Inc.*, Case No. 2016-RD-001-SAL (Apr. 29, 2016).

<sup>26</sup> See, e.g., *Arnaudo Bros., LP*, 40 A.L.R.B. No. 3, 2, 12 (Apr. 4, 2014) (noting that employer argued as a defense to refusal to bargain allegations, that the union disclaimed interest in representing employees), *aff’d*, 41 A.L.R.B. No. 6, (Sept. 10, 2015); *Tri-Fanucchi Farms*, 40 A.L.R.B. No. 4, 2, 4 (Apr. 23, 2014) (noting that employer argued as a defense to refusal to bargain allegations, that the union abandoned the bargaining unit).

<sup>27</sup> Interest arbitration over new contract terms, is less well established in the U.S. than grievance arbitration involving disputes about the interpretation or application of an *existing* collective bargaining agreement. The latter has been promoted by the U.S. Supreme Court as a matter of federal labor law policy. See e.g., *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-85 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 566-69 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960); *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 461 (1957) (Frankfurter, J., dissenting). The Supreme Court has not yet articulated a similar status for interest arbitration. See generally William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, in *PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 35-100 (Paul D. Staudohar & Mark I. Lurie eds., 2011) (discussing the *Steelworkers Trilogy* and whether similar policy concerns there can justify a promoting of interest arbitration). The debate about interest arbitration has been reflected in NLRB litigation. See *Sheet Metal Workers Int’l Ass’n, Local Union No. 59*, 227 N.L.R.B. 520, 520-21 (Dec. 22, 1976) (holding that interest arbitration is a non-mandatory subject of bargaining). I have expressed disagreement with this decision in *Sheet Metal Workers’ Int’l Ass’n, Local Union No. 162*, 314 N.L.R.B. 923, 926 n.12 (Aug. 29, 1994),



2002.<sup>28</sup> Like many of the old or dormant certifications, which were not acted upon by unions themselves, the procedures were rarely invoked even subsequent to the declaration by the Court of Appeal in *Hess Collection Winery*<sup>29</sup> that the statute was constitutional.<sup>30</sup> Subsequently, the Court of Appeal for the Fifth District held in *Gerawan* to the contrary.<sup>31</sup> With new post-*Hess Collection Winery* amendments<sup>32</sup>, it

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and *Laidlaw Transit, Inc.*, 323 N.L.R.B. 867, 867 n.1 (1997).

<sup>28</sup> On September 30, 2002, Governor Gray Davis signed two companion bills, Senate Bill 1156 and Assembly Bill 2596, that amended the Agricultural Labor Relations Act, effective January 1, 2003, to provide for binding mediation in selected circumstances where the parties have been unable to reach a collective bargaining agreement. *Messages from the Governor*, S. JOURNAL, Leg. 2001–2002, Reg. Sess., at 6227 (Cal. 2002).

<sup>29</sup> In this matter, the employer asserted that the MMC law found in California Labor Code sections 1164-1164.14 violated various rights and protections guaranteed under the California and United States Constitutions; however, as the Board explained in its decision, the Board does not have authority to declare a statute unconstitutional under Article 3, Section 3.5 of the California Constitution. *Hess Collection Winery*, 29 A.L.R.B. No. 6, 6-7 (Oct. 16, 2003). Pursuant to the requirements of California Labor Code section 1164.3(b), the Board ordered that the Mediator's Report become the final order of the Board. *Id.* at 12.

<sup>30</sup> *Hess Collection Winery v. Agric. Labor Relations Bd.*, 45 Cal. Rptr. 3d 609, 626 (2006), *appeal denied*, 2006 Cal. LEXIS 11206 (Sept. 13, 2006).

<sup>31</sup> *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 187 Cal. Rptr. 3d 261, 299 (Ct. App. 2015), *appeal granted, depublished by* 354 P.3d 301 (Cal. 2015). One of the issues which could be presented in future litigation relates to century old authority on the constitutionality of interest arbitration. The earliest state law requiring compulsory resolution of private labor disputes, which was passed by Kansas in 1920, was struck down by the Supreme Court in *Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 262 U.S. 522, 542-44 (1923) (finding that an arbitration statute regulating wages and hours was unconstitutional because it interfered with freedom of contract), and *Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 267 U.S. 552, 569 (1925) (finding that an arbitration statute regulating wages and hours was unconstitutional because it interfered with due process). In *Dorchy v. State of Kansas*, 264 U.S. 286, 290-91 (1924), the Court (in an opinion by Justice Brandeis) held that the state supreme court could determine whether the portions of the state law relating to hours could stand alone or was so interwoven with the compulsory arbitration system that it was invalid. Congress, through ad hoc legislation, has imposed compulsory interest arbitration to end disputes in the railroad and maritime industries. In 1963, a railroad dispute over the elimination of certain jobs prompted Congress to enact a special legislation imposing compulsory arbitration. Act of Aug. 28, 1963, Pub. L. No. 88-108, 77 Stat. 132; *see also* *Bhd. of Locomotive Firemen v. Chi., Burlington & Quincy R.R. Co.*, 225 F. Supp. 11, 23 (D.D.C. 1964) (upholding Public Law 88-108 against constitutional challenge), *aff'd sub nom.* *Bhd. of Locomotive Firemen v. Certain Carriers Represented by the E. Conference Comms.*, 331 F.2d 1020 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 918 (1964); *cf.* *Div. 1287 of Amalgamated Ass'n. of Street, Elec. Ry. & Motor Coach Emps. v. Missouri*, 374 U.S. 74, 82 (1963) ("Missouri, through the fiction of 'seizure' by the State, has made a peaceful strike against a public utility unlawful, in direct conflict

appeared that the procedures might be utilized more frequently, and in 2012 and 2013 a number of cases came before the Board.<sup>33</sup> But, gradually over these past couple of years the cases have declined.<sup>34</sup> Like certifications themselves, there was not one single case involving this issue pending before the Board in 2016 until the first petition was filed in August of that year.<sup>35</sup>

What is equally remarkable here is the fact that while the Mandatory Mediation and Conciliation Act of 2002 came into existence a decade and a half ago,<sup>36</sup> today there is not one single case involving this issue

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with federal legislation which guarantees the right to strike against a public utility, as against any employer engaged in interstate commerce. In forbidding a strike against an employer covered by the National Labor Relations Act, Missouri has forbidden the exercise of rights explicitly protected by § 7 of that Act . . . . As in [*Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emps. v. Wis. Emp't Relations Bd.*, 340 U.S. 383], a state law which denies that right cannot stand under the Supremacy Clause of the Constitution.”); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emps. of Am., Div. 998 v. Wis. Emp't Relations Bd.* 340 U.S. 383, 398-99 (1951) (holding that the Wisconsin Public Utility Anti-Strike Law conflicted with the NLRA as amended by the Labor Management Relations Act, and that it was invalid under the Supremacy Clause of the Constitution).

<sup>32</sup> Senate Bill 126, effective January 1, 2012, made two major changes to the Board's MMC provisions in Labor Code section 1164: 1) For labor organizations certified after January 1, 2003, it reduced the waiting period for filing a request for MMC after an initial request to bargain from 180 days to 90 days; and 2) it allowed parties to invoke the MMC process 60 days after a labor organization has been certified pursuant to a bargaining order or 60 days after a decertification petition is dismissed due to unlawful conduct by the employer. S. 126, 2011 Leg., Reg. Sess. (Cal. 2012).

<sup>33</sup> See, e.g., *Gerawan Farming, Inc.*, 39 A.L.R.B. No. 17, 1 (Nov. 19, 2013); *Gerawan Farming, Inc.*, 39 A.L.R.B. No. 16, 1 (Oct. 25, 2013); *Gerawan Farming, Inc.*, 39 A.L.R.B. No. 13, 4-6 (Aug. 21, 2013); *Gerawan Farming, Inc.*, 39 A.L.R.B. No. 11, 1 (July 29, 2013); *George Amaral Ranches, Inc.*, 39 A.L.R.B. No. 10, 1 (July 18, 2013); *Arnaudo Bros., LP*, 39 A.L.R.B. No. 7, 1 (June 5, 2013); *Gerawan Farming, Inc.*, 39 A.L.R.B. No. 5, 1 (Apr. 16, 2013); *San Joaquin Tomato Growers, Inc.*, 38 A.L.R.B. No. 9, 1 (Oct. 9, 2012); *Ace Tomato Co.*, 38 A.L.R.B. No. 8, 1 (Aug. 10, 2012); *San Joaquin Tomato Growers, Inc.*, 38 A.L.R.B. No. 7, 1 (Aug. 3, 2012); *Ace Tomato Co.*, 38 A.L.R.B. No. 6, 1 (July 25, 2012); *San Joaquin Tomato Growers, Inc.*, 38 A.L.R.B. No. 2, 1 (Mar. 29, 2012); *D. Papagni Fruit Co./UFW*, 11 A.L.R.B. No. 38, 2012-MMC-002, (Aug. 24, 2012) (ordering the UFW and D. Papagni Fruit Company to mandatory mediation and conciliation).

<sup>34</sup> Only one MMC case came before the Board in fiscal year 2013/2014. See *Perez Packing, Inc.*, 40 A.L.R.B. No. 5 (May 23, 2014). The Board did not receive any requests for referral to MMC in fiscal year 2014/2015. In fiscal year 2015/2016, there was mandatory mediation in *Mushroom Farms, Inc.*, 42 A.L.R.B. No. 3, 2016-MM-001 (Sept. 7, 2016).

<sup>35</sup> *Mushroom Farms, Inc.*, 42 ALRB Case No. 3 (Aug. 17, 2016).

<sup>36</sup> Recall that it was designed to provide for interest arbitration after the parties had unsuccessfully attempted to resolve their contract differences the first time

pending before the Board. The reason for this may be both rooted in lack of union organizational activity as well as, as discussed below, a vigorous challenge to the Act's constitutionality by the Court of Appeal for the Fifth District<sup>37</sup> in which that tribunal has contradicted the Court of Appeal for the Third District.<sup>38</sup> In the former case, the Fifth District held, in an unpublished decision, that the statute is unconstitutional and that, in any event, under the ALRA unfair labor practice jurisprudence an employer is "not precluded . . . from asserting, as a defense to [a union's] request to commence the MMC process, that the union had abandoned its representative status."<sup>39</sup> Thus, old and dormant certifications, the abandonment of bargaining relationships by the United Farm Workers in particular, renewed hostility to collective bargaining and indeed weakness and delays seemingly inherent in modern labor legislation itself, have all been exploited by a number of employers. Moreover, a large so called wall-to-wall bargaining unit contained in the statute<sup>40</sup> has generally inhibited union organizing.<sup>41</sup> These factors, at least in substantial part,

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around when the relationship was embryonic and fragile. Cf. William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 18 (2009) (discussing the EFCA's advantages of having an abbreviated procedure against the disadvantage of challenging a new relationship); William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 324-28 (2008) (noting that while there are certain provisions in the Employee Free Choice Act providing for interest arbitration for a new collective bargaining agreement, they fail to adequately preserve new fragile relationships and to effectively promote bargaining prior to arbitration).

<sup>37</sup> *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 187 Cal. Rptr. 3d 261, 299 (Ct. App. 2015).

<sup>38</sup> *Hess Collection Winery v. Agric. Labor Relations Bd.*, 45 Cal. Rptr. 3d 609, 626 (Ct. App. 2006).

<sup>39</sup> *Gerawan Farming, Inc.*, 187 Cal. Rptr. at 285.

<sup>40</sup> See CAL. LAB. CODE § 1156.2 (West 2017).

<sup>41</sup> The NLRB has frequently established an appropriate unit presumptively in one location where the employer possesses multi-location facilities. See *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 439-44 (1965); *Metro. Life Ins. Co.*, 156 N.L.R.B. 1408, 1418 (1966); *Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551, 552-53 (1964), *enforcement denied* 356 F.2d 895 (7th Cir. 1966); *F. W. Woolworth Co.*, 144 N.L.R.B. 307, 309 (1963); *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032, 1035 (1962); *Dixie Belle Mills, Inc., A Wholly Owned Subsidiary of Bell Indus.*, 139 N.L.R.B. 629, 632 (1962). Smaller groups than a facility can be appropriate. See *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. 934, 947 (2011); *DTG Operations, Inc.*, 357 N.L.R.B. 2122, 2128-29 (2011); *Northrop Grumman Shipbuilding, Inc.*, 357 N.L.R.B. 2015, 2020 (2011).

have produced and made California agricultural labor overwhelmingly non-union.<sup>42</sup>

But, there is much more to this story. In the first place, until new amendments enacted in 2011, the MMC statute was never even invoked by the unions subsequent to the landmark *Hess* ruling until 2006.<sup>43</sup> Years later, it may be that the Board itself contributed to this problem by holding in *Ace Tomato, Inc.*<sup>44</sup> that a properly fashioned MMC agreement could not be implemented until the employer had exercised its right to appeal,<sup>45</sup> when the very lengthy appeal process itself and the delay associated with it was one that had undermined collective bargaining at the outset, prompting the Legislature to enact the MMC statute in the first instance.<sup>46</sup> This 2012 decision is erroneous, in my view, and seemingly inconsistent with a better reasoned 2014 holding in which a unanimous Board held that the appeal of unfair labor practice decisions by the Board<sup>47</sup> could not delay the implementation of the same MMC provisions.<sup>48</sup>

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<sup>42</sup> See Press Release, Bureau of Labor Statistics, Union Members — 2015 tbl. 3 (Jan. 28, 2016), <http://www.bls.gov/news.release/pdf/union2.pdf>. For 2014, 1.1% of those employed in agriculture and related industries throughout the United States who were members of unions. *Id.* In 2015, the number was 1.2%. *Id.*

<sup>43</sup> Requests for referral to MMC filed in 2006 included Bayou Vista Dairy, LLC, Case No. 06-MMC-3-VI (Oct. 19, 2006), and Valley View Farms, Case No. 2006-MMC-02 (Oct. 12, 2006).

<sup>44</sup> 38 A.L.R.B. No. 8, 8 (Aug. 10, 2012).

<sup>45</sup> Ignoring legislative history and the rationale for MMC legislation itself, the Board stated, “[u]nfortunately, there are no provisions of the ALRA governing the MMC process that permit the Board to seek temporary relief during the pendency of the 30-day period for seeking appellate review.” *Id.* at 7.

<sup>46</sup> In Governor Gray Davis’ message to the legislature as he signed the MMC legislation, he stated that “[t]he appeals process, coupled with a complicated formula for determining damages, often takes so long that the farmworkers can no longer be located by the time the award is made. The bottom line is that too many people who were supposed to benefit from the protections of the ALRA are left without a contract, without a remedy and without hope.” *Messages from the Governor*, S. JOURNAL, Leg. 2001–2002, Reg. Sess., at 6227 (Cal. 2002).

<sup>47</sup> Where the labor organization in question was certified prior to January 1, 2003, the prerequisite conditions for referral to MMC are set forth in Labor Code sections 1164(a)(1) and 1164.11, and section 20400(a) of the Board’s regulations. Pursuant to these provisions, a declaration requesting referral to MMC must be signed under penalty of perjury and include a statement that: 1) the labor organization was certified as the exclusive bargaining agent prior to January 1, 2003; 2) the parties have failed to reach agreement for at least one year after the date of the initial request to bargain; 3) there was a renewed demand to bargain at least 90 days prior to the filing of the declaration requesting referral to MMC; 4) the employer has committed an unfair labor practice, along with the nature of the violation and the corresponding Board decision number or case number; 5) the parties have not previously had a binding

## II. CONCERTED ACTIVITY

Into the vacuum left by an absence of union organizing and invocation of MMC, and consequent unfair labor practice litigation, have stepped the so called “concerted activity” cases which arise, in the overwhelming number of instances, in the non-union establishments that involve workers banding together to protest employment conditions without any contact or involvement with the union at all.

Doctrinally, these cases stem from the United States Supreme Court’s 1962 landmark decision in *NLRB v. Washington Aluminum*<sup>49</sup> where the Court held that walkouts and protests, with or without the presence of any union protected activity and regardless of judicial views about the wisdom of the action taken,<sup>50</sup> constituted protected concerted activity which immunizes employee conduct from employer retaliatory self-help (in the form of discharge or discipline). The right is rooted in the efforts of employees to pursue goals which involve mutual aid and protection through association.<sup>51</sup> One of the best kept secrets is this right to engage in concerted activity. Both under the National Labor Relations Act and the ALRA, employees, the public

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contract between them; and 6) the employer employed or engaged 25 or more agricultural employees during a calendar week in the year preceding the filing of the declaration. CAL. LABOR CODE §§ 1164(a)(1), 1164.11 (West 2017); CAL. CODE REGS., tit. 8, § 20400 (2016).

<sup>48</sup> *Perez Packing, Inc.*, 40 A.L.R.B. No. 1, 6-7 (Mar. 26, 2014). Like *Ace Tomato Inc.*, there was no provision permitting the Board to seek relief during the appeal of the unfair labor practice. But this time the Board got it right and held that the MMC agreement could be implemented during the appeal.

<sup>49</sup> See generally *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962); Archibald Cox, *The Right to Engage in Concerted Activities*, 26 IND. L. J. 319 (1951) (discussing the meaning of “concerted activities” by considering a definition and a proper allocation of interpretive responsibility between the NLRB and courts); William B. Gould, *Recent Developments Under the National Labor Relations Act: The Board and the Circuit Courts*, 14 UC DAVIS L. REV. 497, 513-19 (1981) (analyzing the implications of the *Washington Aluminum* case in relation to other decisions).

<sup>50</sup> “[I]t has long been settled that the reasonableness of workers’ decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.” *Wash. Aluminum Co.*, 370 U.S. at 16.

<sup>51</sup> Section 151 of the NLRA states in part: “It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. § 151 (2012).

and some members of the bar are equally unaware that the statute is much more than a labor management law even though *Washington Aluminum* itself was decided by the Court more than a half century ago.<sup>52</sup> Subsequently, these cases have achieved more prominence because of the so called social media litigation,<sup>53</sup> and particularly cases involving sexual harassment.<sup>54</sup>

In 2014–2016 about half of the cases pending before the Board involved concerted activity.<sup>55</sup> In the last year, of twenty-nine cases which were settled by Administrative Law Judges utilizing old and new settlement procedures, seventy-four percent involved concerted and protected activity.<sup>56</sup> From 2014 through 2016, a majority of the unfair labor practice charges filed with the agency involved concerted activity.<sup>57</sup>

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<sup>52</sup> See Steven Greenhouse, *Workers Organize, but Don't Unionize, to Get Protection Under Labor Law*, N.Y. TIMES (Sept. 6, 2015), <http://www.nytimes.com/2015/09/07/business/economy/nonunion-employees-turn-to-work-site-committees-for-protection.html>.

<sup>53</sup> See, e.g., *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 1 (2012). For a discussion of the social media cases, see generally *Lafayette Park Hotel*, 326 N.L.R.B. 824, 829-30 (1998) (Gould, Chairman, concurring) (establishing that a rule stating that, “the appropriate inquiry [in examining the facial validity of rules] . . . must center on whether a reasonable employee could believe that the rule prohibits protected activity. When the rules have an obvious intent, they cannot be found unlawful by the parsing out certain words and creating theoretical definitions that differ from the obvious ones. If that were the standard, virtually all of the work rules in today’s workplace could be deemed violative of our Act unless they explicitly state that they do not apply to Section 7 activity,” and with the concurring opinion stressing that this approach is more likely to be compatible with rules promoting civility and good manners); WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* 173-78 (5th ed. 2013) (discussing the framework for social media cases and the prerequisites for protected social media conduct).

<sup>54</sup> See, e.g., *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. No. 12, 1 (2014).

<sup>55</sup> Information provided by ALRB Executive Secretary, J. Antonio Barbosa.

<sup>56</sup> *Id.*

<sup>57</sup> In 2014, 42 out of the 74 charges filed involved employee protected concerted activity where no union was involved. In 2015 this ratio was 62:117, and thus far in 2016, it is 17:24. The question of whether and under what circumstances the protest of one employee can constitute concerted activity is addressed in *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 840-41 (1984) (recognizing constructive concerted activity where the employee protest invokes the collective bargaining agreement); see also *Myth, Inc.*, 326 N.L.R.B. 136, 137-42 (1998) (Gould, Chairman, dissenting); *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 885, 888-89 (1986), *aff’d.*, *Prill v. NLRB (Prill II)*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, *Meyers Indus., Inc. v. NLRB*, 487 U.S. 1205 (1988); *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493, 496-97 (1984), *remanded sub nom. Prill v. NLRB (Prill I)*, 755 F.2d 941 (D.C. Cir. 1985); *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1003-05 (1975).

In the cases that have reached the Board, for instance, in *California Artichoke*<sup>58</sup> the Board held that the actions of several workers who were involved in leaving the jobsite (spinach fields in Coachella) because “cold and rain had made working conditions unsafe,” constituted protected concerted activity for which the employees could not be disciplined.

In an earlier case, the Board had similarly accorded protected status to concerted activity designed to protest the employer’s refusal to pay anything more than the minimum wage.<sup>59</sup> It will be interesting to see whether Governor Brown’s signing of the new minimum wage legislation which will lead to \$15.00 an hour will have any impact upon this and employee knowledge and expectations.<sup>60</sup>

Penultimately, following the NLRB’s recent holding in *Fresh & Easy Neighborhood Market*<sup>61</sup> our Board held unanimously in *Sandhu*<sup>62</sup> that not only is the protest about sexual harassment for the purpose of mutual aid and protection within the meaning of our law, but also a majority of the ALRB held that an employee approaching coworkers to seek their support of her efforts regarding the elimination of sexual harassment in the workplace would constitute concerted activity even if the coworkers did not agree with her sexual harassment complaint.<sup>63</sup> In addition, the Board held that the employee was under no obligation to return to work until the sexual harassment complaint was remedied. Significantly, the Board held that the remedy here was not only backpay, but also so called front pay<sup>64</sup> to compensate the

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<sup>58</sup> Cal. Artichoke & Vegetable Corp., 41 A.L.R.B. No. 2, 1 (Apr. 7, 2015).

<sup>59</sup> See P & M Vanderpoel Dairy, 40 A.L.R.B. No. 8, 30 (Aug. 28, 2014). The California Court of Appeal (5th Dist.) affirmed the Board’s decision in an unpublished opinion on October 9, 2015. P & M Vanderpoel Dairy v. Agric. Labor Relations Bd., F070149, 2015 WL 5919588, at \*1 (Cal. App. Oct. 9, 2015).

<sup>60</sup> The Governor signed Senate Bill 3 into law on April 4, 2016. David Siders, *Jerry Brown Signs \$15 Minimum Wage in California*, SACRAMENTO BEE (Apr. 4, 2016), <http://www.sacbee.com/news/politics-government/capitol-alert/article69842317.html>.

<sup>61</sup> Fresh & Easy Neighborhood Mkt, Inc., 361 N.L.R.B. No. 12, 1 (2014).

<sup>62</sup> Gurinder S. Sandhu, 40 A.L.R.B. No. 12, 1 (Nov. 13, 2014).

<sup>63</sup> *Id.* at 28-30. See generally José R. Padilla & David Bacon, *Protect Female Farmworkers*, N.Y. TIMES (Jan. 19, 2016), <http://www.nytimes.com/2016/01/19/opinion/how-to-protect-female-farmworkers.html> (discussing the pervasiveness of sexual assault in the agriculture industry, especially of immigrant women farm workers).

<sup>64</sup> For a discussion of the emergence of this concept in employment discrimination law, see William B. Gould IV, *Title VII of the Civil Rights Act at Fifty: Ruminations on Past, Present, and Future*, 54 SANTA CLARA L. REV. 369, 393-96 (2014) [hereinafter *Title VII at Fifty*]. The concept was initially devised in employment discrimination cases of which *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87, 121-22 (E.D. Mich. 1973), *rev’d in part on other grounds*, Equal Emp’t Opportunity Comm’n v.

employee who could not return because the complaint remained unremedied.<sup>65</sup>

Finally, the Board affirmed on Administrative Law Judge conclusion that a refusal to perform work at the front of a harvesting machine based upon the employees' view that the assignment was unfair constituted protected concerted activity.<sup>66</sup> As in the above referenced concerted activity cases, the termination of the employees in question was held to be unlawful.

The rise in litigation involving concerted activity as well as unfair labor practice litigation involving the status of undocumented workers,<sup>67</sup> has induced the Board to take additional steps to insure farmworkers are aware of their rights and protections with respect to protected concerted activity and to examine with specificity what steps will increase their awareness.<sup>68</sup>

Hearings were held on this matter in Fresno, Salinas and Santa Maria, California during the month of September, 2015, and subsequently, the Board adopted a proposed rule designed to provide for worker education on employer property under the ALRA. The Board held similar hearings in 1978 on worker education regulation, but adopted an ad hoc approach until 1979, when the Court of Appeal

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Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), is illustrative. See generally PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 71-72 (2008) (describing the background of *Stamps v. Detroit Edison Co.* and the novel litigation approach taken in the case); William Wong, *Lawyer William Gould Prods Courts to End Job Bias; His Activism Sometimes Irks Peers*, WALL ST. J., Aug. 21, 1974, at 28. This is designed to compensate workers for employment losses incurred subsequent to a date when reinstatement or instatement should have taken place. See Gould, *Title VII at Fifty*, supra, at 394-96.

<sup>65</sup> Sandhu, 40 A.L.R.B. No. 12 at 59.

<sup>66</sup> Sabor Farms, 42 A.L.R.B. No. 2, 19-20 (Oct. 8, 2015).

<sup>67</sup> For example, in *California Artichoke & Vegetable Corp.*, 41 A.L.R.B. No. 2, 29 (Apr. 7, 2015), the Board found a retaliatory failure to rehire and ordered routine remedies including back pay to be determined through the compliance process. One of the workers owed back pay is alleged to be undocumented. *Id.* at 11. See generally Philip Martin et al., *How Many Workers Are Employed in California Agriculture?*, CAL. AGRIC. (Aug. 23, 2016), <http://ucanr.edu/repositoryfiles/ca2016a0011-162257.pdf> ("Hired workers, rather than self-employed farm operators and their families, do most of the work on the state's largest farms that produce almost all labor-intensive FVH crops. Most California farmworkers were born in Mexico, and 60% of crop workers employed on the state's crop farms have been unauthorized for the past decade, according to the National Agricultural Workers Survey, which is 10 percentage points higher than the U.S. average of 50%. Farm employers say that farmworkers present seemingly valid documentation and Social Security numbers (SSNs) when they are hired, so they do not know who is unauthorized.").

<sup>68</sup> See *infra* notes 69-115.



Fourth Appellate District held in *San Diego Nursery v. Agricultural Labor Relations Board*<sup>69</sup> that in the absence of a valid rule, the Board could not continue the program.

In the *San Diego Nursery* case, the worker education access program was attempted in connection with the filing of petitions for certification. The court appeared to say that such a rule was appropriate under the statute, and that as part of its investigative authority could include advising, notifying or educating employees about their rights and obligations under the Act. But, the Board did not fashion a rule at that particular time, though the matter was discussed both in the late 70's and early 80's.

The increased presence of indigenous workers<sup>70</sup> who did not have, in most instances, a facility with either English or Spanish, in conjunction with the perilous status of undocumented workers,<sup>71</sup> induced the Board to take additional steps in this century.<sup>72</sup> The 2015 public hearings confirmed the emergence of a new population of immigrant workers, some of whom were unfamiliar with the American legal system. Data submitted to the Board indicated that twenty

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<sup>69</sup> *San Diego Nursery Co. v. Agric. Labor Relations Bd.*, 160 Cal. Rptr. 822, 827 (Ct. App. 1979).

<sup>70</sup> For instance, in the petition for certification filed on May 18, 2016, for agricultural workers of Klein Management, Inc. in McFarland, California (Case No. 2016-RC-001-VIS), the United Farm Workers Vice President stated that the workforce included Mixteco and Zapoteco indigenous workers, requiring additional translators. Petition for Certification from Armando Elenes, Vice President of United Farm Workers of America, to the Agric. Labor Relations Bd. (May 5, 2016).

<sup>71</sup> The United States Supreme Court has held that undocumented workers are employees under the NLRA. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984). The ALRB held that such workers were entitled to back pay under the ALRA in the 1980's in *Rigi Agricultural Services, Inc.*, 11 A.L.R.B. No. 27, 16-30 (Oct. 28, 1985). The NLRB initially held that as statutory employees, undocumented workers are entitled to the full range of remedies, including backpay. *A.P.R.A. Fuel Oil Buyers Grp. Inc.*, 320 N.L.R.B. 408, 414-16 (1995), *enforced*, *A.P.R.A. Fuel Oil Buyers Grp., Inc. v. NLRB*, 134 F.3d 50 (2d Cir. 1997). However, in *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002), the Court held that undocumented workers were not entitled to back pay because it would undercut immigration laws. Subsequently, the NLRB has held that where "an employer knowingly employs individuals who lack authorization to work in the United States and then discharges them in violation of the NLRA. [The remedy of reinstatement] is consistent with the policies of both the Act and IRCA." *Mezonos Maven Bakery, Inc.*, 362 N.L.R.B. No. 41, 4 (2015), *remanded sub nom. Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013).

<sup>72</sup> See Memorandum from Thomas Sobel, Admin. Law Judge, & Eduardo Blanco, Special Legal Advisor, on Staff Proposal for an Education Access Regulation for Concerted Activity to the Bd. 37-38 (Nov. 23, 2015), <https://www.alrb.ca.gov/content/pdfs/statutesregulations/regulatory/StaffRecommendationWorksiteAccess.pdf> [hereinafter "Sobel & Blanco Memo"].

percent of the farm workforce was indigenous, sixty-three percent undocumented and sixty-four percent possessing a sixth-grade education.<sup>73</sup> Indigenous workers and their representatives testified that they feared retaliation because of their undocumented status, and the fact that most of them were isolated linguistically. Alternative methods of communicating with such employees had been tried previously by the Board through fairs, churches and meeting halls, but these have been regarded as insufficient.<sup>74</sup> Similarly, the use of computers, cellphones, social media, radio, television, billboards and video training is inadequate.

In addition to the above-described issues, a number of problems were identified by both the Board and the public in these hearings. One was that it was important that those who performed the task of worker education should be separated from prosecutors in the field (1) given the likelihood of resistance to access which might be designed for prosecution rather than education, and (2) grower concern that lack of trust might be engendered by information emerging in education sessions, which could then be used in litigation.<sup>75</sup> The ALRB noted that literacy — only academics read the indigenous languages which have scripts — made effective alternatives to employer property workplace education in any event infeasible. In part, this is because sophisticated cell phones and the internet — putting aside the literacy issues — were not generally available to low income groups. Although cell phones are widely used on agricultural worksites, internet access is limited primarily because purchasing a “smart” phone with a data plan “require[s] income that is not available to farmworkers who mainly devote their incomes to their living situations and to providing for their families both here and in

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<sup>73</sup> Richard Mines et al., *Final Report of the Indigenous Farmworker Study (IFS) to the California Endowment*, AGRIC. LAB. REL. BOARD (Jan. 2010), [www.alrb.ca.gov/content/pdfs/meetings/2015publicmeetings/IFS\\_Mines\\_Final\\_2010.pdf](http://www.alrb.ca.gov/content/pdfs/meetings/2015publicmeetings/IFS_Mines_Final_2010.pdf).

<sup>74</sup> This is because of the centrality of the workplace as a means to communicate with employees both in and outside of agriculture. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978); *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974).

<sup>75</sup> See AGRIC. LABOR RELATIONS Bd., PUBLIC HEARING IN SANTA MARIA TO RECEIVE COMMENT ON WORKSITE ACCESS 42-45, 72 (Sept. 15, 2015), [https://www.alrb.ca.gov/content/pdfs/meetings/2015publicmeetings/2015-09-15\\_Santa\\_Maria\\_Public\\_Hearing.pdf](https://www.alrb.ca.gov/content/pdfs/meetings/2015publicmeetings/2015-09-15_Santa_Maria_Public_Hearing.pdf); AGRIC. LABOR RELATIONS Bd., PUBLIC HEARING IN SALINAS TO RECEIVE COMMENT ON WORKSITE ACCESS 31-36, 89-90 (Sept. 14, 2015), [https://www.alrb.ca.gov/content/pdfs/meetings/2015publicmeetings/2015-09-14\\_Salinas\\_Public\\_Hearing.pdf](https://www.alrb.ca.gov/content/pdfs/meetings/2015publicmeetings/2015-09-14_Salinas_Public_Hearing.pdf); AGRIC. LABOR RELATIONS Bd., PUBLIC HEARING IN FRESNO TO RECEIVE COMMENT ON WORKSITE ACCESS 25, 105-11, 115-17, 142-44 (Sept. 9, 2015), [https://www.alrb.ca.gov/content/pdfs/meetings/2015publicmeetings/2015-09-09\\_Fresno\\_Public\\_Hearing.pdf](https://www.alrb.ca.gov/content/pdfs/meetings/2015publicmeetings/2015-09-09_Fresno_Public_Hearing.pdf).

Mexico.”<sup>76</sup> Even if they had the means to purchase a smart phone, the majority of mestizo and indigenous farmworkers lack the literacy in both computer technology and Spanish to be able to communicate effectively by email or text message.<sup>77</sup> Moreover, even if these prerequisites were met, cell phone signal coverage in the rural areas where farmworkers live and work is spotty.<sup>78</sup> For these reasons, the Board concluded that cell phones do not provide an effective alternative means of communication with farmworkers.

The Board also concluded that social media, radio, television, and billboard advertisements are no more effective than cell phones. Communication by social media requires a smart phone or computer, as well as technical and linguistic literacy. Radio station signals are limited in the areas where farmworkers live and work, and radio, television, and billboard advertisements cannot be broadcast in all of the numerous indigenous languages and dialects used by farmworkers.<sup>79</sup> Even if these advertisements were understood, they offer no opportunity for personal interaction between union organizers and farmworkers. Similarly, outreach through video training was deemed to be markedly inferior to face to face education at the worksite. In the words of a director of a California Farm Labor Contractors’ Association, video training was “ineffective because they are not interactive and people do not pay attention.”<sup>80</sup>

Aside from the isolation that was evidenced at the hearings, in some places, particularly Santa Maria, a “culture of fear” was described because of the possibility of deportation of undocumented workers for exercise of their rights under the ALRA and other statutes addressing employment conditions. Sometimes, farm workers are so fearful that they will not accept back-pay checks presented to them by the Board.

A number of non-ideological questions and concerns were voiced, i.e. which employers would be selected, under what circumstances would access be fashioned<sup>81</sup>, and at what time during the working day?<sup>82</sup>

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<sup>76</sup> Sobel & Blanco Memo, *supra* note 72, at 10-11, 14.

<sup>77</sup> *Id.* at 5, 10-13, 15, 20.

<sup>78</sup> *Id.* at 5, 15, 20.

<sup>79</sup> *Id.* at 5, 19-20.

<sup>80</sup> *Id.* at 18.

<sup>81</sup> *See id.* at 14; *supra* note 67. Prior to *Hoffman*, the ALRB has held that the backpay is available under the ALRA. *Rigi Agric. Services, Inc.*, 11 A.L.R.B. No. 27, 16-30 (Oct. 28, 1985). The question of applicability of *Hoffman* to the ALRA is addressed in Kati L. Griffith, *The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers’ Rights*, 50 UC DAVIS L. REV. (forthcoming Jan. 2017). *Cf. Salas v. Sierra Chem. Co.*, 327 P.3d 797, 804-05 (Cal. 2014) (discussing how

In many respects, the problem of the timing was easiest given the demarcation line between working and non-working time established by the NLRB since the early 1940's.<sup>83</sup> Regarding the circumstances under which access could be obtained, it was thought that the Board ought not to use education access where either the Union was already certified given the fact that information would be presumably provided to employees by the union itself, or where there was a

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*Hoffman* applies to ALRA). See generally, for problems arising under the NLRA addressed by the Board, *Palma v. NLRB*, 723 F.3d 176, 177 (2d. Cir. 2013) (discussing the problems of backpay for undocumented workers and propriety of reinstatement under the NLRA); *Mezonos Maven Bakery, Inc.*, 362 N.L.R.B. No. 41, 4 (2015) (holding that conditional reinstatement is a proper remedy for undocumented workers under the NLRA and IRCA); *Flaum Appetizing Corp.*, 357 N.L.R.B. No. 162, 6 (2011) (discussing pleadings and affirmative defenses under the NLRA).

<sup>82</sup> See Sobel & Blanco Memo, *supra* note 72, at 6, 23. Where governmental administrative agencies conduct warrantless searches issues regarding the Fourth Amendment have arisen. See, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 309-10 (1978) (holding that OSHA agents inspecting for violations need a warrant); *Dow Chem. Co. v. U.S. by & Through Burford*, 749 F.2d 307, 314 (6th Cir. 1984) (ruling that the EPA's aerial photographs did not violate the Fourth Amendment), *aff'd sub nom.* *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986); *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 901-02 (5th Cir. 1981) (questioning whether whether a company's records are protected from government view per the Fourth Amendment); *Equal Emp't Opportunity Comm'n v. Nucor Steel Gallatin, Inc.*, No. 15-53-GFVT, 2016 WL 1704542, at \*1 (E.D. Ky. Apr. 28, 2016) (reviewing whether a governmental agency need a warrant before performing nonconsensual inspections of private commercial property).

<sup>83</sup> See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945); *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), *enforced sub nom.* *NRLB v. Peyton Packing Co.* 142 F.2d 1009 (5th Cir. 1944), *cert. denied*, 323 U.S. 730 (1944); cf. William B. Gould IV, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73, 75-76 (1964) (discussing *Republic Aviation Corp. v. NLRB*, where it was held that certain union activities outside of working time on the employer's property are protected and that impingement of these rights could be "rationalized only by an employer's legitimate business interest in production and discipline"). The United States Supreme Court observed that "[t]he place of work is . . . uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974); see also *Eastex v. NLRB*, 437 U.S. 556, 574 (1978) (noting that the workplace "is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.") (citing *Gale Prods.*, 142 N.L.R.B. 1246, 1249 (1963)). See generally William B. Gould IV, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505, 509-14 (1965) (discussing the rules in place to deal with employees' rights to conduct self-organization activities on company property). However, even today disputes rage on about the definition of solicitation and its protected status. See, e.g., *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1084-88 (8th Cir. 2016) (touching upon what solicitation requires and when it is protected conduct).

dispute about certification either by virtue of a union organizational campaign or a decertification effort instituted against an incumbent certified union. Again, the assumption is that all groups of workers under these circumstances would have information available to them about the statute — in sharp contrast to the overwhelming number of agricultural workers who are without union representation.

It was thought that employees themselves would initiate access given the focus of the *San Diego Nursery* opinion upon investigations in the context of proceedings.<sup>84</sup> Thus, the Board's proposed rule will respond to employee requested education, i.e. when two or more request such education. Though there is concern that the two or more requirement, predicated upon the concerted activity concept, will be ineffective given that employees who lack information to begin with will not know of their right to petition, recent case law under the National Labor Relations Act involving that Board's authority to post notices argued for such an approach.<sup>85</sup>

Access to private property under both the ALRA and the NLRA is not a new issue. Forty years ago, the California Supreme Court approved union access to private property in the *Pandol* decision.<sup>86</sup> As our proposed rule on worksite education emerged, the California Pacific Legal Foundation challenged *Pandol* in an action filed in federal district court. They appeared to shape a shot across the bow of the proposed worksite education rule relying upon the willingness of the Supreme Court to reverse other labor law precedent.<sup>87</sup> Justice Scalia's death within a few days of the filing of the complaint may have disturbed these calculations.<sup>88</sup>

In *Pandol*, the United States Supreme Court, reviewing the Supreme Court of California's decision upholding our access rule, has found a lack of a "substantial federal question."<sup>89</sup> The essence of this new

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<sup>84</sup> See *San Diego Nursery Co. v. ALRB*, 160 Cal. Rptr. 822, 827-28 (Ct. App. 1979).

<sup>85</sup> See *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 958-59 (D.C. Cir. 2013); *Chamber of Commerce v. NLRB*, 721 F.3d 152, 154 (4th Cir. 2013). See particularly the discussion of these cases in *Sobel & Blanco Memo*, *supra* note 72, at 24-34.

<sup>86</sup> See *ALRB v. Superior Court (Pandol & Sons)*, 546 P.2d 687, 690 (Cal. 1976); *supra* note 10.

<sup>87</sup> See *Complaint for Declaratory and Injunctive Relief* at 7-11, *Cedar Point Nursery v. Gould*, No. 1:16-cv-00185-LJO-BAM (E.D. Cal. filed February 10, 2016); see also William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v Quinn: Déjà Vu All Over Again?*, 2014 SUP. CT. REV. 133, 172-73 (2014).

<sup>88</sup> Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

<sup>89</sup> *Kubo v. Agric. Labor Relations Bd.*, 429 U.S. 802, 802 (1976).

proceeding is to re-litigate *Pandol* on the ground that it runs afoul of the Fourth Amendment's prohibition against unreasonable seizures and searches, though the Fifth Amendment issue previously resolved in *Pandol* has been raised anew as well.<sup>90</sup> At the outset, the Plaintiff has argued that the access regulation offends the Fifth Amendment's takings and due process clauses as well, but within the context of a motion for preliminary injunction this was dismissed.<sup>91</sup> In an earlier California case, *PruneYard*,<sup>92</sup> the Supreme Court had held that in both California and the United States, access presented a temporary physical invasion rather than a permanent physical occupation of property and had to be balanced against competing rights — in *PruneYard*, free speech, and in *Pandol*, the State's encouragement of freedom of association and the collective bargaining process. The court, in the California Pacific Foundation *Cedar Point* motion for preliminary injunction proceeding, found the United States Supreme Court jurisprudence to be unsupportive of the Plaintiff's constitutional proposition and even a "continuing intrusion" would not constitute a "categorical taking."<sup>93</sup> The court said that: "[w]hile Plaintiffs liken the Access Regulation to some sort of easement, they do not show that it would allow the public to access their property in a *permanent and continuous manner for whatever reason . . .*"<sup>94</sup> Said the court:

[T]here is a critical difference between a 'blanket easement' and the limited access allowed to union organizers by the Access Regulation. Thus, the fact that the Access Regulation is itself a permanent law does not mean that its application to the Plaintiffs will be permanent. Therefore it does not provide a basis for a categorical taking claim. To find otherwise would render any law providing any measure of access a permanent taking. This is plainly not consistent with the takings jurisprudence.<sup>95</sup>

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<sup>90</sup> U.S. District Judge Lawrence J. O'Neill denied Plaintiffs' attack on *Pandol* on Fifth Amendment grounds in the context of Plaintiffs' motion for preliminary injunction on April 18, 2016. Memorandum Decision and Order Denying in Part Motion for Preliminary Injunction and Requesting Supplemental Briefing at 1, *Cedar Point Nursery v. Gould*, No. 1:16-cv-00185-LJO-BAM, 2016 WL 1559271 (E.D. Cal. Apr. 18, 2016) [hereinafter "April 18, 2016 Memorandum Decision and Order"].

<sup>91</sup> *Id.* at 13.

<sup>92</sup> *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83-84 (1980).

<sup>93</sup> April 18, 2016 Memorandum Decision and Order, *supra* note 90, at 8.

<sup>94</sup> *Id.* at 9.

<sup>95</sup> *Id.* at 10.

Given the fact that the Plaintiffs did not meet the “heavy burden” of showing that they were economically injured by the regulation and union access obtained, the court concluded that there was not a “substantial likelihood that they will succeed on this claim.”<sup>96</sup>

In the same opinion, the court ordered further briefing on the Fourth Amendment issue. The argument here was that the access rule constitutes unreasonable interference with a possessory interest and the growers’ concerns with interest in privacy and that this balance should be fashioned against the competing interest of California in promoting freedom of association and collective bargaining.<sup>97</sup>

Thus, the second prong of the *Cedar Point Nursery* case is predicated upon the view that the entire *Pandol* issue could be relitigated with a new conservative Supreme Court and that the Fourth Amendment issue could present an argument not previously relied upon.<sup>98</sup> But, in a second and far reaching decision addressing this litigation in the context of a motion of a preliminary injunction, this was dismissed,<sup>99</sup> Judge O’Neill of the Eastern District, in denying the Plaintiffs’ motion, in part, held that the claim of abuse gave rise to violations which could be remedied administratively before the Board thus affirmed the union access rule in *Pandol* itself. The court relied upon the fact that the ALRB “heard testimony that agricultural workers remain largely unaware of their labor rights because of a number of communication barriers.”<sup>100</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> For the purposes of their Fourth Amendment argument, Plaintiffs rely principally on *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006). April 18, 2016 Memorandum Decision and Order, *supra* note 90, at 12. In that matter, a landowner sued a city and a nonprofit corporation, contending that they conspired to violate her constitutional rights under the Fourth and Fourteenth Amendments by publishing a map showing a public trail crossing her yard and by refusing to correct this error. *Presley*, 464 F.3d at 482-83.

<sup>98</sup> The animating feature of this complaint is predicated upon the view that the United States Supreme Court is poised to reconsider a wide variety of its rulings from the 1950s, 60s and 70s. See generally William B. Gould IV, *The Supreme Court, Job Discrimination, Affirmative Action, Globalization, and Class Actions: Justice Ginsburg’s Term*, 36 HAW. L. REV. 371 (2014) (discussing how the composition of the Supreme Court can reverse previous decisions of the Court).

<sup>99</sup> Memorandum Decision and Order Re: Plaintiffs’ Motion for Preliminary Injunction at 19, *Cedar Point Nursery v. Gould*, No. 1:16-cv-00185-LJO-BAM (E.D. Cal. May 26, 2016) [hereinafter “May 26, 2016 Memorandum Decision and Order”].

<sup>100</sup> *Id.* at 13.

Said Judge O'Neill:

First, reaching employees directly offsite is difficult because of the long hours that agricultural employees work. Second, many workers are not literate in Spanish or English, and lack access to the internet because of the high cost of data plans and computers. Workers' lack of language and computer literacy means that online outreach efforts have not been very successful. Further, the ALRB heard testimony that agricultural workers were fearful about exercising their rights and that face-to-face communication is important to help them overcome these fears.<sup>101</sup>

Accordingly, the court relied upon ALRB hearings establishing a need for worksite access and thus, without holding to this effect because the issue was not before it, suggested that the worksite education access rules would be upheld on the basis of the reasoning employed by the court in its assessment of the Fourth Amendment preliminary injunction attempt to invalidate *Pandol* itself. Accordingly, the court concluded that the ALRB had put forth evidence supporting their conclusion that worksite access is necessary for organizers to be able to provide this information. Plaintiffs, on the other hand, had not presented compelling evidence that their seasonal workers have reliable access to such information via alternative sources that would negate the need for worksite access. Considering the evidence that the ALRB had adduced regarding worksite education, the court concluded that they had not shown not shown that it would be unreasonable for the ALRB to allow organizers to access their property to provide such information.

Given the fact that the Plaintiffs' argument that the access rule is unconstitutional and that it was alleged that the union had engaged in conduct which was in violation of the regulation, the court concluded that none of the losses suffered, i.e. the loss of goodwill or competitive disadvantage alleged by the Plaintiffs, would have been shown to have occurred within the context of *lawful* implementation or enforcement. Accordingly, the court the concluded that the Plaintiffs were unlikely to show the access regulation would cause them irreparable harm.<sup>102</sup> Finally, Judge O'Neill dismissed the argument that restrictions placed upon union access on private property under the NLRA<sup>103</sup> were

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<sup>101</sup> *Id.* (citations omitted).

<sup>102</sup> *Id.* at 17.

<sup>103</sup> See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539-40 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 109-10 (1956).



applicable inasmuch as they did not raise the constitutional challenges of either the Fourth or Fifth Amendment variety. The court reiterated the California Supreme Court's 1976 holding that employee inaccessibility was the rule rather than the exception in California agriculture.<sup>104</sup> Said the court: "The government presents evidence that these conditions persist today. . . . Thus, the fact that Plaintiffs' employees do not meet certain metrics of isolation does not undermine the State's position that these employees are inaccessible to organizers."<sup>105</sup>

Finally, the court noted the Plaintiffs' submission of declarations by their executives on working conditions — a point that has been frequently made in the context of the Board new proposed worksite access rule — was irrelevant. Said the court:

Plaintiffs also submit declarations of their executives that working conditions at their properties are excellent and that their employees have not expressed an interest in organizing. That is beside the point. The purpose of the Access Regulation is to provide employees with the *knowledge* of their rights. It has nothing to do with employees' decisions as to what, if anything, to do with those rights. This purpose exists independent of the actual conditions on site. As discussed above, Plaintiffs provide no evidence that their workers have reliable access to information about their organizational rights. For these reasons, the Court finds that the balance of the equities favors Defendants and that denial of Plaintiffs' request is in the public interest.<sup>106</sup>

In a subsequent motion to dismiss proceeding, the court noted that its "conclusions as to injunctive relief do not determine the outcome of an analysis under [the relevant Federal Rules]."<sup>107</sup> The court then noted that the Plaintiffs' arguments on the Fifth Amendment issue were "nearly identical to those advanced in support of their motion for a preliminary injunction."<sup>108</sup> The court reiterated its view that the facts alleged do not constitute a "permanent, physical intrusion based on facts specific to their case," and therefore rejected the argument that

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<sup>104</sup> May 26, 2016 Memorandum Decision and Order, *supra* note 99, at 18.

<sup>105</sup> *Id.* at 18.

<sup>106</sup> *Id.* at 18-19 (citations omitted).

<sup>107</sup> Memorandum Decision and Order Re: Defendants' Motion to Dismiss, *Cedar Point Nursery v. Gould*, No. 1:16-cv-00185-LJO-BAM, 2016 WL 3549408, at \*3 (E.D. Cal. July 28, 2016).

<sup>108</sup> *Id.*

they possessed a “viable as-applied categorical takings claim.”<sup>109</sup> As to Plaintiffs’ argument that its goodwill and competitive advantage were harmed, the court noted that Plaintiffs had not shown “any negative economic impact on them at all.”<sup>110</sup> Thus, the Fifth Amendment claim was rejected, though the Plaintiffs were allowed to amend the complaint to show an “economic burden they shoulder is unjust.”<sup>111</sup> Similarly, on the Fourth Amendment claims, the court granted a motion to dismiss with leave to amend and the fact that the Plaintiffs: (1) pointed to no law that suggests that access under the circumstances of the rule approved in *Pandol* would constitute “meaningful interference;” (2) do not suggest that the Access Regulations have permitted them to “suffer a constant physical occupation;” (3) Plaintiffs could not argue that the rule itself was intrinsically deficient when they were arguing that harm was suffered because the union had violated the rule.<sup>112</sup> The court concluded that the rule itself does not allow organizers to disrupt the employer’s “use of his land in a significant manner.”<sup>113</sup>

While the Plaintiffs were granted leave to amend, they did not do so and accordingly the complaint was dismissed.<sup>114</sup> But, an appeal has been taken to the Ninth Circuit.<sup>115</sup>

### III. EXPEDITING ADJUDICATION BEFORE THE BOARD

Although other rights are obtained concerning both worker education and concerted activity in *Pandol*, they remove very little if they cannot be implemented expeditiously with a meaningful remedy. In his veto message of Assembly Bill 561 two years ago,<sup>116</sup> Governor

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at \*4 (emphasis omitted).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at \*5 (“In fact, Plaintiffs do not allege that the ALRB has used the Access Regulation to force them to allow *any* organizers on their properties to date . . . [T]he one example Plaintiffs provide of union organizers accessing their property is alleged to have occurred in violation of the Access Regulation.”).

<sup>113</sup> *Id.*

<sup>114</sup> On July 18, 2016, after Plaintiffs declined to amend the complaint, the Court granted judgment in favor of Defendants and issued an order closing the case. See Order Closing Case at 1, *Cedar Point Nursery v. Gould*, 1:16-cv-00185-LJO-BAM (E.D. Cal. July 18, 2016).

<sup>115</sup> See *Cedar Point Nursery v. Gould*, No. 1:16-cv-00185-LJO-BAM (E.D. Cal. 2016), *appeal docketed*, No. 16-16321 (9th Cir. July 28, 2016).

<sup>116</sup> Assembly Bill 561 would have required the ALRB to process all decisions and orders within one year upon finding an employer liable for benefits due to unfair labor practices. This bill also required employers who appeal a Board order to post a bond

Brown said: “I am directing the Board to examine the current process and make the necessary internal reforms to provide for more timely orders.”<sup>117</sup> The so-called “Expediting Committee” provided a number of recommendations pursuant to Governor Brown’s direction.

The first relates to speedy resolution of cases subsequent to the issuance of a complaint, which include a so-called Case Management Conference (CMC). Through this mechanism, the Executive Secretary will now use all Mondays for Administrative Law Judges (ALJs) to hear motions and to conduct settlement conferences, thus reducing trials to a four-day work week from Tuesday through Friday. The idea here is to both reform procedures so that the parties can get the issues in to the open earlier, contemplating that the full trial would proceed before the ALJ more expeditiously and that, in so doing, the parties will be more amenable to settlement through settlement conferences.<sup>118</sup> The Executive Secretary will seek to schedule and hold a CMC within two weeks of the date of issuance of the Notice of Hearing. The new guidelines state that “[t]he Executive Secretary anticipates setting every case for hearing within sixty days from the date of issuance of a Notice of Hearing to the extent possible.”<sup>119</sup>

Another reform consists of the Board’s adoption of an alternative method through which ALJs can issue decisions. Rather than rely upon the traditional process of oral arguments with briefs following thereafter, the ALJ’s can issue a bench decision at the hearing itself or within seventy-two hours of the close of the process, a procedure adopted by the National Labor Relations Board in 1995. The ALRB Executive Secretary is advising the ALJs to use their discretion in determining the circumstances under which the bench decision, is to be utilized, i.e., where the hearing is relatively short and where the issues are factual rather than involving complex legal questions.<sup>120</sup>

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in the amount of the entire economic value of the order. *See* Assemb. B. 561, 2015 State Assemb., 2015–2016 Reg. Sess. (Cal. 2015).

<sup>117</sup> Edmund G. Brown, Jr., *California Governor Veto Message for Assembly Bill 561* (Oct. 9, 2015), [http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201520160AB561](http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160AB561).

<sup>118</sup> CAL. CODE REGS. tit. 8, § 20248 (2016).

<sup>119</sup> Memorandum from J. Antonio Barbosa, Exec. Sec’y of the Agric. Labor Relations Bd., on Adjudication Timelines to All Parties 3 (Apr. 12, 2016), [https://www.alrb.ca.gov/content/pdfs/directives/Adjudication\\_Memo\\_04-12-16.pdf](https://www.alrb.ca.gov/content/pdfs/directives/Adjudication_Memo_04-12-16.pdf) [hereinafter “Memorandum from J. Antonio Barbosa”].

<sup>120</sup> *See id.* at 4; *see also* NAT’L LABOR RELATIONS BD., DIV. OF JUDGES, BENCH BOOK: AN NLRB TRIAL MANUAL § 15-600 (Jeffrey D. Wedekind ed., 2015). This approach follows the lead of the NLRB, developed when I was Chairman there. *See* *NLRB v. Beverly Enters.–Mass., Inc.*, 174 F.3d 13 (1st Cir. 1999) (approving the propriety of bench

Finally, the ALRB has adopted timelines for processing unfair labor practice charges.<sup>121</sup> The most important feature of these timelines consists of those which the Board has imposed upon itself, i.e., a requirement that in the overwhelming number of instances the decision be issued within ninety days subsequent to the time that the matter has been submitted to it. This has never been done by the NLRB, notwithstanding some attempts to accomplish this.<sup>122</sup> There the NLRB has imposed timelines for Regional Directors and Administrative Law Judges, but has refused to do so for itself.

#### IV. THE NEW MEDICAL MARIJUANA LAW

In 2015, the Legislature passed enactments which were signed by Governor Brown authorizing the production of medical marijuana in California.<sup>123</sup> Section 19322(a)(9) of the Business and Professions Code states that: “an applicant seeking a cultivation license [must] provide a statement declaring the applicant is an ‘agricultural employer’ as defined in the . . . Agricultural Labor Relations Act of 1975 . . . to the extent not prohibited by law.”<sup>124</sup> The statute elsewhere

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decisions).

<sup>121</sup> See Memorandum from J. Antonio Barbosa, *supra* note 119, at 5.

<sup>122</sup> See generally WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB — A MEMOIR (2000) (discussing my time on the NLRB including my efforts to implement reforms such as adjudication timelines).

<sup>123</sup> See S.B. 643, 2015 State S., 2015–2016 Reg. Sess. (Cal. 2015) (enacted); Assemb. B. 243, 2015 State Assemb., 2015–2016 Reg. Sess. (Cal. 2015) (enacted); Assemb. B. 266, 2015 State Assemb., 2015–2016 Reg. Sess. (Cal. 2015) (enacted). The practical upshot may be renewed discussion about the respective jurisdictions of the ALRB and the NLRB see, for instance, *Produce Magic, Inc.*, 318 N.L.R.B. 1171, 1171-73 (1995) (rejecting a proposed cession agreement between the NLRB and the ALRB). Historically, the ALRB has reserved the right to determine its own jurisdiction. *Gerawan*, 21 A.L.R.B. No. 6, 9 (1995) (acknowledging that if the Board finds preemption it will proceed no further with the case); see also *Warmerdam*, 24 A.L.R.B. No. 2, 2-18 (1998); *Royal Packing Co.*, 20 A.L.R.B. No. 14, 5-6 (1994). Notwithstanding state law allowance for the production of medical marijuana, both federal and state courts have rejected the proposition that the use of marijuana by employees is covered by anti-discrimination law. See *Shepherd v. Kohl’s Dep’t Stores, Inc.*, No. 1:14-cv-01901-DAD-BAM, 2016 WL 4126705, at \*3-4 (E.D. Cal. Aug. 2, 2016); *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 203-07 (Cal. 2008); *Coats v. Dish Network, LLC*, 350 P.3d 849, 852-53 (Colo. 2015).

<sup>124</sup> The statement “to the extent not prohibited by law” is given no explanation within the statute, and one can only conjecture if it is, in fact, a veiled acknowledgement of the potential jurisdictional issues raised by certain job functions. On November 8, 2016, California’s voters passed Proposition 64 which expands the boundaries of legal marijuana use to include recreational uses commencing in 2018. However, although the proposition expands the need for further regulatory

defines “cultivation” as including particular types of work, i.e.: “planting, growing, harvesting, drying, curing, grading, or trimming of medical cannabis.”<sup>125</sup> Similarly, such employers will possess a number of retail outlets. The Department of Food and Agricultural under the statute as currently written, will determine who obtains a license although that determination would relate to the question of who is an employer within the meaning of the Act and that would normally be within the jurisdiction of the ALRB.<sup>126</sup>

The fundamental question arising under the new legislation, which will be effective in 2018, is whether and to what extent the state may legislate in the field of private sector labor management relations which ordinarily is preempted by the National Labor Relations Act of 1935, particularly as interpreted by the Supreme Court in the landmark *Garmon*<sup>127</sup> decision which ousts the states from obtaining jurisdiction where the subject matter is arguably protected or prohibited by the National Labor Relations Act itself.

Of course, agricultural laborers are excluded from the NLRA and this is why the ALRA was necessary in 1975.<sup>128</sup> But what is agriculture

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development in the commercial sector, while adding a few new licensing categories for cultivators and allowing medical marijuana cultivators to also grow additional marijuana for the recreational market the proposition leaves in place the medical marijuana regulatory scheme for cultivators and applies it to recreational cultivators. See section 26056, “[a]n applicant for any type of state license issued pursuant to this division shall comply with the same requirements as set forth in Section 19322 of Chapter 3.5 of Division 8 unless otherwise provided by law, including electronic submission of fingerprint images, and any other requirements imposed by law or a licensing authority . . . .”

<sup>125</sup> CAL. BUS. & PROF. CODE § 19300.5(k) (West 2017). The statute also provides that agricultural “nursery” type of work includes the production of “immature plants.” *Id.* § 19300.5(ag).

<sup>126</sup> Some of the principal issues involve questions of jurisdiction over agriculture and retail outlets, the latter, normally not considered to be part of the agricultural process. However, there are exceptions, see *Kawahara Nurseries, Inc.*, 36 A.L.R.B. No. 3, 9-19 (2010), where nursery employees were determined to be agricultural employees where the job functions included display set up of plants in retailers and tending to the plants, at the retailers, on a routine basis until sold.

<sup>127</sup> See *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 245-46 (1959); see also *Bud Antle, Inc., v. Barbosa*, 45 F.3d 1261, 1273-78 (9th Cir. 1994).

<sup>128</sup> The courts have thus far held that the exclusion of agricultural laborers does not mean that the states are constitutionally precluded from enacting legislation under the doctrine of preemption by virtue of *Garmon* and its progeny. See generally William B. Gould IV, *The Garmon Case: Decline and Threshold of “Litigating Elucidation,”* 39 U. DET. L. J. 539 (1962) (discussing the *Garmon* case, the history of federal preemption and the interplay between the two); Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption*

or an agricultural employee which is excluded within state jurisdiction? For instance, and only preliminarily, fact gathering by ALRB staff on cannabis cultivation practices indicates that “trimming,” a job function expressly mentioned in the cannabis statute as being agriculture, may in fact, in some instances, be similar to packing shed-like operations. Cannabis plants from various cultivators would be sent “off the farm” for the employees of the “trim” house, who is not “a farmer” to trim the leaves off the plant which are then packaged and sent off for further processing into its chemical components. Traditionally, packing shed operations would be found to be commercial rather than agricultural and thus within NLRB jurisdiction.<sup>129</sup>

Section 2(3) of the NLRA excludes individuals who are agricultural laborers. Subsequent to narrowing interpretations of this language<sup>130</sup> Congress mandated a more expansive exclusion through an annual Appropriations Act directing the Board to define “agriculture” as

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*Decisions*, 120 HARV. L. REV. 1604 (2007) (summarizing the debate about preemption through a discussion of leading academics and Supreme Court cases). The case law first emerged without questions relating to state regulation of supervisors who are also excluded. See *Hanna Mining Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 188, 192-93 (1965) (“[A]ctivity designed to secure organization or recognition of supervisors cannot be protected by § 7 of the Act, arguably or otherwise. . . . [C]entral interests served by the Garmon doctrine are not endangered by state injunction when . . . the Board has established that the workers sought to be organized are outside the regime of the Act.”). *But see* *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 661 (1974) (setting forth a warning against state regulation of supervisors); *cf.* *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 177-78 (1962) (addressing state court jurisdiction over issues involving definition of a “labor organization” admitting supervisors). Notwithstanding the preemption doctrine where farmworker regulation is involved, “states remain free to legislate as they see fit.” *United Farm Workers v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982); *accord* *United Farm Workers v. Ariz. Agric. Emp't Relations Bd.*, 727 F.2d 1475, 1476 (9th Cir. 1984); *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 921 (7th Cir. 1990); *United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1192-93 (D. Ariz. 2013); *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 577-78 (D. Minn. 1977) (“[T]here is no legislative history to indicate that the NLRA’s exclusion of agricultural laborers from its coverage was intended to leave the area totally free from regulation and because that exclusion standing alone is to be understood to mean that federal policy is indifferent . . . the court has concluded that state regulation has not been preempted . . .”). The same principle has been applied to domestic or household workers who are also excluded under federal law. See *Greene v. Dayton*, 806 F.3d 1146, 1149 (8th Cir. 2015).

<sup>129</sup> See *Camsco Produce Co.*, 297 N.L.R.B. 905, 908-09 (1990).

<sup>130</sup> See *Knaust Bros.*, 36 N.L.R.B. 915, 917-18 (1941); *Park Floral Co.*, 19 N.L.R.B. 403, 412-13 (1940).

defined as in section 3(f) of the Fair Labor Standards Act of 1938.<sup>131</sup> Section 3(f) defines agriculture as practices “performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.”<sup>132</sup> Subsequently, the Supreme Court was to establish a distinction between primary and secondary agriculture and, in so doing, reiterated this language.<sup>133</sup>

Technological change and mixed work where employees are performing both agricultural and non-agricultural work have given rise to the economically integrated nature of the industry which cuts across the statutory definitions<sup>134</sup> have given rise to a series of decisions by the NLRB and the courts.<sup>135</sup> The NLRB in *Produce Magic, Inc.*<sup>136</sup> has held that “only those secondary agricultural practices which are performed by a farmer simply in order to prepare its own products for market” are agricultural and thus beyond the federal statutory coverage.<sup>137</sup> Said the Board: “[t]o the extent that modern agricultural business practices have departed from this ‘traditional model,’ and the farmer no longer prepares its own products for market, it was the intent of Congress to extend coverage of the Act to individuals engaged in activities other than primary agriculture.”<sup>138</sup> Subsequently, a divided Board, in response to a motion for reconsideration, refused to enter into a so called cession agreement whereby the NLRB will cede jurisdiction to the ALRB given the overlap between the statutes,

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<sup>131</sup> See 29 U.S.C. § 203(f) (2012).

<sup>132</sup> *Id.*

<sup>133</sup> See *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397-99 nn.5-6 (1996); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-70 (1949).

<sup>134</sup> See generally Ronald H. Barsamian & E. Mark Hanna, *ALRB or NLRB: Where Do We Draw the Line?*, 11 SAN JOAQUIN AGRIC. L. REV. 1 (2001) (discussing how the “transformation” in agricultural production is altering long-standing rules used by both the ALRB and NLRB).

<sup>135</sup> See, e.g., *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1273-78 (9th Cir. 1994); *Camsco Produce Co.*, 297 N.L.R.B. 905, 905-06 (1990); *Mario Saikhon, Inc.*, 278 N.L.R.B. 1289, \*1-4 (1986); *Emp’r Members of Grower-Shipper Vegetable Ass’n*, 230 N.L.R.B. 1011, 1011-13 (1977); *DeCoster*, 223 N.L.R.B. 884, 884-86 (1976); *Garin Co.*, 148 N.L.R.B. 1499, 1499-01 (1964); *Olaa Sugar Co.*, 118 N.L.R.B. 1442, 1442-45 (1957).

<sup>136</sup> 311 N.L.R.B. 1277 (1993).

<sup>137</sup> *Id.* at 1279.

<sup>138</sup> *Id.*

the majority concluding<sup>139</sup> the statutes were “inconsistent” thus, not allowing for such agreement under Section 10(a).<sup>140</sup>

Medical marijuana will present a new area of tension between federal and state regulations. The General Counsel of the NLRB has already issued an Advice Memorandum quoting that jurisdiction can be asserted in this area over “workers who process marijuana that has already been cultivated and harvested by other workers.”<sup>141</sup> Notwithstanding the fact that though “the Controlled Substance Act (CSA) prohibits the possession, cultivation and distribution of marijuana,”<sup>142</sup> the General Counsel, relying upon case law in connection with tobacco bulking and sugar milling, has concluded that a processing operation in Maine “is not incident to or in conjunction with its farming operation, and therefore is not secondary agriculture, because the processing operation transforms the cannabis plants from their raw and natural state and therefore is more akin to manufacturing than agriculture.”<sup>143</sup> Again, it seems probable that the respective statutes and agencies will collide. By virtue of the doctrine of preemption, the NLRB is in the driver’s seat. But, the better approach would be to fashion a cession agreement of a kind that the NLRB rejected 22 years ago.

Another issue looming on the cannabis statutory horizon is the creation of the so-called “labor peace agreement” which is referenced in Section 19322(6)(A) of the Business and Professions Code, and defined in Section 19300.5(w) of the Business and Professions Code, and when read together, provide that an employer with a minimum of 20 employees must, when requested by a union, sign a labor peace agreement. Essentially, in exchange for the union giving up the economic “weapons” of picketing, work stoppages, boycotts, and any other economic interference with the applicant’s business, the

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<sup>139</sup> See *Produce Magic, Inc.*, 318 N.L.R.B. 1171, 1171-73 (1995) (Gould, Chairman, and Browning, Member, dissenting in part).

<sup>140</sup> *Id.* at 1172 n.10.

<sup>141</sup> Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, on *Ne. Patients Grp. d/b/a Wellness Connection of Me.* Cases 01-CA-104979; 01-CA-106405 to Jonathan B. Kreisberg, NLRB Reg’l Dir. at 1 (Oct. 25, 2013).

<sup>142</sup> *Id.* at 3.

<sup>143</sup> *Id.* at 13. However, the election of Donald Trump as President and appointment of Attorney General Jeff Sessions may induce new NLRB appointees to shift ground. See generally William B. Gould IV, *Trump and Organized Labor on a Collision Course*, SEATTLE TIMES, Dec. 1, 2015, at A15. The shift in Board policy with a new administration is quite common. See generally William B. Gould IV, *Politics and the Effect on the National Labor Relations Board’s Adjudicative and Rulemaking Processes*, 64 EMORY L. J. 1501 (2015).



employer will allow “a bona fide labor organization access at reasonable times to areas in which the applicant’s employees work, for the purpose of meeting with employees to discuss their right to representation, employment rights under state law, and terms and conditions of employment.”<sup>144</sup> The employer also agrees not to interfere with or disrupt these union efforts.

The statutory language does not address the time, place and manner under which the union is to take access except that it is to be at reasonable times to work areas. It also does not address what is to occur if the employer refuses to sign, but arguably such a refusal might result in the suspension or revocation of the employer’s license under the disciplinary authority given to the California Department of Food and Agriculture (CDFA)(for cultivators).<sup>145</sup>

What happens to cultivators with less than twenty employees is not statutorily addressed. However, the ALRB has already established regulations providing for union access without regard to the size of the workforce.<sup>146</sup>

The ALRB’s regulations provide for two types of union access to employees: (1) An Notice of Intent to Take Access (NA) which allows work site access and is a means by which a union may use to “feel out” if there is any employee interest in union representation and/or (2) Notice of Intent to Organize (NO) which is a process by which the union obtains the signatures of ten percent of the workforce and besides worksite access puts obligations upon an employer to provide an address list of the employees. Historically, until the above described disappearance of union activity in agriculture, this procedure was usually the precursor to a union filing a petition for an employee election to determine if they want to be represented for a contract.

Generally, the access regulation also limits the number of times in a calendar year a union may take access, provides the criteria for the number of organizers that can enter the worksite to take access (discussed below) and specifies certain additional procedures for the citrus industry and limitations on access in specific segments of agriculture where prevention of contamination of the product is important.

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<sup>144</sup> CAL. BUS. & PROF. CODE § 19300.5(w) (West 2017).

<sup>145</sup> The labor peace agreement is not limited to cultivators but applies to all of the cannabis licensing categories. See CAL. BUS. & PROF. CODE § 19300.5(x) (West 2017).

<sup>146</sup> See CAL. CODE REGS. tit. 8, § 20900(d) (2016). On the content and nature of the workforce see Jonah Raskin, *Marijuana Industry’s Unseen Workforce: the ‘Trimmigrants’*, S.F. CHRON. (Dec. 10, 2016, 10:57 AM), <http://www.sfchronicle.com/opinion/article/Marijuana-industry-s-unseen-workforce-the-10688637.php>.

By providing that a union only obtains bargaining rights through certification subsequent to a secret ballot box election, the ALRA is written to avoid any favoritism or “sweetheart” deals between employers and unions. Unwittingly, a statutorily required labor peace agreement could be detrimental to employees in that employees can reasonably perceive or reasonably conclude that the employer either favors or approves of the union with which it entered into this agreement and that likewise the workers should favor that union as well. Further, on its face, the labor peace agreement language would seem to allow a union to argue that it now has an exclusive right of access and that another union cannot seek access (through the required procedures contained in the Board’s regulations).<sup>147</sup> An issue for CDFR to resolve is whether the Legislature intends for there to be exclusivity for one union<sup>148</sup> or if any and all unions can seek and must be granted access through a labor peace agreement.

Another union could challenge such an exclusive arrangement and prohibition in the courts as an unlawful interference with its ability to meet with employees and it certainly could delay the legitimization of any union elections that might take place prior to the judicial process running its course. Alternatively, and probably more appropriately, a union would seek to challenge that exclusivity in front of the ALRB. Either way, this would foreseeably present the Board with yet another challenge to its jurisdiction and would impede the major virtue of the ALRA, i.e. expedited elections which diminish the potential for employer anti-union campaigning.<sup>149</sup>

A union could also submit an unfair labor practice charge regarding the use of coercion or promise of benefits should there be any expression of favoritism by the employer for an election with the ‘favored’ union. This is so because it is a violation of Labor Code Section 1153(b) and (a) to afford union A more and better

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<sup>147</sup> Section 20900(e)(2) of the Board’s regulations allows for parties to reach voluntary agreements on the terms for access taking. *See* CAL. CODE REGS. tit. 8, § 20900(e)(2) (2016).

<sup>148</sup> California Business and Professions Code section 19300.5(w) speaks of “a” union. CAL. BUS. & PROF. CODE § 19300.5(w) (West 2017). The legislature could have substituted with “any” union but apparently chose not to.

<sup>149</sup> *See* San Diego Gas & Elec., 325 N.L.R.B. 1143, 1148-51 (1998) (Gould, Chairman, concurring). The dissenters, Members Hurtgen and Brame, decried the use of postal ballots, in part because they made employer captive-audience antiunion campaigning less effective. *See id.* at 1150-51. For a response to this concern, see Chairman Gould’s concurring opinion. *Id.* at 1148-49.

opportunities for access to its employees at the work site than it afforded to union B.<sup>150</sup>

How CDFA will choose to address avoiding the potential for favoritism or coercion and also address the practical access considerations such as defining the “reasonable times” for access taking and whether limitations on the number of access takers will be included<sup>151</sup> into their regulatory scheme remains to be seen. But, it is clear that the labor peace agreement statutory provision will provide unions levels of work site access currently prohibited nationally and currently controlled under well-defined limits in California agriculture.

#### CONCLUSION

The challenges before the ALRB are enormous, given a series of factors which have brought about a decline in both union organizing, the collective bargaining process, and the ALRB itself. As noted previously,<sup>152</sup> the factors are numerous. The extent of litigation has produced Dickensian<sup>153</sup> litigation delays and complexity.<sup>154</sup> Now, the Board may confront new challenges by virtue of not only the preemption problems emerging from the recently enacted medical marijuana legislation, but also because of a peace agreement provision or obligation which is unknown to the 1975 statute and one which will potentially be at odds with the Access Regulations (because the peace agreement itself provides for access in exchange for union concessions). Whatever emerges from this, the response must be the same as prior to the new marijuana legislation, i.e., adequate resources and amendments so that the ALRB’s toolkit of remedies are more expansive<sup>155</sup> and it may be that the Board will need to be equipped with the ability to initiate charges and complaints on its own rather than reply upon farmworkers, whose declining income resources and access to labor organizations makes charges less likely, workplace democracy increasingly ephemeral and worksite education an

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<sup>150</sup> See *Royal Packing Co.*, 5 A.L.R.B. No. 31, 4-6 (1979).

<sup>151</sup> Section 20900(e)(4)(A) of the Board’s regulations places limitations on the number of access takers allowed per work crew. See CAL. CODE REGS. tit. 8, § 20900(e)(4)(A) (2016).

<sup>152</sup> See *supra* notes 12–13, and accompanying text.

<sup>153</sup> See, e.g., CHARLES DICKENS, *BLEAK HOUSE* 14 (Stephen Gill ed., Oxford Univ. Press 1996).

<sup>154</sup> See, e.g., *supra* note 14.

<sup>155</sup> See, e.g., WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993).

imperative. Indeed, the ineffectiveness of the current legal framework, union organizational indolence, and employer obduracy, argue for the repeal<sup>156</sup> of the ALRA if an equitable regulation of wage and working conditions through a state wage board<sup>157</sup> could be substituted for the status quo.

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<sup>156</sup> This is not the first time that this idea has been propounded by those who are friendly to the Act's objectives. See generally MIRIAM J. WELLS & MARTHA S. WEST, THE CAL. INST. FOR RURAL STUDIES, REGULATION OF THE FARM LABOR MARKET: AN ASSESSMENT OF FARM WORKER PROTECTIONS UNDER CALIFORNIA'S AGRICULTURAL LABOR RELATIONS ACT (1989). For a radically different approach, see generally Harvard Law School with The Dunlop Commission, *Fair Food Program Report: 2011-2013*, in FARM LABOR CHALLENGES: HOSTED BY THE LABOR AND WORKLIFE PROGRAM 124-139 (2014).

<sup>157</sup> The Supreme Court of California has reminded us recently of the fact that wage order machinery in the California labor code has been present since 1913, though it appears to have fallen into disuse in the wage arena. *Augustus v. ABM Security Services, Inc.*, No. S224853, 2016 Cal. LEXIS 9627, at \*5-6 (Cal. Dec. 22, 2016). A similar development has taken place in the United Kingdom. *Unite the Union v. United Kingdom*, App. No. 65397/13 (Eur. Ct. H.R. May 3, 2016), <http://hudoc.echr.coe.int/eng?i=001-163461>.