Case No. S227270

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
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TRI-FANUCCHI FARMS,
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD, et al.
Respondent.

and

UNITED FARM WORKERS OF AMERICA, a labor union,
Real Party-In-Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT
Case No. F066648

TRI-FANUCCHI'S ANSWER TO AGRICULTURAL LABOR RELATIONS BOARD'S BRIEF ON THE MERITS

SAGASER, WATKINS & WIELAND PC
Howard A. Sagaser, Bar No. 072492
Ian B. Wieland, Bar No. 285721
Allie E. Wieland, Bar No. 285860
7550 North Palm Avenue, Suite 100
Fresno, California 93711
Telephone: (559) 421-7000
Facsimile: (559) 473-1483

Attorneys for Petitioner
TRI-FANUCCHI FARMS

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7550 North Palm Avenue, Suite 100
Fresno, California 93711
Telephone: (559) 421-7000
Facsimile: (559) 473-1483

Attorneys for Petitioner
TRI-FANUCCHI FARMS

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INTRODUCTION

The California Legislature intended an award of makewhole relief by the Agricultural Labor Relations Board ("ALRB" or "Board") to be discretionary after an examination of the facts and circumstances of each unique case. Unfortunately, without affording Tri-Fanucchi Farms ("Fanucchi") an evidentiary hearing, the Board failed to follow the legal standard for makewhole relief in this matter by erroneously awarding makewhole in a conclusory fashion simply because the employer lost its appeal before the Board. The Court of Appeal's reversal of the Board's automatic imposition of the makewhole relief was therefore correct as Fanucchi's appeal raised the issue of long term and total union abandonment under the Agricultural Labor Relations Act ("ALRA") before the Court of Appeal. Fanucchi's position was brought in good faith as numerous California agricultural employers and unions will be impacted by this Court's final decision and Fanucchi's appeal has allowed the California courts to decide an important public policy issue that had not yet been addressed. Thus, Fanucchi's efforts have helped bring clarity to the ALRA and binding legal precedent to a previously unsettled area of the law.

Contrary to the Board's position, the makewhole remedy should not imposed on employers for seeking appeals of important public policy questions that have not been addressed by the Courts. Notwithstanding direct legal precedent from the United States Supreme Court and California

Supreme Court, the ALRB asks this Court to allow the Board to deter employers from asserting their statutory right to appeal Board's decision and to improperly utilize the makewhole remedy as a form of punishment against an employer, that carries a large financial penalty, for having elected to pursue an important representation question that had not yet been addressed by the California courts. Evidently, the Board's position is contrary to public policy, clear legal precedent, and should be denied.

In this matter, Fanucchi rightfully sought judicial review of the Board's summarily dismissal of its long term abandonment defense, which had not yet been addressed by the California Courts. Fanucchi has petitioned this Court to hold that long term and total union abandonment, especially for the twenty four (24) year absence at issue in this case, is a defense under the ALRA. Until such time as Fanucchi raised the question of law before the Court of Appeal as to whether long term and total abandonment by the bargaining representative was a defense to an employer's duty to bargain, the Board's conflicting and inconsistent statutory construction and legal analysis of the total abandonment defense under the ALRA was not binding or final. Therefore, the Board's conclusion that the invalidity of the "abandonment" defense was settled law prior to Fanucchi's litigation and the Court of Appeal's opinion was plainly an erroneous legal conclusion and contrary to its own historical decisions.

The Court of Appeal followed the appropriate standard of judicial review in this case when that it reversed the Board's imposition of makewhole against Fanucchi as evidenced by its clear statement in the opinion: "*With all due deference to the Board regarding ALRA policy issues, we find that Board was clearly wrong in its legal conclusion that Fanucchi's litigation efforts in this matter did not further the purposes and policies of the ALRA, as we now explain.*" (*Tri-Fanucchi Farms v. Agricultural Labor Relations Board* (2015) 236 Cal.App.4th 1079, 1097 ("*Tri-Fanucchi*") [italics added].) Given the fact that the bargaining representative abandoned Fanucchi's employees for twenty-four (24) years, coupled with the uncertainty in the law that existed due to the Board's and California Courts not having issued binding legal precedent on the issue of whether the abandonment defense could be raised by an employer in this case, Fanucchi's appeal was clearly sought in good faith and helped bring clarity to a previously unsettled area of the law. The Board's imposition of makewhole relief was improperly punitive in nature and clear reversible error given the public policy questions at issue in this case. As such, the Court of Appeal's finding that the Board made an erroneous legal conclusion was proper and should be upheld by this Court as it is clear that Fanucchi's advancement of this litigation plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

A. The UFW's 1977 Certification of Tri-Fanucchi's Workers & Ensuing Abandonment

Respondent Tri-Fanucchi Farms is a family-owned farming operation that has been operating in Kern County, California for decades. Fanucchi maintains approximately thirty-five (35) year round employees and hires several hundred seasonal employees through various labor contractors.

In 1977, Fanucchi's agricultural employees elected the UFW to be their collective bargaining representative. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms* (1986) 12 ALRB No. 8, p. 2.) Fanucchi initially "technically" refused to bargain with the UFW with the intent to challenge the election pursuant to Labor Code section 1160.8. (*Ibid.*) Ten months passed before the UFW filed an unfair labor practice charge based on Fanucchi's refusal to bargain, which was ultimately dismissed when Fanucchi agreed to begin negotiations. (*Ibid.*) The parties then engaged in limited initial bargaining. (*Ibid.*)

In May 1979, Fanucchi requested clarification from the UFW regarding its designated negotiator, to which the UFW never responded. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 2.) It was not until July 1981 that the UFW expressed interest in resuming

bargaining on behalf of Fanucchi's employees. (*Ibid.*) Between May 1979 and July 1981, the UFW did not have any contact with Fanucchi or its employees.

In July 1981, the UFW sought to resume bargaining. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 2.) After polling its employees and believing they no longer wanted the UFW to represent them, Fanucchi informed the UFW that it could not continue to bargain with the UFW on the good faith belief that it no longer had majority support of its employees. (*Id.* at p. 3.) More than four months later, the UFW brought an unfair labor practice charge, which was eventually dismissed by the ALRB regional director. The UFW did not seek review of the dismissal. (*Ibid.*)

Nearly two years passed before the UFW made another request to resume collective bargaining in April 1984. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 3.) Fanucchi declined the request, citing the 1981 employee poll. (*Id.* at p. 4.) The UFW filed an unfair labor practice charge in June 1984 and the General Counsel did not file a complaint until over a year later in July 1985. (*Ibid.*)

At the hearing, Fanucchi's "central rationale for refusing to meet and negotiate" was that the UFW had lost majority support of its employees. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 7.) Without holding an evidentiary hearing, the Board rejected Fanucchi's

defense, holding that pursuant to the California appellate court's holding in *F & P Growers Assn. v. Agricultural Labor Relations Board* (1985) 168 Cal.App.3d 667 ("*F & P Growers*"), "neither actual loss of majority support, nor a reasonable good faith belief in that occurrence constitutes a cognizable defense to a section 1153(e) refusal to bargain allegation." (*Ibid.*)

Although Fanucchi did not raise abandonment "explicitly," the Board held it was implied and addressed it briefly. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, at p. 9, fn. 6.) Citing *Ventura County Fruit Growers, Inc., supra,* 10 ALRB No. 45, the Board held that the UFW had not abandoned the unit because its "recurrent request for bargaining" demonstrated "desire and intent to actively represent unit employees in the conduct of negotiations." (*Ibid.*)

Upon concluding that Fanucchi had committed an unfair labor practice by refusing to bargain with the UFW, the Board imposed makewhole relief. (*Joe G. Fanucchi & Sons/Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 9.) The basis of the Board's decision to issue makewhole relief was that Fanucchi's lack of majority defense was identical to that rejected in *F & P Growers.* (*Id.* at p. 10.)

B. <u>The Fifth District Court of Appeal's 1986 Holding</u>

Fanucchi petitioned for review of the Board's order in the Fifth District Court of Appeal. (*Tri-Fanucchi Farms v. Agricultural Labor*

Relations Bd. (Nov. 21, 1987, F008776) [nonpub. opn.].) On appeal, Fanucchi raised the loss of majority defense, laches, estoppel, and union abandonment. (*Ibid.*) Regarding the abandonment claim, Fanucchi asserted that the UFW's failure to seek board review of the 1982 dismissal of its unfair labor practice charges, together with the two-year period of union inactivity, demonstrated union abandonment. (*Id.* at pp. 8-9.) Relying on NLRB precedent, the Court of Appeal rejected Fanucchi's argument, finding that the UFW's request to negotiate indicated that it was active and had resumed its role by the time Fanucchi had questioned its status. (*Id.* at p. 9.)

The Court of Appeal also upheld the Board's makewhole award on the basis that the Fanucchi could not claim a public interest in refusing to bargain based on good faith doubt of the Union's majority support. (*Tri-Fanucchi Farms v. ALRB, supra,* F008776 at pp. 10-11.)

C. **The UFW's Twenty-Four Year** **<u>Total Abandonment of Tri-Fanucchi's Workers</u>**

In 1988, Fanucchi informed the UFW that it was willing to engage in bargaining and resume contract negotiations with the UFW. [CR 92.] The UFW responded that it would arrange bargaining dates as soon as its negotiator returned from vacation. (*Ibid.*) For reasons unexplained by the UFW, the UFW negotiator never responded and the UFW disappeared from

the scene and no bargaining occurred for approximately twenty-four (24) years. (*Ibid.*)

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

PROCEDURAL BACKGROUND

A. The 2012 Unfair Labor Practice Charge Hearing and Decision

On March 7 and April 16, 2013, UFW filed charges with the Board on the grounds that Fanucchi had allegedly engaged in unfair labor practices by refusing to bargain and by refusing to provide information relevant to bargaining. [CR 1-6.] On September 5, 2013, the Board's general counsel ("General Counsel") filed a consolidated administrative

complaint ("Complaint") against Fanucchi, arguing that Fanucchi's refusal to bargain and provide information constituted unfair labor practices in violation of the ALRA, Labor Code section 1153, subdivisions (1) and (e). [CR 7 – 11.] Additionally, the General Counsel requested the Board award make whole relief against Fanucchi pursuant to ALRA section 1160.3. [CR 11.]

Fanucchi filed an answer to the Complaint on October 8, 2013. [CR 91-96.] The Answer admitted to the underlying facts alleged in the Complaint, but maintained that UFW had forfeited its representative status by completely abandoning the bargaining unit for twenty-four (24) years. [CR 94.] Fanucchi again asserted that its refusal to bargain was in good faith for the purpose of obtaining judicial review of the important labor relations issue of long-term union abandonment. [CR 96.]

Before the scheduled hearing by the administrative law judge ("ALJ") on October 21, 2013, the General Counsel submitted a motion in limine requesting that all evidence related to Fanucchi's abandonment defense be excluded on the basis that the defense is not recognized by Board precedent. [CR 123-128.] The ALJ granted the motion in limine, which he treated as a motion to strike or a judgment on the pleadings related to Fanucchi's abandonment defense and related equitable defenses. [CR 158-180.] Having rejected Fanucchi's asserted defenses to the duty to bargain, the ALJ addressed the merits of the Complaint, refused to allow

Fanucchi to have an evidentiary hearing to cross-examine UFW subpoenaed witnesses regarding whether the UFW had completely abandoned its employees during the twenty-four (24) years, and held that Fanucchi's refusal to bargain and turn over information constituted unfair labor practices. [CR 169-171.] The ALJ also found that Fanucchi's refusal to bargain as a means of seeking judicial review was not justifiable in light of Board precedent, and thus awarded make whole relief against Fanucchi. [CR 161.]

B. The Board's Adoption of the ALJ's Decision

On November 20, 2013, Fanucchi timely filed with the Board fifteen (15) "exceptions" to the ALJ's decision. [CR 181-184.] Fanucchi argued that the UFW should be held to have forfeited its certification status by totally abandoning the bargaining unit for 24-years. Fanucchi also asserted that its refusal to bargain with the UFW in order to seek judicial review of its certification status amounted to a "technical refusal to bargain", and that the ALJ erred in failing to apply the standard in *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1 ("*J.R.* Norton") to determine whether to issue the makewhole remedy. [CR 198-199.] Fanucchi set forth facts demonstrating its good faith efforts to seek expedited judicial review and how the UFW and General Counsel had thwarted its efforts. [CR 199-200.]

On April 23, 2014, the Board issued its decision[1] in agreement with the ALJ and finding that Fanucchi's refusal to bargain with the UFW and to provide information constituted violations of section 1153, subdivision (a) and (e). The Board denied Fanucchi's contention that the UFW's complete abandonment was a defense to its duty to bargain, as well as similar equitable defenses based on the twenty-four (24) years of total inactivity by the UFW. The Board cited previous Board holdings that under the ALRA, "the fact that a labor organization has been inactive or absent, even for an extended period of time, does not represent a defense to the employer's duty to bargain." (40 ALRB No. 4, p. 8.)

The Board also held that makewhole relief awarded against Fanucchi was proper. (40 ALRB No. 4, p. 19.) The Board rejected Fanucchi's claim that the case is governed by *J.R. Norton, supra,* 26 Cal.3d 1, finding that *J.R. Norton* was limited to cases in which an employer refuses to bargain in order to seek judicial review of a certification election. (*Id.* at pp. 17-18.) The Board instead applied the *F & P Growers* standard, and concluded that because Fanucchi's abandonment defense was allegedly contrary to over 30 years of Board precedent, it cannot be held to have furthered the policies and purposes of the ALRA. (*Id.* at p. 18.)

///

[1] The Board's decision is reported at *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4 ("*Tri-Fanucchi Farms*").

C. **Fanucchi's Petition for Review and the <u>Court of Appeal's Opinion</u>**

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

The Court of Appeal affirmed the portion of the Board's decision that rejected Fanucchi's defenses to the duty to bargain and held that Fanucchi had committed unfair labor practices for refusing to bargain with the UFW and refusing to provide information. (*Tri-Fanucchi, supra,* 236 Cal.App.4th 1079.) The Court of Appeal deferred to the Board's position that past conduct by the UFW indicating abandonment – i.e. UFW absence, failure to carry out its duties, and lack of contact with the employees and the employer for more than twenty-four (24) years – did not create a legal basis for Fanucchi to refuse to bargain with the UFW. (*Id.* at 1092.)

The Court of Appeal reversed the make whole relief award imposed by the Board against Fanucchi. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1094-1098.) The appellate court rejected Fanucchi's arguments that its refusal to bargain was technical and thus subject to the *J.R. Norton* standard of review, and instead upheld the Board's reliance on the *F & P Growers* standard. (*Id.* at 1097.) However, the Court of Appeal diverged from the Board on the issue of whether Fanucchi's litigation efforts did in fact

further the policies and purposes of the ALRA. (*Ibid.*) Acknowledging "all due deference to the Board regarding ALRA policy issues," the Court of Appeal found "the Board was clearly wrong in its legal conclusion that Fanucchi's litigation efforts in this matter did not further the purposes and policies of the ALRA." (*Ibid.*)

The Court of Appeal recognized that despite a history of Board precedent summarily disposing of the abandonment defense to the employer's duty to bargain under the ALRA, "[u]ltimately, it is the courts that must ascertain the intent of the statute so as to effectuate the purpose of the law." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097-1098, citing *J.R. Norton, supra*, 26 Cal.3d at 29 and *Bodinson Mfg. Co. v. California E. Com., supra*, 17 Cal.2d at 326.) The Court noted that until Fanucchi sought and obtained judicial review, no appellate court had addressed the specific question of whether union abandonment was a defense to an employer's duty to bargain, and therefore the question has remained unsettled by the courts. (*Id.* at 1097-1098.) The appellate court concluded "Fanucchi's advancement of this litigation plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue," and held that the Board "prejudicially erred when it ordered make whole relief in this case." (*Id.* at 1098.)

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

ARGUMENT

I. THE BOARD'S DISCRETION TO ORDER MAKEWHOLE RELIEF TO REMEDY UNFAIR LABOR PRACTICES CANNOT BE PUNITIVE AND MUST BE ATTUNED TO THE FUNDAMENTAL PURPOSES OF THE ACT.

A. The Bargaining Makewhole Remedy Under the ALRA

In 1974, the California Legislature enacted the Agricultural Labor Relations Act ("ALRA" or "the Act") "to provide for collective-bargaining rights for agricultural employees." (Lab. Code, § 1140.2.) The ALRA declares it is the policy of the State of California "to encourage and protect the right of agricultural employees to full freedom of association, self-organizations, and designation of representatives of their own choosing ... for the purpose of collective bargaining or other mutual aid and protection." (*Ibid.*) This Court has recognized "[a] central feature in the promotion of this policy is the [ALRA's] procedure for agricultural employees to elect representatives 'for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.' [Citations.] " (*J.R. Norton, supra,* 26 Cal.3d 1, 8.)

The Legislature modeled the ALRA after the comprehensive federal labor relations statute, the National Labor Relations Act ("NLRA"), and created the Board with authority and responsibilities comparable to those exercised by the National Labor Relations Board ("NLRB"), as the agency in charge of the Act's implementation and administration. (*J. R. Norton, supra,* 26 Cal. 3d at 8.) The ALRA empowers the Board "to prevent any person from engaging in any unfair labor practice" and authorized the Board to issue complaints, hold hearings, and remedy unfair labor practices. (Lab. Code §§ 1160, 1160.2 & 1160.3.)

The Board derives its authority to impose the makewhole remedy at issue in this case from Labor Code section 1160.3. Labor Code section 1160.3 provides that when the Board finds an employer guilty of an unfair labor practice for refusal to bargain in good faith, it may enter an order "requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part."

As the wording of Section 1160.3 indicates, makewhole relief is discretionary in nature and is to be applied only where the Board determines it is appropriate under the circumstances and conforms to the

fundamental purposes of the act. (*J.R. Norton, supra,* 26 Cal.3d at 37-38; *Highland Ranch v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 848, 866; *F & P Growers, supra,* 168 Cal.App.3d at 679 ["The language of [Labor Code 1160.3] clearly indicates ... that the remedy of make whole does not apply per se or necessarily from an unfair labor practice."].) The plain language of Section 1160.3 also limits make-whole relief for the purpose of "making employees whole" for losses of pay suffered by employees, not as a penalty for unacceptable conduct. (*J.R. Norton, supra,* 26 Cal.3d at p. 36; *William Dal Porto & Sons, Inc. v. Agric. Labor Relations Bd.* (1987) 191 Cal. App. 3d 1195, 1204.)

As this Court has recognized, the purpose of providing the ALRB discretion to impose the makewhole remedy is two-fold. First, an employer's "dilatory tactics after a representation election ... may substantially impair the strength and support of a union and consequently the employees' interest in selecting an agent to represent them in collective bargaining" thus resulting in a union "to weak to bargain effectively" after the order to bargain. (*J. R. Norton, supra,* 26 Cal. 3d at 31.) Secondly, the imposition of a makewhole remedy against an employer compensates the employees for losses incurred as a result of "delays in the collective bargaining process[2]" as a result of an employer's refusal to bargain

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2 One commenter referred to this purpose of the makewhole remedy as compensation to employees for the "lost *opportunity to negotiate* a

immediately upon the union's demand. (*Ibid.*) The amount of the award reflects "increased benefits" the employees would have gained had the employer bargained.

Although makewhole relief is intended to be compensatory in nature, this Court clarified that "[i]t does not follow, however, that such compensation is justified in every case in which the employer pursues his case in a judicial forum and ultimately does not prevail." (*J. R. Norton, supra,* 26 Cal. 3d at 36.) "The Board's remedial powers do not exist simply to reallocate monetary loss to whomever it considers to be most deserving; they exist, as appears from the statute itself, to effectuate the policies of the Act." (*Id.* at 39-40.)

B. The NLRB Refuses to Impose the Makewhole Remedy, Finding It Conflicts With The No-Concession Clause of the NLRB and Recognizing Its Potential Deterrent and Punitive Impact.

The Board is required, pursuant to section 1148 of the ALRA, to adhere to applicable NLRA precedent. (Lab. Code, § 1148.) Courts have consistently held that when interpreting the ALRA's remedial provision, it is necessary to examine the remedial provision in the NLRA as they have been interpreted by the courts. (*Carl Joseph Maggio, Inc. v. Agric. Labor Relations Bd.* (1984) 154 Cal. App. 3d 40, 55, *citing* Lab.Code, § 1148;

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contract." (*Employee Reimbursement for an Employer's Refusal to Bargain: The Ex-Cell-O Doctrine,* 46 Tex. L. Rev. 758, 764 (1968).)

Triple E Produce Corp. v. Agricultural Labor Relations Bd. (1983) 35 Cal.3d 42, 48*; Highland Ranch, supra, 29* Cal.3d 848, 855–856.)

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

Despite federal appellate court authority holding that the NLRB has the authority to issue makewhole order in cases involving employers' refusal to bargain, the NLRB has continuously declined to award makewhole on the grounds that it lacked authority under the NLRA. (*Int'l Union of Electrical, Radio and Machine Workers v. NLRB* ("*Tiidee Products*") (D.C.Cir.1970) 426 F.2d 1243.) In *Tiidee Products,* the court held statutory authority was located in section 10(c) of the NLRA (29 U.S.C. § 160(c)), which commanded the National Labor Relations Board "to take such affirmative action ... as will effectuate the policies of this

subchapter." (*Id.* at 1248.) The court perceived that the makewhole remedy was necessary in certain cases to afford employees a remedy against unwarranted delay resulting from an employer's refusal to bargain. (*Id.* at 1249–1250.)

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

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

The controversial nature of the makewhole remedy was also discussed by this Court in *J.R. Norton, supra,* 26 Cal.3d at 34-35:

> As one commentator has observed, it is important to recognize that the make-whole remedy "place(s) greater restrictions on judicial review in general and, therefore, will reduce the number of appeal-worthy refusal-to-bargain cases heard by the courts. This will frustrate (the policy) underlying the federal labor legislation. . . . (I)t will deter the initiation of many appeals that would otherwise have been asserted in good faith. Since in many cases the employer might have won on appeal, the deterrence of good-faith review might interfere with the employees' right not to be represented by a union . . . ." (Comment, supra 46 Tex.L.Rev. at p. 774.) Moreover, it has also been pointed out that the make-whole remedy "is especially harmful to small employers. Many small employers who in good faith believed the (NLRB) to be wrong would have neither the resources nor reserves to risk review of a representation decision if the damage remedy might be imposed upon them if they 'guessed wrong' and

> lost. The (make-whole) remedy, litigation expenses, and the threat of strike while review was pending, would definitely discourage seeking review. In view of statistics showing that the (NLRB) is reversed in the courts on 40% of the bargaining orders reviewed, such discouragement would appear oppressive and contrary to the Act's policies. (Citation.)" (McGuiness, op. cit. supra, 14 Wayne L.Rev. at p. 1102, fn. 89.)

J. R. Norton, supra, 26 Cal. 3d at 34-35 [footnotes omitted].

Despite the NLRB's caution that the makewhole remedy conflicts with the clear no-concession language of the statute and the potential deterrent and punitive impact of the remedy, as discussed above, the California Legislature specifically provided the ALRB authority to issue a makewhole remedy against the employer. In *J.R. Norton,* this Court noted that in the legislative testimony before the Senate committee reviewing the bill, then-Secretary of Agriculture and Services Rose Elizabeth Bird testified "that the provision authorizes the Board to award make-whole damages *only when the Board has determined that an employer refused to bargain and acted in bad faith.* The words 'when the board deems such relief appropriate,' according to her testimony, were intended to convey the notion that the Board must carefully evaluate the asserted grounds for ordering make-whole relief; such an evaluation necessarily requires the Board to examine the facts and equities of each particular case." (*J. R. Norton, supra,* 26 Cal. 3d at 38 [italics added].) In light of the NLRB precedent, California case law interpreting the makewhole remedy has

continuously sought to temper the inherent controversy of the remedy by establishing the standards the Board must comply with in determining the appropriateness of makewhole pursuant to Labor Code section 1160.3.

C. Standards the Board Must Comply With In Exercising Its Discretion to Order Makewhole.

As the wording of section 1160.3 and the legislative history clearly indicates, the Legislature intended an award of makewhole relief by the Board to be discretionary after an examination of the facts and circumstances of each unique case. (*J.R. Norton, supra,* 26 Cal.3d at 37-38; *F & P Growers, supra,* 168 Cal.App.3d at 680.) It is not permissible for the Board to impose make whole relief on a per se basis, such as imposing it automatically whenever an employer is found to have committed an unfair labor practice. (*J.R. Norton, supra,* 26 Cal.3d at 37-38.) Instead, the Board is required to carefully evaluate the asserted grounds for ordering makewhole relief. (*Id.* at 28.)

The ALRB originally held that the makewhole remedy provided in section 1160.3 is appropriate in *any* refusal to bargain case, including when an employer has made a " 'technical' refusal to bargain" as a means of obtaining judicial review of the validity of a representation election. (*J.R. Norton, supra,* 26 Cal.3d at 27.) This Court reversed the Board's position, and after examining the statute and the legislative history, held that the Board lacks authority to impose makewhole relief in a categorical fashion

when an employer is found guilty of an unfair labor practice solely as a result of a technical refusal to bargain. (*Id.* at 27-40.) The *J.R. Norton* court observed that the technical refusal to bargain procedure is necessary because under the ALRA, like the NLRA, election certification decisions by the Board are not subject to direct judicial review. (*Id.* at 27.) The Court also recognized that judicial review is important to provide a check on arbitrary action by the Board. (*Id.* at 30.)

The *J.R. Norton* court then instructed the Board that makewhole relief is appropriate only when an employer's refusal to bargain lacks merits and is pursued as a tactic designed to stifle employee organization. Specifically, the Court set forth the following standard:

> [T]he Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. We emphasize that this holding does not imply that whenever the Board finds an employer has failed to present a prima facie case, and the finding is subsequently upheld by the courts, the Board may order make-whole relief. Such decision by hind-sight would impermissibly deter judicial review of close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice. As discussed above, judicial review in this context is fundamental in providing for checks on administrative agencies as a protection against arbitrary exercises of their discretion. On the other hand, our holding does not mean that the Board is deprived of its make-whole power by every colorable claim of a violation of the laboratory conditions of a representation election: it must

> appear that the employer reasonably and in good faith believed the violation would have affected the outcome of the election.

J.R. Norton, supra, 26 Cal.3d at 39.

In cases where the employer's refusal to bargain is not technical because neither an election nor a certification is at issue, the standard the Board must adhere to in exercising its discretion to award makewhole is the referred to as the "*F & P Growers* standard." (*F & P Growers, supra,* 168 Cal.App. 4th 667.) The standard adopted by the Board in *F & P Growers* for determining whether makewhole is appropriate, and acknowledged as proper by the Court of Appeal, was as follows:

> [W]e consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain.

F & P Growers, supra, 168 Cal.App.3d at 682.

In *F & P Growers,* the Court of Appeal also emphasized that "it does not follow either from the language of the statute or from the legislative purpose, that makewhole relief is available in every case where the employer has failed to bargain without a defense." (*F & P Growers, supra*, 168 Cal.App.3d at 681.)

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II. THE ALRA PROVIDES EMPLOYERS THE UNQUESTIONABLE RIGHT TO SEEK JUDICIAL REVIEW OF ANY BOARD ORDER REGARDING UNFAIR LABOR PRACTICES AND ASSERTED REMEDIES

A. In Enacting the ALRA, the Legislature Provided Parties the Right to Petition for Judicial Review of the Board's Orders to Serve as a Check On Arbitrary Administrative Action.

The Legislature has imposed upon the appellate courts the responsibility of reviewing the Board's orders for arbitrary administrative action. Labor Code section 1160.8 clearly enumerates the circumstances under which courts have jurisdiction to review decisions of the board. That section states in pertinent part, "Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in ... by filing in such court a written petition requesting that the order of the board be modified or set aside."

The California Legislature provided judicial review pursuant to section 1160.8 as the means under which an aggrieved party can challenge the Board's order and remedies for an abuse of discretion. This Court has recognized that judicial review of the Board's remedies is "fundamental to the promotion of ALRA policy" as it amounts to "a check on arbitrary administrative action." (*J.R. Norton, supra,* 26 Cal. 3d at 30.) In

recognizing the important interest of fostering judicial review as a check on arbitrary administrative action, the *J.R. Norton* court rejected the Board's asserted remedy because it "place[d] burdensome restraints on those who legitimately seek judicial resolution of close cases in which a potentially meritorious claim could be made that the NLRB or ALRB abused its discretion." (*Id.* at 32.) In the opinion of the Court, the Board failed to acknowledge the serious deterrent impact on judicial review when it announced the rule and applied it in *J.R. Norton.* (*Ibid.*)

The importance of judicial review, as a check on arbitrary administrative action in the context of federal labor legislation, has been explicitly acknowledged by the United States Supreme Court. In *Universal Camera Corp. v. NLRB* (1951) 340 U.S. 474, 490-491, the Court recognized that where "Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds," the reviewing courts "are not to abdicate the conventional judicial function." Similarly, in *May Stores Co. v. Labor Board* (1945) 326 U.S. 376, 380, the Court recognized that judicial review is afforded to "guarantee against arbitrary action by the Board." [Footnote omitted.]

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B. Although the Scope of Judicial Review of the Board's Remedial Action Is Deferential, That Does Not Imply Judicial Abdication of The Court's Constitutional Role of <u>Reviewing the Board's Decisions For Legal Correctness.</u>

The Board dedicates a significant portion of its brief to setting forth redundant state and federal cases holding that the Board's remedial action is subject to deferential judicial review. (ALRB Opening Brief, pp. 24-32.) Generally, courts accord considerable deference to the Board's expertise in determining which remedies would effectuate the policies of the ALRA, and the remedies chosen by the Board are to be overturned by the courts only where they fail to effectuate the policies of the ALRA or amount to an abuse of discretion. In *Carian v. ALRB,* this Court recognized that the Board's remedial order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." (*Carian v. ALRB* (1984) 36 Cal. 3d 654, 674; *Karahadian Ranches v. ALRB* (1985) 156 Cal.3d 1, 16.) It is further recognized that a Court can only reverse a Board's remedial order where it finds "the method chosen was so irrational as to amount to an abuse of discretion ..." (*Butte View Farms v. Agricultural Labor Relations Bd.* (1979) 95 Cal.App.3d 961, 967-968.)

Despite the deferential standard of review afforded to the Board's remedial orders, the Board's discretion in ordering affirmative action to remedy unfair labor practices "is not unbounded." (*Sunnyside Nurseries,*

Inc. v. Agricultural Labor Relations Bd. (1979) 93 Cal.App.3d 922, 940 [the court reversed the remedy imposed by the Board after finding it was punitive in character].) Although the Board's remedial orders are entitled to a presumption of deference, "this presumption does not immunize agency action from effective judicial review." (*California Hotel & Motel Assn. v. Indus. Welfare Com.* (1979) 25 Cal. 3d 200, 212 [footnote omitted].)

By providing parties a direct means of judicial review pursuant to section 1160.8, the Legislature did not intent that the courts abdicate their judicial function. It is well-established that in statutory construction and questions of law, it is the role of the courts to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*J.R. Norton, supra,* 26 Cal.3d at 29; *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 813-814.) "Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244; *People v. Cruz* (1996) 13 Cal.4th 764, 781.) Accordingly, it is "the duty of this court, when ... a question of law is properly presented, to state the true meaning of the statute ... even though this requires the overthrow of an earlier erroneous administrative construction." (*Gibson v. Unemployment Ins. Appeals Bd.* (1973) 9 Cal. 3d 494, 498, citing *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326.)

It is further undisputed that it is the Court's role to settle important questions of law. Therefore, in assessing whether a Board decision rests upon an " 'erroneous legal foundation,' " (*NLRB v. Brown* (1965) 380 U.S. 278, 290, quoting *National Labor Relations Board v. Babcock & Wilcox Co.* (1956) 351 U.S. 105, 112—113), the courts should heed the directive of the United States Supreme Court:

> Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '(t)he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co. v. National Labor Relations Board*, 380 U.S., at 318, 85 S.Ct., at 967.

N.L.R.B. v. Brown, *supra*, 380 U.S. at 291-92.

Finally, when there is a clash between two labor law policies, it is the role of the courts "to examine the Board's decision to ensure a reasonable balance is struck." (*GAF Corp. v. N.L.R.B.*, (5th Cir. 1975) 524 F.2d 492, 495; *NLRB v. Brown, supra,* 380 U.S. at 290-91.)

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III. THE COURT OF APPEAL APPLIED THE APPROPRIATE STANDARD OF REVIEW TO THE BOARD'S REMEDIAL ORDER IN REJECTING THE MAKEWHOLE REMEDY AS APPLIED TO FANUCCHI IN THIS CASE

According to the Board, the essential issue in this case is whether the Court of Appeal applied the appropriate deferential standard of review to the Board's makewhole award. (Opening Brief, at 32.) The Board maintains that the Court of Appeal erred in reversing its determination regarding the appropriateness of the makewhole award without giving the Board the appropriate deference. (Opening Brief, at 34.)

Contrary to the Board's assertions, the Court of Appeal was well aware of the judicial scope of review when it reversed the Board's imposition of makewhole against Fanucchi as evidenced by its clear statement in the opinion: "*With all due deference to the Board regarding ALRA policy issues*, we believe the Board was *clearly wrong in its legal conclusion* that Fanucchi's litigation efforts in this matter did not further the purposes and policies of the ALRA, as we now explain." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097 [italics added].)

The Court of Appeal's deference to the Board on ALRA policy considerations is evidenced by the fact that its analysis centers on the issue of whether the invalidity of the "abandonment" defense was settled law. According to the Board, if the issue of abandonment was settled, its assertion as a basis for refusing to bargain would not further the policies

and purposed of the Act. (*Tri–Fanucchi Farms, supra,* ALRB No. 4 at 6.) The Court of Appeal made the determination that the Board's legal conclusion that the issue of abandonment was settled by Board precedent was "clearly wrong." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097.) It never made a policy determination as to what conduct furthers the policies and purposes of the Act. Therefore, the Court of Appeal's reasoned analysis was within the "narrow confines of the law" and never slid "into the more spacious domain of policy." (*Carian v. ALRB, supra*, 36 Cal.3d 654, 674.)

The Court of Appeal's consideration of whether the Board's makewhole award failed to effectuate the policies of the ALRA or amounted to an abuse of discretion is further evidenced by the court's conclusion, where it states: "Accordingly, we conclude that the Board prejudicially erred when it ordered make whole relief in this case, and that portion of the Board's order is hereby reversed." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1098.)

In light of the Court of Appeal's explicit statement that it had afforded the Board deference regarding ALRA policy determinations and that it believed the Board has abused its discretion, there can be no doubt that in undertaking its analysis of whether the makewhole remedy was appropriately ordered by the Board that the Court of Appeal was aware of the appropriate standard of review.

However, insofar as the Court of Appeal believed the Board's decision to impose makewhole on Fanucchi was based on a "clearly wrong" legal conclusion (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097), it was "not obliged to stand aside and rubberstamp" the Board's makewhole remedy. (*NLRB v. Brown, supra,* 380 U.S. 278, 290-292.) The Court of Appeal's review of the Board's legal conclusions "is always properly within the judicial province," and the Court of Appeal would have abandoned its judicial responsibility if it did not fully review the Board's decision. (*Ibid.*) Matters presenting pure statutory and questions of law are subject to the appellate court's *de novo* review. (*Topanga & Victory Partners v. Toghia* (2002) 103 Cal. App. 4th 775, 779, *as modified on denial of reh'g* (Dec. 11, 2002).)

Thus, Court of Appeal did not apply the wrong standard of review in determining that the Board prejudicially erred when it ordered makewhole relief in this case.

A. The Court of Appeal Appropriately Held that the Board Erred In Its Underlying Legal Conclusion that The Abandonment Issue Was Settled By Board Precedent.

1. The History of the ALRA Demonstrates That Abandonment Is A Proper Defense

In enacting the ALRA, the Legislature expressed its intent and the underlying purpose of the Act as to enable agricultural employees to designate "*representatives of their own choosing... for the purpose of*

collective bargaining or other mutual aid or protection." (Lab. Code, § 1140.2, italics added; *also see*, Lab. Code, § 1152.) The Legislature was clear that the ALRA "is adopted to provide for the collective-bargaining rights for agricultural employees." (Lab. Code, § 1140.2.) As noted by this Court, "[a] central feature in the promotion of this policy is the [ALRA's] procedure for agricultural employees to elect representatives 'for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.' (*Id.,* § 1156, et seq.)" (*J.R. Norton, Co., supra,* 26 Cal.3d at 34.)

Failing to recognize abandonment as a defense to an employer's obligation to bargain with a certified union may result in the very consequence the Legislature sought to prevent when enacting the ALRA. One of the purposes driving the enactment of the ALRA was to protect employee rights by prohibiting unions and employers from imposing a contract upon employees without their consent. (*See Englund v. Chavez* (1972) 8 Cal.3d 572, 597 ("*Englund v. Chavez*").) In *Englund v. Chavez* this Court refused to uphold collective bargaining agreements that were forced upon unwilling employees after being negotiated by a union that did not have the support of those employees. (*Id.* at 577-579.)

By not applying the abandonment defense, there is a threat that the concern expressed in *Englund v. Chavez* may actually occur as the union,

through the mandatory mediation and conciliation ("MMC") process[3], can bypass the employees and impose a contract upon the employees without their consent.

2. The ALRB In The Past Has Recognized That Abandonment By A Certified Union Is A Defense to An Employer's Obligation to Bargain

The Board has repeatedly recognized that a union has abandoned its status as certified representative where the union is either unwilling or unable to continue its responsibilities to represent the employees. (*Bruce Church, Inc.* (1990) 17 ALRB No.1 ("*Bruce Church*"); *Dole Fresh Fruit Company* (1996) 22 ALRB No. 4 ("*Dole Fresh Fruit*").) In analyzing abandonment, the Board usually considers the facts surrounding the union's alleged absence to determine whether it amounted to merely a hiatus in bargaining, or whether the union effectively left the scene all together. (*Ibid.*)

In "clearly recognizing" the existence of the abandonment theory in the context of the ALRA, the Board in *Bruce Church* relied on its earlier holding in *Lu-Ette Farms* (1982) 8 ALRB No. 91 ("*Lu-Ette Farms*"), in which it stated: "Once a union has been certified, it remains the exclusive collective bargaining representative of the employees in the unit until it is

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[3] The ALRA permits mandatory mediation and conciliation ("MMC") in cases of initial-contract bargaining impasse. (See Cal. Labor Code §§ 1164-1164.13.) MMC enables the ALRB to impose collective bargaining agreements based on a mediator's report.

decertified or a rival union is certified, *or until the union becomes defunct or disclaims interest in continuing to represent the unit employees...*" (*Bruce Church, supra,* at 44, citing *Lu-Ette Farms, supra,* 8 ALRB No. 91 at 8 [emphasis added].) Stated another way, the Board explained that under the ALRA, the bargaining obligation may cease with "formal decertification, or, in essence, a showing that the Union had effectively left the scene altogether." (*Id.* at 10.) It would appear that a 24-year absence would equate to leaving the scene altogether.

Seeking to explain the interrelatedness between the concepts of defunctness, disclaiming interest, and abandonment, the Board turned to NLRA precedent. (*Bruce Church, Inc., supra,* 17 ALRB No.1 at 45, fn. 37.) The Board described the concept of defunctness, as originally used by the NLRB, "clearly has both the sense of disabled, implied by the primary meaning of defunct, *and of passivity or unwillingness to perform*, implied by the terms abandonment or disclaimer of interest." (*Ibid.* [emphasis added; internal quotations omitted], citing *Hershey Chocolate Corp.* (1958) 121 NLRB 901, 911.)

Ultimately, the Board in *Bruce Church* reviewed the record and determined that in that case there was no evidence indicating the union had disclaimed interest in, or was unwilling or unable to represent the bargaining unit. (*Bruce Church, supra,* at 10.) In reaching this conclusion, the Board stated "no evidence was presented to show the amount of

contact, or lack thereof, with unit employees, or to show that the Union has stopped representing employees in grievances or other nonbargaining matters." (*Ibid.*) The record in *Bruce Church* showed that despite the slow pace in which the union communicated with the employer and periods of union inactivity lasting between six months to one year, the union continued to represent the employees by presenting a complete proposal and wage package on their behalf, engaging in negotiation meetings with the employer, requesting a wage proposal from the employer, protesting wage changes, and filing unfair labor practices on the employees' behalf. (*Id.* at 45-50.) Additionally, in *Bruce Church*, the Board found that the employer had engaged in unfair labor practices during the time of alleged abandonment that undermined the union's representative status, and thus was disqualified from raising abandonment as a defense. (*Id.* at 50.)

The Board's analysis in *Bruce Church* demonstrates that an employer's bargaining obligation may cease under the ALRA upon "a showing that the Union had *effectively left the scene altogether*." (*Id.* at 10 [emphasis added].) Although the Board concluded that the factual circumstances in *Bruce Church* did not justify a finding that the union was either unwilling or unable to represent the employees in question, it did leave open the question of whether another set of facts might justify such a finding. This is why Fanucchi should have been provided an evidentiary hearing by the Board.

On the issue of abandonment, the Board noted that pursuant to the "distinct law that has developed under the ALRA, the proper question before the Board is whether Respondent has carried its burden of establishing that its duty to bargain has been extinguished by the Union's inability or unwillingness to represent the grape employees, on either...the date of the UFW's formal request to resume negotiations, *or at times prior thereto.*" (*Id.* at 10 [emphasis added].) Despite the Board's criticism of the Dole's decision to raise abandonment at the time the union came forward with its request to bargain after the alleged absence, the Board's analysis did not end there.[4] (*Id.* at 10.)

Instead, the Board went on to examine the record and found that the facts "only serve to demonstrate the Union's continued interest in representing" the grape employees. (*Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 13.) Specifically, the Board focused on the interaction between the UFW and the grape employees during the time between Dole's acquisition of the grape operations in 1988 and the date Dole refused to bargain on the basis of abandonment in May 1994. The Board noted the following facts:

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[4] The ALRB and UFW have repeatedly argued that Fanucchi's abandonment defense became an impossibility when the UFW requested bargaining after its twenty-four (24) year absence because the UFW demonstrated its current willingness to represent the employees, citing *Dole Fresh Fruit, supra,* 22 ALRB No. 4 at 10. However, that is not what the Board in *Dole Fresh Fruit* intended. If the Board was taking the position that the abandonment defense was a factual impossibility when the UFW requested bargaining after a long-term, total absence from the scene, its analysis would have ended at that inquiry.

(1) the UFW made separate formal requests to bargain on behalf of the grape employees in 1990, 1992, and 1994; (2) the UFW filed Notices of Intent to Take Access to engage employer's grape employees; and (3) the UFW sought a general wage increase for all grape workers in the region. (*Id.* at 13.) The Board concluded that the UFW "actually remained active on behalf of the grape employees, albeit by various means other than direct negotiations, and therefore was not 'totally absent from the scene.' (*Bruce Church, supra,* 19 ALRB No. 1.)" (*Ibid.*)

In a separate and distinct section of the Board's analysis in *Dole Fresh Fruit, supra,* 22 ALRB No. 4, the Board addressed concerns regarding "dormant" certifications in which "the certified representative does not appear to be actively representing employees for an extended period of time." (*Id.* at 7 – 18.) The Board's decision to separately address abandonment based on a union's "total absence from the scene," as opposed to a "hiatus in negotiations," demonstrates that the Board itself recognizes there is a line when a union's inactivity progresses from dormant to full-on abandonment. It is hard to imagine a factual scenario more fitting for recognizing abandonment than the UFW's total absence from the scene at Fanucchi's operations for more than twenty-four (24) years.

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3. It Was Appropriate For Fanucchi to Seek Judicial Review.

As discussed above, the Board's conclusion that Fanucchi's litigation of the abandonment theory did not further the policies and purposes of the ALRA was based exclusively on the fact that Fanucchi's position was "contrary to over 30 years of Board precedent holding that abandonment is not a defense to the duty to bargain." (*Tri–Fanucchi Farms, supra,* ALRB No. 4, p.18.) With no further analysis or assessment of the individual facts or circumstances of the case, in the very next sentence, the Board concludes: "Accordingly, [Fanucchi's] position cannot be said to further the policies and purposes of the ALRA." (*Ibid.*)

The "clearly wrong" legal conclusion the Court of Appeal is referring to is the Board's conclusion that because Fanucchi's abandonment defense was contrary to *Board precedent*, the issue was thus settled, and Fanucchi's efforts to seek judicial review of the abandonment defense did not further the policies and purposes of the ALRA. As the Court of Appeal explained, whether or not abandonment is a defense to an employer's duty to bargain is a *legal question primarily involving the interpretation of legislative purposes and policies of the ALRA*. (*Tri-Fanucchi, supra*, 236 Cal. App. 4th at 1088 [emphasis added].) It is well-established that in statutory construction and questions of law, it is the role of the courts to "ascertain the intent of the Legislature so as to effectuate the purpose of the

law." (*J.R. Norton, supra,* 26 Cal.3d at 29; *Clean Air Constituency v. California State Air Resources Bd., supra,* 11 Cal.3d 801, 813-814.) "[A] tentative administrative interpretation makes no pretense at finality and it is the duty of this court, when such a question of law is properly presented, to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction." (*Bodinson Mfg. Co., supra,* 17 Cal.2d at 326; also see *Gibson v. Unemployment Ins. Appeals Bd., supra,* 9 Cal. 3d at 498.)

Here, Fanucchi rightfully sought judicial review of the Board's summarily dismissal of its abandonment defense pursuant to section 1160.8. Until such time as Fanucchi raised the question of law before the Court of Appeal as to whether long term and total abandonment by the bargaining representative was a defense to an employer's duty to bargain, the Board's statutory construction and legal analysis of the abandonment defense under the ALRA was not binding or final. (*Bodinson Mfg. Co., supra,* 17 Cal.2d at 326; also see *Gibson v. Unemployment Ins. Appeals Bd., supra,* 9 Cal. 3d at 498.) Therefore, the Board's conclusion that the invalidity of the "abandonment" defense was settled law prior to Fanucchi's litigation and the Court of Appeal's opinion was necessarily an erroneous legal conclusion.

The Board argues that the Court of Appeal's decision is "compounded error because it stands on the erroneous assumption that the

Board cannot rely upon its own settled precedent in determining whether assertion of a particular defense furthers the policies and purpose of the Act in determining remedial make whole." (Opening Brief, 36.) However, the Court of Appeal's assumption is not erroneous and is supported by the binding authority from this Court. In *Gibson v. Unemployment Ins. Appeals Bd.*, *supra*, 9 Cal. 3d at 498, footnote 6, this Court recognized that although an agency's decision represents a settled administrative construction of the statute, "the duty of this court, when ... a question of law is properly presented, to state the true meaning of the statute ... even though this requires the overthrow of an earlier erroneous administrative construction." (*Gibson v. Unemployment Ins. Appeals Bd.*, *supra,* 9 Cal. 3d 494, 498, citing *Bodinson Mfg. Co. v. California E. Com.*, *supra,* 17 Cal.2d 321, 326; *also see Rabago v. Unemployment Insurance Appeals Board* (1978) 84 Cal.App.3d 200, 207, fn. 5 ["The Board's decisions representing a settled administrative construction of the law must be given great weight although, of course, they are not binding on the courts."].)

The Board also asserts that the Court of Appeal's alleged failure to treat the Board's precedent as established "effectively eviscerates the Legislature's statutory mandate to the Board to serve as the expert agency with primary responsibility to formulate appropriate remedies." (Opening Brief, at 27.) A similar argument was made by the NLRB and addressed by the United States Supreme Court in *NLRB v. Brown, supra,* 380 U.S. 278,

290. In that case, the NLRB claimed that since the Board's decision fell "within the area of its expert judgment," in setting aside that judgment, "the Court of Appeals exceeded the authorized scope of judicial review." (380 U.S. 278, 290.) The U.S. Supreme Court clarified that "limited judicial review" did not mean "that the balance struck by the Board is immune from judicial examination and reversal in proper cases." (*Ibid.*) Specifically, the U.S. Supreme Court stated that although "[c]ourts should be slow to overturn an administrative decision [citations] ... they are not left to sheer acceptance of the Board's conclusions [citations]." (*Ibid.*)

The Court of Appeal opinion does not treat the Board's precedent as having no weight. The Court of Appeal clearly recognized that "[s]ince the Board is the administrative agency entrusted with enforcement of the ALRA, its interpretation of the ALRA is given deference by the courts and will be followed if not clearly erroneous." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1087.) Further, the Board's argument that under the Court of Appeal's rationale the Board could never settle the status of the abandonment defense so as to permit the Board to rely upon it in formulating an appropriate remedy is nonsensical. The Board overlooks the well-established rule of law that in every case in which the Board is exercising its discretion to determine whether makewhole is appropriate it must examine all the facts and circumstances of a particular case. (*J.R. Norton, supra,* 26 Cal.3d at 37-38; *F & P Growers, supra,* 168 Cal.App.3d

at 680.) As the Board determined in *F & P Growers,* regardless of whether or not the employer failed to bargain without a defense, the Board is still "required to examine the employer's conduct for particular facts and circumstances to see if the make whole remedy was appropriate." (*F & P Growers, supra,* 168 Cal.App.3d at 681.)

As demonstrated here, the Court of Appeal appropriately held that the Board prejudicially erred when it ordered make whole relief against Fanucchi on the sole basis that Fanucchi's position was contrary to Board precedent on a legal issue not yet finally and conclusively determine by the courts.

B. The Court of Appeal Did Not Assume the Remedial Authority of the Board When It Concluded That the Board Prejudicially Erred When It Ordered Makewhole Relief In This Case.

The Board's written decision describing its reasoning for finding the makewhole remedy appropriate in this case was based on a single legal conclusion – that the position taken by Fanucchi that the UFW had forfeited its certification by abandoning the bargaining unit was contrary to Board precedent that therefore Fanucchi's position did not further the policies and purposes of the ALRA. (*Tri-Fanucchi Farms, supra,* ALRB No. 4 at 18.) As described above, the Court of Appeal appropriately held that the Board's legal conclusion was erroneous, and therefore could not be relied upon to support makewhole. Because the Board failed to examine any

other facts or equities before imposing the makewhole remedy against Fanucchi, it was not an abuse of discretion for the Court of Appeal to conclude that the Board prejudicially erred when it ordered makewhole relief in this case.

The Board takes issue with the fact that after the Court of Appeal determined there was no legal basis for the Board's conclusion that the issue of abandonment was settled by virtue of a history of Board precedent, the Court of Appeal cited additional factors to support why it was reasonable for Fanucchi to believe the abandonment issue was unsettled and that its judicial resolution would further the public interest. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1098.) The Board characterizes the Court of Appeal's analysis as a de novo determination of the appropriateness of makewhole and an assumption of the Board's remedial authority. This portrayal of the Court of Appeal's position is inaccurate.

After determining that the Board was clearly wrong in its legal conclusion that 30 years of Board precedent foreclosed on whether or not Fanucchi's litigation efforts furthered the purposes and policies of the ALRA, the Court of Appeal went on to describe factors that further demonstrate that despite Board's prior decisions summarily dismissing abandonment, the issue was necessarily unsettled. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1098.) The Court of Appeal was merely describing the further inadequacies in the Board's conclusion that a history of Board

precedent equated the issue was settled and that litigation of Fanucchi's position could never advance the policies and purposed of the Act.

In fact, there is nothing in the Court of Appeal opinion that suggests the Court of Appeal conducting any weighing of competing interest or policy considerations whatsoever. That the Court of Appeal did not apply the *F & P Growers* test de novo is shown by the fact that in its conclusion, the Court of Appeal returns to its earlier assessment that until Fanucchi sought judicial review of the abandonment issue, it was wrong for the Board to conclude the issue was settled and did not further the public interest. The Court of Appeal concludes: "Therefore, Fanucchi's advancement of this litigation plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1098.)

The Board relies on the fact that the Court of Appeal did not remand the matter to the Board for further proceedings as evidence of the Court of Appeal's de novo assessment of the makewhole remedy. (Opening Brief, at 38.) However, the ALRA "makes no provision for remand of a case back to the Board for further proceedings once the Court of Appeal has accepted it for review. Section 1160.8, construed with section 1160.3, appears to vest exclusive jurisdiction in the Court of Appeal once the record is filed in the court pursuant to the clerk's notice." (*Pandol & Sons v.*

Agric. Labor Relations Bd. (1979) 98 Cal. App. 3d 580, 590 [footnotes omitted].)

This Court's decision to remand the issue of the appropriateness of makewhole to the Board to *J.R. Norton, supra,* 26 Cal.3d 1, 38-39 did not bind the Court of Appeal to return the issue of makewhole to the Board in the present case. In *J.R. Norton,* this Court concluded that the Board had applied the wrong standard for assessing the appropriateness of makewhole, and therefore held that "the case must be returned to the Board to apply the proper standard." (*Ibid.*) Similarly, in *William Dal Porto & Sons Inc. v. ALRB, supra,* 191 Cal.App.3d 1195, 1212-1214, the court concluded that where the Board was unaware of the correct legal standard, "the case ordinarily should be referred to the Board so it may reconsider its decision." (*Id.* at 1214.) The court ultimately decided that remand was necessary so that the employer could produce evidence under the correct legal standard. (*Ibid.*) In contrast, in the present case, the Court of Appeal held that the Board had applied the appropriate standard of review when it followed the *F & P Growers* test so it was not necessary for the Board to return to the matter to consider different facts or circumstances. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097.)

The Board also suggests, in hindsight, that even if the Court of Appeal was correct in its assessment that Fanucchi's litigation furthered stability in labor relations, it did not necessarily follow that makewhole

would be inappropriate because it would need to be weighed against countervailing policy considerations. (Opening Brief, p. 40.) However, when the Board was faced with the opportunity to consider the extent to which the public interest in the employer's position weighed against the harm done to the employees, it summarily concluded that since Fancucchi's position contradicted Board precedent it could not be said to further the policies and purposes of the ALRA. (*Tri-Fanucchi Farms, supra,* ALRB No. 4 at 18-19.) The fact that the Court of Appeal determined the Board's assessment to be an erroneous legal conclusion does not change the undisputed facts and circumstances before the Board when it exercised its discretion and found makewhole appropriate. The fact that the Board failed to weigh the public interest in the employer's position against the harm done to the employees before asserting makewhole against Fanucchi in this case only further demonstrates the extent to which the Board abused its discretion.

The Court of Appeal appropriately held that the Board prejudicially erred when it ordered makewhole relief in this case. As demonstrated by the Court of Appeal's clear statement that it was deferring to the Board on policy considerations, the Court did afford the Board's makewhole remedy the appropriate deferential standard of review. However, where, as here, the Board's conclusion was based on erroneous legal foundation, it was

well within its judicial province to find the Board had abused its discretion in awarding the controversial makewhole remedy.

IV. THE COURT OF APPEAL'S CONCLUSION THAT FANUCCHI'S PURSUIT OF THE ABANDONMENT DEFENSE FURTHERED THE POLICIES AND PURPOSES OF THE ACT WAS CORRECT

The only facts and circumstances the Board examined to conclude that Fanucchi's position did not further the policies and purposes of the ALRA was that Fanucchi's position that the UFW forfeited its certification by abandoning the bargaining unit was contrary to over 30 years of Board precedent. (*Tri–Fanucchi Farms, supra,* ALRB No. 4 at18.) After the Court of Appeal disposed of this consideration as an erroneous legal conclusion, the Board's written decision set forth no other considerations for the Court of Appeal is review that would support the Board's assessment of the makewhole remedy against Fanucchi. As such, the Court of Appeal correctly concluded that Fanucchi's advancement of this litigation furthered the policies and purposes of the Act.

A. It Is Explicit In The Board's Written Decision That The Only Facts and Circumstances Considered By The Board To Assess Makewhole Was That Fanucchi's Position was Contrary to Board Precedent.

The Board's argument that the Court of Appeal erroneously found that its makewhole determination was based solely on its assessment of the abandonment defense is artful at best. (Opening Brief, at p. 45.) The

Board's written analysis to determine whether the makewhole remedy was appropriate in Fanucchi's case stated as follows:

> "Here, because [Fanucchi] is not seeking review of a certification election, *F&P Growers* applies, rather than *J.R. Norton.* The issue, therefore, is whether the public interest in [Fanucchi's] position outweighs the harm done to employees by its refusal to bargain. The position taken by [Fanucchi] is based principally on its contention the UFW forfeited its certification by abandoning the bargaining unit. As discussed above, this position is contrary to over 30 years of Board precedent holding that abandonment is not a defense to the duty to bargain. Accordingly, [Fanucchi's] position cannot be said to further the policies and purposes of the ALRA. [Citation.] [¶] ... [¶] Based upon our review of the facts and circumstances and the equities of this case, we conclude, in agreement with the ALJ, that an award of makewhole is appropriate and that, under the circumstances presented in this case, '[Fanucchi], not the employees, should ultimately bear the financial risk of [Fanucchi's] choice to litigate rather than bargain.' [Citation.]" (*Tri–Fanucchi Farms, supra,* ALRB No. 4, pp. 18, 20, fns. omitted.)

Tri-Fanucchi, supra, 236 Cal. App. 4th at 1097.

It is explicit from the Board's decision that the only facts and circumstances considered by the Board to determine whether Fanucchi's position furthered the policies and purposes of the Act was that Fanucchi's position was contrary to Board precedent.

The Board's decision cites *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms,* 12 ALRB No. 8, p. 9 -10 as authority[5] that makewhole was

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[5] In *Joe G. Fanucchi & Sons/Tri-Fanucchi Farms,* 12 ALRB No. 8 at p. 10 the Board held: "Since Respondent's defense here is identical to that rejected in *F & P,* makewhole relief … is appropriate." The case does not support the Board's contention that 30 years of *Board precedent* equates

appropriate "where Employer raised defenses that had already been rejected under existing case law." (*Tri–Fanucchi Farms, supra,* ALRB No. 4, at18.) There is no indication that the Board considered the previous litigation as alternative facts or circumstances to support the makewhole remedy. The Board's alternative claim that it considered the equitable arguments raised by Fanucchi is also without foundation. It is clearly evident from the Board's decision that it had already determined makewhole was appropriate based on its assessment that Fanucchi had not further the policies and purposes of the ALRA and that it was merely acknowledging and summarily dismissing Fanucchi's equitable arguments. (*Ibid.*) Further, the equitable arguments that the Board alleges to have considered are not part of the analysis under *F & P Growers* to determine whether Fanucchi's position furthered the policies and purposes of the act or whether Fanucchi's liability should have been mitigated by the public interest in its position. (*F & P Growers, supra,* 168 Cal.App.3d at 682.)

B. The Court of Appeal's Legal Conclusion that the State of the Law on Abandonment Was Unsettled Is Well-Reasoned and Should Be Sustained.

The Board contends that the Court of Appeal made an error in concluding that the law on abandonment was so unsettled that the Board could not find that its advancement did not further the policies and purposes

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the *settled case law* rejecting the loss of majority defense to an employer's duty to bargain in *F & P Growers, supra,* 168 Cal.App.3d 667.

of the ALRA. (Opening Brief, p. 47.) As the Board notes, the Court of Appeal had reviewed the state of the law on abandonment at length in it opinion before ultimately concluding that it was not a defense to an employer's duty to bargain under the ALRA[6]. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1093-1094.) Nonetheless, it was the opinion of the Court of Appeal that the issue was unsettled until Fanucchi sought judicial review. (*Id.* at 1098.) The basis for the Court of Appeal's conclusion is explained in a soundly-reasoned analysis, and the fact that the Board thinks the Court's conclusion was wrong is not a basis for this Court to overturn it.

Furthermore, as examined above at sections III.A.1 and III.A.2, the history of the ALRA provides a basis for asserting the abandonment defense, and the ALRB has recognized abandonment by a certified union as a defense to an employer's duty to bargain. Contrary to the Board's contentions, the Board's precedent on the abandonment defense was conflicting and inconsistent.

C. The Court of Appeal's Holding Does Not Undermine Stability in Agricultural Labor Relations.

The Court of Appeal concluded that the Board prejudicially erred in its legal conclusion that Fanucchi's litigation effort did not further the purposes and policies of the ALRA. (*Tri-Fanucchi, supra,* 236 Cal.App.4th

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[6] Fanucchi disagrees with the Court of Appeal's rejection of the abandonment and unclean hands defenses, and filed a Petition for Review before this Court. This Court granted the petition on August 19, 2015.

at 1097.) The Court of Appeal explained that "Fanucchi's advancement of this litigation plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1098.) The Board erroneously argues that the Court of Appeal's holding threatens to undermine labor relations stability. (Opening Brief, p. 49.)

The Board contends that the Court of Appeal's ruling undermines labor relations stability because it allegedly negates the Board's legislatively assigned role as the expert agency with primary and exclusive jurisdiction over unfair labor practices. In support of this claim, the Board cites to *United Farm Workers v. Superior Court (Mount Arbor Nurseries)* (1977) 72 Cal. App. 3d 268, 273 to improperly assert that administration by the Board, rather than through ad hoc judicial determinations, is essential to the Legislature's effort to bring stability to agricultural labor relations. However, the court in *Mount Arbor Nurseries* was examining the impermissibility of the party's attempt to obtain *declaratory relief* in superior court of whether it had a duty to bargain with the UFW as an attempt to bypass an unfair labor practice proceeding by the Board. (*Ibid.*) In rejecting the party's position, the court noted that by enacting the ALRA's provisions for appellate review of unfair labor practice proceedings, the Legislature "intended to foreclose action for declaratory relief in the superior court." (*Ibid.*) Thus, *Mount Arbor Nurseries*

illustrates the Legislature's recognition of the important function of providing parties judicial review of the Board's administrative action.

The Board's arguments that the Court of Appeal's decision will place additional burdens on the Courts because the Courts will be increasingly asked to "settle" the law are facetious. (Opening Brief, p. 50.) The Board overlooks that since the creation of the ALRA aggrieved parties have always had the opportunity to obtain judicial review of any Board action. (Lab. Code, § 1160.8.) The fact that the Legislature provides the ALRB with primary and exclusive jurisdiction over ULPS does not mean that the Legislature intended to abdicate the courts of their statutory duty to review Board orders.

Further, this Court recognized years ago that judicial review of the Board's action is "fundamental to the promotion of ALRA policy" as it amounts to "a check on arbitrary administrative action." (*J.R. Norton, supra,* 26 Cal. 3d at 30.) In *J.R. Norton*, this Court recognized that a Board rule that imposed the makewhole award in every instance an employer committed an ULP "place[d] burdensome restraints on those who legitimately seek judicial resolution of close cases in which a potentially meritorious claim could be made that the NLRB or ALRB abused its discretion." (*Id.* at 32.)

The Board's argument that the Court of Appeal incentivizes employers who pursue judicial review of a Board decision rather than

resume bargaining reveals the Board's true motive behind awarding makewhole against Fanucchi in this case was to punish it for pursuing its statutory right to seek judicial review of the Board's order. However, it was never the Legislature's intent to punish or penalize an employer for seeking judicial review on Board action in good faith, even if the employer's position is ultimately rejected. (*J.R. Norton, supra,* 26 Cal.3d at 36; *William Dal Porto & Sons, Inc. v. ALRB, supra,* 191 Cal.App.3d at 1204.) As noted earlier, the legislative testimony of Rose Elizabeth Bird demonstrates that the makewhole remedy was intended for the limited purposes of compensating employee's for losses of pay "*when the Board has determined that an employer refused to bargain and acted in bad faith.*" (*J. R. Norton, supra,* 26 Cal. 3d at 38 [italics added].) Furthermore, the litigation expenses in seeking judicial review are sufficient to deter an employer from pursuing appellate review on clearly meritless issues.

Therefore, the suggestion that the Court of Appeal's decision undermines stable agricultural relations by encouraging employers to litigate rather than bargain is without merit and does not warrant reversal of the Court of Appeal's opinion.

The Board assertion that the Court of Appeal decision implies that the Board should have "punished" the UFW by declining to award makewhole against the employer is absurd. (Opening Brief, p. 53.) The Court of Appeal merely refers to the UFW's "egregious inactivity" and

"extreme dereliction" as facts and circumstances demonstrating that it was reasonable for Fanucchi to believe that by seeking judicial review it was advancing the public interest and the policies and purposes of the ALRA where a certified bargaining representative neglected its statutory duties to the employees it was elected to represent for decades. The Court of Appeal's opinion clearly demonstrates that it was well aware that the makewhole remedy is entitled to compensate the employees to the extent they have suffered harm, if any. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1094 ["If an employer is guilty of an unlawful labor practice for refusal to bargain in good faith, the Board has discretion under the ALRA to impose a make whole remedy against the employer to compensate the employees for losses incurred as a result of the delays in the collective bargaining process."].) The Board's suggestion that the Court of Appeal intended to punish the UFW by reversing the makewhole award is entirely unreasonable and unworthy of this Court's consideration.

Finally, the Board's suggestion that the Court of Appeal's conclusion that Fanucchi's efforts in seeking judicial review of the abandonment defense furthered the "broader purposes of the ALRA to promote stability in labor relations by obtaining an appellate decision on this important issue" was incorrect because it failed to account for equally important purposes of the act is meritless.

In *F & P Growers,* the court upheld the Board's award of makewhole against the employer on the basis that it believed the Board examined the facts and circumstances of the case before exercising its discretion to award makewhole. (*F & P Growers, supra,* 168 Cal.App.3d at 682.) At issue in that case was the employer's reliance on the lack of majority defense to its duty to bargain under the ALRA. In analyzing whether the makewhole relief was appropriate, the Board stated in its written decision: "Although we have found such a defense to be unavailing under the ALRA, we shall consider in deciding whether to award makewhole whether Respondent's liability should be mitigated by the public interest in its position." (*F & P Growers* (1982) 9 ALRB No. 22, p. 9.) The Court of Appeal held: "Since the Board in the instant case did in fact examine the facts and circumstances of the particular case, and did not apply the make whole remedy per se or automatically, but applied it only after it exercised discretion and deemed that relief appropriate, the order herein was not an abuse of discretion. The Board must examine the facts and equities of each 'particular' case before imposing make whole relief (*J. R. Norton Co. v. Agricultural Labor Relations Bd.*, supra., 26 Cal.3d 1, 37, 38) and this the Board did do." (*Ibid.*)

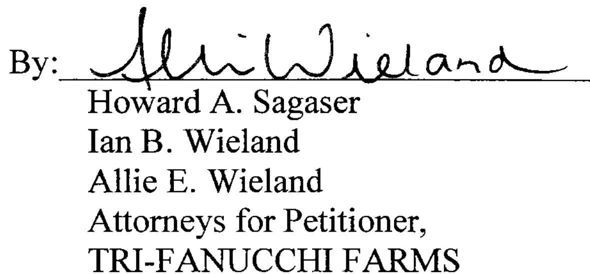
In contrast, as discussed in detail above, the Board rested its entire decision to award makewhole against Fanucchi in this case on the basis that Fanucchi's position was contrary to Board to precedent. In deciding

whether to award makewhole, the Board did no analysis whatsoever of whether Fanucchi's litigation furthered any of the important purposes of the ALRA. In criticizing the Court of Appeal's conclusion, the ALRB acknowledges the analysis it was required to do, but did not do, before exercising its discretion to impose the makewhole remedy. The Board's assertions that the Court of Appeal was incorrect to conclude that Fanucchi's litigation of the abandonment defense furthered the legislative policy of fostering stability in labor relations is clearly misplaced and should be rejected by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed as to the makewhole remedy.

Dated: February 1, 2016 **SAGASER, WATKINS & WIELAND PC**



By:____________________
Howard A. Sagaser
Ian B. Wieland
Allie E. Wieland
Attorneys for Petitioner,
TRI-FANUCCHI FARMS

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c)(1))

Pursuant to California Rule of Court 8.520(c)(1), counsel for Petitioners hereby certifies that the number of words contained in this **TRI-FANUCCHI'S ANSWER TO AGRICULTURAL LABOR RELATIONS BOARD'S BRIEF ON THE MERITS**, including footnotes, but excluding the Table of Contents, Table of Authorities, and this Certificate, is 13,603 words as calculated using the word count feature of the computer program used to generate the brief.

Dated: February 1, 2016 SAGASER, WATKINS & WIELAND, PC

By:

Allie E. Wieland
Counsel for Petitioner
TRI-FANUCCHI FARMS

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PROOF OF SERVICE
(Code of Civil Procedure § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 7550 North Palm Avenue, Suite 100, Fresno, California 93711.

On February 1, 2016, I served the following document described as **TRI-FANUCCHI'S ANSWER TO AGRICULTURAL LABOR RELATIONS BOARD'S BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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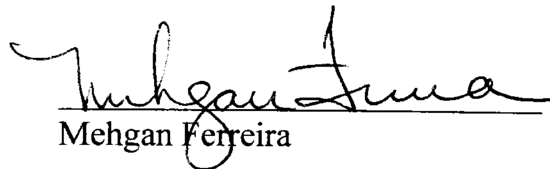
☒ **BY MAIL**: I deposited such envelope in the mail at Fresno, California. The envelope(s) was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presume invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 1, 2016, at Fresno, California.



Mehgan Ferreira

SERVICE LIST

Sent Via U.S. Priority Mail:
Silas Shawver (SBN 241532)
Agricultural Labor Relations Board
Visalia Regional Office
1642 West Walnut Avenue
Visalia, California 93277-5348
Facsimile: (559) 627-0985

Attorneys for Real Party in Interest, Agricultural Labor Relations Board

Sent Via U.S. Priority Mail:
Mark Woo-Sam, General Counsel
Agricultural Labor Relations Board
1325 J Street, Suite 1900-A
Sacramento, California 95814
Facsimile: (916) 653-8750

Sent Via U.S. Priority Mail:
Antonio Barbosa
Executive Secretary
Agricultural Labor Relations Board
1325 J Street, Suite 1900-A
Sacramento, California 95814
Facsimile: (916) 653-8750

Sent Via U.S. Priority Mail:
Mario Martinez
Martínez Aguilasocho & Lynch, APLC
P.O. Box 11208
Bakersfield, Ca. 93389-1208
Facsimile: (661) 840-6154

Sent Via U.S. Priority Mail:
Kamala D. Harris, Attorney General
Office of the Attorney General
1300 I Street
Sacramento, California 95814-2919

Sent Via FedEx Overnight:
Supreme Court of California *(8 copies)*
350 McAllister Street
San Francisco, CA 94102