No. 17-1375

IN THE

Supreme Court of the United States

GERAWAN FARMING, INC.,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent.

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

BRIEF FOR ROBERTO ANGELES, *ET AL.*, AND THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

W. James Young
Counsel of Record
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
wjy@nrtw.org

Anthony J. Raimondo
Raimondo and Associates
7080 North Marks Ave., Suite 117
Fresno, CA 93711
(559) 432-2242
apr@raimondoassociates.com

Counsel for Amici

May 16, 2018

QUESTION PRESENTED

Whether the State of California may impose a monopoly-bargaining agreement on a private employer and its employees through non-consensual compulsory arbitration, thereby abrogating the workers' rights to determine their own bargaining representative without violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

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INTEREST OF THE AMICI CURIAE[1]

Roberto Angeles, Rodolfo Carranza, Javier Zamora Delgado, Jovita Zamora Delgado, Rafael Agular Flores, Manuel Guzman, Angel Rincon, and Edith Hernandez Vergara are employed by Petitioner Gerawan Farming, Inc. in a bargaining unit currently represented by the United Farm Workers, AFL-CIO. They are among thousands of similarly-situated Gerawan employees whose efforts to discharge an unwanted monopoly bargaining representative have been consistently thwarted by Respondent Agricultural Labor Relations Board. They now face, by virtue of California law and the actions of the ALRB, imposition of a monopoly-bargaining "agreement" which they do not want. Indeed, the ALRB has gone so far as to refuse to ascertain the wishes of Gerawan's employees regarding union representation and the merits and demerits of the "agreement."

The National Right to Work Legal Defense Foundation, Inc. is a nonprofit organization that provides free legal aid to workers, like the individual amici, whose rights are infringed upon by compulsory unionism schemes. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate against compulsory union fee requirements.

Currently, Foundation staff attorneys represent workers in more than 175 federal, state, and admin-

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[1] Pursuant to Supreme Court Rule 37.2, all parties received notice of intent to file this brief. Counsel for Petitioner stated that it consents to the filing of this brief. Counsel for Respondent replied that it "does not oppose … filing" of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no party's counsel authored any part of the brief and no one other than *amicus* Foundation funded its preparation or filing.

istrative cases involving forced union fee requirements. Foundation attorneys have represented individual workers in almost all of the compulsory union association and/or fee cases that have come before this Court since 1968.[2] Those cases include *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and *Janus v. AFSCME*, S. Ct. No. 16-1466 (pending).

The *amici* submit this brief to urge the Court to protect the Due Process and Equal Protection rights of all workers, as well as their substantive right to a meaningful voice in the determination of their own terms and conditions of employment. Such a voice is particularly needed where, as here, an unwanted union, imposed and perpetuated by the State, is unjustly treated as "speaking" for Gerawan's employees.

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[2] *See* http://www.nrtw.org/en/foundation-cases.htm (last visited May 14, 2018).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution and the Bill of Rights prohibit government from forcing individuals into unwanted associations and contracts. This case presents an appalling confluence of impingement upon these fundamental liberties for both employers and employees. Petitioner Gerawan presents a compelling case for review by this Court to protect its liberty interests, yet its argument perforce focuses mainly upon its own constitutional liberties. These *amici* support the Petition because the State of California's impingement upon liberty here is not limited to Petitioner.

The ALRB has applied California's Agricultural Labor Relations Act, Cal.Lab.Code § 1140 *et seq.*, to consistently, unremittingly, and unrelentingly frustrate the efforts of the individual *amici* and thousands of their fellow employees to discharge an unwanted labor union representative. When coupled with the impingements upon Gerawan's constitutional rights and the California Supreme Court's casual disregard of this Court's precedents, the outcome below cries out for the intervention of this Court.

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ARGUMENT FOR GRANTING THE WRIT

I. Respondent has consistently, unremittingly and unrelentingly frustrated Gerawan's employees efforts to discharge an unwanted union representative.

As discussed in the Petition ("Pet."), Gerawan's employees are purportedly represented, exclusively for purposes of collective bargaining, by real-party-in-interest UFW. However, until late 2012, this "representation" consisted of: (1) victory in a 1990 run-off election conducted by Respondent ALRB; (2) a preliminary bargaining session in 1995; and (3) "disappear[ance] from the scene" and cessation of all contact with Gerawan for a period of almost two decades. Appendix ("App.") 12 & 56.

It was not until October 2012, after turnover in the workforce such that few or none of the employees who had voted for the UFW remained in Gerawan's employ, that the UFW resurfaced to assert its role as the employees' "representative" under the Agricultural Labor Relations Act ("ALRA"). Cal.Lab.Code § 1140.4(e). Although Gerawan inquired why, the UFW refused to explain its disappearance from and apparent abandonment of the "great responsibilities" accompanying its designation as an exclusive bargaining representative. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977); *see also Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 552 (1991) (Marshall, J., concurring in part and dissenting in part); *Minnesota St. Bd. for Community Colleges v. Knight*,

465 U.S. 271, 320 (1984).[3] Then, after ten bargaining sessions marked by the UFW's failure to make any economic proposals, App. 12, in March 2013, the UFW invoked the provisions of California's mandatory mediation and conciliation ("MMC") process, a process available since its enactment in 2002. Cal.Lab.Code § 1164 *et seq*. The ALRB granted the UFW's request, compelling Gerawan into the MMC process in April 2013.

In the meantime, Gerawan workers—caught unaware by the UFW's reappearance after almost two decades, and deeply and broadly dubious about the benefits of its "representation"—sought multiple means to have their voices actually heard, as follows:

1. Gerawan workers sought permission to observe the MMC proceedings. Their so-called "representative," but not Gerawan, opposed this request, which the "mediator" denied.

2. Gerawan workers sought leave to intervene from the ALRB. The ALRB refused their request, holding that their interests were "adequately represented" by the labor union which had disappeared for nearly two decades, for which none or almost none of them had ever voted, CR 232, 235, and about which a majority of current Gerawan workers had then signed a petition for decertification.

3. Gerawan workers filed a request with the ALRB to observe silently the "on the record"

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[3] Gerawan's unfair labor practice charges against the UFW over its absence were dismissed by the ALRB as time-barred. Certified Record ("CR") 42-44.

portion of the MMC process. The ALRB denied this request, too, holding that the public interest was not served by allowing the very workers whose employment was to be governed by the outcome of the MMC process to be present at and observe the proceedings. CR 275-84.

4. Gerawan workers engaged in public protests over the ALRB's and the UFW's actions. *See* ABC30 Action News, *Many Workers With Gerawan Farming Protest United Farm Workers Union* (Sept. 30, 2013), https://tinyurl.com/yd7rxdn4; *see also* Erika Cervantes, *Farm Workers Protest Against Union—Say Their Rights Have Been Violated*, KMPH Fox 26 (Sept. 25, 2013), https://tinyurl.com/yar2uuc8; Jane Wells, CNBC, *Union Tangles With Big Farm After 20-Year Absence* (Sept. 25, 2013), https://tinyurl.com/y7bvmeao.

In September 2013, the "mediator" issued a report unilaterally setting the terms and conditions of employment for Gerawan workers. Among those terms was a forced-unionism provision requiring Gerawan workers—under pain of discharge for refusal to comply—to surrender to the UFW 3% of their wages. Significantly, the amount to be surrendered to the UFW exceeded the mandated pay increases for most employees. CR 417. In short, the forced contract enriched the UFW at the expense of the Gerawan workers while reducing the net income of most of them.

In response to the UFW's resurrection at Gerawan, the employees attempted to exercise their rights under the ALRA to discharge an unwanted representative. Cal.Lab.Code § 1156.7(c). Gerawan workers initiated these efforts prior to the "mediator's" de-

cision. Pet. at 14-16. However, their petition for decertification—supported by a majority of Gerawan employees—was summarily dismissed by the ALRB's Regional Director on September 25, 2013. CR 351; *see also* ALRB Admin Order No. 2013-37 (Sept. 26, 2016) (denying petition for review).

The Gerawan employees were not dissuaded, however. Instead, in October 2013—after seeing the "contract" to be imposed upon them by the MMC process—they staged a one-day walkout.

Additionally, in October 2013, they submitted another decertification petition signed by an overwhelming majority of Gerawan employees. This demonstration of opposition to the UFW was also dismissed by the Regional Director, but the ALRB overruled its Regional Director and conducted a secret-ballot election on November 5, 2013. App. 61. Yet, although thousands of Gerawan workers voted in the election, the ALRB then "impounded" the ballots and prevented them from being counted, pending the outcome of unfair labor practice charges filed by the UFW. App. 61. Legal challenges mounted both by Gerawan and the employees remain pending in the California courts,[4] but the employees' ballots have never been counted. Their voice—the expression of the workers whose rights the ALRA should protect—has never been heard by the ALRB. Indeed, at virtually every step, the ALRB has turned an affirmatively deaf ear to that voice.

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[4] *Gerawan Farming, Inc. v. ALRB*, No. F073720 (Cal. Ct. App.); *Lopez v. ALRB*, No. F073730 (Cal. Ct. App.); *Gerawan Farming, Inc. v. ALRB*, No. F073769 (Cal. Ct. App.).

Notwithstanding the pendency of the decertification election, the ALRB refused to stay the MMC proceedings at Gerawan's request. On November 19, 2013, the ALRB rejected Gerawan's challenge to certain terms of the MMC "mediator's" report, which on that date became a final order, and imposed terms and conditions of employment—including a forced-unionism provision—upon Gerawan's employees for a term of three years. App. 13, 52.

Further proceedings challenging the ALRB's Order were pursued by Gerawan in the California courts, Pet. at 16-19. resulting in the California Supreme Court order which is the subject of Gerawan's instant petition.

II. The ALRB's studied disinterest in ascertaining the will of Gerawan's employees cannot be squared with the legitimate primary purposes of American labor law.

The ALRA purports to protect the rights of employees

> to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and … *the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153.

(emphasis added).

This provision Cal.Lab.Code § 1152 mimics the protections guaranteed to private-sector employees under the National Labor Relations Act.[5] Thus, it cannot be gainsaid that—even under labor statutes—the necessary corollary of the right to associate is the right to refuse to associate, a proposition repeatedly reaffirmed by this Court. "Freedom of association … plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), *citing Abood*, 431 U.S. at 234-35; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). The individual *amici* are employees who wish to exercise their right not to associate with the UFW, a right that has been frustrated by the ALRB and California courts.

Like employees under the NLRA, employees under the ALRA ostensibly enjoy a statutory *right* to pe-

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[5] The National Labor Relations Act is equally clear on this point:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 157 (West) (emphasis added).

tition for a decertification election. Cal. Labor Code § 1156.7(c); *see also* 29 U.S.C. § 159(c)(1)(A)(ii). Nevertheless, this case provides a case study in bureaucratic and administrative efforts to prevent or frustrate the expression of true employee free choice.

Employee free choice under NLRA Section 7 is the paramount interest of the Act. *See Pattern Makers League v. NLRB*, 473 U.S. 95, 104 (1985); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act") (quotation marks and citation omitted). An NLRB-conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. *See Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717, 725-26 (2001). Industrial stability is enhanced when employees vote in secret-ballot elections, because they ensure that employees actually support (or not) the workplace representative empowered to speak exclusively for them.

Employee free choice also purports to be paramount under the ALRA, as its purpose is "to protect the employees' right of free choice in the selection of their collective bargaining agent." *J. R. Norton Co. v. Agric. Lab. Rel. Bd.*, 603 P.2d 1306, 1321 (Cal. 1979), *citing Perry Farms, Inc.*, 4 A.L.R.B. No. 25, at 10 (Apr. 26, 1978), *rev'd on other grounds* 86 Cal.App.3d 448, 150 Cal.Rptr. 495 (1978); *see also Harry Carian Sales v. Agric. Lab. Rel. Bd.*, 703 P.2d 27, 38 (Cal. 1985) ("worker self-determination" is "the underlying purpose of the Act").

The facts of this case make a mockery of these purported purposes of the ALRA. At every turn the ALRB and its officials have demonstrated hostility toward employee efforts to rid themselves of an unwanted union, not allowing them the opportunity to express effectively their opinion of the UFW's representation. The ALRB's hostility to the rights of Gerawan's employees proved to be so acute that they are on the cusp of being forced to work under an "agreement" they did not want and on which they could not vote, written by a "mediator" who refused to hear them and who indulged his own brand of "industrial justice," including a forced-unionism clause notwithstanding clear and repeated demonstrations of employee opposition to UFW "representation."

This case is a study in bureaucratic and administrative efforts to frustrate and impede the expression of employee free will in the workplace. It is the arrogance of the nanny state writ large. The scope, extent, and results of these impediments should command the attention of this Court.

* * * * *

CONCLUSION

This case presents an appalling example of both union and administrative agency abuse of and disregard for individual employee rights, committed under the guise of the myth that union interests are consonant with employee interests. The case demonstrates the folly of imagining that in labor and employment relations there are only two sides, employer and union, and not three, employer, union, *and* employees who have their own, separate interests. The petition for a writ of certiorari to the Supreme Court of the State of California should be granted.

Respectfully submitted,

W. James Young
Counsel of Record
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
wjy@nrtw.org

Counsel for Amici

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