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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of: CINAGRO FARMS, INC., Respondent, and, MARISOL JIMENEZ, Charging Party.	Case No.: 2017-CE-008-SAL **BRIEF OF *AMICUS CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC. AND CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION**

I. STATEMENT OF INTEREST

California Rural Legal Assistance, Inc. ("CRLA"), a non-profit legal services organization, has provided services to rural communities since 1966. Through its 16 field offices, CRLA has represented tens of thousands of low-wage workers, including farmworkers, many of whom have legitimate fears of retaliation that prevent them from personally filing or reporting a labor law violation. Misclassification of farmworkers as independent contractors has been a persistent problem in California agriculture. The impact of misclassification affects not only the individual misclassified, but the individuals in their crews who are expected to look to an undercapitalized former crew leader as their employer. Crew leaders who complain about the arrangement lose their jobs, and their whole crew is discharged as well. CRLA has represented crew members who have suffered wage loss and difficulty navigating the wage claim process because their crew leader was misclassified as an independent contractor.

California Rural Legal Assistance Foundation ("CRLAF") is a legal nonprofit that for over three decades has represented California's immigrant farmworkers and other low-wage workers in class and representative actions and engaged in regulatory and legislative advocacy on their behalf. CRLAF works with California state agencies to address the most pressing needs of the farmworker community in labor, housing, safety, and health by bringing complaints that prompt state action. CRLAF has recovered wages and other compensation for thousands of farmworkers, nearly all of whom are seasonal. These workers have been subjected to illegal tactics to deny, interfere with or impede them from taking their breaks, receiving full payment for their wages; and they have been forced to endure working conditions which expose them to pesticides, heat stress, and acute and sustained ergonomic stress. The ability of farmworkers to recover unpaid wages and seek redress for their workings conditions is impeded when employers misclassify them as independent contractors. CRLAF has assisted farmworkers in filing unfair labor practices with the Agricultural Labor Relations Board ("ALRB") when employers retaliated against them for engaging in protected concerted activity.

II. INTRODUCTION

California labor laws provide critical protections to farmworkers that are both unique to

California and superior to those under federal law. That is particularly true in the case of agricultural workers. Unlike federal law, California covers all farmworkers in its health and safety, minimum wage and overtime protections. With the adoption of Labor Code Section 857,[1] *et seq,* California has largely abandoned the fiction that agricultural workers are different from and entitled to fewer protections. Independent contractor status, and the nature of the employment relationship between farmworkers and agricultural producers have been addressed by the courts and the legislature many times over the years. The hallmark of those legislative and judicial decisions has been the consistent application of general principals of California labor law - not agriculture specific standards - informed by, but not governed by federal statute, administrative, or judicial case law.

Labor Code sections 226.8 and 2775, *et seq.* follow that course by establishing a California test for independent contractor status and establishing a penalty scheme that can be assessed against any person or employer, by any department, commission, agency, or board within the Labor and Workforce Development Agency. These statutes apply without regard to whether an individual works in agriculture, and must be applied in that manner. The Agricultural Labor Relations Act ("ALRA or the "Act") is the lynchpin that ensures that collective action is, likewise, protected, both in the context of formal bargaining, and when workers act together to address working conditions. Preventing the ALRA from either applying the California definition of independent contractor, or assessing the penalties that are designed to deter misclassification in the context of collective action, would be a throwback to the times when farmworkers were treated as second class and their work was dishonored as a matter of law. There is nothing in the provisions of the ALRA that suggests, much the less mandates that the California Legislature intended that.

Under the ALRA, the misclassification of farmworkers is a *per se* violation of Section 1153(a) and the National Labor Relations Board's ("NLRB") decision in *Velox Express, Inc.* (2019) 368 NLRB No. 61 is inapplicable precedent. Section 226.8 grants the Board the authority to redress this misclassification.

[1] All statutory references are to the California Labor Code unless otherwise indicated.

III. ARGUMENT

A. The NLRB's *Velox* Decision Is Inapplicable Precedent Under Section 1148.

NLRB precedent is inapplicable under Section 1148 when the ALRA is not modeled after the National Labor Relations Act ("NLRA"). (*See Cadiz v. ALRB* (1979) 92, Cal.App.3d 365, 374-75 (NLRB decisions receive precedential value to the extent the ALRA provisions are derived from the NLRA); *F & P Growers Assn. v. ALRB* (1985) 168 Cal.App.3d 667, 676 (ALRB not required to follow NLRB precedent because of California's legislative purpose and differences in the relevant sections of the two acts).) The Board is not obligated to "blindly" follow NLRB precedent "without regard to the significant differences that exist between the industrial setting of the NLRA and the agricultural setting of the ALRA." (*San Clemente Ranch, LTD v. ALRB* (1981) 29 Cal.3d 874, 876-877.) The Legislature intended for the ALRB "to select and follow only those federal precedents which are relevant to the particular problems of labor relations on the California Agricultural scene." (*ALRB* v. *Superior Court* (1976) 16 Cal.3d 392, 412-413.) "The crucial question before the court is whether the particular NLRA precedent is 'applicable.'" (*F & P Growers Ass'n*, 168 Cal. App. 3d at 672-673.)

1. NLRB Precedent Is Not Applicable To The Determination of Independent Contractor Status Because California Labor Law Does Not Apply General Agency Principles as the Exclusive Test for Independent Contractors.

As the U.S. Supreme Court recognized in *NLRB v. United Ins. Co.* (1968) 390 U.S. 254, 256, Congress reactively amended the NLRA to expressly exempt independent contractors from coverage, and in doing so the "obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." The California Legislature did not emulate that approach. The ALRA neither excludes nor defines independent contractor. Since the ALRA departs from the NLRA in this respect, NLRB precedent is not applicable. To the extent that determination of "independent contractor" status is relevant to an ALRA determination, the appropriate standard is California law

Although the ALRA regulates a particular industry with specificity, it necessarily incorporates California labor protections and standards. It does not address the minimum wages

and working conditions for agricultural employees. Those definitions come from the application of California Labor law as applied to employees in general. When California statute or regulation departs from the federal scheme, then California law controls. (*See S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341; *Martinez v. Combs* (2010) 49 Cal.4th 35, 64; *Dynamex Operations W. v. Superior Court* (2018) 4 Cal. 5th 903, 915; *Morillion v. Royal Packing Co*. (2000) 22 Cal. 4th 575, 592 ("… we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication.").) The ALRA does not change that. In fact, in those few instances when farmworkers are excluded from other minimum standards of employment or remedies established by statute, those are expressly addressed statute by statute.[2] Whether or not an individual is an employee, or an independent contractor is likewise a question of California law, not federal law, and does not turn on common law agency standards.

Applying California standards when determining independent contractor law is not inconsistent with Section 1148. But even if it could be read that way, Section 1148, must be construed in context with Sections 2775, *et seq*. and 226.8, which define independent contractor status, and prescribe penalties for violators. These provision do not exclude agricultural workers, and are designed to expand worker protections. "Under the applicable principles of statutory interpretation, potentially conflicting statutory provisions should be interpreted to harmonize and reconcile their respective elements so as to carry out the overriding legislative purpose of the statutory scheme as a whole" (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal. App. 4th 66, 82 (rejecting the argument that Public Utilities Act collective bargaining provisions should be read to exempt transit agency employees from the minimum wage).)

2. <u>The ALRA's Employee and Employer Definition Are Not Modeled After the NLRA.</u>

The ALRA is tailored to California's agricultural industry, given its seasonal nature, transient workforce, reliance on farm labor contractors, and isolated and rural worksites. This

[2] See, *e.g.* sections 226.7(f)(3), 2699.6, 2699.8,

tailoring is reflected in the ALRA's definition of agricultural employer (§ 1140.4(c)) and agricultural employee (§ 1140.4(b)). Unlike the Section 2(3) of the NLRA, the ALRA does not exclude independent contractors from the definition of employee. In this instance, the ALRA was not modeled after the NLRA. Congress in the Taft-Hartley amendments excluded independent contractors from the NLRA due to the federal courts' expansive interpretation of "employee" in order to preserve independent contractor relationships. (*Velox*, 368 NLRB No. 61, p. 9.) Close to thirty-years later when California enacted the ALRA in 1975, it did not include such exclusion into the ALRA. Courts, and by extension the Board, "presume that when the Legislature borrows a federal statute and enacts it into state law, it has considered and is aware of the legislative history behind that enactment." (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal. 4th 758, 778.) This indicates the Legislature intended a broad construction of the definition of "agricultural employee," expressly delineated by the NLRA's exclusion of agricultural employees and the definition of agriculture. (*See* § 1140.4(b).) The Board must liberally construe the ALRA, and underlying Labor Code provisions in favor of protecting farmworkers. (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 262.)

The ALRA in defining "agricultural employer" excludes both farm labor contractors ("FLCs") and "any [other] person supplying agricultural workers to an employer." (§ 1140.4(c).) The grower engaging the labor suppliers "is deemed the [statutory] employer for all purposes" under the Act. (*Rivcom Corp. v. ALRB* (1983) 34 Cal. 3d 743, 767-68 citing § 1140.4(c).) The ALRA "expressly discounts the widespread use of labor contractors by growers." (*Id*. at 770.) Absent this exclusion labor contractors would have naturally fallen under such classification. (*Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307, 323.) The Legislature did this for the bargaining process to occur between unions and growers rather than unions and labor contractors with bargaining units established on a grower-wide basis. (*Ibid*.) "Farmworkers would be more secure, and find their remedies under the ALRA more effective, if collective bargaining agreements were entered with the better capitalized and more stable growers, rather than with the more transient and typically less economically responsible farm labor contractors." (*Id*. at 324.) Section 2 (2) of the NLRA does not contain similar exclusions to its employer definition.

Under the ALRA an individual or entity engaging in agriculture as defined under section 1140.4(a) falls into three categories: an employee, FLC (or person supplying workers), or an agricultural employer (grower). Cinagro Farms is the agricultural employer under the ALRA regardless of how it classifies its employees. Cinagro misclassified Ms. Jimenez and her coworkers as vendors and failed to comply with its obligations as an employer under California law, including providing wage statements. (*Cinagro Farms, Inc.* Case No. 2017-CE-008-SAL, ALJ Decision at p. 52-53). Cinagro contracted Ms. Jimenez to provide agricultural labor for a fee, i.e. piece rate wages. Ms. Jimenez can only fall into one of the three categories listed above. She did not supply workers to Cinagro. Neither is she a grower. She was an employee. Even assuming, *arguendo*, that she worked for a labor contractor or supplied employees, Cinagro Farms is still the statutory employer. Her job was to harvest vegetables for Cinagro. (*Id.* at 51-52.) The pure independent contractor and employee dichotomy that the *Velox* majority seeks to protect is not at issue here. The ALRA purposefully blurs that line by not excluding independent contractors from the definition of employee and excluding labor suppliers from the definition of employer. Cinagro's potential ignorance of the ALRA is not an excuse for misclassifying Ms. Jimenez and her coworkers.

The *Velox* majority also relies on Section 8(c) of the NLRA to classify the employer's misclassification of its employees as a legal opinion and relieve the employer there of liability. (*Velox*, 368 NLRB at p. 6, 9.) This is erroneous and contrary to the NLRA, and by extension the ALRA, for the reasons stated by the *Velox* dissent. (*Id.* at p. 18-19.) While Section 1148 directs the Board to follow applicable NLRB precedent, the Board must also construe the Act considering its "remedial purpose," "the class of persons intended to be protected," and with "particular reference to the history and fundamental purposes" of the Act. (*S.G. Borello*, 48 Cal. 3d at 353-354). The Board must not construe the ALRA in a manner that "nullif[ies] the will of the Legislature." (*Cal. Sch. Emps. Ass'n v. Jefferson Elementary Sch. Dist.,* 45 Cal. App. 3d 683, 691-92.) Under *Velox*, a grower could shield itself from liability under the ALRA behind a purported legal opinion that interferes, restrains, or coerces farmworkers in their exercise of their Section 1152 rights. As shown in section B below, the misclassification of farmworkers is a *per*

se violation under the Act. For the Board to permit otherwise, it defeats the purpose of the ALRA. (*See* § 1140.2.)

B. An Agricultural Employer's Misclassification of an Agricultural Employee as an Independent Contractor Is a *Per Se* Violation of Section 1153(a).

The ALRA's purpose is "to encourage and protect the right of agricultural employees to full freedom of association" and for them "to be free from the interference, restrain, or coercion of employers" in exercising their rights under the ALRA. (§ 1140.2.) These rights are (1) to self-organize, (2) to form and join unions, (3) to bargain collectively with employers, and (4) to work in concert with other employees to achieve employment-related goals. (§ 1152.) "[T]the principle of labor relations which the Board is to foster" is employees' right "to organize for mutual aid without employer interference." (*Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, 798.) It is for the Board to apply the Act's "general prohibitory language in light of the infinite combinations of events which might be charged as violative." (*Ibid*.)

The misclassification of farmworkers as independent contractors is a combination that interferes and restrains farmworkers' Section 1152 rights by unlawfully misclassifying a worker, and creating the impression that there is no collective right to bargain. There is no need for an employee to have engaged in protected concerted activity first for an employer to violate Section 1153(a). (*See Parexel International, LLC* (2011) 356 NLRB 516, 519; *World Color (USA) Corp.* (2014) 360 NLRB 227, 228, enf. denied in part on other grounds 776 F.3d 17 (D.C. Cir. 2015).) No proof of coercive intent or effect is necessary under Section 1153(a), the test is whether the employer's conduct reasonably tends to interfere with the free exercise of employee rights. (*NLRB v. Ill. Tool Works* (7th Cir. 1946) 153 F.2d 811, 814.) As shown below, employer's misclassification of farmworkers interferes in the exercise of their rights.

The Board must consider employer's misclassification in light of the practical reality of California's farmworkers and the unequal employment relationship. Farmworkers are mainly unorganized with no bargaining representative to aid them. They are predominantly immigrants.[3]

[3] Findings from the National Agricultural Workers Survey (NAWS) 2015-2016, Research Report, p. 1, https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf (accessed May 25, 2022) ("NAWS Report").

In 2015, the Board found that this immigrant population is "less familiar with the American legal system, and more difficult to reach because of various language and cultural barriers. They…remain largely unaware of their…rights and protections."[4] Many are undocumented,[5] with their primary language being Spanish or an Indigenous language.[6] Many are also "functionally illiterate" (reading at between fourth and seventh grade levels) or "totally illiterate" (reading below fourth grade level).[7] They are a transient workforce reliant on labor contractors.[8] They are also poor.[9]

California courts and the U.S. Supreme Court have long recognized that workers' economic need place the worker at the mercy of the employer. A single employee "was helpless in dealing with an employer[;]" if "the employer refused to pay him the wages he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment." (*NLRB v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 33-34.) "The prospective employer and applicant for employment, who is usually dependent on his own earnings for the support of himself and his family, do not deal in equal footing." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 327 (internal quotations and citations omitted).) A worker accepts the independent contractor classification out of economic need. An employer imposes that classification to avoid a whole panoply of labor protections, including the anti-retaliation protections of the ALRA.

1. The Misclassification of Farmworkers Interferes With Their Section 1152 Rights As It Serves As a Prior Restraint On The Exercise of Those Rights.

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[4] Memorandum of Thomas Sobel, Administrative Law Judge, & Eduardo Blanco, Special Legal Advisor, on Staff Proposal for an Education Access Regulation for Concerted Activity to the Bd., p. 3 (Nov. 23, 2015), https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/06/StaffRecommendationWorksiteAccess.pdf ("Board Memo") (quotations omitted) (accessed May 25, 2022).

[5] NAWS Report, *supra*, *Id*. at p. 5.

[6] *Id.* at p. 10.

[7] Board Memo at p. 12-13; NAWS Report at p. 5.

[8] Martin, Philip, *et al*. Employment and earnings of California farmworkers in 2015, California Agriculture, Volume 72, Number 2, p. 108, 111, http://www.ncaeonline.org/wp-content/uploads/2019/08/Employment-and-Earnings-of-California-Farmworkers-in-2015.pdf (accessed May 25, 2022).

[9] *See* Board Memo at p. 5; Occupational Employment and Wages, May 2021, 45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse, https://www.bls.gov/oes/current/oes452092.htm#st (accessed May 25, 2022).

The employer's misclassification deprives and conceals from the workers protections available to them under the ALRA. A core activity protected by Section 1152 is farmworkers' right to discuss, debate, and communicate with each other regarding their workplace conditions and band together to make their demands more effective. (*See Beth Israel Hospital v. NLRB* (1978) 437 U.S. 483, 491; *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565; *Triana Industries, Inc.* (1979), 245 NLRB 1258, 1258; *Coosa Valley Convalescent Ctr.* (1976) 224 NLRB 1288, ALJ Decision at p. 1289). Wage discussions, for example, are "the grist on which concerted activity feeds." (*Aroostook County Reg'l Ophthalmology Ctr.* (1995) 317 NLRB 218, 220, enfd. in part 81 F.3d 209 (D.C. Cir 1996) (internal quotations and citations omitted).) "[T]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." (*ALRB v. Superior Court*, 16 Cal.3d at 406.) As such, embedded in Section 1152 is the farmworkers' right to freely communicate to exercise these rights. (*People v. Medrano* (1977) 71 Cal.App.3d 823, 327.)

But these tenets depend on farmworkers identifying themselves as employees from the onset and engaging in these discussions that lead to concerted activity. An employer in misclassifying a worker unilaterally strips the worker of their "employee status" and the protections that come with it. This has a pernicious effect. In misclassifying employees, employers change the starting line for employees. The starting line is no longer whether the workers are being paid properly and should join together to request higher wages, but whether they are "employees." They first need to overcome this unnecessary hurdle unilaterally imposed by employers. In misclassifying workers, the employer erects "a dam…at the source of supply" of initial employee discussions that serve as the impetus for potential concerted activity. (*Phelps Dodge Corp v. NLRB* (1941) 313 U.S. 177, 185 ("Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply.").) Thus, chilling farmworkers in their exercise of Section 1152 activities.

2. <u>Employee Misclassification Is A Variation of The Yellow-Dog Contract.</u>

Employers' misclassification of farmworkers is simply an underhanded attempt at using a

yellow-dog contract. Employers used yellow-dog contracts to condition employment on the workers' promise to not join a union. (*Epic Sys. Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1634 (dis. opn. of Ginsburg).) Many yellow-dog contracts also "cast an even wider net, proscribing all manner of concerted activities." (*Id*. (internal citations and quotations omitted).) While the employer in misclassifying the worker does not explicitly prohibit worker from engaging in joining unions, self-organizing, or engaging in concerted activities, the operative effect is the same. Farmworkers effectively waive their rights as employees, including their Section 1152 rights.

True independent contractors have only the protections of the contract. They do not benefit from the various labor laws and are not protected by the ALRA, or otherwise if they want to join with others to assert them and request better working conditions. On the contrary, independent contractors may only present concerns or grievances individually without the aid of similarly classified contractors, and without the anti-retaliation protections of the ALRA or other Labor Code provisions (e.g. Section 98.6). Independent contractors have no rights under the ALRA. Misclassified farmworkers find themselves outside of the ALRA—as though the Legislature did not enact the ALRA in 1975 to protect their full freedom of association. (*See* § 1140.2.) An employer by misclassifying workers intends "the very consequences which foreseeably and inescapably flow from his actions." (*NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221, 228.) That consequence is removing farmworkers from the protection of the ALRA. This is inherently destructive to workers Section 1152 rights. The NLRA, as does the ALRA, proscribes "inherently destructive" acts of "employee interests…without need of proof of an underlying improper motive." (*NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26, 33-34.)

An employer interferes and restrains employees in the exercise of their Section 1152 rights "by mandating that they prospectively renounce those rights in individual employment agreements. The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employer could condition employment on workers signing away those rights." (*Epic Sys.*, 138 S.Ct. at 1641-42 1634 (dis. opn. of Ginsburg) (internal quotations and citations omitted); *see also T.T. Miyasaki, Inc.* (2016)

42 ALRB No. 5, ALJ Decision at p. 36-37).) The violation of the Section 1153(a) occurs when the worker acquiesces to the misclassification. (*Time-O-Matic Inc. v. NLRB* (7th Cir. 1959) 264, F.2d 96, 99 ("A violation of Section 8(a)(1) [of the NLRA] was complete when the statements were made to prospective employees who are employees for purposes of the Act.") citing *Phelps*, 313 U.S. at 182, 191-192.)

3. Employee Knowledge of The Employer's Misclassification Is Not Necessary To Find a Violation of Section 1153(a).

The potential lack of employee knowledge does not preclude a finding that Cinagro's misclassification is a *per se* violation of Section 1153(a). For example, in a union surveillance case the Ninth Circuit found that even in the absence of employee knowledge, an employer's surveillance and espionage of union activities violated Section 8(a)(1) of the NLRA. (*NLRB v. Grower--Shipper Vegetable Ass'n* (9th Cir. 1941) 122 F.2d 368, 376.) "Casual examination of the dictionary discloses that a person may be interfered with, restrained, or coerced without knowing it." (*Ibid*.)

In the instant case, the ALJ's findings do not include whether Cinagro notified its employees that it misclassified them as independent contractors or the farmworkers acquiesced to the misclassification. (ALJ Decision at p. 51-57.) Cinagro, nonetheless, continued to misclassifying its farmworkers. (*Id.* 52-53.) Cinagro's surreptitious conduct in denying its workers the plenary employment rights afforded to them should not serve to shield it from liability. It is a loophole that contravenes the purpose of the ALRA in guaranteeing justice to workers and to protect their full freedom of association. Otherwise, an employer could misclassify farmworkers and effectively deny them their rights. The employer does not tell that worker that he is not an "employee," but the employer's actual conduct communicates to the worker the lack of employee status. The employer's acts speak for themselves. Cinagro's secretive behavior is actually more egregious in that employee's renounce their rights by virtue of accepting the job without prior notice.

In conclusion, employer's misclassification of farmworkers is a *per se* violation of Section 1153(a).

C. The ALRB as a Board Within the LWDA Has the Express Power to Award Penalties Against an Employer Who Misclassifies a Worker as an Independent Contractor Under Section 226.8.

The plain language of Section 226.8 makes clear that if the "Labor and Workforce Development Agency" makes a determination that a willful misclassification has occurred, the "person or employer" responsible for that misclassification is subject to penalties. Subdivision (i)(2) of the statute defines the Labor and Workforce Development Agency and includes the agency "or any of its departments, divisions, commissions, *boards,* or agencies." (*Id.* (emphasis added).) This all-inclusive term was deliberate and departs from other subdivisions which provide directives or authority to specific divisions like the Labor Commissioner (see subdivision (g) addressing the mechanism by which the Labor Commissioner is to issue the penalty) and subdivision (f) (directing specific action by the Contractors' State License Board). The ALRB is a board that is within the Labor and Workforce Development Agency. (Govt. Code § 12813(b).) Therefore, there is no question that the Legislature intended that the ability to award penalties under 226.8 be extended to the ALRB. To read this section otherwise would be to place an exemption in the language of the statute that simply does not exist. "[A] court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose....The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.)

Nothing in the language of the ALRA precludes the Board from exercising the authority given to it in Section 226.8. Section 1160.3 does provide specific examples of relief that may be granted and does not include penalties.[10] However, it does not prohibit the award of penalties.

[10] Some courts and various Board decisions, applying NLRA precedent, have construed this section to preclude "punitive" orders. (*See J. R. Norton Co. v. ALRB*. (1987) 192 Cal. App. 3d 874; *Laflin & Laflin v. ALRB* (1985)166 Cal. App. 3d 368.) However, those decisions considered whether certain "remedial" orders were so broad as to be considered punitive in nature, and applied NLRA case law, as applicable, to determine what was encompassed within the language of Section 1160.3. Those cases do not control here because an award of 228.6 penalties, is by definition punitive and the Board' authority does not depend on a construction of 1160.3. It is independently authorized to make that award under 226.8.

Thus, there is no direct conflict between Section 1160.3 and the authorizing power given to the ALRB in 226.8.

Penalty provisions designed to deter labor law violations must be construed in the same broad fashion as the underlying labor protections. Like basic protection standards, they must be construed in context, and in a manner that promotes the underlying purpose of the statutory scheme. It is a "basic rule of statutory construction [that]: insofar as possible, we must harmonize code sections relating to the same subject matter and avoid interpretations that render related provisions nugatory." (*Bright v. 99¢ Only Stores* (2010)189 Cal. App. 4th 1472, 1478, citing *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1325 (harmonizing the provisions of the applicable Wage Order, section 1198 and the penalty provisions of section 2699 led to the conclusion that a failure to provide seats gave rise to penalties under the PAGA).)

Section 226.8 was designed to create a comprehensive approach to the regulation of employers who willfully misclassify workers as independent contractors. Proponents argued it was necessary to address the economic impacts of rampant misclassification in taking place in every employment sector.[11] In addition to defining damages that could be collected by workers, the Legislature provided for penalties, to be awarded by the Labor and Workforce Development Agency. This critical element of the statute is designed to provide a meaningful disincentive to employers seeking to evade their obligation under California labor laws by purposefully misclassifying an employee as an independent contractor. (*Id.*)

The broad scope of the bill and the fact that misclassification affects collective bargaining and retaliation protections, was expressly acknowledged in the Senate Analysis prior to passing the bill. Acknowledging that prior legislation and addressed the issue, piecemeal, the analysis notes that:

> However, this bill takes a more comprehensive approach and attempts to address each of these elements in one measure. The sponsors of this bill argue that when a worker is misclassified, he/she loses more than just minimum wage and overtime

[11] SENATE RULES COMMITTEE Office of Senate Floor Analyses, September 8, 2011, at pages 7-8, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201120120SB459 (accessed May 27, 2022).

> protections. He/she has no workers' compensation coverage if injured on the job, no right to family leave when a loved one is ill, and no unemployment insurance if he or she loses his/her job. If he/she does not like the working conditions and tries to join with others to ask for more pay or a safer workplace, *he/she has no legal right to organize or join a union and no protection against employer*.
>
> (*Id.*, (italics added).)

The only construction consistent with the express language of 226.8, the Legislative history and the broad protections provided under California law, is to allow the Board to use California law when determining both who is an independent contractor; and what remedies, including penalties, should be awarded.

IV. CONCLUSION

Based on the foregoing, the Board should find that Cinagro's misclassification is a *per se* violation of Section 1153(a) and asses the appropriate penalty under Section 226.8.

Dated: May 27, 2022

Respectfully Submitted,

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PROOF OF SERVICE

I, Carolina Estrada Soto, declare as follows:

I am employed with the law offices of California Rural Legal Assistance Foundation, whose address is 2210 K Street, Suite 201, Sacramento, California 95816. I am over the age of eighteen years and I am not a party to this action.

On May 27, 2022, I served the following documents:

BRIEF OF *AMICUS CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC. AND CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION

for Case No. 2017-CE-0008-SAL, on the parties listed below, addressed as follows:

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By electronically filing and serving the above referenced document on the email addresses listed above pursuant to 8 C.C.R. § 20169. For Charging Party, Ms. Jimenez, by placing a true copy of said document in a sealed envelope with postage thereon fully prepaid in the United States mail at Sacramento, California via certified mail pursuant to 8 C.C.R. §§ 20164, 20166.

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct. Executed on May 27, 2022, at Sacramento, California.

/s/ Carolina Estrada Soto
Carolina Estrada Soto