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Sent Via E-mail Only

Santiago Avila-Gomez
Executive Secretary, ALRB
Email: Santiago.Avila-Gomez@alrb.ca.gov

Re: ALRB Subcommittee Report Regarding Updated Proposed Modifications to Proposed Rulemaking (AB 113): Majority Support Petitions and Appeal Bonds

Dear Mr. Avila-Gomez,

On behalf of the United Farm Workers of America ("UFW"), below are the UFW's comments to the ALRB Subcommittee's Report Regarding the Current Proposed Regulations and Modifications for AB 113.

§ 20297. Unfair Labor Practice Appeal Bonds

Current proposed language:

"(2) The address at which the agricultural employer who has given the bond and surety may be served with notices, papers, and other documents, including as provided for under Code of Civil Procedure section 995.010 et seq."

UFW Comment:

The ALRB should include that the surety and agricultural employer must provide the name and other contact information (email, phone number, fax number) of the agent for service or process for both the surety and agricultural employer.

Proposed revision:

"(2) The ***name, email address, phone number, fax number and physical*** address ~~at which the~~ ***for an agent for service for the surety*** ~~the agricultural employer~~ who has given the bond and ***for the agricultural employer for service of*** ~~surety may be~~

~~served with~~ notices, papers, and other documents, including as provided for under Code of Civil Procedure section 995.010 et seq."

§ 20297.5. Cash Deposits in Lieu of Appeal Bond

Current proposed language for § 20297.5(b)(2):

(2) An agent of the Board shall be present at the time of delivery of the cash deposit. The deposit shall be accompanied by an agreement executed by the agricultural employer authorizing the Board to collect or otherwise apply the deposit to enforce the liability of the agricultural employer on the deposit. The agreement shall include the address at which the agricultural employer may be served with notices, papers, and other documents. The agreement shall be signed under penalty of perjury and further shall expressly state the individual signing it has authority to do so on behalf of the agricultural employer. The Board will make a form available to the agricultural employer for use in complying with the requirements of this subdivision.

UFW Comment:

The ALRB should include that the agricultural employer must provide the name and other contact information (email, phone number, fax number) of the agent for service for the agricultural employer, similar to the UFW suggestion for § 20297(a)(2).

§ 20297.5(c)(2):

Current proposed language:

> The deposit shall be accompanied by an agreement executed by the agricultural employer authorizing the Board to collect or otherwise apply the deposit to enforce the liability of the agricultural employer on the deposit. The agreement shall include the address at which the agricultural employer may be served with notices, papers, and other documents. The agreement shall be signed under penalty of perjury and further shall expressly state the individual signing it has authority to do so on behalf of the agricultural employer. The Board will make a form available to the agricultural employer for use in complying with the requirements of this subdivision.

UFW Comment:

The ALRB should include that the agricultural employer must provide the name and other contact information (email, phone number, fax number) of the agent for service for the agricultural employer, similar to the UFW suggestion for § 20297(a)(2) and § 20297.5(b)(2).

§ 20391. Majority Support Petitions Under Labor Code Section 1156.37

Current Proposed Language:

"A majority support petition shall be in writing and signed by hand or electronically. ~~Printed~~ fForms for such petitions will be supplied by the regional offices of the Board upon request and also made available on the Board's web site. A petition shall contain a declaration, signed under penalty of perjury, that the petition's contents are true and correct to the best of the declarant's knowledge. The petition shall be filed in person at the regional office nearest the location of the employer whose employees the labor organization seeks to represent~~electronically pursuant to section 20169~~. A labor organization filing a majority support petition shall submit with the petition proof that the labor organization (1) has filed LM-2 reports with the federal Office of Labor-Management Standards for the preceding two years, and (2) is or was a party to a collective bargaining agreement covering agricultural employees as defined in subdivision (b) of Labor Code section 1140.4 that was in effect on May 15, 2023. The petition is deemed filed upon the appropriate regional office's receipt of all required information, including proof of service of the petition on the employer and evidence of majority support, as described in subdivision (a)(1). Immediately upon confirming all required materials have been submitted, the regional office shall notify the employer by telephone and email, if available, of (1) the date and time of the filing of the petition, and (2) the case number assigned to the petition."

UFW Comment re: in person filing

Current draft states that "The petition shall be filed in person at the regional office nearest the location of the employer whose employees the labor organization seeks to represent."

UFW requests that unions be permitted to file all petitions and accompanying authorization cards electronically, via email. To date, all Majority support Petitions have been filed electronically, along with pdf copies of authorization cards, with no reported issues from the ALRB Regional Directors. The originals of authorization cards are usually submitted within a day of the submission of electronic copies of cards. UFW would urge the Board to adopt regulations to allow for electronic filing of MSPs and all authorization cards or petitions, with filing of originals within 48 hours or as reasonably permitted by the Regional Director. Electronic service has been adopted and used by the ALRB on virtually all other matters and it makes no sense to require in person filings, especially when bargaining units, workers, and collected authorization cards may be at a substantial distance from regional ALRB offices. Electronic service would maximize exercise of free choice, especially with tight timelines, and thus allow workers to submit authorization cards to the Regional offices in a quicker manner.

Current proposed language:

"A labor organization filing a majority support petition shall submit with the petition proof that the labor organization (1) has filed LM-2 reports with the

federal Office of Labor-Management Standards for the preceding two years, and (2) is or was a party to a collective bargaining agreement covering agricultural employees as defined in subdivision (b) of Labor Code section 1140.4 that was in effect on May 15, 2023."

UFW Comment re: proof of LM-2 and CBAs

The Board should only require unions to state on the petition under penalty of perjury whether it has filed an LM-2 report for the prior two years and whether it has had a qualifying CBA – as is currently required. If the Employer (or other union) contests this, they may do so in a response, and only then should the union be required to provide the proof. Filing each petition with a lengthy LM-2 report and a potentially lengthy collective bargaining agreement would be burdensome, unnecessary and would clutter what should be a simple filing for prompt processing. Alternatively, UFW proposes that there be a "prequalification" window whereby a union can submit directly to the Board the LM-2 filing and qualifying CBA on an annual basis, and the Executive Secretary would "pre-qualify" the Union for that year. In any case, UFW is opposed to the current regulation language requiring submission of LM-2 and CBA with each petition as burdensome and unnecessary, unless there is a challenge to the union's declaration under penalty of perjury.

UFW Comment re: proof of service

Current proposed language:
"The petition is deemed filed upon the appropriate regional office's receipt of all required information, including proof of service of the petition on the employer . . ."
The current draft regulations do not specify how service is to be accomplished.

UFW proposes that service can be accomplished as follows:

"Service on the employer may be accomplished by service upon any owner, officer, or director of the employer, or by leaving a copy at an office of the employer with a person apparently in charge of the office or other responsible person, or by personal service upon a supervisor of employees covered by the petition for certification. If service is made by delivering a copy of the petition to anyone other than an owner, officer, or director of the employer, the petitioner shall immediately send an email or facsimile transmission to the owner, officer, director, counsel, or agent for service of the employer declaring that a certification petition is being filed and stating the name and location of the person actually served, and shall file with the regional office proof that the email or facsimile transmission was sent. If after a diligent and reasonably search for an email and facsimile, one cannot be found by the union, this requirement shall be excused by the Regional Director."

This language largely tracks current language on service of petitions under section 20300(f) of the Board's regulation, with the exception that "telegram" is replaced with "email," and also with the addition of "counsel" or "agent for service" as one of the people for which the follow up email can be sent.

20391(a)(1) (Submission of "originals")

Current proposed language:

"(1) Evidence that a majority of the currently employed employees in the bargaining unit support the petitioner shall be delivered, in person, to the appropriate regional office as soon as possible after the petition is filed pursuant to subdivision (a). Such evidence shall consist of originals of either: (A) authorization cards, signed by employees, dated, and providing that the signer authorizes the union to be their collective bargaining representative, or (B) a petition to the same effect signed by employees, each signature dated. Authorization cards or petitions submitted as evidence of majority support also shall identify the name of the agricultural employer to which the cards or petitions pertain and shall clearly state that (i) signing the card or petition is equivalent to a vote in support of the petitioning labor organization; (ii) a signature on the card or petition is valid for one year from the date it is signed; and (iii) a signature on the card or petition may not be revoked."

UFW Comment re: submission of "originals"

Current proposed language would require the filing of "originals" of authorization cards or petitions. For the reasons explained above, the Board's Regional directors should be permitted to receive electronic copies of authorization cards or petitions, pending submission of originals within a reasonable time period, i.e. within 48 hours or as allowed by the Regional Director. To date, all petitions and authorization cards have been filed electronically, with originals submitted shortly thereafter, with no reported issues from the ALRB Regional Directors. Electronic service has been adopted and used by the ALRB on virtually all other matters and it makes no sense to require in person filings, especially when bargaining units, workers, and collected authorization cards may be at a substantial distance from ALRB Regional offices. UFW has filed electronically and then submitted original cards to the Region shortly after the electronic filing. Allowing the submission of electronic copies of cards, with subsequent provision of originals, is efficient and provides workers with the fullest opportunity to exercise their rights, and because many workers work in areas far from the few Regional offices in the state, allowing for submission of authorization cards electronically promotes freedom of choice, especially when farmworkers are facing timelines for submission of proof of support.

Comment re: format of authorization cards or petitions (203919(a)(1) and 20391(a)(1)(A)

The current proposed regulations propose a specific format and content for authorization cards or petitions. Because the statute does not prescribe the proposed format, UFW requests that the Board add language to the proposed regulation that would allow for the Board to accept proof of support that is not in this format. Indeed, Labor Code section 1156.37(a) states only that a petition "shall be accompanied by proof of majority support, through authorization cards, petitions, or other appropriate proof of majority support" but it does not specify how the support should be demonstrated. While UFW does not necessarily

disagree with the proposed format as a good idea, UFW would request that the Board add the highlighted language allowing it to consider any proof of support, as follows (highlighted language is proposed by UFW):

"Authorization cards or petitions submitted as evidence of majority support also shall identify the name of the agricultural employer to which the cards or petitions pertain and shall clearly state that (i) signing the card or petition is equivalent to a vote in support of the petitioning labor organization; (ii) a signature on the card or petition is valid for one year from the date it is signed; and (iii) a signature on the card or petition may not be revoked. If a card is not in this format, the Board shall have discretion to accept the support as valid, so long as the support can reasonably be understood to be an authorization for union representation by the worker. The Board's discretion shall be exercised to promote the purpose of encouraging collective bargaining, as provided for in the Act."

This language would also permit the Board to consider cards that were signed within a year but before the implementation of any proposed regulations.

Format of cards 20391(a)(1)(A) and content

With respect to the suggested format and content of the cards under the current proposed regulations, the Board should again add language allowing for acceptance of proof of support even if some of the information on the card is missing or left blank. The MSP statute does not require the specific format or content the Board is proposing, and instead states only that "The board shall ignore discrepancies between the employee's name listed on the proof of support and the employee's name on the employer's list if the preponderance of the evidence, such as the employee's address, the name of the employee's foreman or forewoman, or evidence submitted by the labor organization or employee shows that the employee who signed the proof of support is the same person as the employee on the employer's list." Lab. Code 1156.37(e)(1). UFW therefore requests that the Board add this highlighted language to 20391(a)(1)(A): "The Board shall have discretion to accept the support as valid if not all the information in the format is provided, so long as the support can reasonably be understood to be an authorization for union representation by the worker. The Board's discretion shall be exercised to promote the purpose of encouraging collective bargaining, as provided for in the Act."

The same language should be added to section 20391(a)(1)(B) regarding "petition format."

UFW comment re assistance filling out cards

Given various literacy levels among farmworkers, the Board's regulation should permit a labor organization, family member, or other non-employer third-party to fill out the information on the authorization card or petition, other than the signature. This is already acceptable practice under the NLRA and other statutes

and the Board should make clear that this is acceptable practice and will not be grounds for objecting to an election.[1]

Section 20391(a)(1)(A) and 20391(B) (No Employer use or abuse of sample cards or petitions)

Both sections state that the Board shall provide downloadable copies of cards or petitions on its website.

UFW Comment:
UFW is concerned that the Board's provision of sample authorization cards will be used or abused by Employers to dissuade workers from joining a union. UFW is therefore opposed to the Board's use of sample or downloadable cards on its website.

Should the Board provide such sample cards, the Board should add language that Employers and their agents shall not be permitted to use the sample authorization cards or sample petitions at all, and certainly not to dissuade workers from selecting a union representative, or to confuse them about the purpose of a card or petition. The ALRB and NLRB already have strict rules against defacement of election notices to ensure a free and fair election and the Board should adopt similar rules regarding any sample cards or petitions it uses, if it decides to use them.

Proposed Regulation § 20391(3) (Notice and Q & A Session)

Current Proposed Regulation:
"(3) Notice to Agricultural Employees. Within 48 hours after the regional director notifies the employer pursuant to subdivision (a) that the petition has been accepted for filing, or the next business day after the 48-hour period expires if it does so on a Saturday, Sunday, or legal holiday, the regional director or the regional director's agent(s) shall distribute and read a notice to all agricultural employees at the employer's workplace regarding the filing of the majority support petition and answer questions from the employees regarding the petition. The employer shall post the notice in conspicuous places on its property and notify the regional director and labor organization of the date and locations of the posting of the notice. The posting shall remain in place until the regional director makes a final determination whether majority support has been established. All parties shall be required to cooperate fully in the dissemination of the notice to the employer's agricultural employees."

[1] UFW notes that the Regional Directors, in their letter of April 22, 2024, support the ability of others to sign cards for farmworkers. UFW generally asks workers to sign their own cards, even if with an "X," and prefers that workers be asked to sign their own cards, but UFW would like the Board to clarify that labor organizations or other non-employer third parties can fill out other portions of the card.

UFW Strongly Objects to the Proposed Addition of an ALRB Notice and Question/Answer Period

UFW strongly objects to the proposed addition of an ALRB notice and question period as a provision which exceeds the Board's authority. The proposed language comes from the suggestion of the two ALRB Regional Directors. *See*, April 22, 2024 Memorandum to ALRB from J. Arciniega and Y. De Luna; June 3, 2023 Memorandum to ALRB from J. Arciniega and Y. De Luna. This proposal was never discussed with UFW, other unions, or, as far as UFW can tell, was not discussed with agricultural employers.[2] Therefore it does not reflect the compromise, negotiation, views or support of anyone but two Regional Directors. The proposed language was never presented to, or discussed by, the Legislature that passed AB 113, nor presented to or discussed with Governor Newsom, who signed the bill. As the Board is well aware, AB 113 was the product of years of lengthy discussion, negotiations, and proposals that did not include the proposed language or any version of it. Indeed, the current language of AB 113 provides for specific duties by the Board that **do not** include a notice and question and answer period.

Labor Code section 1156.37(e)(1) enumerates the specific affirmative duties imposed on the Board when an MSP is filed, and none of those duties involve a notice and question and answer period by Board agents. Upon receipt of an MSP, the Board is directed to do several things:

(1) "the board shall immediately commence an investigation regarding the validity of the petition and the proof of support submitted."

(2) "Within five days of receipt of the petition, the board shall make an administrative determination as to whether the requirements set forth in subdivision (b) are met by the petition and whether the labor

[2] With all respect to the RD's, their statement that the notice would "empower workers in th[e] [MSP] process to make their own decisions free of coercion by either the employer or union" (see Aprill 22, 2024 Memo at 2) is off-base with respect to any claim that unions in general or the UFW in particular have coerced any worker in connection with elections. As the Board is well aware, AB 113 is designed by its own terms to allow workers to select a union free from coercion by employers. The history of the ALRA is flooded with examples of employer coercion and voter suppression, and that long-history of voter coercion does not extend to unions or UFW historically coercing workers in voting. *See, e.g., Giumarra Vineyards Corp.* (2006) 32 ALRB No. 5 at 5 (Board expressing regret that in cases involving employer misconduct during an election there is a "lack of any sanctions other than setting aside the election [and] no method of removing the taint on employee free choice created by the election misconduct. … Obviously, this allows wrongdoers to profit from their misconduct even if it results in the setting aside of the election … Regrettably, the statute in its present form does not provide the Board with remedial authority through which it might address this problem. Consequently, it is a problem that may be addressed only by the Legislature.").

organization submitting the petition has provided proof of majority support."

(3) "The board shall ignore discrepancies between the employee's name listed on the proof of support and the employee's name on the employer's list if the preponderance of the evidence, such as the employee's address, the name of the employee's foreman or forewoman, or evidence submitted by the labor organization or employee shows that the employee who signed the proof of support is the same person as the employee on the employer's list."

(4) "The board shall return proof of majority support that it finds invalid to the labor organization that filed the Majority Support Petition, with an explanation as to why each proof of support was found to be invalid."

(5) "If the board determines that the labor organization has submitted proof of majority support and met the requirements set forth in this section, it shall immediately certify the labor organization as the exclusive bargaining representative of the employees in the bargaining unit."

(6) "If the board determines that the labor organization has not submitted the requisite proof of majority support, the board shall notify the labor organization of the deficiency and grant the labor organization 30 days from the date it is notified to submit additional support."

Again, it bears repeating that ***none*** of the enumerated duties under this section involve the Board providing a notice to workers or conducting a question and answer period. As such, UFW considers the proposed regulation an attempt to undermine the specific language and purpose of AB 113. The Board has an express duty to adopt regulations that are consistent with the will of the Legislature and this proposed regulation directly conflicts with what the Legislature passed and what the Governor signed. "Administrative regulations that violate acts of the Legislature are void . . . They must conform to the legislative will . . ." *ALRB v. Superior Court* (1976) 16 Cal. 3d 392, 419; *ALRB v. Superior Court (Gallo Vineyards)* (1996) 48 Cal. App. 4th 1489, 1510 (same); *Cadiz v. ALRB* (1979) 92 Cal. App. 3d 365, 372-373 (The Board "exceed[s] it authority" when it "arrogat[es] unto itself the right to act contrary to the express terms of the statute."). Indeed, the recent Supreme Court decision in *Loper Bright Enters. v. Raimondo* mandates that state agencies must strictly adhere to the statutory language when implementing regulations, without introducing new processes or requirements not explicitly stated in the statute. *Loper Bright Enters. v. Raimondo* (June 28, 2024) Nos. 22-451, 22-1219, 2024 U.S. LEXIS 2882. The Court decision there emphasized that regulatory bodies must exercise judgment by respecting the plain language of the statute and courts will not defer to agency interpretations that extend beyond legislative intent. *Loper Bright Enters. v. Raimondo*, at *61. Consequently, any ALRB regulations that attempt to create new procedural requirements or modify the statute are invalid and would not withstand judicial scrutiny under this precedent.

For these reasons, UFW strongly objects to the proposed notice and question and answer period proposed by the RDs.

20391(b) (48 Hour Employer response)

Current proposed language:
"(b) Within 48 hours after personal service of the petition on the employer named in the petition, the employer shall file with the Board and serve personally on the labor organization its response to the petition. If the 48-hour period expires on a Saturday, Sunday, or legal holiday, the time to file the response shall be extended to the corresponding hour on the next business day."

UFW Comment:

The UFW strongly objects to expanding the employer response period to beyond 48 hours. The proposed regulation reads: "If the 48-hour period expires on a Saturday, Sunday, or legal holiday, the time to file the response shall be extended to the corresponding hour on the next business day." This proposed language conflicts with the clear language of the statute which requires an employer response within 48 hours. ***The statute makes no exception for Saturdays, Sundays or legal holidays:*** "Within 48 hours after the petition is served, the employer shall file with the board, and personally serve upon the labor organization that filed the petition, its response to the petition." Lab. Code § 1156.37(d).

Expanding the response period to beyond 48 hours will negatively impact union organizing efforts and is in direct conflict with the statute. As noted *ante*, the Board cannot pass regulations that undermine or directly conflict with clear statutory language. *ALRB v. Superior Court* (1976) 16 Cal. 3d 392, 419; *ALRB v. Superior Court (Gallo Vineyards)* (1996) 48 Cal. App. 4th 1489, 1510; *Cadiz v. ALRB* (1979) 92 Cal. App. 3d 365, 372-373. By way of example, if UFW submits an MSP on Thursday at 11:00 a.m., compliance with the statute would require an employer response and employee eligibility list by Saturday, at 11:00 a.m.. This would allow UFW organizers to communicate with farmworkers on Saturday evening and on Sundays, which is frequently their only day off, when workers are most readily available to discuss unionization.[3] Under the Board's proposed regulations, the Employer would not have to produce its response until Monday at 11:00 a.m., thus giving the employer the equivalent of 4 days, which is well beyond the Legislature's clear language. This would deprive the Union of communicating with workers over the weekend, and given the tight window of time to prove majority status (especially under the initial 5 day period), every day is critical. There is simply nothing in the statute which authorizes the Board to expand this 48 hour period, which is clear and was deliberately included in the statute to provide for streamlining of the election process.[4]

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[3] Many farmworkers often work on Sundays and most work on legal holidays anyway, especially during harvest periods when fruit needs to be harvested to prevent it from spoiling. UFW contracts typically seek to give workers paid time off for many state and federal holidays.

[4] UFW notes that the Board's existing regulations regarding computation of time periods (8 Cal. Code Regs. § 20170) excludes intermediate Saturdays, Sundays

Comment re: section 20391(c) (Regional Director 5 day Determination)

Current Proposed Language:

"(c) The regional director of the office in which the majority support petition is filed shall commence an investigation regarding the validity of the petition and accompanying proof of support after the petition is filed. Within three days after receipt of the employer's response, the regional director shall notify the parties of its determination whether (i) a bona fide question of representation exists, (ii) the bargaining unit described in the petition is not appropriate, or (iii) the proof of support submitted with the petition is not sufficient. If the time period for the regional director to make these determinations expires on a Saturday, Sunday, or legal holiday, the time for providing such notice to the parties shall be extended to the next business day."

UFW objects to two portions of this proposed language. First, the Regional Director's determination is being tied to "three days after receipt of the employer's response." This is problematic because the statute requires a determination within 5 days of the filing of the MSP, and if an employer delays its response by any time period, this would cause the RD to issue a determination beyond the 5 days required in the statute.[5] The Board should follow the language of the statute which provides that: "*Within five days of receipt of the petition*, the board shall make an administrative determination as to whether the requirements set forth in subdivision (b) are met by the petition and whether the labor organization submitting the petition has provided proof of majority support." Lab. Code § 1156.37(e)(1) (emphasis added). For the same reason, the proposal of the Regional Directors (as expressed in their April 22, 2024 letter) to "be afforded 3 ***business days*** after receiving the Employer response to submit the tally" (emphasis added) and findings, and to exclude Saturdays, Sunday, and holidays, should also be rejected. While the timelines are tight, that is what the Legislature decided was appropriate; whatever reasons the RDs or Board may have for wanting more time are simply irrelevant when the Legislature has made clear what timelines should be followed. While UFW is sympathetic to the many issues that must be resolved by the RDs during the initial 5 day period, the regulations should not deviate from clear statutory language adopted by the Legislature: a determination from the Board (RDs) within 5 days of receipt of the MSP.

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and holidays, but that a regulation cannot trump a clear, later-enacted statute. The Legislature is presumed to be aware of existing laws at the time it enacts new laws, so it is presumed it was aware of the Board's existing time computations. Accordingly, if it wanted to exclude intermediate Saturdays, Sundays and holidays in computing time periods, it would have said so. See *People v. Frahs* (2020) 9 Cal. 5th 618, 634 (the Legislature "is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted.").

[5] Taken to the extreme, the Board would never have to issue a tally or determination if the Employer never submitted a response, and certainly that is not what the Legislature envisioned.

Comment re: section 20391(b)(2)

Current proposed language
"Service of the employer's employee list in electronic format may be by email or pursuant to subdivision (b) of section 20169 if the response is filed electronically with the Board. The Board shall notify the labor organization promptly after the employer's response is filed and, if the labor organization contends it has not received proper service of the response, the Board shall serve the employer's response on the labor organization."

UFW Comment
Given that the statute already requires the Employer to personally serve the petitioning labor organization and for the Board to provide the response to the labor organization, the regulations should also state that the Employer must also serve the labor organization with its response, via email and personally. *See, e.g.*, 1156.37(d) ("Within 48 hours after the petition is served, the employer shall file with the board, and personally serve upon the labor organization that filed the petition, its response to the petition. As part of the response, the employer shall provide a complete and accurate list of the full names, current street addresses, telephone numbers, job classifications, and crew or department of all currently employed employees in the bargaining unit employed as of the payroll period immediately preceding the filing of the petition… Immediately upon receiving the employer response and employee list, the board shall provide the response and employee list by hardcopy and electronic copy to the labor organization that filed the Majority Support Petition.").

UFW Comment re: 20391(c)(2) and 20391(c)(3) ("cure" period)
UFW prefers that the period for additional support be identified as the "30 day additional support period," as a more proper identification.

Comment re: 20391(c)(2) and 20391(c)(3), 20391(c)(4) (Providing Tally)

UFW objects to the Regional Director providing a "tally" or count of the number of authorization cards submitted showing proof of support. The statute does not provide that this information should be provided and since the first MSP tally, UFW has objected to this process and asked that no tally be provided. There is simply no reason for it. The current statute simply states that "Within five days of receipt of the petition, the board shall make an administrative determination as to whether the requirements set forth in subdivision (b) are met by the petition and whether the labor organization submitting the petition has provided proof of majority support." Lab. Code 1156.37(e)(1). There is no mention of a tally here. Elsewhere the statute simply directs the Board to certify the union upon proof of majority support: "If the board determines that the labor organization has submitted proof of majority support and met the requirements set forth in this section, it shall immediately certify the labor organization as the exclusive bargaining representative of the employees in the bargaining unit." Lab. Code 1156.37(e)(3). Again, there is no mention of providing a tally to anyone.

UFW believes that providing a tally, especially in close cases, will encourage employers to file objections, lawsuits, and to otherwise seek to delay collective bargaining. At minimum, the filing of objections are a drain on both the Board's resources and a labor organization's resources. The frivolous filing of objections can be avoided if the Board simply stated that a labor organization has submitted proof of support. In New York PERB's application of its union dues authorization statute, no tally is provided, and in the UFW's experience in private sector voluntary card check procedures, a neutral does not provide a tally but simply states whether or not there is majority support for the union. This is the experience of other labor organizations as well. Indeed, in California PERB's administration of card check procedures, no tally is provided by PERB.

As the Board knows, California PERB administers several public employee labor relations statutes, and a review of several of them shows that no tally is provided by PERB in administering proof of support or card check. *See, e.g.*, Educational Employment Relations Act, 8 Cal. Code Regs. § 30375(c) ("Upon completion of the review of the showing of support, the regional director shall inform the parties in writing of the determination as to sufficiency or lack thereof regarding the showing of support."); State Employer-Employee Relations Act, 8 Cal. Code Regs. § 40174 ("Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the final determination as to sufficiency or lack thereof regarding the proof of support. The petition shall be dismissed if the Board determines that the petition lacks sufficient proof of support."); Higher Education Employer-Employee Relations Act, 8 Cal. Code Regs. § 51050 ("Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the final determination as to sufficiency or lack thereof regarding the proof of support."); Meyers-Milias-Brown Act 8 Cal. Code Regs. § 61275 ("If the Board determines (1) an employee organization requesting recognition has demonstrated at least majority proof of the employees in an appropriate unit, (2) no other employee organization has demonstrated proof of support of at least 30 percent of the employees, and (3) the public agency has not granted recognition, the Board shall certify the petitioner as the exclusive representative.").

This Board's current practice and proposed regulation in providing a tally is therefore plainly inconsistent with prevailing practices in California, New York, the NLRA, and elsewhere. For the foregoing reasons, UFW requests that the Board stop providing a tally in its determinations, and instead simply provide whether or not the petitioning labor organization has provided proof of majority support.

Comment re: 20391(c)(4)(A) and 20391(c)(4)(B) (Eligibility Disputes and Employees Not On List)

Current Proposed Language

"(4) Eligibility Disputes.

(A) Employees Identified on Employer's List.

(i) If during the course of the regional director's initial investigation of a majority support petition, including the proof of support submitted by the labor

organization and the employee list produced by the employer, the regional director or a labor organization, for good cause shown, challenges the eligibility of an individual included on the employer's employee list based on any of the grounds listed in regulation 20355, subdivisions (a)(1)-(7), the regional director shall designate such individual as "challenged." The regional director shall promptly notify the employer of all such challenges made. The regional director shall then proceed to make a determination whether majority support has been established excluding the individuals designated as "challenged." If the number of challenged individuals is determinative of the question whether majority support is established, the regional director shall notify the parties in writing of its determination and allow the labor organization 30 days from the date of the regional director's notice to submit additional proof of support or to cure any support previously submitted and returned to the labor organization as invalid.
(ii) Within 10 days after the date of the regional director's notice that there is a determinative number of challenged individuals, both the labor organization and employer shall submit to the regional director written statements setting forth their positions on the eligibility of each challenged individual, including all evidence in support of their positions.
B) Individuals Not Included on Employer's List.
(i) If a labor organization contends the employer's list omits agricultural employees who are eligible for inclusion in the bargaining unit, the labor organization shall submit a written statement to the regional director stating its position regarding the subject individuals' eligibility, including all evidence in support of its eligibility claims.
(ii) If the labor organization makes a claim that an omitted employee is eligible to vote during the regional director's initial investigation of the petition, the regional director shall not include the individual(s) alleged to be eligible in the regional director's initial determination whether proof of majority support has been established. If the regional director determines majority support has not been established, the regional director shall notify the parties in writing of its determination and allow the labor organization 30 days from the date of the regional director's notice to submit additional proof of support or to cure any support previously submitted and returned to the labor organization as invalid.
(iii) If the regional director determines the labor organization did not establish proof of majority support during the regional director's initial investigation, during the subsequent 30-day cure period the regional director shall consider and determine the eligibility of all individuals claimed by the labor organization to be eligible but omitted from the employer's list, including such claims as presented to the regional director during the initial investigation of the petition and any additional claims presented by the labor organization during the cure period.
(iv) Within two days after the 30-day cure period closes, the regional director shall notify the parties and executive secretary whether proof of majority support has been established. If the number of claims submitted by the labor organization regarding individuals alleged to be eligible but omitted from the employer's list is in an amount determinative of whether majority support has been established, the regional director shall determine the eligibility of each such individual. The regional director's notice shall include a tally setting forth (1) the total number of employees determined to be in the bargaining unit, (2) the number of cards or

petition signatures received, and (3) the number of cards or petition signatures found to be invalid. In addition, the tally shall identify the employees determined by the regional director to be eligible but omitted from the employer's list. Upon receiving notice of the regional director's determination and tally, the executive secretary shall issue an appropriate certification."

UFW comment:
Assuming the disputed employees affect the outcome of the MSP, the Regional Director should still be required to make a preliminary finding as to the eligibility of contested workers within the 5-day determination period, because that is what is required by statute. Lab. Code § 1156.37(e)(1). Presumptions should favor certification in this initial process, and the RDs should provide their reasons for inclusion or exclusion of an employee, including by providing the parties with any information that does not include disclosure of the identify of agricultural workers during the initial 5-day determination period.

The parties should then be provided with 7 days to provide information to the RD and the other side challenging the initial determination, with 7 days for the opposing side to respond to the submitted information. In providing information to the RD, the parties should be permitted to not disclose non-supervisory agricultural worker identifying information, as much as reasonably possible. The RDs can then use this information to modify or affirm their initial determination, and the RD can also notify the parties that the disputed employees are no longer outcome determinative if the labor organization submits additional proof of support in the intervening time period.

20391(c)(4)(B)(iv) (Tally)
(iv) Within two days after the 30-day cure period closes, the regional director shall notify the parties and executive secretary whether proof of majority support has been established. If the number of claims submitted by the labor organization regarding individuals alleged to be eligible but omitted from the employer's list is in an amount determinative of whether majority support has been established, the regional director shall determine the eligibility of each such individual. The regional director's notice shall include a tally setting forth (1) the total number of employees determined to be in the bargaining unit, (2) the number of cards or petition signatures received, and (3) the number of cards or petition signatures found to be invalid. In addition, the tally shall identify the employees determined by the regional director to be eligible but omitted from the employer's list. Upon receiving notice of the regional director's determination and tally, the executive secretary shall issue an appropriate certification.

UFW comment:
With respect to the tally, UFW incorporates its objections regarding providing the tally, as outlined above. With respect to the language that "In addition, the tally shall identify the employees determined by the regional director to be eligible but omitted from the employer's list," UWF requests that the RD be required to provide reasons why employees were included as eligible to be in the unit.

20391(c)(4)(B)(v)

Current proposed language:

"However, if the evidence includes any declarations or statements of non-supervisory agricultural employees other than those of the employees alleged to be eligible, the regional director shall serve on the parties only a summary of such declarations or statements prepared in a manner that does not reveal the identities of the other employees."

UFW Comment:

The UFW requests that the Board amend the cited language to prohibit the disclosure of any declarations from ***any*** non-supervisory agricultural employees, including those of the employees in dispute. Specifically, the current proposed language would require the RD to provide declarations from "the employees alleged to be eligible." This would be inconsistent with current Board regulations and the *Giumarra rule* as contained in *Giumarra Vineyards Corp*. (1977) 3 ALRB No. 21. See also, 8 Cal. Code Regs. §§ 20236, 20237, 20274 (all protecting the identity and statements of non-supervisory agricultural workers prior to testifying); *Giumarra Vineyards, supra,* at 2 ("We agree with the general counsel that the Board *must preserve as confidential the identity of workers assisting this agency in the investigation and litigation of unfair labor practices.* The names and statements of workers who are complainants, proposed witnesses, or who give information to the ALRB is information which respondents may not receive in advance of trial."). Current Board law and regulations do not allow for exceptions for disclosure of declarations of agricultural employees. Moreover, if the RD provides reasons for including a disputed employee, that is enough to allow an employer to contest the evidence relied on by the RD.

Comment re: section 20391(d) (Presumptions)

UFW fully supports the proposed language and presumptions in cases where employers refuse to provide information or documents that are required by law or would assist the Board in investigating MSPs. UFW notes that the language is consistent with the language adopted in connection with presumptions for secret ballot elections under the Board's current regulations at section 8 Cal. Code Regs. § 20310(f).

UFW Comment re: section 20391(e) (Objections)

This section allows for employers to file objections, but does not afford labor organizations to do so. UFW requests that the Board expressly provide in its regulations that labor organizations can also file objections to an MSP. This issue was most recently dealt with in the MSP involving DiMare, where UFW filed "conditional objections." There, a majority of the Board stated that it would "consider whether and how to address the UFW's objections, as necessary, after the determination of DiMare's objections," while Chair Hassid, in a dissent, stated that UFW does not have a right to file objections. *In re DMB Packing Corp. and UFW* (2023) Admin. Order 2023-11, at 18-19.

UFW maintains that AB 113 never intended to deprive labor organizations of the right to file objections. Indeed, that right is presumed to exist in the clear text of AB 113 which states that: "If an employer commits an unfair labor practice ***or misconduct,*** including vote suppression, during a labor organization's Majority Support Petition campaign, and the employer's unfair labor practice ***or misconduct*** would render slight the chances of a new majority support campaign reflecting the free and fair choice of employees, the labor organization shall be certified by the board as the exclusive bargaining representative for the bargaining unit. For purposes of a finding of an unfair labor practice ***or misconduct*** under this part and under this section, a misrepresentation of fact or law by an employer, an employer's representative, or agent is an unfair labor practice ***or misconduct*** whether or not a labor organization has had an opportunity to respond to or correct the misrepresentation." Labor Code § 1156.27(j) (emphasis added).

The term "misconduct" or "election misconduct" is a term of art which has historically been used by both the ALRB and NLRB to denote employer misconduct during an election campaign that can or does affect the results of the election, and it is ordinarily discussed on the context of election objections. For example in the *Giumarra Vineyards* case, 32 ALRB No. 5, the Board lamented its lack of remedy for employer election misconduct and noted that "[t]he statute does not provide for any other sanctions for engaging in *misconduct* affecting the results of an election." *Giumarra Vineyards,* 32 ALRB No. 5 at 4-5 (emphasis added). In *Richard's Grove and Saralee's Vineyard*, the Board detailed the difference between ULPs and "misconduct" in applying the *Mann Packing* rule: "Section 1156.3, subdivision (c) provides a right to file election objections, inter alia, *alleging misconduct affecting the results of the election*, and requires that they be evaluated by the Board." *Richard's Grove and Saralee's Vineyard* (2007) 33 ALRB No. 7, at 7 (emphasis added). In Gallo Vineyards, Inc, the Board again emphasized the difference between ULPs and "election misconduct": "The burden [of overturning an election] is met by a showing of specific evidence *that misconduct occurred and that this misconduct tended to interfere with employee free choice* to such an extent that it affected the results of the election." *In re Gallo Vineyards, Inc*. (2008) 34 ALRB No. 6, at 11-12 (emphasis added), *citing Mann Packing Co*. (1990) 16 ALRB No. 15 at 4. Thus, it should be clear that the Legislature's use of "unfair labor practice or misconduct" in section 1156.37(j) was intentional and not superfluous. Indeed, as noted *ante*, when passing Legislation, the Legislature "is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted" and clearly understood the difference between proving a ULP and proving "misconduct" when it drafted the MSP statute. See *People v. Frahs* (2020) 9 Cal. 5th 618, 634

Thus, UFW can now be certified through MSP proof of majority support, or, as detailed in section 1156.37(j), through proving a ULP, or through proving misconduct that renders slight the chances of a new majority support campaign reflecting the free choice of employees. It goes without saying that if a labor organization cannot file objections to an election, then it cannot seek the remedy provided in section 1156.37(j). To deprive a labor organization of this remedy is

inconsistent with that section and Legislative intent. The Board should therefore not deprive UFW of the ability to file objections.

Comment re: section 20391(f)(2) (Setting Objections for Hearing)

UFW requests that the Board adopt a regulation that prior to setting objections for hearing, the Executive Secretary consult with counsel for the affected labor organization and the employer to decide on scheduling of the hearing. Often, counsel can agree to hearing dates. More importantly, the affected labor organization has been given the right, under the statute, to request that an objections hearing commence beyond the 14 day period: "The board shall conduct the hearing within 14 days of the filing of an objection, unless an extension is agreed to by the labor organization." Lab. Code 1156.37(f)(2). Prior to setting a matter for hearing, the ES should consult with counsel for the affected labor organization to determine whether or not the labor organization would agree to an extension of time.

UFW also requests that the Board adopt a regulation that the assigned IHE be required to conduct a prehearing conference, issue a prehearing conference order, issue pre-trial motion deadlines, and as much as reasonably possible, rule on all pre-trial motions prior to the start of an objections hearing. UFW notes that several objections hearings have begun without the IHEs ruling on pretrial motions. This affects preparation for the case, presentation of evidence, and preparation of witnesses.

Comment re: section 20391(i) (Commencement of MSP Campaign)

Current proposed language:
"(i) For purposes of subdivisions (j) and (k) of Labor Code section 1156.37, a labor organization's majority support petition campaign shall be deemed underway if the labor organization is able to establish proof of support from at least 10% of the agricultural employees in the bargaining unit sought to be represented, unless the labor organization demonstrates the unlawful employer conduct was of such nature as to prevent the labor organization from obtaining additional employee support."

UFW Comment:
UFW objects to the arbitrary definition of when an MSP campaign "shall be deemed underway" as a 10% card-signing threshold. This arbitrary number has no support in the statutory language which makes reference only to employer unfair labor practices, misconduct or vote suppression "during a labor organization's Majority Support Petition campaign". Lab. Code § 1156.37(j) and (k). Defining "during a labor organization's Majority Support Petition campaign," as meaning 10% signing of cards has no support in the statutory text. While UFW appreciates the Board's attempt to draw a bright line on this issue, there is simply no need to do so. Indeed, the use of anti-union labor consultants, captive audience meetings, or other illegal activity to dissuade workers from signing cards can happen at any time in the life of an MSP campaign, and if done

early enough, could stifle the gathering of cards. If the Board adopts a 10% threshold, it could actually encourage Employers to run scorched-earth anti-union campaigns to prevent the union from achieving the 10%.

If the Board wishes to propose a bright line rule, then the most simple rule is that "during a Majority Support Petition campaign" starts with the first meeting with workers to discuss an MSP or with the first card signing, whichever comes first. Any misconduct, ULP, or voter suppression after a first meeting or first card signing falls into the clear definition of "during a labor organization's Majority Support Petition campaign." UFW therefore strongly objects to the 10% threshold, and instead would urge the Board to adopt a regulation that sets out that "during a Majority Support Petition campaign" starts with the first meeting with workers to discuss an MSP or with the first card signing, whichever comes first.[6]

Thank you for your consideration of UFW's comments.

Best,
MARTÍNEZ AGUILASOCHO LAW, INC.

By: 
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[6] In their April 22, 2024 memo, the Regional Directors acknowledge that "an effective anti-union campaign by an employer may render the collection of cards impossible" and that "union campaigns may be well underway prior to the signing of cards."