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August 7, 2018

Chief Justice Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
California, CA 94102

Re: Letter of *Amicus Curaie* Silvia Lopez Opposing Petitions for Review in *Gerawan Farming, Inc.* v. *Agricultural Labor Relations Board*, No. S249865

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amicus curiae Silvia Lopez respectfully asks this Court to deny review in this case.

For seventeen years leading up to 2012, farmworkers at Gerawan Farming, Inc., bargained with their employer on their own, without the involvement of a union. This arrangement worked well, since the farmworkers earned the highest wages in the industry. In 2012, United Farm Workers of America appeared on the scene, claiming to be the workers' rightful bargaining representative. The Union had won an election to become the workers' representative in 1990, but had inexplicably abandoned the workers and stopped all contact with the company starting in 1995. Invoking California's mandatory mediation and conciliation procedure, the resurfaced Union secured a mediator-imposed "agreement" that required Gerawan's workers to pay fees to the Union, prohibited the workers from striking, and stripped some workers of seniority. The effect of the newly imposed union fees was to *reduce* most workers' take-home pay. *See* Consolidated Answer 13.

Gerawan's workers, led by *amicus* Silvia Lopez, strongly objected to the Union's conduct. In September 2013, Ms. Lopez collected enough signatures to

trigger an election to decertify the union. The Agricultural Labor Relations Board initially refused to hold the election, but 1,000 to 2,000 workers walked off the job to demand a vote, and 300 to 400 workers traveled by bus to Sacramento to protest the Board's decision. Thereafter, in October 2013, over 2,000 workers filed a second decertification petition. The Board, at last, held an election. To this day, however, it has not counted the ballots, on the ground that Gerawan allegedly engaged in unlawful practices in the lead-up to the election. *See* Consolidated Answer 13–14.

The California Court of Appeals has now ordered the Board to tally the votes cast before adjudicating the validity of the election. The Board and the Union, however, have asked this Court to review and overturn that order—so that the results of the election remain secret from the company, the workers, and the courts. This effort to smother worker democracy in a blanket of secrecy is fundamentally wrong.

First, a long line of judicial decisions holds that votes already cast should be counted, even if the election was allegedly tainted by irregularities. This Court long ago held that "it would be a most dangerous interference by the courts to prevent" canvassers from "announc[ing] the result of [the] election," even if the election were "contested." *People ex rel. Attorney General* v. *Board of Supervisors*, 16 P. 776, 778 (Cal. 1888). Instead, it is "more appropriate" to review challenges "after the election"—in other words, after the ballots have all been cast and counted. *Mulkey* v. *Reitman*, 413 P.2d 825, 829 (Cal. 1966) (in bank). This Court is far from alone in reaching these conclusions: "The courts have held (practically unanimously) that election officers may not be restrained from canvassing the vote and declaring the election, even though it be alleged that there was fraud or illegality in the election." *State ex rel. Sathre* v. *Byrne*, 258 N.W. 121, 125 (ND 1934). This principle applies with even greater force than usual in this case, because (even on the Board's and the Union's own version of events) the alleged irregularity taints at most the campaign leading up to the election, not the ballot-casting itself.

Second, refusing to count ballots already cast violates the fundamental rights of the voters. The Fourteenth Amendment to the United States Constitution protects the right of a qualified voter to have his vote counted: "It has

been repeatedly recognized that all qualified voters have a constitutionally protected right to vote *and to have their votes counted*." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964) (emphasis added). The First Amendment to the United States Constitution protects the same right: "First Amendment speech through the vote would [be] effectively extinguished if [the Government] block[s] releasing and certifying the results. To cast a lawful vote only to be told that the vote will not be counted or released is to rob the vote of any communicative meaning whatsoever." *Turner* v. *D.C. Board of Elections & Ethics*, 77 F. Supp. 2d 25, 31 (DDC 1999). The California Constitution, too, protects this right: "A voter who casts a vote in an election in accordance with the laws of the State *shall have the vote counted*." Cal. Const. art. II, § 2.5 (emphasis added). In accordance with California law, Ms. Lopez and other Gerawan workers have cast ballots in a decertification election. To refuse to tally those votes would deprive them of their rights under both the Federal and the California Constitution.

Third, refusing to count ballots already cast erodes public confidence in the integrity of elections. It is a "basic principle, inherent in our Constitution and our democracy, that every legal vote should be counted." *Bush* v. *Gore*, 531 U.S. 1046, 1048 (2000) (Stevens, J., dissenting). As a result, "preventing [a count] from being completed will inevitably cast a cloud on the legitimacy" of the electoral process. *Id.* Put simply, "where persons who are eligible to vote lose faith that their ballot will count they will conclude that voting does not matter"; they "may decline to exercise the franchise, thereby giving up the most fundamental right of our democracy as completely as if it had been taken forcibly." *League of Women Voters* v. *Blackwell*, 340 F. Supp. 2d 823, 829 (ND Ohio 2004).

Fourth, refusing to count ballots already cast disregards the "strong public policy supporting transparency in government." *Engineers* v. *Superior Court*, 165 P.3d 488, 331 (Cal. 2007). In the California Court of Appeal's words, the Board's "secretive approach" violates "the fundamental principle that open and transparent government are an essential check against the arbitrary exercise of official power." *Gerawan Farming, Inc.* v. *ALRB*, 23 Cal. App. 5th 1129, 1220 n. 106 (2018). "Something seems greatly amiss when a statutory election process has been commenced and secret ballot votes have been duly cast by the workers, but all pertinent information about what happened in the

election—*i.e.*, the vote tally—is suppressed or concealed by the government agency entrusted with that statutory process. Even if, hypothetically, the situation were one in which the Board could properly exercise discretion to set aside the election, why not do so in a transparent fashion, in the light of day, so that it would be known *what* is being set aside?" *Id.*

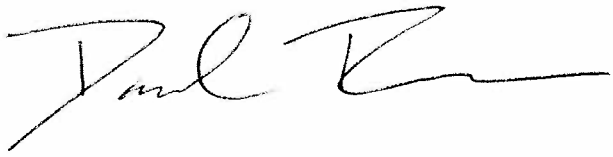
Fifth, a refusal to count the votes undermines the judicial process by forcing courts to rule on challenges to an election before it is necessary to do so. It is well established that "the rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." *People ex rel. Lynch* v. *Superior Court*, 464 P.2d 126, 127 (Cal. 1970) (in bank). To rule on a challenge to the election before the votes have been counted is to risk issuing an advisory opinion: The side challenging the result could have won anyway, in which case the court need not rule on the challenge. In this case, it makes no sense to rule on the Union's claim that Gerawan improperly influenced the election before the courts even know whether the Union won or lost that election: If the Union won, no ruling would be necessary.

The Board and Union offer three justifications for continuing to keep the result of the election secret, but none is persuasive. One, the Board asserts that Gerawan and Ms. Lopez previously "defended" an order to "impound" the ballots. ALRB Petition 25–26. But temporarily impounding the ballots in order to preserve the status quo is quite different from permanently refusing to count them. Two, the Board asserts that the refusal to count the ballots advances the "goa[l] of ... protecting employee free choice from unlawful interference or coercion." ALRB Petition 26. But any alleged interference or coercion is fully remedied by invalidating the *results* of the election. A refusal to count the ballots adds nothing except a cloud of secrecy. Three, the Board and Union assert that disclosing "a vote count tainted by employer misconduct" would undermine the "status of the exclusive bargaining representative" and the "peace and stability" of the workplace. ALRB Petition 26; *see* Union Petition 32–33. This remarkable argument rests on the incorrect premise that workers are "better kept in ignorance than trusted with correct ... information." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 374 (1977). To the extent the Board and the Union fear that disclosure of an ostensibly tainted vote count will present "an inaccurate picture" about the Union's level of support, "the preferred remedy

is more disclosure, rather than less" (*id.*): The Union remains free to explain to the workers why it views the result of the election as illegitimate. What the Board and the Union may not do, however, is to prevent everyone from finding out the result in the first place.

This Court should therefore deny review and allow the votes cast by Ms. Lopez and her colleagues to be counted.

Very truly yours,



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PROOF OF SERVICE

I am over 18 years of age and not a party to this action. I am employed in the county where the mailing took place. My business address is: 51 Louisiana Avenue N.W., Washington, D.C. 20001.

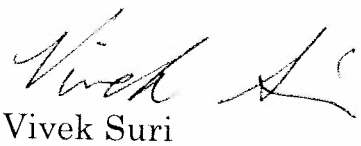
On August 7, 2018, I caused the following document to be served on each interested party, as stated on the attached service list:

Letter of *Amicus Curaie* Silvia Lopez Opposing Petitions for Review in *Gerawan Farming, Inc.* v. *Agricultural Labor Relations Board*, No. S249865

The document was served by FedEx, an express service carrier that provides overnight delivery. I caused true copies of the foregoing document to be placed in sealed envelopes or packages designated by the express service carrier, addressed, as stated on the attached service list, with fees for overnight delivery paid or provided for.

Executed on August 7, 2018, at Washington, D.C.

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



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