No. 17-1375

In The Supreme Court of the United States

GERAWAN FARMING, INC.,
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOUTHEASTERN LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), the National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") and Southeastern Legal Foundation ("SLF") respectfully request leave to file an *amici curiae* brief in this matter. In support of the motion, *amici* state:

1. On behalf of the *amici curiae*, the NFIB Legal Center requested consent from both the Petitioner and Respondent, as well as from the United Farm Workers of America (UFW), to file the proposed amici curiae brief. This request was timely, in accordance with Supreme Court Rule 37.2.

2. The Petitioner granted consent in writing. The Respondent acknowledged the request and said that it "does not oppose" the proposed *amici curiae* brief. Likewise, UFW responded, saying that it "does not oppose" this filing.

3. The NFIB Legal Center and SLF seek leave to file in this matter because this case raises an important issue of significance throughout the country. NFIB Legal Center—representing the interest of the nation's small business community—has a great interest in this case because of the potential that the decision below may embolden other states and or Congress to experiment with compulsory arbitration regimes that will single-out small

businesses for individualized legal proscriptions. Likewise, as an advocate for individual rights and constitutional principles, SLF has an interest here. *Amici* have submitted respective statements of interest more fully explaining their organizational interest in the case.

4. *Amici* believe that the proposed brief offers valuable perspective and expertise. What is more, NFIB Legal Center participated as *amicus curiae* in the proceedings below, both in the California Court of Appeals and in the California Supreme Court. Though the California Supreme Court reversed, NFIB Legal Center believes that its *amicus curiae* was especially helpful for the California Court of Appeals in elucidating the class-of-one doctrine, including in demonstrating the degree to which compulsory arbitration will result in different legal proscriptions for similarly situated businesses.

5. At this stage, the proposed *amici curiae* brief speaks to the implications of the California Supreme Court's decision below, and specifically it's potential to embolden special interest groups to lobby for individualized compulsory arbitration regimes in Congress and in the states. Further, the proposed brief will assist the Court in reviewing the petition for *certiorari* by emphasizing the common doctrinal thread between the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment—*i.e.*, the need for

neutrality and impartiality in any legitimate act of governance.

Amici curiae respectfully request leave to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether the State of California violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment when compelling non-consenting parties into a contractual relationship.

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INTEREST OF AMICI CURIAE[1]

The NFIB Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership reflects American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The Center files in this case because it raises an important issue. Specifically, the Center voices concern that compulsory "collective bargaining agreements" will improperly singles-out small

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[1] In accordance with Rule 37.6, *Amici* state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution to fund the brief's preparation or submission.

businesses for individualized legal proscriptions—above and beyond generally applicable law. What is more, the California Supreme Court's decision may encourage other state legislatures to implement similar regimes—*i.e.*, targeting select agricultural businesses for heightened regulatory burdens. Finally, the decision below may embolden more aggressive initiatives. For example, there is real concern that California's Agricultural Labor Relations Act may serve as a model in Congress for legislation forcing business in other industries to submit to government-imposed (non-consensual) collective bargaining agreements. *See e.g.*, H.R. 5000, 114th Cong. (2016); H.R. 1409, 111th Cong. (2009); H.R. 800, 110th Cong. (2007); H.R. 1696, 109th Cong. (2005); H.R. 3619, 108th Cong. (2003).

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court. SLF has an interest both in reaffirming this Court's decisions in *Wolff Packing Co. v. Ct. of Indus. Relations of Kan.*, 262 U.S. 522 (1923); *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Wolff Packing Co. v. Ct. of Indus. Relations of Kan.*, 267 U.S. 552 (1925), and in seeking clarification from this Court on the proper application of the class of one doctrine set forth in *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

SUMMARY OF ARGUMENT

The California Agricultural Labor Relations Act ("ALRA") requires targeted businesses to submit to "mandatory interest arbitration." Cal. Lab. Code §§ 1164-1164.13. This "interest arbitration" is not truly arbitration, but rather a compulsory regime that culminates with imposition of unique legal burdens for a targeted business and its employees. *Hess Collection Winery v. Agricultural Labor Relations Bd.*, 140 Cal. App. 4th 1584 (2006). Whereas consent and a meeting of the minds have always been the hallmark of a legitimate contract, California purports to invoke its police powers to compel assent to a collective bargaining agreement in a manner that violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The ALRA authorizes a labor union ("Petitioning Union"), claiming to represent the employees of an agricultural company, to petition the California Agricultural Labor Relations Board for an order compelling the company to submit to interest arbitration, wherein an "arbitrator" is assigned to write a "collective bargaining agreement." Cal. Labor Code § 1164. Once that "agreement" is approved by the Board, it becomes effective law governing employer-employee relations—binding only upon the subject business and the Petitioning Union, while affecting the lives of employees who (as in this case) may not even support the union. *Id.* § 1164.3(d). Thus, in imposing individualized legal burdens, the ALRA regime arbitrarily creates a "class of one" for no reason beyond the fact that the company has fallen into the cross-hairs of union operatives.

The California Supreme Court upheld this regime as a supposedly "rational" approach to advance California's goal of promoting collective bargaining agreements in an industry for which the legislature thought labor unions were lacking in power. This does not justify singling-out businesses for special legal burdens because this Court has said that it is beyond the police powers of the state to compel nonconsenting parties into a contract. *Wolff Packing Co. v. Ct. of Indus. Relations of Kan.*, 262 U.S. 522 (1923); *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Wolff Packing Co. v. Ct. of Indus. Relations of Kan.*, 267 U.S. 552 (1925). But, the opinion below repudiated this Court's decisions in the *Wolff Packing* cases, sweeping aside the entire trilogy as a vestige of the *Lochner* era. Accordingly, this Court should grant certiorari to reaffirm that the state has no legitimate interest in compelling collective bargaining agreements under the Due Process Clause, and to further clarify that the ALRA's system of individualized legal proscriptions violates the Equal Protection Clause—*i.e.*, imposing unique legal burdens without justification.

THE STATE HAS NO POWER TO COMPEL A BUSINESS TO SUBMIT TO A COLLECTIVE BARGAINING AGREEMENT

A. The State Cannot Compel Non-Consenting Parties to Agree to Anything

a. The Decision Below Repudiates Valid Supreme Court Precedent

In the opinion below, the California Supreme Court suggests that nothing in the realm of economic regulation is beyond the purview of state regulation in the post-*Lochner* era. In the same vein many commentators once argued that nothing was beyond the reach of federal regulation. Commerce Clause jurisprudence has since drawn a line in the sand, over which the federal government may not step. Those who thought federal commerce powers to be without limit were repudiated in *United States v. Lopez*, *United States v. Morrison*, and still again in *NFIB v. Sibelius*. 514 U.S. 549 (1995); 529 U.S. 598 (2000); 132 S.Ct. 2566 (2012). Likewise, this Court should repudiate the California Supreme Court's ruling that the State may compel non-consenting parties to enter a contract. That assertion of power crosses a line set long ago in *Wolff Packing Co. v. Ct. of Indus. Relations of Kan.*, 262 U.S. 522 (1923); *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Wolff Packing Co. v. Ct. of Indus. Relations of Kan.*, 267 U.S. 552 (1925).

State and federal authorities can certainly restrict economic liberties in enumerable ways without running into constitutional problems. As the small business community knows all too well, California law imposes extensive and ever-changing

regulations governing every aspect of the employer-employee relationship. Additionally, federal law imposes burdens on top of the requirements of state law. And these restrictions are usually subject only to rational basis review when challenged on substantive grounds. But a governmental directive purporting to compel a contractual agreement between non-consenting parties is another matter—the proverbial 'bridge too far.'

The California Supreme Court acknowledged that this Court struck-down a Kansas law that had established a Commission with authority to impose contracts upon unwilling parties in *Wolff Packing Co.*. But, while the assailed ALRB regime is, in every material respect, identical to the stricken Kansas regime, the California Court upheld the ALRA on the assumption that *Wolff Packing Co.* has been repudiated by post-*Lochner* cases. *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.*, 3 Cal.5th 1118 (2017) (citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937)). But, this Court has never backed away from its holding that a compelled contract violates due process. Jerre S. Williams, *The Compulsory Settlement of Contract Negotiation Labor Disputes*, 27 Tex. L. Rev. 587, 622-23 (1949) (observing that despite the "tenor of [New Deal] era decisions … the *Wolff* cases have not been overruled[,]" and suggesting that "compulsory settlement legislation" may infringe upon "individual liberties…").

To the contrary, while applying a highly deferential standard in other due process cases, this Court's opinions signaled the continued validity of *Wolff Packing Co.'s* essential holding during the

height of the New Deal era. For example, this Court upheld the National Labor Relations Act "at least in part because it 'does not compel agreements between employers and employees.'" Bryant M. O'Keefe, *The Employee Free Choice Act's Interest Arbitration Provision: In Whose Best Interest?*, 115 Penn St. L. Rev. 211, 216 (2010) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 397 U.S. 99 (1970)). Justice Hughes' opinion in *Jones & Laughlin Steel Corp.* recognized this to be an important consideration in his due process analysis—a compelling sign that there would have been a problem if the NLRA had been construed to compel contracts upon non-consenting parties. *NLRB*, 397 U.S. at 45; *see also United Steelworkers of Am. v. United States*, 361 U.S. 39, 74-75 (1959) (Douglas, J., dissenting) (citing the *Wolff* cases).

Moreover, this Court has said, in accordance with the doctrine of stare decisis, that it does not overrule past precedent by mere inference or implication—but only in directly addressing and departing from past precedent. *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997) ("Despite what Chief Judge Posner aptly described as *Albrecht's* 'infirmities, [and] its increasingly moth-eaten foundations,' there remains the question whether *Albrecht* deserves continuing respect under the doctrine of stare decisis.") (internal citations omitted). Accordingly, if we are to abandon *Wolff Packing Co.*, it is not for the California courts to lead the way. This Court alone should make that decision, or else reaffirm *Wolff Packing Co.* as controlling precedent. *State Oil Co.* at 20 ("The Court of Appeals was correct in applying [the doctrine of stare decisis] … despite disagreement… for it is this Court's prerogative

alone to overrule one of its precedents."). Until then nothing more should be inferred than what this Court has said directly: "[A] system [of compulsory arbitration] infringes the liberty of contract and rights of property guaranteed by the due process clause of the Fourteenth Amendment." *Wolff Packing Co.*, 267 U.S. at 569. Thus, while the State's prerogative to regulate the terms of a contract is undoubtedly broad, the supposed power to mandate an unwilling party to enter a contract remains subject to the highest level of constitutional scrutiny. *See Peick v. Pension Ben. Gaur. Corp.*, 724 F.2d 1277 (7th Cir. 1983) (distinguishing between state-imposed "compulsory settlements" and a mere requirement to enter arbitration as a means of encouraging *voluntary* settlement); *see also Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union No. 513*, 221 F.2d 644, 647 (6th Cir. 1955) (citing *Wolff Packing* for the proposition that "compulsory arbitration, without right to have the issue determined by court action is invalid.").

b. The ALRA's Regime of Individualized Legal Proscriptions Violates Due Process

A contract creates private law, altering the legal rights of the parties only through voluntary assent to its terms. *Bustamante v. Intuit, Inc.*, 141 Cal.App.4th 199, 208 (2006) (a valid contract requires "mutual consent."). For this reason, it is hornbook law that a contract requires a "meeting of the minds." By contrast, the ALRA regime presumes that the police powers of the state may either affirmatively compel assent or may simply override the need for *mutual* agreement. Yet, viewed in either

light, a state mandated compulsory contract between private parties is fraught with constitutional infirmities.

It would make little sense to say that the ALRA's compulsory arbitration regime truly forces assent. That would require an especially Orwellian conception of the police powers—which would both defy reality and contravene First Amendment principles.[2] This is likely why the California Supreme Court characterized the ALRA not as requiring affirmative assent, but as a direct and forcible imposition of substantive legal requirements. *Gerawan Farming, Inc.*, 3 Cal.5th at 1089 ("If the parties do not reach an agreement on all terms through mediation, the mediator resolves the disputed terms and submits a proposed contract to the Board, which can then *impose* that contract on the parties.") (emphasis added).

But in assuming the state's power to override objections from a non-consenting party, the decision not only purported to bury the *Wolff Packing Co.* trilogy but departed from still older constitutional precepts. The fundamental problem is that it is beyond the power of a legislative body to make

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[2] For one, the state cannot *literally* compel a meeting of the minds. And in any event, an order requiring assent to a contract would unquestionably violate the First Amendment both in compelling a communicative act and in violating the freedom of association. *See Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2007) ("[F]reedom of speech prohibits the government from telling people what they must say."); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) ("Freedom of association … plainly presupposes a freedom not to associate.").

private law as between individuals or incorporated entities. The foundational concept of due process is that one may only be denied property rights, or other liberties, in accordance with generally applicable *public law*. Bernard H. Siegan, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT, 39 (Transaction Publishers, 2001) (observing that "Blackstone defined 'law' as 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong[,]" and explaining that this means "a law must not be 'a transient, sudden order from a superior to or *concerning a particular person*; but something permanent, *uniform, and universal*.'") (emphasis added) (quoting 1 BLACKSTONE, COMMENTARIES 44). Accordingly, individualized impositions—applicable only to a specific party—are not lawful at all. *Cf. Cleburne v. Cleburne Living Center*, 437 U.S. 432, 452 (1985). ("[E]lements of legitimacy and neutrality [must] characterize the performance of the sovereign's duty to govern impartially."); Siegan, *supra* at 39 ("A law which only affects and exhausts itself upon a particular person's rights or interests and has no relation to the community in general 'is rather a sentence than law.'") (quoting 1 BLACKSTONE, COMMENTARIES 44). Without general application, a purported legal imposition stands patently in conflict with the rule of law. *Hurado v. California*, 110 U.S. 516, 535-36 (1884) ("Law is something more than mere will exerted as an act of power. It must be not a *special rule for a particular person* or a particular case, but … the 'general law' … which

govern[s] society…") (internal citations omitted) (emphasis added).[3]

B. The ALRA's System of Individualized Legal Proscriptions Violates the Equal Protection Clause

a. The Decision Below Contravenes this Court's Class-of-One Doctrine

i. Where an Agency or Political Subdivision is Vested with Authority to Issue Individualized Directives, There is Tremendous Potential for Inconsistent Results

Individualized legal proscriptions are inherently suspect because the law can only be viewed as rationale if similarly situated individuals are treated the same. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). For this reason, the class of one doctrine places the burden on the State to prove that it has a rational justification for treating an individual differently from the larger class. *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1023 (9th Cir.). Yet the California Supreme Court upheld the ALRA's compulsory arbitration scheme notwithstanding the fact that the state failed to demonstrate either that: (a) the regime would apply identical proscriptions on similarly situated business, or; (b) that there is a

[3] Due process "thus exlud[es]… acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgements and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation." *Id*. Simply put, "[a]rbitrary power… is not law, whether manifested as the decree of a personal monarch or [as the legislative will] of an impersonal multitude." *Id*.

rational basis for targeting specific companies. Instead, the opinion blithely dispensed with the class of one doctrine in concluding that there are sufficient safeguards to "minimiz[e] arbitrary or irrational differences between collective bargaining agreements…" *Gerawan Farming, Inc.*, 3 Cal.5 th at 1144-46.

But there are no meaningful standards cabining the Agricultural Labor Relation Board's discretion, and therefore no guarantee that similarly situated businesses will be treated alike. *See Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887) (explaining that the Fourteenth Amendment "requires that all persons subjected to … legislation be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."). All that the ALRA requires is that (a) the arbitrator must take into account several (non-exclusive) considerations before submitting a proposed contract for the Board's approval, and (b) the final terms must be justified by the record.[4] In other words, the ALRA vests power in the hands of a single person to craft terms for an imposed "contract" simply in accordance with his or her own sense of good governance or personal conceptions of social justice.

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[4] The arbitrator may consider: "(1) the stipulations of the parties; (2) the financial condition of the employer…; (3) the corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements; (4) the corresponding wages, benefits, and terms of employment in comparable firms or industries in geographical areas with similar economic conditions…; and (5) the average consumer prices for goods and services according to the California Consumer Price Index, and the overall cost of living, in the area where the work is performed." Cal. Lab. Code § 1164(e).

For example, the mediator in this case might have chosen to propose a contract that would have allowed Petitioner to continue with its preexisting compensation system because the record demonstrates that the company already paid substantially higher than the industry average. Instead the arbitrator recommended—and the Board approved—terms requiring the company to increase wages by $.50 per hour and an additional 12.5% for piece-rates. The decision could just as well have been to compel the company to increase wages by only 20, or 30 cents. To the extent the record supported compelling an increase of 50 cents per hour, the contract might well have been approved with a recommendation for an increase to $.75 or $1.75. The record could arguably support any of these divergent choices. *Gentry v. City of Murrieta*, 36 Cal.App.4th 1359, 1366 (1995) (explaining that an agency decision will be upheld where "supported by substantial evidence."). Therefore, contrary to the opinion below, there is little or no guarantee that a different arbitrator—assigned the task of crafting a collective bargaining agreement in a nearly identical scenario—would exercise judgment in the same manner or apply the same calculus. *Hess*, 140 Cal. App. 4th at 1616 (Nicholson, J., dissenting) (observing that this process "results in disparate treatment within the class of employers without an initial collective bargaining agreement because *the agreement imposed* on each employer in this class *will be different*.") (emphasis added).

ii. There is No Rational Basis

Despite acknowledging that *Olech* requires a "[showing] that '(1) the plaintiff was treated differently from other similarly situated persons,

(2) the difference in treatment was intentional, and (3) there was no rational basis for the difference in treatment[,]'" the California Supreme Court never identified a legitimate rational basis for this compulsory arbitration regime. *Gerawan Farming, Inc.*, 3 Cal.5th at 1144. (quoting *Las Lomas Land Co., LLC v. City of Los Angeles*, 177 Cal.App.4th 837, 858 (2009)). Instead, the opinion simply dispenses with the need for identifying a rational basis where a legislative body has decided upon a system of individualized legal proscriptions. As Justice Liu put it, "the [entire] point of the [ALRA] scheme is to make agreements tailored to the parties' individualized circumstances and relationships."). In the view of the California Supreme Court, it was enough to say that there was a rational basis for the system as a whole: "We conclude that the MMC [provisions of the ALRA] [are] not facially invalid on equal protection grounds because the Legislature had a rational basis for enacting the [] statute to facilitate collective bargaining agreements…"

But as set forth in Section I, California does not have a legitimate state interest in compelling contractual agreements between non-consenting parties. As such, the opinion below failed to provide a legitimate explanation for why any specific business is to be targeted for "individualized" treatment. What is more, there can be no rational basis for individualized rulemaking proceedings in the legislature's cited goal of bettering working conditions for agricultural employees. Surely such concerns could justify *generally applicable regulation* tailored for the agricultural industry. But, generalized concerns justify only generalized regulation—not special directives targeted upon a

single employer. *See Lazy Ranch Ltd. v. Behrens*, 546 F.3d 580, 590 (9th Cir. 2008) (holding that although "administrative costs might be a valid reason to deny a bidder a lease, it simply does not offer a basis for treating conservationists different from other bidders."); *Genesis Envtl. Servs. v. San Joaquin Valley Unified Air Pollution Control Dist.*, 113 Cal.App.4th 597, 606 (2003) ("[I]f a rational classification is applied unevenly, the reason for singling out a particular person must be rational and not the product of intentional and arbitrary discrimination.").

There can be no mistake as to what this regime is intended to accomplish. The only reason that the ALRA's compulsory arbitration scheme addresses the "individualized circumstances" of a specific employer is that the subject business has yet to enter a collective bargaining agreement. But again, the right to withhold assent to a contract is protected by the Due Process Clause—if not other constitutional precepts.[5] And the Legislature's

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[5] In addition to raising serious First Amendment problems, a compulsory contract would also likely raise a problem under the Takings Clause in so far as a forcible contract should require one party to transfer personal property to another. *See Horne v. U.S. Dept. of Agriculture*, 135 S.Ct. 2419, 2425-26 (2015) (affirming that per se rules apply when the government appropriates money for public use); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2600 (2013) (clarifying that the Takings Clause applies where there is a "direct link between the government's demand and a specific … property."); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 540-544 (1998) (Kennedy J., concurring and dissenting in part) (suggesting that the Takings Clause is implicated where a government imposition "operate[s] upon or alters an identified property interest…").

finding that agricultural employees are somehow uniquely impotent in their capacity to effectively exert their interests in concerted action is beside the point because that line of argument improperly assumes that the State has the power to compel contracts to address that concern. Indeed, it cannot be that the State has a rational basis for forcing a business into an "individualized" rulemaking regime simply because the business has chosen to exercise its constitutional rights. *Cf. Thomas v. Collins*, 323 U.S. 516, 537 (1945) (recognizing that employers have a First Amendment right to oppose unionization); *Chamber of Commerce v. Brown*, 554 U.S. 60, 66-68 (2008) (same).

Finally, the fact that a labor union wishes to force a specific business to abide by heightened legal standards to advance its economic interests is an insufficient basis for imposing special legal requirements upon the targeted business. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir. 2013) (holding that regulation serving no purpose but "economic protectionism" or "favoritism" cannot survive rational basis review); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (2008); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). And it does not matter whether a business is (or is not) capable of paying higher wages or providing greater benefits. What matters is that the California Legislature has already weighed competing social and economic considerations in saying what wages are owed and in dictating working conditions as a matter of general law—including in imposing industry specific

standards.[6] As such, the question remains: Why should a labor union have the capacity to coerce a business into either "voluntarily" accepting heightened standards or having more burdensome standards forcibly imposed through compulsory arbitration?[7]

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[6] *See e.g.*, Jazmine Ullua and John Myers, In Historic Move, Gov. Jerry Brown expands overtime pay for California farmworkers, Los Angeles Times (Sep. 12, 2016), a*vailable* online at http://www.latimes.com/politics/la-pol-sac-farmworkers-overtime-signed-20160912-snap-story.html (last visited Apr. 25, 2018).

[7] The compulsory arbitration process is permissible only regarding agricultural employers who have engaged in unfair labor practices in the past. Cal. Lab. Code § 1164.11(b). But, this cannot serve as a rational basis for targeting select employers for individualized treatment because there is simply no nexus to the bargaining process in question. If conduct unrelated to the bargaining process can trigger compulsory arbitration and individualized treatment, the California Legislature might just as well have said that a Petitioning Union can target a business if the company conducts operations on even-numbered calendar days, or if the owner chews bubble-gum. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979) (explaining that there would be no rational basis in a case in which a regulation was imposed upon a targeted group [or individual] for a reason wholly unrelated to the achievement of a legitimate purpose). In this case the targeted business is said to have committed an unfair labor practice over a quarter-century ago, prior to UFW's certification as the exclusive representative of Gerawan's employees, and long before UFW reemerged from its (unexplained) decade-long absence to demand a collective bargaining agreement—ostensibly on behalf of employees who no longer want union representation.

b. The Decision Below Invites Special Interest Groups to Lobby for Individualized Legal Proscriptions

When government issues a directive that is only applicable to a single targeted business, there is a substantial likelihood that the law-giver has been captured by the interests of those parties standing to benefit from the directive. See Josh Blackman, *Equal Protection From Eminent Domain: Protecting the Home of Olech's Class of One*, 55 Loy. 697, 742 (2009) (discussing a case in which General Motors had "exerted a disproportionate… determinant influence upon the public policy process [to prompt a municipality to initiate eminent domain] [,]" and concluding that "GM had captured the political process."). To some extent, this is a risk with any legislative action; however, it is an especially great risk when a lone business may be singled-out as easy prey. Indeed, parties who are singled-out by government action "are less likely to influence the political process and hence more vulnerable to state action that benefits [other] private parties." *Id*. at 743-46 (arguing that meaningful "class of one" scrutiny is necessary to deter "rent seeking").

Yet in blessing the ALRA's system of individualized rulemaking proceedings, the opinion below invites politically powerful interest groups—labor unions, consumer groups, environmental organizations, and others—to push for adoption of similar compulsory arbitration regimes in the states or at the federal level. *Cf. NC State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015) (concerning anticompetitive conduct on the part of a governing board that had been captured by special interests).

Special interest groups stand to benefit from ad hoc individualized schemes because they can avoid unified resistance on the part of the broader regulated community when targeting select businesses for special obligations. Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 Am. U. J. Int'L. & Pol. 745, 748 (1995) (explaining that an organized interest group has an inherent advantage, and "can outcompete … less efficient groups in the market for political loyalty.").

Public choice theory tells us, that a special interest group will be willing to expend substantial resources in lobbying for a regulation that harms the economic interests of others, so long as it promises greater economic benefits than the amount expended in the process. Steven P. Croley, *Theories of Regulation: Incorporation the Administrative Process*, 98 Colum. L. Rev. 1, 35 (1998). Even when the adverse economic impacts of regulation are diffused among the entire population or a large class of individuals, the transactional costs associated with coordinating a successful opposition are usually prohibitive—meaning that special interest groups will often succeed in pushing for regulation to advance their economic interests, resulting in diffused economic harms to the public. Stephan, 10 Am. U. J. Int'L. & Pol'y at 750. But here, the risk of anti-democratic rent-seeking behavior is all the greater—and inherently more perverse—because the economic impacts are limited to individually targeted victims.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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