IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S227243

GERAWAN FARMING, INC.
Petitioner,
v.
AGRICULTURAL LABOR RELATIONS BOARD,
Respondent,
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest.

After an Opinion by the Court of Appeal,
Fifth Appellate District
(Case Nos. F068676 and F068526)

On Appeal from the Superior Court of Fresno County
(Case No. 13CECG01408, Honorable Donald S. Black, Judge)

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CATO INSTITUTE, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA FRESH FRUIT ASSOCIATION, WESTERN GROWERS ASSOCIATION, AND VENTURA COUNTY AGRICULTURAL ASSOCIATION IN SUPPORT OF PETITIONER GERAWAN FARMING, INC.

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rule of Court 8.520(f),[1] the National Federation of Independent Business Small Business Legal Center, Cato Institute, California Farm Bureau Federation, California Fresh Fruit Association, Western Growers Association, and Ventura County Agricultural Association respectfully apply to file the accompanying amicus curiae brief in support of Petitioner Gerawan Farming, Inc. The Proposed Amici are familiar with the parties' arguments. They believe that the attached brief will aid the Court in its consideration of the issues presented in this case. In particular, the brief provides useful background on the origins of and policies underlying the equal protection and non-delegation arguments discussed in the parties' briefs. This background supports the conclusion that the Mandatory Mediation and Conciliation Process is unconstitutional.

[1] The Proposed Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than the Proposed Amici, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

IDENTITIES AND INTERESTS OF PROPOSED AMICI CURIAE

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources. The Center serves as a voice for small business in the nation's courts through representation on issues of public interest affecting small business. To fulfill that role, the Center frequently files amicus briefs in cases that will affect the small business community. The Center seeks to file in this case because it raises an important issue for small business owners, especially in the agricultural industry: the constitutionality of a regime that targets select businesses for imposition of individualized regulation and burdens. Such a regime unfairly singles out a targeted company for imposition of heightened legal requirements—beyond those generally applicable—without any special justification. The Center filed an amicus brief in the court of appeal in support of Gerawan.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principle of limited constitutional government which is the foundation of liberty. To advance this end, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case is of interest to Cato because

it implicates the doctrines of equal protection and the separation of powers, both of which are critical to maintaining limited government.

California Farm Bureau Federation is a California non-governmental voluntary membership organization. Its members are 53 county Farm Bureaus representing farmers and ranchers in 56 California counties. Those 53 county Farm Bureaus have in total more than 53,000 members, including nearly 29,000 agricultural members. One of the Farm Bureau's purposes is to represent, protect, and advance the economic interests of California's farmers and ranchers. Many of these farmers and ranchers are considered agricultural employers under the state's Agricultural Labor Relations Act. They are or may become engaged in collective bargaining under the Act. Accordingly, labor law arbitration issues like those raised in this action are of direct interest to these Farm Bureau members. The Farm Bureau filed an amicus brief in the court of appeal in support of Gerawan.

The California Fresh Fruit Association is a voluntary public policy association that represents growers, packers, and shippers of California table grapes, blueberries, kiwi, pomegranate, and deciduous tree fruit. With origins dating to 1921, the Association currently represents by volume approximately 85% of 13 permanent fresh fruit commodities, valued at over $3 billion in the state. The Association serves as the primary public policy representative for these growers, shippers, and packers for the aforementioned commodities on

issues at both the state and federal levels, including matters pertaining to labor and employment disputes.

Founded in 1926, Western Growers Association is a trade association of California, Arizona, and Colorado farmers who grow, pack, and ship almost 50% of the nation's produce and a third of America's fresh organic produce. Its mission is to enhance the competitiveness and profitability of its members. With offices and dedicated staff in Washington, D.C., and Sacramento, California, Western Growers is the leading public policy advocate for the fresh produce industry and has a longstanding interest in employment and labor matters. The Association filed an amicus brief in the court of appeal in support of Gerawan.

The Ventura County Agricultural Association is a nonprofit agricultural trade association. Its membership consists of over 90% of the agricultural employers and farm labor contractors subject to the jurisdiction of the Agricultural Labor Relations Act in Ventura and Santa Barbara Counties. These businesses represent the entire spectrum of tree fruits, row crops, berries, nursery, and other agricultural commodities. Through its General Counsel, the Association has a long-standing history of representing its members in labor and employment matters, including arbitration issues, arising under the state's Agricultural Labor Relations Act. The Association filed an amicus brief in the court of appeal in support of Gerawan.

AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

Unique in the nation, California compels agricultural employers and their employees' unions to assent to collective bargaining agreements. *See* Philip B. Rosen & Richard I. Greenberg, *Constitutional Viability of the Employee Free Choice Act's Interest Arbitration Provision*, 26 Hofstra Lab. & Emp. L.J. 33, 51 (2008) (noting that California is the only state that has imposed binding interest arbitration on private employers and employees). Rather than being negotiated at arm's length, these agreements' terms are dictated to the parties by a "mediator."[2] *See* Jordan T.L. Halgas, *Reach an Agreement or Else: Mandatory Arbitration Under the California Agricultural Labor Relations Act*, 14 San Joaquin Agric. L. Rev. 1, 27 (2004) ("In effect, [California agricultural labor relations law] require[s] that the arbitrator become the 'master drafter' of the parties' collective bargaining agreement.").

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[2] The National Labor Relations Act does not apply to farm laborers. 29 U.S.C. § 152(3) (defining "employee" so as not to include "any individual employed as an agricultural laborer"). Farm laborer unions generally have accepted that exclusion because it allows them and their members to pursue secondary boycotts, an activity prohibited under federal law. *See* Jordan T.L. Halgas, *Reach an Agreement or Else: Mandatory Arbitration Under the California Agricultural Labor Relations Act*, 14 San Joaquin Agric. L. Rev. 1, 10-11 (2004). *Cf. Griffith Co. v. NLRB*, 545 F.2d 1194, 1199 (9th Cir. 1976) (describing prohibited "secondary boycotts" as "union pressure directed at a neutral employer the object of which (is) to induce or coerce him to cease doing business with an employer with whom the union (is) engaged in a labor dispute") (quoting *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 622 (1967)).

This compulsion is the result of the Mandatory Mediation and Conciliation Process ("Compulsion Regime"), Lab. Code §§ 1164-1164.13, "a legislative labyrinth that creates many more problems than it could ever solve." Halgas, *supra*, at 2.

Under the Compulsion Regime, the mediator "*may* consider those factors commonly considered in" labor arbitration when crafting the terms of a collective bargaining agreement that will be imposed on the parties. Lab. Code § 1164(e) (emphasis added). Such factors include the financial condition of the employer, industry-standard wages and benefits, and the collective bargaining agreements reached by other parties. *See id*. § 1164(e)(1)-(5). But the Compulsion Regime does not *require* the mediator to consider—much less be bound by—any factor.[3] *See id*. It does not explain how much weight should be assigned to any factor. *See id*. It contains no standard or goal toward which the mediator should aim. *See id*. § 1164(e) (directing merely that certain factors may be considered "[i]n resolving the issues in dispute"). Rather, the Compulsion Regime grants the mediator nearly unlimited discretion to compel the parties' assent to whatever terms the mediator wishes. It gives no assurance that the collective bargaining agreements that result will

[3] *But see Hess Collection Winery v. Cal. Agric. Labor Relations Bd.*, 140 Cal. App. 4th 1584, 1606-08 (2006) (relying on the canon of constitutional avoidance to construe the Compulsion Regime to require that mediator consider the listed factors).

treat similarly situated agricultural employers in like manner.[4] *See id*. § 1164.3(a)(1)-(3), (e) (limiting the labor board's review of a mediator's decision to relevance to employment conditions, clearly erroneous factual findings, arbitrary and capricious conclusions, corruption, fraud, and misconduct); *id*. § 1164.5(b) (substantially circumscribing judicial review of labor board review of the mediator's decision).

The Compulsion Regime is unconstitutional, for two reasons. First, it imposes mini-labor codes to govern the relations of individual employers and their employees' unions. It does not provide any safeguard to ensure that similarly situated employers or unions will be treated similarly. It allows mediators to wield legislative authority irrationally and arbitrarily. It therefore denies affected parties the equal protection of the laws, in violation of the United States and California Constitutions. Second, the Compulsion Regime delegates substantial legislative authority to private-party mediators. It does not provide these mediators with any goal or purpose that they must achieve in drafting collective bargaining agreements. It does not give them any

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[4] The Compulsion Regime's major proponents were the unions. *See* Halgas, *supra*, at 9 ("[T]he UFW was the major supporter of the Mandatory Arbitration Bills . . . ."). *Cf. id*. at 22 ("Growers responded that the UFW backed the passage of the Bills as a way to beg politicians for union contracts that it (was) too weak to win on its own." (internal quotation marks omitted)). They supported the Regime because, under California labor law, they would retain their right to strike and to engage in secondary activity. *See id*. at 33. In public employment, where binding interest arbitration is more common, the rights to strike and to engage in secondary activity are usually given up in exchange for binding interest arbitration. *See id*.

standard or rule by which to achieve any goal or purpose. It fails to establish any adequate safeguards against the abusive exercise of the power delegated. The Compulsion Regime therefore violates the non-delegation doctrine and the separation of powers.

The judgment of the court of appeal should be affirmed.

ARGUMENT

I

THE COMPULSION REGIME VIOLATES EQUAL PROTECTION

A. Government May Not Invidiously or Irrationally Target Individual Persons or Businesses

The federal and California Constitutions guarantee to all persons the "equal protection of the laws." *See* U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7(a). Equal protection of the laws means that the government must treat similarly situated individuals in the same manner. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). This constitutional right forbids class legislation based on invidious criteria. *See Harris v. McRae*, 448 U.S. 297, 322 (1980). It also prohibits the arbitrary burdening of individuals as individuals, *i.e.*, as a "class of one." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). Unconstitutional "class of one" regulation occurs when: (i) the government treats a person or business differently from other similarly situated persons; (ii) the differential treatment is intentional;

and (iii) the differential treatment lacks any rational basis. *Id*. *See* William D. Araiza, *Flunking the Class-Of-One/Failing Equal Protection*, 55 Wm. & Mary L. Rev. 435, 455 (2013) (explaining that, in class of one claims, "the plaintiff is singled out as an individual, not as a member of a racial or other group").

B. The Compulsion Regime Irrationally Targets Individual Agricultural Employers

The Compulsion Regime cannot be reconciled with the Equal Protection Clause's prohibition on arbitrary individualized regulation. The Regime dictates that each agricultural employer that cannot come to an agreement with its employees' union must be made subject, at the union's instigation, to a collective bargaining agreement drafted by the mediator. Lab. Code § 1164(a)-(b). This "agreement" operates as individualized labor legislation. It governs wages, hours, and all other significant employment issues between the employer and its employees. But the Regime contains no standards or other means to ensure that similarly situated employers within the class of those employers made subject to it will be treated in like manner. It merely directs that the mediator "*may* consider" various factors in "resolving the issues in dispute." Lab. Code § 1164(e) (emphasis added); Cal. Code Regs. tit. 8, § 20407(b) ("In determining the issues in dispute, the mediator *may* consider those factors commonly applied in similar proceedings . . . ." (emphasis added)). The Compulsion Regime does not even mandate that the mediator consider, for example, "collective bargaining agreements covering

similar agricultural operations with similar labor requirements." Lab. Code § 1164(e)(3). Moreover, even if the mediator were required to take any factors into account when drafting collective bargaining agreements, the Compulsion Regime allows the mediator complete freedom to assign whatever weight—or none at all—to any factor.[5] *Cf*. Lab. Code § 1164(e).

It is irrelevant that the Regime seeks to vindicate the state's legitimate interest in resolving agricultural labor disputes. The "class of one" doctrine requires that the government articulate a rational basis for the *manner* of regulation, *i.e.*, regulating on an individual rather than a broader basis. *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."); *Gerhart v. Lake County*, 637 F.3d 1013, 1023 (9th Cir. 2011) ("[T]he rational basis prong of a 'class of one' claim turns on whether there is a rational basis for the *distinction*, rather than the underlying government *action*."). *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590 (9th Cir. 2008) ("[Although]

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[5] Hence, merely mandating the consideration of certain factors still would not guarantee that similarly situated employers would be subject to similar agreement terms. *See Hess*, 140 Cal. App. 4th at 1616-17 (Nicholson, J., dissenting) ("[T]he discrimination is arbitrary because there are no standards set forth pursuant to which the mediator's decision in this case will be the same as a mediator's decision in any other case under Labor Code section 1164 and the related statutes.").

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."). That any given collective bargaining agreement may turn out to be rational cannot justify the irrational targeting which produced it.

The Compulsion Regime establishes a framework whereby otherwise similarly situated agricultural employers are subject to arbitrarily varying labor regulations. *See* Halgas, *supra*, at 31 (noting that the "arbitrator, who will not likely have any special economic expertise, will set the economic terms of a contract at a rate . . . which could [be] higher than the employer can actually pay"). *Cf. People v. Rhodes*, 126 Cal. App. 4th 1374, 1383 (2005) ("Under the equal protection clause, [a] classification must be reasonable, not arbitrary . . . ." (internal quotation marks omitted)). The Regime does not comport with the equal protection of the laws.

C. As a Quasi-Legislative Creation, the Compulsion Regime Is Subject to the Constitutional Prohibitions on Irrational Government Targeting

Some types of discretionary and individualized government decision-making are not subject to "class of one" analysis. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 603-05 (2008) (discretionary government employment decisions); *Squires v. City of Eureka*, 231 Cal. App. 4th 577, 595 (2014) (discretionary enforcement of land-use ordinances); *Las Lomas Land Co., LLC v. City of Los Angeles*, 177 Cal. App. 4th 837, 860 (2009) (discretionary land-

use entitlement decision-making). The Compulsion Regime directs the discretionary exercise of government power on an individualized basis. Thus, at first blush, the Regime seems akin to the "discretionary decisionmaking based on a vast array of subjective, individualized assessments" that is exempt from "class of one" review. *Engquist*, 553 U.S. at 603.

There is, however, a critical difference between (i) the kinds of government decision-making that have been exempted from "class of one" review and (ii) what the mediator does pursuant to the Compulsion Regime. The former are analogous to *executive* or *quasi-adjudicative* decision-making.[6] In contrast, the Regime authorizes mediators to exercise *quasi-legislative* power. *Hess*, 140 Cal. App. 4th at 1597-98 (majority op.). No class of legislative activity has ever been entirely exempted from equal protection review. *See* Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 Minn. L. Rev. 1, 3 (1980) (noting that the "rational basis" test is "the standard that all legislation must meet to survive constitutional attack . . . under the . . . equal protection clause."). Therefore, the *Engquist* line of cases should have no bearing on the constitutionality of the individualized but nonetheless quasi-legislative agreements which result from the Compulsion Regime.

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[6] Part of the challenged decision in *Las Lomas* concerned rezoning, *Las Lomas*, 177 Cal. App. 4th at 843, which is a quasi-legislative act, *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 516 (1980). But the core of the dispute in *Las Lomas* was about a proposed major subdivision, *see Las Lomas*, 177 Cal. App. 4th at 843, approval of which is a quasi-adjudicative act, *see Calvert v. County of Yuba*, 145 Cal. App. 4th 613, 622 (2006).

D. Judicial Review of Irrational, Quasi-Legislative Targeting Is Essential to Fight Back Against Agency Capture and to Smoke Out Biased Decision-Making

For policy reasons as well, maintaining "class of one" review for individualized legislative action—notwithstanding its slight similarity to other individualized forms of government power—makes sense. To exclude any exercise of legislative power from rational basis equal protection review, on the ground that the power is exercised on an individual basis, would threaten the fundamental principle that the "government [must] always act pursuant to a public purpose." Araiza, *supra*, at 460. Superficially inoffensive classifications may in reality reflect officials' own personal interests or those of private parties. *See id*. at 461. Hence, "class of one" review is essential to mitigate the effects of the private "capture" of legislative authority. *Cf.* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1, 5 (1998) (explaining that capture occurs when "agencies deliver regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public"). Notably, the risks of such capture under the Compulsion Regime are especially strong because one party—the union—is a regular player in mediation disputes. *Cf.* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 22 (2010) ("[T]he comparative overrepresentation of regulated or client interests in the process

of agency decision results in a persistent policy bias in favor of these interests." (quoting Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1713 (1975))).

Additionally, "class of one" review of all legislative classifications helps to smoke out improper motivations. *See Cleburne*, 473 U.S. at 446 (under equal protection rational basis review, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational," or simply reflects "a bare . . . desire to harm a politically unpopular group" (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))). Without such salutary review, an enterprising legislature or government official exercising quasi-legislative power could classify irrationally, arbitrarily, or even with animus, so long as the burdensome classifications were issued on a per-person basis.[7]

The Compulsion Regime presents a substantial risk of arbitrary action. The mediator "hold[s] [the agricultural employer], and no other agricultural employer, to the terms of a private legislator's decision," yet is bound by "no

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[7] The absence of such review would be especially pernicious given that the Bill of Attainder Clauses of the United States and California Constitutions, *see* U.S. Const. art. I, § 9, cl. 3; Cal. Const. art. I, § 9—which limit the Legislature's ability to regulate on an individual basis—typically apply only to formally "punitive" action. *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 472-73 (1977); *Law Sch. Admission Council, Inc. v. State*, 222 Cal. App. 4th 1265, 1298-99 (2014). *See also Nixon*, 433 U.S. at 471 ("However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine . . . .").

standards" to ensure consistency among the agreements. *Hess*, 140 Cal. App. 4th at 1616-17 (Nicholson, J., dissenting). A mediator could require one employer to provide high wages and substantial medical benefits, but could compel another, similarly situated, employer to provide substantially lower wages and benefits. The only "reason" for the differing treatment would be the mediator's inscrutable (and possibly malign) judgment based on the weighing of unlimited factors. Maintaining "class of one" review for legislative and quasi-legislative action therefore helps to prevent such abuses of government power.

E. Judicial Review of Irrational, Quasi-Legislative Targeting Ensures That All Groups in Society Have a Meaningful Opportunity to Participate in the Laws and Regulations That Govern Them

Judicial review of individualized legislative and quasi-legislative action also serves the goal of "representation reinforcement," *i.e.*, the protection of "those groups in society to whose needs and wishes elected officials have no apparent interest in attending." Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of* Olech*'s Class of One*, 55 Loy. L. Rev. 697, 742 (2009) (quoting John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 151 (1980)). The principle of representation reinforcement acknowledges that the Legislature rarely is interested in rectifying an injustice done to one regulated individual, as opposed to groups of such individuals. *See* Jonathan R. Macey, *Promoting Public-Regarding*

Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 231-32 (1986) ("[T]he laws that are enacted will tend to benefit whichever small, cohesive special interest groups lobby most effectively."). After all, it is "[r]esponsiveness to *broad* constituencies," rather than to individual citizens' complaints, that "is an important aspect of representation," Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873, 889 (1987) (emphasis added). Representation reinforcement seeks to remedy that inadequacy.

The Compulsion Regime thwarts such reinforcement. Because the Compulsion Regime results in individualized legislation, employers who are unfairly burdened by it cannot readily band together with other employers to lobby the Board or the Legislature for redress. Their problem is that each is in a "class of one" with, by definition, discrete and different (and likely incommensurable) grievances. Even if that were not the case, targeted employers still might forego any protest and quietly accept otherwise objectionable terms. They reasonably would fear being made subject to worse terms imposed in retaliation. *See* Jesse Molina, Comment, *Broken Promises, Broken Process: Repairing the Mandatory Mediation Conciliation Process in Agricultural Labor Disputes*, 21 San Joaquin Agric. L. Rev. 179, 198 (2012) ("In the [mandatory mediation and conciliation] framework even if both parties participate, a union or grower can feel pressured to accept a collective bargaining term in fear that the mediator may impose a term on them, which

greatly inhibits the parties' freedom to bargain and negotiate."). They also might fail to object because they lack the substantial resources necessary to litigate the matter through the administrative and judicial appeal process.

Hence, the only realistic and meaningful remedy for such grievances—one that ensures that all segments of society have a voice in self-government—is the "class of one" review that the Equal Protection Clause guarantees. Under that review, the Compulsion Regime must fall.

II

THE COMPULSION REGIME VIOLATES THE NON-DELEGATION DOCTRINE

A. The Legislature May Not Delegate the Resolution of Fundamental Policy Issues

The California Constitution vests the legislative power of the state in the Legislature. Cal. Const. art. IV, § 1. Although the judiciary has interpreted this vesting so as not to prohibit all delegations, it nevertheless has imposed important limitations.[8] *See generally Kugler v. Yocum*, 69 Cal. 2d 371, 375 (1968) ("[T]he doctrine prohibiting delegation of legislative power

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[8] The doctrine can be traced at least as far back as John Locke. *See* John Locke, *The Second Treatise of Government*, *in Two Treatises of Government* 265, § 141 at 363 (Peter Laslett, ed. Cambridge 1988). ("[Power] being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands."), *quoted in* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297, 1297 (2003).

. . . is well established in California."). Specifically, the Legislature may not "(1) leave[] the resolution of fundamental policy issues to others or (2) fail[] to provide adequate direction for the implementation of that policy." *Carson Mobilehome Park Owners' Ass'n v. City of Carson*, 35 Cal. 3d 184, 190 (1983). Both limitations must be observed to avoid an unconstitutional delegation. *See Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 169 (1976).

The first limitation imposes upon the Legislature the duty to "effectively resolve the truly fundamental issues." *Kugler*, 69 Cal. 2d at 376. The second limitation imposes the duty "to establish an effective mechanism to assure the proper implementation of its policy decisions." *Id*. at 376-77. Such "proper implementation" may be achieved through the legislative setting of channeling standards. *See id*. at 375-76. It also may be achieved by establishing adequate "safeguards," such as vigorous judicial review. *See id*. at 381-82. *See also* Jennifer Holman, *Re-Regulation at the CPUC and California's Non-Delegation Doctrine: Did the CPUC Impermissibly Convey Its Power to Interested Parties?*, 20 Environs 58, 61 (June 1997) ("[T]he availability of judicial review is . . . commonly cited as one of the most important and effective safeguards."). Either way, the reason for requiring standards or safeguards is that, in their absence, "effective review of the exercise of the delegated power [is] impossible." *Blumenthal v. Bd. of Med. Exam'rs*, 57 Cal. 2d 228, 236 (1962).

B. Vigorous Enforcement of the Non-Delegation Doctrine Prevents Dangerous Concentrations of Power and Thereby Protects Important Democratic Values of Accountability and Public Deliberation

Because the non-delegation doctrine is a corollary of the principle of the separation of powers, its enforcement helps to prevent dangerous concentrations of power. *See* Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 Ga. L. Rev. 117, 125-26 (2011) ("[T]he nondelegation doctrine should be viewed primarily as an expression of the . . . commitment to republican liberty."). *See also* Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 Am. U. L. Rev. 295, 296 (1987) ("[T]he delegation of broad and undefined discretionary power from the legislature to the executive branch deranges virtually all constitutional relationships and prevents attainment of the constitutional goals of limitation on power, substantive calculability, and procedural calculability.").

But just as important for this case, the doctrine also protects democratic values of accountability and public deliberation. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (observing that the doctrine serves the "important function[]" of ensuring that "important choices of social policy are made by [the legislature], the branch of our Government most responsive to the popular will"). The doctrine helps to "ensur[e] a deliberative democracy" by encouraging

"accountability [as well as] reflectiveness." Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 336 (1999). It promotes "public accountability" by requiring the Legislature "to make specific decisions, thereby incorporating the views of the public." C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 Tex. Rev. L. & Pol. 1, 21 (2000). These protections are fundamental to a free society. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) ("Liberty requires accountability.").

C. Vigorous Enforcement of the Non-Delegation Doctrine Thwarts the Anti-Democratic Dangers of Rent-Seeking

By precluding the Legislature from passing off difficult issues, the doctrine also protects against the rent-seeking[9] dangers of unfettered delegation. Such protection is critical, for "[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences." *Dep't of Transp.*, 135 S. Ct. at 1234 (Alito, J., concurring). That temptation is strong because "delegation enables individual legislators to reduce the political costs of policies that injure relatively uninterested voters, without losing credit for benefits bestowed on those interest groups intensely

[9] "Broadly speaking, [r]ent seeking is the socially costly pursuit of wealth transfers." Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 Stan L. Rev. 191, 228 (2012) (internal quotation marks omitted).

enough motivated to trace the chain of power." Donald A. Dripps, *Delegation and Due Process*, 1988 Duke L.J. 657, 668. Thus, the need for the doctrine's protection is particularly acute where, as here, the attempted delegation is to private parties. *See Hess*, 140 Cal. App. 4th at 1608 (acknowledging that "the mediator is a private person rather than a publicly accountable official"). For in that instance, the government "ce[des] power to unelected and politically unaccountable persons who have every incentive to exercise the delegated power for their own ends." Calvin R. Massey, *The Non-Delegation Doctrine and Private Parties*, 17 Green Bag 2d 157, 167 (2014).

D. The Compulsion Regime Violates the Non-Delegation Doctrine

1. The Legislature Failed to Resolve the Fundamental Issues of Agricultural Labor Disputes

The Compulsion Regime violates the non-delegation doctrine as well as the democratic values that animate it because the Legislature has not resolved the fundamental policy questions of agricultural labor disputes. How high should wages be? What should the employer's profit margin be? How and when is time off to be made available? The Compulsion Regime is silent as to all of these issues.[10] It provides no direction as to how they should be

[10] The Legislature certainly knows how to set broadly applicable worker protections. *See, e.g.*, Lab. Code § 204 (rules for when and how workers are to be paid); *id*. §§ 510-512 (rules for the length of the workday and meal periods); *id*. § 1182.12 (minimum wage for all industries).

resolved.[11] Instead, it merely establishes *a forum* for their binding resolution. Such discretion cannot be squared with the non-delegation doctrine. *See Int'l Union v. Occupational Safety & Health Admin.*, 938 F.2d 1310, 1317 (D.C. Cir. 1991) (allowing an agency to regulate "to the verge of economic ruin" or "to do nothing at all" would "raise a serious nondelegation issue"), *discussed in* Cass R. Sunstein, *Is OSHA Unconstitutional*, 94 Va. L. Rev. 1407, 1417-20 (2008). *Cf. Coastside Fishing Club v. Cal. Resources Agency*, 158 Cal. App. 4th 1183, 1209 (2008) (holding as sufficiently elaborated a legislative grant requiring a plan to serve six specified goals and to contain five specified elements).

To be sure, "[w]hen the Legislature delegates its power, standards may be implied by the statutory purpose to avoid arbitrary action." *City of Glendale v. Marcus Cable Assocs., LLC*, 231 Cal. App. 4th 1359, 1380 (2014). In enacting the Regime, the Legislature declared its purpose to be to "ensure

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[11] In *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 201 (1981), this Court rejected a non-delegation challenge to the State Employer-Employee Relations Act, which allows the Governor to collectively bargain with state employee unions regarding wages, hours, and other conditions of employment. Permitting the head of the executive branch to negotiate with employees of executive branch agencies is a substantially less dramatic delegation than that contained in the Compulsion Regime. In *Birkenfeld*, this Court rejected a non-delegation challenge to a municipal charter amendment governing adjustments for maximum rents. 17 Cal. 3d at 168. This Court reasoned that the amendment's delegation of power was sufficiently constrained by a list of nonexclusive factors combined with a clear statement of purpose. *Id.* In contrast, here the Compulsion Regime is not limited to the narrow legislative matter of setting wages but instead extends to all issues relating to employment.

a more effective collective bargaining process between agricultural employers and agricultural employees." Cal. Stats. 2002, ch. 1145, § 1, at 7401. That in turn would "ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California's economic well-being by ensuring stability in its most vital industry." *Id*.

These legislative declarations mean simply that the Compulsion Regime's purpose is to do good for the agricultural industry. Such a bland and broad assertion cannot resolve the fundamental policy questions over how best to achieve that end. Although the Legislature generally may delegate the "attainment of the ends" of its policy, *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1146 (1999), accepting as adequate a very broad articulation of policy would eviscerate the non-delegation doctrine. Laws are supposed to serve the common good, *see Massingill v. Dep't of Food & Agric.*, 102 Cal. App. 4th 498, 504 (2002) (noting the "power of the state to [enact] reasonable regulation for the general welfare") (quoting 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 784, p. 311), but the Legislature could not constitutionally delegate to an agency the power to regulate "as you think best for the People." *See People v. Williams*, 175 Cal. App. 3d Supp. 16, 23 (1985) ("The power . . . to determine the general purpose or policy to be achieved by the law and to fix the limits of its operation cannot be delegated."). *See also* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 372-73

(2002) ("The act of legislation is not completed simply by announcing an ambition; . . . the legislature [must] specify how and to what extent those ambitions should be realized."), *summarizing* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1227 (1985); Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407, 1407 (2008) (observing that a statute directing an agency to "Do what you believe is best" would violate the nondelegation doctrine). Thus, the Compulsion Regime does not resolve the fundamental issues of agricultural labor disputes.[12]

2. The Compulsion Regime Lacks Meaningful Safeguards

The Compulsion Regime also lacks effective safeguards. The Board's review of the mediator's decision, and the court of appeal's review of the Board's decision—essentially "arbitrary and capricious" or "abuse of discretion" review, *see* Lab. Code §§ 1164.3(a), 1164.5(b)—is extremely deferential.[13] This absence of meaningful standards undercuts even the

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[12] For the same reasons articulated in this section, the Compulsion Regime lacks standards to channel the delegation of legislative power. *Cf. Kugler*, 69 Cal. 2d at 375-76 ("[L]egislative power may properly be delegated if channeled by a sufficient standard.").

[13] Notably, even the Board itself is powerless to review uncontested issues. *See* Lab. Code § 1164.3(b) (the Board must order as final those provisions of the mediator's report not petitioned for review). Thus, a union that does not adequately represent its workers could agree to employment terms odious to those workers. The Compulsion Regime leaves them without recourse.

minimal review authorized by statute. *Cf.* Schoenbrod, *supra*, at 1239 ("A statute that fails to make key choices reflects little in the way of legislative will and so will allow a wide range of 'lawful' agency activity.").

Adequate safeguards could include statutory backstops, multiple layers of de novo review, and notification procedures to allow the Legislature to redress unjust applications.[14] The Regime affords none of these protections: the mediator has no backstop to the terms he may impose; his decision is not subject to de novo review; his assembling of the record is not subject to the Evidence Code[15]; and his decisions take effect without any lengthy notice period. In short, the Regime provides no safeguard to ensure that individual

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[14] *See Duarte Nursery, Inc. v. Cal. Grape Rootstock Improvement Comm'n*, 239 Cal. App. 4th 1000, 1019 (2015) (finding adequate safeguards where an agency's oversight included the power to order the delegate "to cease or correct any acts not in the public interest" and where the delegate's discretion was limited by maximum assessment rates); *Golightly v. Molina*, 229 Cal. App. 4th 1501, 1517-18 (2014) (finding adequate safeguards where an agency's oversight included multiple layers of presumably de novo review coupled with spending caps); *Sturgeon v. County of Los Angeles*, 191 Cal. App. 4th 344, 354 (2010) (finding adequate safeguards where an agency was required to report inconsistencies to the Legislature and where adverse action had to be preceded by a lengthy notice period, which would allow the Legislature to rectify any inappropriate action).

[15] For example, on-the-record discussions before the mediator are exempt from the Evidence Code's confidentiality provisions governing mediation. *See* Cal. Code Regs. tit. 8, § 20407(a)(2); Molina, *supra*, at 194-95. Interestingly, employees are *forbidden* to attend even on-the-record portions of the mediation. *See Gerawan Farming, Inc. v. United Farmworkers of Am.*, 39 ALRB No. 13, at 10 (Aug. 21, 2013) ("[W]e do not think the public interest in the process of reaching an agreement as to the terms of a collective bargaining agreement is served by public presence during that process.").

agricultural employers will be treated fairly and consistently. *See* Molina, *supra*, at 204 ("[T]he [Process] violates the ethical mandates of the California Rules of Court, American Bar Association, Model Standards for Mediators, and the Arbitrator Code.").

3. Invalidating the Compulsion Regime Would Vindicate the Key Democratic Values Undergirding the Non-Delegation Doctrine

Overturning the Compulsion Regime would serve the purposes underlying the non-delegation doctrine. Demanding that the Legislature establish the basic contours of collective bargaining agreements would signal to the public what their representatives believe is most important in the agricultural employer-employee relationship. That signaling would enable the electorate to hold legislators accountable for their choices, *see* Martin H. Redish, *The Constitution as Political Structure* 136-37 (1995) ("[A]ccountability for lawmakers constitutes the sine qua non of a representative democracy."), *quoted in* Lawson, *supra*, at 374, rather than letting them pass off the difficult decisions to others, *see* Cynthia R. Farina, *Deconstructing Nondelegation*, 33 Harv. J.L. & Pub. Pol'y 87, 95 (2010) ("Lawyers and political scientists alike have charged that delegation enables the legislature to punt the really tough policy choices."). It also would

guarantee that the liberty of contract otherwise enjoyed by employers and employees would not be abridged "unless diverse members of [the Legislature] have been able to agree on a particular form of words." Sunstein, *supra*, at 336. That is "an important safeguard of freedom." *Id*. *See Dep't of Transp.*, 135 S. Ct. at 1237 (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty."). Finally, it would serve the doctrine's purpose of "avoiding or minimizing unchecked power," *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 362 (1989), by requiring that mediators' drafting discretion be circumscribed by meaningful standards and goals. Overturning the Regime would therefore serve the public's interest in a free and open democracy as much as it would the business interests of agricultural employers and employees.

CONCLUSION

The Compulsion Regime creates an unfair system whereby agricultural employers can be made subject to irrational and arbitrary labor regulation. Through its unchecked grant of legislative power to private mediators, the Regime threatens fundamental republican and democratic values of separation of powers and accountability. The Regime is unconstitutional.

The judgment of the court of appeal should be affirmed.

DATED: May 16, 2016.

Respectfully submitted,

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By 
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Association, Western Growers
Association, and Ventura County
Agricultural Association

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CATO INSTITUTE, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA FRESH FRUIT ASSOCIATION, WESTERN GROWERS ASSOCIATION, AND VENTURA COUNTY AGRICULTURAL ASSOCIATION IN SUPPORT OF PETITIONER GERAWAN FARMING, INC., is proportionately spaced, has a typeface of 13 points or more, and contains 6,592 words.

DATED: May 16, 2016.

DAMIEN M. SCHIFF

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On May 16, 2016, true copies of APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CATO INSTITUTE, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA FRESH FRUIT ASSOCIATION, WESTERN GROWERS ASSOCIATION, AND VENTURA COUNTY AGRICULTURAL ASSOCIATION IN SUPPORT OF PETITIONER GERAWAN FARMING, INC. were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 16th day of May, 2016, at Sacramento, California.

TAWNDA ELLING