No. 16-16236

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOWLER PACKING COMPANY, INC.
and GERAWAN FARMING, INC.,

Plaintiffs-Appellants,

v.

DAVID M. LANIER, in his official capacity as Secretary
of the California Labor and Workforce Development Agency, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Honorable Dale A. Drozd, District Judge

BRIEF AMICUS CURIAE OF WESTERN GROWERS, CALIFORNIA FRESH FRUIT ASSOCIATION, AFRICAN-AMERICAN FARMERS OF CALIFORNIA, CALIFORNIA FARM BUREAU FEDERATION, FRESNO COUNTY FARM BUREAU, AND NISEI FARMERS LEAGUE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae California Fresh Fruit Association, Western Growers, the African-American Farmers of California, California Farm Bureau Federation, the Fresno County Farm Bureau, and the Nisei Farmers League state that they have no parent corporations and that no publicly held corporation owns 10% or more of the stock of any of them.

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IDENTITY AND INTERESTS OF AMICI CURIAE

Founded in 1926, Western Growers is a trade association of California, Arizona, and Colorado farmers who grow, pack, and ship almost 50% of our 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 California Fresh Fruit Association (CFFA) is a voluntary public policy association that represents growers, packers, and shippers of California table grapes, blueberries, kiwis, pomegranates, and deciduous tree fruits. The origins of CFFA go back to 1921 and it currently represents, by volume, approximately 85% of 13 permanent fresh fruit commodities valued at over $3 billion in the state. CFFA serves as the primary public policy representative for these growers, shippers, and packers for the aforementioned commodities at the state and federal levels.

The African-American Farmers of California (AAFC) is an organization of 75 farmers with the objective of ensuring that future generations of African-Americans continue in the farming profession. AAFC endeavors to reintroduce Southern

specialty crops, which are a part of the traditional African-American diet, into black communities to help prevent obesity and diabetes.

California Farm Bureau Federation is a non-governmental voluntary membership organization incorporated under and governed by the California Nonprofit Mutual Benefit Corporation Law (Cal. Corp. Code, § 7110, et seq.). 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 its purposes is to represent, protect, and advance the economic interests of California's farmers and ranchers.

The Fresno County Farm Bureau (FCFB) is a nonprofit organization founded in 1917 to promote and protect agriculture. FCFB's vision is to lead the industry and the community in addressing issues that result in long-term economic viability for agriculture and promoting the economic vitality of the region. FCFB is a part of a grassroots, nationwide network of farm bureaus organized on county, state, and national levels. The county farm bureau is the center of the organization. It is here that members join by payment of nominal annual dues, which entitles them to the wide range of services and benefits of membership. One of the 53 county farm

bureaus in California, FCFB represents over 3,000 Fresno County agricultural employers.

The Nisei Farmers League (League) was organized in 1970. The League is a non-profit California corporation that is a grower-driven organization dedicated to protecting the rights and livelihoods of farmers and farmworkers. The League educates its members about labor, immigration, housing, transportation, water, regulations, farmworker safety, and other issues affecting them in their communities.

Assembly Bill 1513, and legislation like it, is tremendously important to Amici and their members. As explained below, AB 1513 provided much-needed relief to California business, which were threatened with crippling liability after California courts interpreted the state's minimum wage laws in unexpected ways. Yet, to appease a politically powerful union, the California Legislature targeted Fowler Packing Company and Gerawan Farming by denying those businesses the opportunity to obtain that relief. Although Amici are not the focus of this particular legislation, they are concerned that they too will one day be on the wrong side of a legislature that finds it expedient to "assume the mantle of a judge or, worse still, a lynch mob." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 480 (1977). Amici believe that this

brief will provide the Court with a unique perspective on the underlying rationale of the prohibition against bills of attainder.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Legislature enacted Assembly Bill 1513 (adding Section 226.2 to the California Labor Code) to shield businesses from unforeseen liability after courts interpreted, in an unexpected manner, California's minimum wage law and its application to piece-rate compensation. In *Gonzalez v. Downtown LA Motors LP*, 215 Cal. App. 4th 36, 50 (2013), and *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864, 872 (2013), the California courts of appeal held that the state's minimum wage law requires piece-rate employers to compensate workers for nonproductive time, such as time spent waiting for work. AB 1513 addressed the unforeseen consequences of these decisions by creating a "safe harbor," which allows businesses to avoid statutory damages if they promptly pay back some wages in accordance with *Gonzalez* and *Bluford*. *See* Cal. Lab. Code § 226.2. To secure the support of the United Farm Workers (the union) for the bill, the Legislature excluded Fowler Packing Company and Gerawan Farming from this safe harbor. Appellants' Excerpts

[1] Appellants are members of some of the amici. Nevertheless, no party authored this brief in whole or in part. No person or entity, other than amici and their counsel, made a monetary contribution to the preparation or submission of this brief. Appellants consented to the filing of this brief. Because Appellees refused consent, this brief is accompanied by a Motion for Leave to File.

of Record, Volume 1 of 2 (ER) at 28. *Fowler Packing Company, Inc. v. Lanier,* No. 16-16236 (9th Cir. Oct. 25, 2016).[2]

AB 1513's carve-outs violate the United States Constitution's Bill of Attainder Clause, which is designed to prevent legislatures from determining guilt and inflicting punishment upon individuals without a judicial trial.[3] *See Nixon*, 433 U.S. at 468. The Clause reflects "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States v. Brown*, 381 U.S. 437, 445 (1965). Alexander Hamilton, for example, expressed concern that bills of attainder would substitute "a new and arbitrary mode of prosecution" for an "ancient and highly esteemed one, recognized by laws and the constitution." Alexander Hamilton, *A Second Letter from Phocion* (1784), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON 530, 544 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (spelling modernized). James Madison echoed this concern, noting that legislative interferences with private rights "were evils which had more

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[2] The carve-outs are codified as California Labor Code §§ 226.2(g)(2) and 226.2(g)(5).

[3] The United States Constitution prohibits bills of attainder in two places. Article I, § 9, clause 3 prohibits Congress from enacting bills of attainder. Because this case concerns state legislation, references to the Clause are to Article I, § 10, clause 1, which prohibits state legislatures from enacting bills of attainder.

perhaps than anything else, produced" the Constitutional Convention. 1 *The Records of the Federal Convention of 1787*, at 134 (Max Farrand ed., 1911) (Madison).

Accordingly, the Framers enacted the Bill of Attainder Clause as one of the many structural devices ensuring the separation of powers, which in turn protects individual liberty. *Brown*, 381 U.S. at 442 ("[T]he Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers."); *see also* Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 Wis. L. Rev. 1203, 1237-40 (2010) (the prohibition against bills of attainder, like other clauses ensuring the separation of powers, ensures individual liberty). The Clause ensures that the power to inflict punishment rests firmly with the judiciary, rather than the legislature. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.,) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals [is] the duty of other departments.").

A law violates the Bill of Attainder Clause if it (1) singles out particular parties and (2) imposes punishment on those parties without trial. *SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002) (citing *Nixon*, 433 U.S. at 425). Appellees David Lanier, et al. (the state), have not disputed that

AB 1513 impermissibly singles out Fowler and Gerawan. ER 35.[4] This amicus brief therefore focuses on whether the AB 1513 inflicts punishment upon Fowler and Gerawan. *See SeaRiver*, 309 F.3d at 668.

To determine whether a statute imposes punishment, courts consider "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984). A statute need not fit all three factors to satisfy the bill of attainder test for punishment. *Consolidated Edison Co. of New York, Inc. v. Pataki*, 292 F.3d 338, 350 (2d Cir. 2002). Rather, the factors are weighed together. *Id.* Applying this test, the district court held that AB 1513's carve-outs "are not punitive and do not constitute unconstitutional bills of attainder." ER 36. Yet proper application of the

[4] Although this Court may, in its discretion, affirm the district court's dismissal on any ground supported by the record, *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011), that discretion only "extends to issues raised in a manner providing the district court [with] an opportunity to rule on it." *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 974 (9th Cir. 2010) (refusing to consider Defendants' qualified immunity defense on appeal because Defendants "did not raise" the defense "in any of their dispositive motions before the district court.").

factors leads to the opposite conclusion: the carve-outs punish Fowler and Gerawan and, as a result, support the characterization of AB 1513 as a bill of attainder.

ARGUMENT

I

THE STATUTORY CARVE-OUTS IN AB 1513 IMPOSE HARMS TRADITIONALLY PROHIBITED BY THE BILL OF ATTAINDER CLAUSE

The statutory carve-outs in AB 1513 impose the same stigmatic harms as pernicious practices in England and the colonial United States. These historical examples provide "a ready checklist of deprivations and disabilities . . . held to fall within the proscription" against bills of attainder. *Nixon*, 433 U.S. at 473. Laws imposing such harms are "immediately constitutionally suspect," regardless of the particular means by which the harm is imposed. *See id.*

For example, in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), the Supreme Court invalidated a provision in the Missouri Constitution prohibiting Confederate sympathizers from holding certain jobs. *Id*. at 320. In so doing, the Court explicitly rejected the State's contention that "to punish one is to deprive him of life, liberty, or property and that to take from him anything less than these is no punishment at all . . . ." *Id.* The Court was instead moved by how the Missouri law at issue operated—namely, it stigmatized those attainted by forbidding them from

holding "any office of honor, trust, or profit." *Id.* at 280.

Similarly, in *United States v. Lovett*, 328 U.S. 303 (1946), the Court held that a federal statute barring the use of government funds to pay three specified government employees deemed by the House of Representatives to have engaged in "subversive activities" was a bill of attainder.[5] *Id.* at 315. That a denial of federal funds hardly resembles pains of death and corruption of blood–penalties traditionally associated with bills of attainder–posed no obstacle to the statute's invalidation. The Court explained that laws denying benefits inflict punishment when the denial is the result of purported wrongdoing. *See id.* at 316 (noting that Congress has traditionally imposed the punishment in *Lovett* for crimes such as treason or acceptance of bribes).

The D.C. Circuit took the same approach when it invalidated an act prohibiting a non-custodial parent from visiting his daughter without his ex-wife's consent. *Foretich v. United States*, 351 F.3d 1198, 1219 (D.C. Cir. 2003). In so doing, the court adhered to Supreme Court precedent demonstrating that "a statute will be particularly susceptible to invalidation as a bill of attainder where its effect is to mark

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[5] Because *Lovett* was decided before the cases in which the Supreme Court held that individuals have a constitutionally protected property interest in continuing public employment, the decision does not address whether the legislative deprivation of a benefit would violate due process. Rather, what moved the *Lovett* Court was the fact that a legislative body, rather than a court, had terminated the plaintiffs' eligibility. *See Lovett*, 328 U.S. at 316. So too here, the California Legislature, not a court, adjudicated Fowler and Gerawan's guilt by denying them the safe harbor otherwise generally open to California piece-rate employers.

specific persons with a brand of infamy or disloyalty." *Id.* at 1219. Accordingly, although a denial of parental rights was hardly the primary form of punishment in seventeenth-century England, such denial was congruous with "historical notions of punishment" because it imposes an analogous stigmatic harm. *Id.* at 1219.

The preceding decisions illustrate that there is no reason to impose an artificial dichotomy between, on the one hand, the arbitrary denial of life, liberty, and property and, on the other hand, the arbitrary denial of an affirmative defense. *See* Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330, 359-60 (1962) (arguing that a so-called "right-privilege dichotomy" cannot be reconciled with the underlying rationale of the Bill of Attainder Clause). Either way, the legislation is constitutionally suspect, because it imposes the evil that the Bill of Attainder Clause was meant to avoid: arbitrary legislation that imposes a stigma on those attainted. *See* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203, 224 n.81 (1996) (the Bill of Attainder Clause, "historically speaking, [was] tightly bound up with concerns about stigma and 'corrupt' or 'degraded' 'blood' ").

Such stigma is indisputably present here: the California Legislature adjudged Fowler and Gerawan to be unworthy of a protection that every other California employer enjoys. The public naturally would view that deprivation as a legislative declaration that Fowler and Gerawan are guilty of egregious conduct. But no court

has so found. The carve-outs at issue thus inflict punishment within the historic meaning of the Bill of Attainder Clause, because they impose the same stigmatic harms as punishments traditionally prohibited by the Clause.

II

THE STATUTORY CARVE-OUTS IN AB 1513 FAIL TO FURTHER A NONPUNITIVE LEGISLATIVE PURPOSE

"Whether a statutes falls within the meaning of punishment is only one factor in [the] analysis." *SeaRiver*, 309 F.3d at 674. A court "would not decline to hold that legislation with an indisputably punitive purpose was a bill of attainder merely because" the legislature "employed unconventional means." *Id.* Rather, courts apply a "functional test," and inquire whether the law, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive purposes." *Nixon*, 433 U.S. at 475. By applying this test, courts prevent enterprising legislatures "from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups." *BellSouth Corp. v. FCC*, 144 F.3d 58, 65 (D.C. Cir. 1998).

This test also indicates that AB 1513 is an unlawful bill of attainder, because its carve-outs do not constitute a "legitimate regulation of conduct." *Selective Service*, 468 U.S. at 851. AB 1513 is designed to give California businesses the opportunity to avoid massive liability in the aftermath of unforeseen appellate court decisions. Because the carve-outs exclude Fowler and Gerawan from this otherwise

generally applicable opportunity, they fail to advance any legitimate nonpunitive objective.[6] *Cf. Foretich*, 351 F.3d at 1224 (a regulatory singling out "belies the claim that [the Legislature's] purposes were nonpunitive").

The district court concluded that the carve-outs reflect a "balance between addressing the expected increase in litigation [after] *Gonzalez* and *Bluford*, and preserving the expectations of parties who had engaged in litigation for a significant period of time before the law took effect." ER 36. Yet the decision below omits any discussion of "less burdensome alternatives" to achieving that objective—a crucial part of the bill of attainder analysis. *See Nixon*, 433 U.S. at 482 ("In determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which that legislature . . . could have achieved its legitimate nonpunitive objectives."); *SeaRiver*, 309 F.3d at 677-78 (considering whether there existed any less burdensome alternatives by which the legislature could have achieved its purpose).

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[6] Allowing such targeted regulation undercuts the "effective practical guaranty against arbitrary and unreasonable government" that results from requiring laws "which officials would impose upon a minority [to] be imposed generally." *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). Because isolated groups do not wield the political power necessary to stave off laws targeted at them, the Bill of Attainder Clause ensures that they cannot be deprived of their rights until "after an impartial trial pursuant to a duly enacted and generally applicable rule." Anthony Dick, Note, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 Stan. L. Rev. 1177, 1211 (2011).

Plainly, the Legislature had available to it less burdensome alternatives to AB 1513's carve-outs. For example, an existing carve-out excludes from the same safe harbor those claims filed after *Gonzalez* was decided (March 6, 2013) but before March 1, 2014. Below, the state argued and the district court accepted that this carve-out was reasonable because it protected the settled expectations of parties to piece-rate litigation that had commenced after *Gonzalez* but before AB 1513 was enacted. Yet if that truly was the Legislature's rationale, then the carve-out is too small: parties to lawsuits commenced in 2012 that were ongoing when *Gonzalez* was decided would have had as much of a settled expectation as parties to lawsuits filed after *Gonzalez* was decided. *Cf. Beverly Hilton Hotel v. Workers' Comp. Appeals Bd.*, 176 Cal. App. 4th 1597, 1609 (2009) (noting the "principle that changes in the law would apply to pending cases from the date of enactment and thereafter"). A much more straightforward approach would have been to treat defendant-employers facing lawsuits filed in 2012 the same as defendant-employers facing lawsuits filed in 2013.[7] The availability of such easy alternatives demonstrates that the Legislature "made no attempt whatsoever to ensure to the costs imposed on" Fowler and Gerawan "were proportional to the problems that the legislature could legitimately seek to ameliorate." *Consol. Edison*, 292 F.3d at 354.

[7] The legislature could do this by excluding all claims initiated before 2014 from the safe harbor or by providing the safe harbor to all employers.

III

LEGISLATIVE INTENT TO PUNISH "POTENTIAL BAD ACTORS" REINFORCES THE CONCLUSION THAT AB 1513 IS A BILL OF ATTAINDER

The third factor for determining whether a bill of attainder is punitive is whether the legislative record evinces an intent to punish. *See SeaRiver*, 309 F.3d at 676-77. Because the carve-outs were forced through the Legislature at the eleventh-hour without sufficient time for debate, the legislative record is scant. But the legislative statements that do exist support the conclusion that the Legislature intended to punish Fowler and Gerawan by excluding them from AB 1513's safe harbor. Indeed, Assembly Member Das Williams, AB 1513's author, admitted that the "carve-outs were necessary to maintain the support of labor," and that the Legislature was determining that Fowler and Gerawan were "potential bad actor[s]." ER 95.

The district court held that statements "made outside the legislative record" were insufficient to support a finding that the carve-outs were punitive in nature. ER 36. But "a formal legislative announcement of moral blameworthiness or punishment" is not "necessary to an unlawful bill of attainder." *Nixon*, 433 U.S. at 480. Otherwise, a legislature could escape the limitations posed by the Bill of Attainder Clause simply by concealing its motives. Of course, the statements of a single legislator are not "overwhelming evidence of penal intent," and do not by themselves

show that the statute is punitive. *Consol. Edison*, 292 F.3d at 355. But combined with the other evidence showing a punitive intent, such statements reinforce the conclusion that AB 1513's carve-outs constitute a bill of attainder. *See id*. ("[A] substantial part of the legislation cannot be justified by any legislative purpose but punishment.").

CONCLUSION

In sum, the analogy to historical precedents, the absence of legitimate nonpunitive purposes, and statements by the Bill's author, demonstrate that AB 1513 imposes "punishment" within the meaning of the Bill of Attainder Clause. Therefore, AB 1513 is unconstitutional as a bill of attainder; the decision of the district court should be reversed.

DATED: October 27, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically file the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 27, 2016.

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/s/ Wencong Fa
WENCONG FA