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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

FOWLER PACKING COMPANY, INC.; GERAWAN FARMING, INC., Plaintiffs, v. DAVID M. LANIER, in his official capacity as Secretary of the California Labor and Workforce Development Agency; CHRISTINE BAKER, in her official capacity as the Director of the Department of Industrial Relations; JULIE A. SU, in her official capacity as California Labor Commissioner, Defendants.	No. 1:16-cv-00106-AWI-SMS **BRIEF AMICUS CURIAE** Judge: The Hon. Anthony W. Ishii

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page

Cases

United States Constitution

California Constitution

California Statutes

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Page

Miscellaneous

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INTRODUCTION AND SUMMARY OF ARGUMENT

The California Legislature enacted Assembly Bill 1513 (adding Section 226.2 to the California Labor Code) to provide relief for businesses facing sudden and unforeseen liability in the wake of recent California judicial decisions interpreting the state's minimum wage law and its application to piece-rate compensation. *See Gonzalez v. Downtown LA Motors LP*, 215 Cal. App. 4th 36, 50 (2013) (holding that the common practice of averaging piece-rate compensation over the hours that the employee worked is illegal); *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864, 872 (2013) (holding that the common practice of not separately compensating rest periods using a piece-rate formula is illegal). AB 1513's safe harbor 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 Plaintiffs Fowler Packing Company and Gerawan Farming from AB 1513's safe harbor. *See* Compl. ¶ 8.

AB 1513's carve-out violates the United States Constitution's Bill of Attainder Clause, which is designed to prevent Congress and state legislatures from determining guilt and inflicting punishment upon individuals without a judicial trial.[1] *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). This constitutional guarantee was so central to the Founders that it was one of the few provisions which ran against both Congress, U.S. Const. art. I, § 9, cl. 3, and state legislatures, *id*. art. I, § 10, cl. 1. According to the Framers' design, the imposition of liability on specific individuals would be a judicial, not a legislative, power. As Chief Justice John Marshall put it, "[i]t is the peculiar province of the legislature to prescribe general rules of society; the application of those rules to individuals [is] the duty of other departments." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). To that end, the constitutional prohibition on bills of attainder serves the larger liberty-protecting goal of separation of powers. *United States v. Brown*, 381 U.S. 437, 442 (1965) ("[T]he Bill of Attainder Clause was intended not as a narrow, technical (and

[1] The California courts construe the state constitution's Bill of Attainder Clause, Cal. Const. art. I, § 9, congruently with the federal clause. *See Law School Admission Council, Inc. v. State*, 222 Cal. App. 4th 1265, 1298-99 (2014). Accordingly, for the reasons set forth in the text, AB 1513 violates the state as well as the federal Constitution.

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therefore soon to be outmoded) 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).

A law constitutes a bill of attainder 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). As set forth below, AB 1513 does both.[2] It is unconstitutional.

I

AB 1513 SINGLES OUT PLAINTIFFS BY USING PLAINTIFFS' PAST, IRREVERSIBLE CONDUCT TO DRAW CARVE-OUTS TO THE SAFE HARBOR PROVISION

Assembly Bill 1513 contains all the hallmarks of a bill of attainder. The legislation (i) applies to easily ascertainable individuals, (ii) regulates past conduct, and (iii) focuses on irrevocable acts. *See SeaRiver*, 309 F.3d at 669-72 (using these factors in determining that a law impermissibly targeted specific individuals).

A. Although AB 1513 Does Not Mention Plaintiffs By Name, Its Carve-Outs Were Plainly Designed To Target Plaintiffs

AB 1513 targets both Fowler and Gerawan specifically. The law prevents Fowler from taking advantage of the safe harbor by means of a so-called "ghost worker" carve-out. *See* Cal. Lab. Code § 226.2(g)(5). That carve-out excludes from the safe harbor "[c]laims for paid rest or recovery periods or pay for other nonproductive time that were made in any case filed prior to April 1, 2015," when the case contained "an allegation that the employer had intentionally stolen, diminished, or otherwise deprived employees of wages through the use of fictitious worker names or names of workers that were not actually working." *Id.* The only lawsuit that fits this description is a lawsuit that the United Farm Workers' General Counsel filed against Fowler. Compl. ¶ 28. In

[2] For purposes of the motion to dismiss, Defendants contest only the second element. *See* Mot. to Dismiss at 18-20 (focusing solely on the issue of whether AB 1513 imposes "punishment" within the meaning of the Bill of Attainder Clause).

short, AB 1513's ghost worker carve-out is mere shorthand for the General Counsel's claim against Fowler, and only that claim.

It is a similar story with respect to Gerawan. AB 1513 carves out from its safe harbor any claim that was "asserted in a court pleading prior to March 1, 2014." Given that AB 1513 deals only with lawsuits filed after *Bluford* (which was decided May 8, 2013), the carve-out period amounts to less than a year. The only lawsuit affected is the General Counsel's action against Gerawan, which was filed just three weeks before the cut-off date. Compl. ¶ 26. Hence, AB 1513 satisfies the first specificity element of the bill of attainder test, notwithstanding that the law does not mention Fowler and Gerawan by name. *Cf. Brown*, 381 U.S. at 461 ("It was not uncommon for English acts of attainder to inflict their deprivation . . . by description rather than name.").

B. AB 1513's Carve-Outs Are Defined by Past Conduct, and Their Retroactive Effect Reveals an Important Hallmark of a Bill of Attainder

AB 1513 applies retrospectively because it looks to past events to determine the availability of its safe harbor. The law was enacted in October 2015. But its carve-out for Fowler applies only to claims containing ghost worker allegations made *before* April 1, 2015. Similarly, the Gerawan carve-out applies only to lawsuits filed *before* March 1, 2014. Thus, AB 1513 is retroactive on its face.

Retroactive laws are disfavored because they "present[] serious fairness and efficiency concerns." Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1056 (1997); *see also* Guido Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 Yale L.J. 1191, 1191 n.2 (1962) ("Fairness is the ultimate test of the validity of retroactive laws.") (internal quotations omitted). Such disfavor is particularly apt with respect to the retroactivity involved with bills of attainder such as AB 1513. When statutory liability is untethered "to a prospective risk to a larger and more defined class," there is no "generalized effect" to "temper[] the concerns of 'tyranny' by the 'multitude.'" *SeaRiver*, 309 F.3d at 670-71 (quoting *Brown*, 381 U.S. at 443). Thus, even if AB 1513's carve-outs would otherwise be permissible if purely prospective, their retroactive effect weighs heavily in favor of a determination that AB 1513 is a bill of attainder.

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C. AB 1513's Carve-Outs Target and Penalize Irreversible Conduct

Whether a law targets and penalizes irreversible conduct is a central factor in the specificity inquiry under the Bill of Attainder Clause. *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 848 (1984). AB 1513's carve-outs satisfy that requirement, because they hinge upon the wage claims against Gerawan and ghost worker claims against Fowler, all of which in turn are tied to irreversible, past conduct.

Comparing AB 1513 to the Supreme Court's leading Bill of Attainder cases from the Civil War dealing with "irreversability" confirms that conclusion. For example, in *Cummings v. Missouri*, 71 U.S. 277 (1866), the Supreme Court invalidated a state constitutional provision that compelled those seeking to serve as priests to swear an oath that they had never assisted or sympathized with the Confederacy. *Id.* at 316-17. Similarly, in *Ex Parte Garland*, 71 U.S. 333 (1866), the Court voided a law requiring attorneys to swear that they had never aided Confederate soldiers. *Id.* at 334-35. The Supreme Court subsequently explained that the key defect in these laws was that "the persons in the group disqualified were defined entirely by irreversible acts committed by them." *Selective Service*, 468 U.S. at 848. The same is true of AB1513's carve-outs.

The bill of attainder analysis reasonably focuses on whether a law punishes irreversible conduct. Laws of this sort tear away the "veil of ignorance" that normally accompanies legislation and thus invite corrupt legislative purposes to infect lawmaking. Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203, 222 (1996). They therefore "enable[] legislatures to launch surgical strikes against unpopular groups, confident that such burdens will not affect favored constituents upon whom the legislator depends." Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of* Romer, 95 Mich. L. Rev. 236, 242 (1996). Voiding such laws, like AB 1513, serve the worthy purpose of preventing legislation at the behest and benefit of special interests.

In sum, there can be little doubt that the AB 1513 carve-outs, which exclude Fowler and Gerawan—and *only* Fowler and Gerawan—from the safe-harbor provision, were crafted specifically to accomplish that improper purpose. By focusing on past, irreversible conduct, the Legislature

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sought to avoid liberty-guarding limitations that accompany generally applicable laws. In so doing, the Legislature enacted a bill that satisfies the specificity component of a bill of attainder.

II

HISTORICAL MEANING, THE LACK OF A NONPUNITIVE LEGISLATIVE PURPOSE, AND A LEGISLATIVE RECORD REFLECTING PUNITIVE INTENT DEMONSTRATE THAT AB 1513 IMPOSES PUNISHMENT ON PLAINTIFFS WITHOUT JUDICIAL TRIAL

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 Service*, 468 U.S. at 852. AB 1513 not only singles out Fowler and Gerawan, it also inflicts *punishment* on them sufficient to constitute a bill of attainder.

A statute need not satisfy all three factors to constitute a bill of attainder. For example, the "inquiry does not end" even if the challenged law "does not inflict punishment in its historical sense." *Id.* at 853. Courts also must determine whether the statute "can be reasonably said to further nonpunitive goals." *Id.* at 854. Here, however, all three factors lead to the same conclusion: AB 1513 punishes Fowler and Gerawan.

A. AB 1513's Carve-Outs Are Analogous to Punishments Traditionally Prohibited by the Bill of Attainder Clause and Thus Their Invalidation Would Further the Clause's Purposes

The California Legislature's behavior in singling out Fowler and Gerawan is eerily reminiscent of pernicious practices in England and colonial America, which provide "a ready checklist of deprivations [that] fall within the proscription of" the Bill of Attainder Clause. *Nixon*, 433 U.S. at 473. In the seventeenth century, the British Parliament presided over specific cases, heard evidence on criminal charges, and then voted on the guilt of the accused. *See, e.g.*, *Fenwick's case*, (1696) 13 How. St. Tr. 537 (H.C.). Colonial legislatures adopted this practice, and frequently enacted special legislation that "modif[ied] the position of named parties before the law." Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. 247, 258 (1914). Those legislatures "extend[ed] their deliberations to the cases of individuals" so frequently

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that many "consider[ed] an application to the legislature, as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law." *A Report of the Committee of the Council of Censors* 6 (Phila. 1784).

Legislative interferences with private rights "were evils which had more than perhaps anything else, produced" the Constitutional Convention. 1 *The Records of the Federal Convention of 1787*, at 134 (Max Farrand ed., 1911) (Madison). The Framers were appalled at the "many instances" in which colonial legislatures "decided rights which should have been left to judicial controversy." Thomas Jefferson, *Notes on the State of Virginia* 126 (Shuffelton ed. 1999). The Bill of Attainder Clause specifies that although such practices were acceptable in England around the time of the Star Chamber, they defied the constitutional principles of this Nation.

A bill of attainder was originally understood narrowly to mean a parliamentary act sentencing specified individuals to death. *Brown*, 381 U.S. at 441. Yet as early as 1810, the Supreme Court had extended the list of punishments prohibited by the Clause to include such lesser sanctions as imprisonment, banishment, and confiscation of property. *See Fletcher*, 10 U.S. (6 Cranch) at 138. Employing such a flexible interpretation of the punitive element to the Bill of Attainder Clause analysis is warranted. It helps to prevent an enterprising legislature "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). That in turn serves the Clause's role in protecting the separation of powers. *See* Thomas B. Griffith, Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 Va. L. Rev. 475, 481 (1984) (noting that the Supreme Court's Bill of Attainder cases during the Civil War era "viewed the bill of attainder clause as part of a larger scheme to guaranty procedural due process by ensuring the separation of legislative and judicial functions").

Viewed from this perspective, AB 1513's carve-outs are punitive, even if they could plausibly be characterized as the mere denial of a benefit. *But see* Mot. to Dismiss at 18 (contending that the denial of a benefit can never constitute a bill of attainder). In *United States v. Lovett*, 328 U.S. 303 (1946), the Supreme Court held that a federal statute barring the use of government funds to pay three specified government employees deemed by the House to have

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engaged in "subversive activities" was a bill of attainder.[3] *Id.* at 315. That a denial of federal funds hardly resembles pains of death and corruption of blood traditionally associated with bills of attainder posed no difficulty. The Court explained that laws which deny benefits to ascertainable individuals inflict punishment, for purposes of the Bill of Attainder Clause, just as much as more traditionally punitive actions. *See id.*

Commentators have reached the same conclusion. Alexander Hamilton argued that, regardless of the degree of deprivation, bills of attainder should be prohibited because they 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). John Hart Ely made the same point nearly two centuries later in deeming a so-called "right-privilege dichotomy" to be inconsistent with the underlying rationale of the Bill of Attainder Clause. *See* Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330, 359-60 (1962).

Adherence to the artificial dichotomy between direct punishment and deprivation of a benefit fails to acknowledge that, just as much as the outright infliction of punishment, the denial of a privilege can carry with it a strong stigma. That was an evil the Bill of Attainder Clause was meant to avoid. *See* Amar, *supra*, at 224 n.81 (The Attainder Clause, "historically speaking, [was] tightly bound up with concerns about stigma and 'corrupt' or 'degraded' 'blood'"). Such a stigma is present here: the 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

[3] 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, as explained in the text, 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.

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so found. Classifying AB 1513's carve-outs as punitive would therefore serve the purposes underlying the prohibition on bills of attainder.

B. AB 1513's Carve-Outs, When Viewed in Terms of the Type and Severity of the Burdens Imposed, Do Not Further a Nonpunitive Legislative Purpose

Another indication that AB 1513 constitutes a bill of attainder is that its carve-outs do not constitute a "legitimate regulation of conduct."[4] *Selective Service*, 468 U.S. at 851. The statute's purpose is to allow 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.[5] *Cf. Foretich v. United States*, 351 F.3d 1198, 1224 (D.C. Cir. 2003) (a regulatory singling out "belies the claim that [the Legislature's] purposes were nonpunitive").

Defendants contend otherwise on the ground that any punishment meted out to Fowler and Gerawan is "attributable to [their] own actions in failing to pay employees." Mot. to Dismiss at 20. But an allegedly wrongful past act will be at issue in every bill of attainder case. *See* David P. Restaino, Comment, *Conditioning Financial Aid on Draft Registration: A Bill of Attainder and Fifth Amendment Analysis*, 84 Colum. L. Rev. 775, 779 (1984) (acts of attainder "commonly included a declaration of guilt for some past wrong"). Thus, the Defendants' argument would mean that no law could ever be a bill of attainder. Moreover, that Fowler's and Gerawan's potential liability is attributable to their past actions is just as true for the other businesses that qualify for the

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[4] Despite Defendants' contentions to the contrary, *see* Mot. to Dismiss at 18, this standard is tougher than the rational basis review used in the typical equal protection or due process challenge. That is because the Bill of Attainder Clause requires courts to look beyond the rational relationship of the statute to a legitimate public purpose for "less burdensome alternatives by which [the] legislature . . . could have achieved nonpunitive objectives." *Nixon*, 433 U.S. at 482.

[5] 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).

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safe harbor. If that fact were enough to defeat a Bill of Attainder Clause challenge, then no safe harbor exclusion could ever be overturned, no matter how vindictively crafted.

C. The Legislative Record, Which Contains Statements by AB 1513's Author That the Bill Reflects a Legislative Determination That Plaintiffs Were "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. This factor "differ[s] from the second only in inviting a journey through legislative history." *BellSouth Corp.*, 144 F.3d at 67. In applying this factor, it is appropriate to bear in mind that "a formal legislative announcement of moral blameworthiness or punishment" is not "necessary to an unlawful bill of attainder." *Nixon*, 433 U.S. at 480.

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, the bill'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]." Compl. ¶ 8.

Of course, the statement of a single legislator is not "overwhelming evidence of penal intent," and does not by itself show that the statute is punitive. *Consolidated Edison Co. of New York, Inc. v. Pataki*, 292 F.3d 338, 355 (2d Cir. 2002). But combined with the other evidence showing a punitive intent, the legislative record reinforces 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."). Accordingly, based on historical meaning, the absence of legitimate nonpunitive purposes, and the legislative record, AB 1513 imposes "punishment" within the meaning of the Bill of Attainder Clause.

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CONCLUSION

For the foregoing reasons, AB 1513 is unconstitutional as a bill of attainder. The motion to dismiss should be denied.

DATED: April 1, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, I electronically filed the foregoing documents with the Clerk of the Court by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 1, 2016, at Sacramento, California.

By /s/ Wencong Fa
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