Fresno suit challenges bill of attainder

By Wencong Fa

New York Times

A farm in Fresno.

In less than a month, a federal court in Fresno will hear arguments in *Fowler v. Lanier*, a challenge to a law that singles out two agricultural businesses for punishment at the bequest of a powerful union. The lawsuit is based on the time-honored prohibition against bills of attainders or, as the Supreme Court called them, trials by Legislature.

Last October, the California Legislature enacted Assembly Bill 1513 to provide relief for businesses facing unforseen liability in the aftermath of California court decisions interpreting the state's minimum wage law. Those courts held that the California labor law prohibited previously common employment practices, such as averaging piece-rate compensation over hours worked. As a consequence, many employers were subjected to sudden liability in the form of back wages and statutory damages.

AB 1513 provided relief to nearly every employer. The statute's safe harbor provision allowed businesses to avoid statutory damages if they handed over back wages. Yet the California Legislature, in order to gain the support of a powerful union, excluded two agricultural businesses from the safe harbor by way of statutory carve-outs.

The first carve-out targets Fowler Packing, a fruit-producing business based in Fresno. The "ghost worker" carve-out excludes claims that contain *allegations* that the employer had deprived employees of wages through the use of fictitious worker names, even if such allegations are completely fabricated. The carve-out has little to do with piece-rate compensation, and the only claim that it affects is one the union's general counsel filed against Fowler.

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The second carve-out targets Gerawan Farming, another fruit grower headquartered in Fresno. That carve-out specifies that a business cannot take advantage of AB 1513's safe harbor provision if it had a claim filed against it before March 1, 2014. Given that AB 1513 is intended to deal with lawsuits filed after the Court of Appeal's decision in *Bluford* (May 8, 2013), the carve-out period amounts to less than a year. The only lawsuit that this carve-out affects is one that the union's general counsel filed against Gerawan.

Neither Fowler nor Gerawan were all too happy with being singled out by the Legislature. They filed a lawsuit in federal court alleging that the carve-outs violated one of the most venerable provisions in the U.S. Constitution: the bill of attainder clause.

The impetus for the prohibition against bills of attainder was experience. Too often, the Founders saw instances in which a legislative body decided rights that should have been left to the judicial branch.

British Parliament in the 17th century, for instance, presided over specific cases, heard evidence, and voted on the guilt of the accused. Legislative bodies in Colonial America did much the same. Plaintiffs frequently brought judicial controversies to the legislature, which they viewed as a more favorable forum for vindication of their claims. The Framers found these practices appalling and enacted the bill of attainder clause to specify that individual cases should be decided, not by the legislature, but by a court.

Of course, it is all too easy to say that the Constitution prohibits bills of attainder. But how do we know when a law is such a bill? The Supreme Court has provided a useful two-part framework. A bill of attainder (1) targets specific individuals and (2) dishes out punishment on those individuals.

The first requirement is easily met. As discussed above, the *only* two claims that the AB 1513 carve-outs affect are the claims that the union's general counsel filed against Fowler and Gerawan. The carve-outs thus target those two businesses with laser-like precision.

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The second requirement demands a deeper dive into case-law. There are three separate tests for what constitutes "punishment" within the meaning of the bill of attainder clause, and the Supreme Court has never determined the precise weight given to each test in attainder cases. But that is no matter for this case, because AB 1513's carve-outs inflict punishment on the plaintiffs under any test.

Let's start with the historical test. It may be counterintuitive that the carve-outs in AB 1513 resemble punishments meted out by Parliament in the era of the Star Chamber: Death and corruption of blood (preventing attainted individuals from passing down titles of nobility to their heirs).

But take a closer look. The reason that corruption of blood was so effective was the way in which it stigmatized the attainted. That is quite similar to the stigma imposed on Fowler and Gerawan. By denying those employers the protection that every other employer enjoys, the Legislature essentially adjudged them to be guilty of egregious conduct. But the constitution does not give legislatures the power to determine guilt, it grants that authority to courts.

The second or "functional" test also compels the conclusion that AB 1513's carve-outs impose punishment. The purpose of AB 1513 was to provide relief to all employers to California after surprising state appellate court decisions. But the carve-outs deny the same relief to Fowler and Gerawan for no apparent reason. State officials defending the lawsuit argue that this denial is attributable to the plaintiffs' own actions in failing to pay employees. Yet an allegedly wrongful past act will be at issue in *every* bill of attainder case.

Then there's the motivational test: Did the Legislature intend to punish Fowler and Gerawan? There's not much in the record, because the carve-outs were forced through the Legislature at the eleventh-hour without much time for debate.

But the statements that *do* exist support the conclusion that the Legislature intended to dole out punishment. The bill's author himself told reporters that the "carve-outs were necessary to maintain the support of labor," and that the Legislature determined that Fowler and Gerawan were potential bad actors.

In all, AB 1513 (with its carve-outs) is plainly a bill of attainder. The California Legislature violated the clause and ignored the clause's embodiment of separation-of-powers principles. Perhaps the Legislature should take a cue from the great Chief Justice John Marshall, who said that although it is the role of the legislature to prescribe general rules of society, it is emphatically the role of the judiciary to say what the law is.

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Get all the facts before dismantling the bar

Continued from page 1

here is unlikely to produce a good result, and there is no obvious need for speed.

The inspiration for the dissolution proposal is unclear. The rationale for immediate action is equally opaque. The trustee claimed in public comments that the bar is enduring a "seemingly endless cycle of disruption, dissension, crisis and scandal" and a "quagmire of discord, internecine politics, and suits and counter suits." Bold claims indeed. But dramatic language aside, what exactly is the problem? The bar is hardly in crisis now. True, the bar recently endured the contested departure of its former executive director, Joe Dunn, after he was terminated in November 2014 — and Dunn fired back with a lawsuit against the bar.

That dispute was cited as evidence that the bar is somehow in crisis. How so? Instead, the contrary is true: Now that the leadership has changed, any crisis appears to be over. And just last week an arbitrator sustained the bar's demurrer to all of Dunn's claims. To the extent that those events are cited as demonstrating that the legislature needs to be more involved in supervising the bar, we note that Joe Dunn and the trustee now proposing these sweeping changes were both members of the Legislature. So was Joe Dunn part of the problem, or was his departure part of the solution?

Leaving motivation aside for the moment, there can be no dispute that over the past 20 years the governor and the Legislature have frequently intervened in bar governance matters, and it is equally apparent that the Legislature and some governors have asserted increasing control over regulating the practice of law. In 2011, those branches compelled major structural changes to the bar by assuming partial control over appointments to its governing body. The trustee's proposal would go even further: The judiciary no longer would have a majority of appointments to the proposed new regulatory agency. That would place the Legislature and the governor firmly in control of the new agency.

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Thus, the bar will no longer be a judicial branch agency. That raises a separation of powers issue, which may make the proposal unconstitutional. The bar was first created by statute in 1927, and it became a constitutional entity in 1966 when it was added to the judicial article of the state constitution. The existing bar is a judicial branch agency, which functions as an administrative arm of the California Supreme Court. And because the admission and discipline of attorneys is a core judicial branch power, the judiciary is the ultimate authority over regulating the practice of law in California. The core judicial power over officers of the court is subject to only reasonable legislative regulation. At some point "regulation" becomes "destruction" and unconstitutionally invades the judiciary's power.

Returning to the question of motivation, consider this: who benefits? It is clear who will *not* benefit: the public. Proponents of the proposal have justified it by comparing it favorably to regulatory schemes for other professions and the bar in other states. There are some superficial similarities between this profession and others — medicine, for example. But the law is unique, and the bar's work is crucial to our government and to society itself. Although doctors perform an important public service (saving lives), that is substantively distinct from the public role the bar plays: maintaining the integrity of the legal system and ensuring access to justice. For example, the bar has a major role in vetting judicial candidates. Will the new entity have the resources to continue operating the Judicial Nominees Evaluation Commission? And if some other states regulate their bars differently, so what? California should take pride in doing things differently — and better.

No one disputes that the profession should be regulated. And it currently is. The question is whether there is anything so fundamentally wrong with the existing regulatory scheme that requires it to be entirely dismantled. That question is still pending, and the task force is still taking evidence. Regarding the proposal, California's Chief Justice Tani Cantil-Sakauye said that it would be "extraordinary" for it to proceed without the benefit of a deliberative process and without input from the California Supreme Court: "Given the critical work the state bar does in the area of access, fairness, and diversity, it would not be fair or just to the people of the state if the state bar's governance issues were unreasonably rushed." We share the chief justice's concern about a rush to judgment being both unwarranted and likely to produce a negative outcome. Making hasty decisions on limited information, when there is no reason to do so, is rarely the best way to produce positive change. We think the task force should complete its investigation, analyze the evidence, and present its recommendations. Then we can revisit this proposal — when all the facts are in.

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