No. 17-1375

In the
Supreme Court of the United States

GERAWAN FARMING, INC.,
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA FRESH FRUIT ASSOCIATION, WESTERN GROWERS ASSOCIATION, AND VENTURA COUNTY AGRICULTURAL ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a state's imposition of labor agreements on non-consenting private employers and employees, without any requirement that such agreements be consistent across businesses or industries, violate the Equal Protection Clause of the Fourteenth Amendment?

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1973, **Pacific Legal Foundation** (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates nationwide to secure all Americans' inalienable rights to live responsibly and productively in pursuit of happiness. PLF has repeatedly litigated in defense of the right of individuals and businesses to earn an honest living free from unreasonable government interference. *See Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014).

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 Robert E. Levy 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*.

The **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

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae funded its preparation or submission. More than 10 days in advance, all parties received notice of the intended filing of this brief. Letters of consent to the brief's filing from all parties are on file with the Clerk.

have in total nearly 40,000 members, including nearly 27,000 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 in the courts below an amicus brief 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 fruits. 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 of California. 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, the **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 **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 California Agricultural Labor Relations Act in Ventura and Santa Barbara Counties. These businesses represent the entire spectrum of fruit trees, 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 arising under California's Agricultural Labor Relations Act.

This case is important to Amici because the California Supreme Court's decision threatens the foundational principle that laws and regulations should be generally applicable, and thereby invites the arbitrary burdening of individuals as individuals. This principle is a critical justification for the doctrine of equal protection, which itself is crucial for the protection of individual rights.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

In 49 states and the District of Columbia, a private employer and its employees have the right to agree, or not, to a collective bargaining agreement. *See* Philip B. Rosen & Richard I. Greenberg, *Constitutional Viability of 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). California, alone, compels agricultural employers and their employees to assent to collective bargaining agreements dictated to them by a so-called "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.").

This stark departure from the norm of allowing private employers and employees to negotiate their own collective bargaining agreements is the result of the California Mandatory Mediation and Conciliation Process ("Compulsion Regime"), Cal. Lab. Code §§ 1164-1164.13, "a legislative labyrinth that creates many more problems than it could ever solve." Halgas, *supra*, at 2. The most disturbing facet of the Compulsion Regime is that it requires the state imposition, through the mediator, of a collective

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[2] The National Labor Relations Act does not apply to farm laborers. 29 U.S.C. § 152(c) (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 Halgas, supra,* at 27. *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 introduce 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)).

bargaining agreement drafted solely by the mediator and applicable only to one specific agricultural employer and its employees.

This "mini labor code"—for it is not properly termed a "collective bargaining agreement" because it is not collective, bargained for, or agreed to by the parties—creates a mediator who wields almost unlimited discretion. Factors commonly considered in labor arbitration when crafting the terms of a collective bargaining agreement, such as the financial condition of the employer, industry-standard wages and benefits, and collective bargaining agreements reached by other parties, are the only factors that *may* be considered by the mediator under the Compulsion Regime. Cal. Lab. Code §§ 1164(e)(1)-(5). The mediator is not required to consider, nor is he bound by, any factor.[3] *See id*. In fact, the Compulsion Regime does not even explain how much weight each factor should be assigned, or provide a standard or goal towards which the mediator should aim. *See id*. § 1164(e) (directing merely that certain factors be considered "[i]n resolving the issues in dispute."). Instead, the mediator has virtually unfettered discretion to compel the parties' assent to whatever terms the mediator dictates, with no assurance to the employer or its employees that the collective bargaining agreements that result will treat similarly situated agricultural employers or employees in a like

[3] *But see Hess Collection Winery v. Cal. Agric. Labor Relations Bd*., 45 Cal. Rptr. 3d 609, 624-27 (Ct. App. 2006) (relying on the canon of constitutional avoidance to construe the Compulsion Regime to require that the mediator consider the listed factors).

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 the labor board's review of the mediator's decision).

This Court should grant review for two reasons. First, the California Supreme Court's decision runs afoul of the fundamental principle that laws and regulations should apply generally to all members of society, thereby violating the Equal Protection Clause of the Fourteenth Amendment by arbitrarily burdening individuals as individuals. Second, because California is a regulatory leader among the states, the negative effects of the Compulsion Regime could easily spread to infect other jurisdictions.

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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)). The unions supported the Compulsion Regime because, under California labor law, they would retain the right to strike and engage in secondary activity. *See id.* at 33. In public employment, where binding interest arbitration is more common, the rights to strike and engage in secondary activity are usually given up in exchange for binding interest arbitration. *See id.*

REASONS FOR GRANTING THE PETITION

I

ARBITRARILY BURDENING INDIVIDUALS AS INDIVIDUALS VIOLATES THE PRINCIPLE THAT LAWS SHOULD BE OF GENERAL APPLICABILITY

A. Laws Should Be of General Applicability

By dictating that each agricultural employer and its employees be subject to an individual collective bargaining agreement drafted by a state-imposed mediator, Cal. Lab. Code § 1164(a)-(b), the Compulsion Regime is not a law of general applicability. Mediator-imposed agreements are specific to the particular agricultural employer and its employees and do not apply to any of the agricultural employer's competitors, no matter how alike they are.

The principle that laws should apply generally to all members of society, rather than single out certain individuals for special treatment, dates back at least to the Roman Republic and is woven into the fabric of our Constitution. Cicero condemned as "unjust" the Roman legislative practice of bestowing special treatment on select individuals. Evan C. Zoldan, *Reviving Legislative Generality*, 98 Marq. L. Rev. 625, 652 (2014) (quoting Marcus Tullius Cicero, *On the Laws*, *in* On the Commonwealth and On the Laws 105, 173 (James E.G. Zetzel ed., 1999)). Millennia later, Blackstone argued that acts of a legislature must be "universal"; a law applicable to a single individual "has no relation to the community in general" and is "rather a sentence than a law." *Id.* (citing 1 William Blackstone, Commentaries on the

Laws of England 303 (Wayne Morrison ed., Cavendish Publ'g 2001)).[5] John Locke wrote that to be considered a law, a rule must be "common to every one of that society." *Id.* (quoting John Locke, Second Treatise of Government § 22 (C.B. Macpherson ed., Hackett Publ'g Co. 1980)).

The Framers of our Constitution, "[w]earied by a decade of special laws, and recalling the history of abusive special legislation enacted by Parliament . . . rejected the power of the legislature to declare named individuals ineligible for the protections of the standing laws." Zoldan, *supra,* at 652.[6] The Framers recognized the inherent risks of singling out individuals and were concerned for the legitimacy of any government that did so. *See* Michael Pappas, *Singled Out*, 76 Md. L. Rev. 122, 126 (2016). In response, they "sought to structure government to prevent majorities or particularly influential interest groups from treating themselves preferentially or their enemies detrimentally." *Id.* (noting that the Constitution reflects a strong preference for the general applicability of laws). The Bill of Attainder, Ex Post Facto, and Title of Nobility Clauses all

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[5] This Court has said that Blackstone's works "constituted the preeminent authority on English law for the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 593-4 (2008) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

[6] The prevalence of special litigation is closely akin to the class-of-one doctrine and relies on the same philosophical and jurisprudential underpinning. *See, e.g.*, Zoldan, *supra*, at 628 ("The principle that rules of conduct ought to apply generally to all of society's members, rather than single out individuals for special treatment, has long been advocated by jurists and philosophers of law.").

illustrate an intent to prevent a government actor from singling out an individual for different treatment. Zoldan, *supra*, at 653.

The Equal Protection Clause incorporates this concern with protecting the individual against his or her government. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in the judgment) ("The Equal Protection Clause and our constitutional tradition are based on the theory that an individual possesses rights that are protected against lawless action by the government."); *see also U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest."). Less than 20 years after the passage of the Fourteenth Amendment, this Court noted that "[l]aw is something more than mere will exerted as an act of power," and there "must be not a special rule for a particular person or a particular case . . . " *Hurtado v. People of State of Cal.*, 110 U.S. 516, 535 (1884). The ability to enforce limitations against arbitrary government power "is the device of self-governing communities to *protect the rights of individuals and minorities*, as well as against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of government." *Id.* (emphasis added).

The Founders' fear of influential groups wielding state power against their enemies has become a reality in California.

B. The Compulsion Regime Is An Unconstitutional "Class-Of-One" Regulation and Therefore Violates the Principle That Laws Should Be of General Applicability

In *Village of Willowbrook v. Olech*, this Court recognized that the arbitrary burdening of individuals as individuals, *i.e.*, as a "class-of-one," is unconstitutional. 528 U.S. 562, 564 (2000). The Constitution guarantees to all persons the "equal protection of the laws," and this right means that the government must treat similarly situated individuals in the same manner. *See* U.S. Const. amend. XIV, §1; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). 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. *Olech*, 528 U.S. at 564; *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."). The regulations produced by the Compulsion Regime, like the collective bargaining agreement imposed on Petitioner and its employees, fit firmly within this definition of unconstitutional class-of-one regulation.

(i) The Compulsion Regime Treats Each Agricultural Employer Differently From Other Similarly Situated Agricultural Employers

The Compulsion Regime targets individual agricultural employers by dictating 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. Cal. Lab. Code § 1164(a)-(b). This so-called "agreement" operates as individualized labor legislation affecting a single employer. It governs wages, hours, and all other significant issues between the employer and its employees, yet 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 a like manner. Instead, it merely directs that the mediator "*may* consider" various factors in "resolving the issues in dispute." Cal. 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 mediator is not even required to consider, for example, "collective bargaining agreements covering similar agricultural operations with similar labor requirements." Cal. Lab. Code § 1164(e)(3). Moreover, even if the mediator were required to take any factors into account when drafting a collective bargaining agreement, the Compulsion Regime gives the mediator complete

freedom to assign whatever weight—or none at all—to any factor.[7] *Cf.* Cal. Lab. Code § 1164(e).

(ii) This Differential Treatment Is Intentional

By its very terms, the Compulsion Regime treats individual agricultural employers differently. The Regime's failure to mandate any factors that the mediator must consider necessarily results in each agricultural employer being treated differently from other similarly situated employers. *Cf.* Cal. Lab. Code § 1164(e). The Regime grants mediators nearly boundless discretion to write the agreement, with no limits to provide uniformity. *See id.* There is nothing within the Compulsion Regime to prevent the imposition of an agreement that disadvantages a single employer without applying to similarly situated competitors. The absence of any standards or limits to the mediator's discretion strongly suggests an intent to treat like agricultural employers differently.

(iii) There Is No Rational Basis for Singling Out Agricultural Employers

It is irrelevant that the Compulsion Regime seeks to vindicate the state's legitimate interest in resolving agricultural labor disputes. The class-of-one

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[7] 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*, 45 Cal. Rptr. 3d at 633 (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 the mediator's decision in any other case under Labor Code section 1164 and the related statutes.").

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. *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] 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 any 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 and their employees 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.") The Regime does not comport with the equal protection of the laws.

II

THIS CASE PROVIDES AN OPPORTUNITY TO DELINEATE THE *ENGQUIST* EXCEPTION TO *OLECH*

In *Olech*, the Court broadly recognized that a class-of-one claim does not depend on group membership, but can include the singling out of an individual from others similarly situated for no

rational purpose. 528 U.S. at 564. In *Engquist v. Oregon Department of Agriculture*, this Court clarified its holding in *Olech* to exclude state actions "which by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments," and in particular discretionary government employment decisions. 553 U.S. 591, 603-05 (2008). Through *Olech* and *Engquist*, the class-of-one equal protection claim "expresses the principle of impartiality at the heart of the Equal Protection Clause, but is divorced from the group-centered tiered scrutiny of traditional equal protection analysis." Alex M. Hagen, *Mixed Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-of-One Equal Protection Theory*, 58 S.D. L. Rev. 197 (2013).

The instant case presents an opportunity for this Court to demarcate the boundaries of the *Engquist* exception to *Olech*. Unlike the *executive or quasi-adjudicative* decision-making exercised in discretionary government employment decisions, *see Engquist,* 553 U.S. at 603-05, the mediators under the Compulsion Regime exercise quasi-*legislative* power. *Hess*, 45 Cal. Rptr. 3d at 617-18. 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.

Multiple circuit courts have extended the *Engquist* public employment decisions exception to other contexts, while others have refused to do so, creating a need for clarity in this area. *See* Hagen, *supra*, at 249 n.40 (*comparing Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012) (rejecting death row prisoners' class-of-one challenge to Arizona's lethal injection protocol by reasoning that decisions on such matters "such as which drug protocol to use, which people to select for the execution team, and whether to use a central femoral IV" are by statute relegated to the discretion of the Director of Prisons, with no requirement of uniformity); *Flowers v. City of Minneapolis*, 558 F.3d 794, 799-80 (8th Cir. 2009) (class-of-one claim against police officers based on "directed patrol" of plaintiff's residence made for a "poor fit" and "while a police officer's investigative decisions remain subject to traditional class-based equal protection analysis, they may not be attacked in a class-of-one equal protection claim"); *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008) ("We have little trouble applying the reasoning in *Engquist*, directed at a the [sic] government-employee relationship, to the circumstances in this case involving a government-contractor relationship."); *with*, *e.g.*, *Mathers v. Wright*, 636 F.3d 396, 400-01 (8th Cir. 2011) (concluding that allegations of teacher's intentional misconduct stated class-of-one claim because conduct in question "exceeded the scope of professionally acceptable choices and was not discretionary"); *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 141-43 (2d Cir. 2010) (acknowledging the circuit split and declining to extend *Engquist* to limited discretion exercised pursuant to state's sovereign

regulatory power); *Franks v. Rubitschun*, 312 F. App'x 764, 766 n.3 (6th Cir. 2009) (declining to apply *Engquist* to denial of parole); *Hanes v. Zurick*, 578 F.3d 491, 495 (7th Cir. 2009) (declining to apply *Engquist* to police discretionary conduct, reasoning that police officers, "in contrast to public employers, exercise the government's sovereign power" and have less discretion than government employers)).

Thus, this case presents the Court with an opportunity to provide needed clarity on the scope of the *Engquist* limitation to the class-of-one doctrine, and to reaffirm that no exercise of legislative power is exempt from equal protection review.

III

LEFT UNCHECKED, THE COMPULSION REGIME'S ARBITRARY BURDENING OF INDIVIDUALS AS INDIVIDUALS WILL SPREAD FAR BEYOND CALIFORNIA

This Court has previously held that singling out individuals in an irrational and arbitrary manner violates the Equal Protection Clause "under even [this Court's] most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988); *see also Olech*, 528 U.S. at 565. The California Supreme Court's opinion below substantially weakens this Court's ban against singling out individuals for irrational and arbitrary treatment for all Californians. *See* App. 27 (finding that "individualized determinations are rationally related to the Legislature's legitimate interest in ensuring that collective bargaining agreements are tailored to the unique circumstances of each employer"). If the Equal Protection Clause no longer stands between

Californians and class-of-one violations, then more than just agricultural employers and farm workers are at risk.

California is a nationwide regulatory leader. *See, e.g.,* Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 750 (1977) (amending Clean Air Act to allow other states to adopt California's new motor vehicle emission standards if the state's standards "are identical to the California standards for which a waiver has been granted for such model year"); Andrew Gilfoil, *Baby You Can Drive My Car: Rethinking Greenhouse Gas Emissions Preemption in Light of* Massachusetts and Green Mountain Chrysler, 28 St. Louis U. Pub. L. Rev. 559, 565 (2009) (California "holds a unique position as a regulatory leader among the states"); Michael H. Wall, *The Regional Greenhouse Gas Initiative and California Assembly Bill 1493: Filling the American Greenhouse Gas Regulation Void*, 41 U. Rich. L. Rev. 567, 577 (2007) (describing California as a "figurehead of progressive environmental legislation"); Ann E. Carlson, *Energy Efficiency and Federalism*, 1 San Diego J. Climate & Energy L. 11, 20 (2009) (noting that California "is the de facto regulatory leader for appliances not subject to federal standards"). Now that California has shown the way in regulating agricultural employers and employees, other states and the federal government may follow if this Court does not check their advance. The Compulsion Regime could easily be replicated for agricultural employers and employees in other states. The California Supreme Court's disregard of the class-of-one doctrine will embolden other government actors, both in California and beyond, to do the same.

There have already been significant efforts at the federal level to apply compulsory interest arbitration, the system at the heart of the Compulsion Regime, to all private employers and employees, by amending the National Labor Relations Act. To date, the Employee Free Choice Act has been introduced five times in the U.S. House of Representatives and four times in the U.S. Senate. *See* H.R. 3619, 108th Cong. (2003); H.R. 1696, 109th Cong. (2005); H.R. 800, 110th Cong. (2007); H.R. 1409, 111th Cong. (2009); H.R. 5000, 114th Cong. (2016); S. 1925, 108th Cong. (2003); S. 842, 109th Cong. (2005); S. 1041, 110th Cong. (2007); S. 560, 111th Cong. (2009). Among other things, the Employee Free Choice Act seeks to amend the National Labor Relations Act to require compulsory interest arbitration for all employers covered by the latter—meaning almost all private employers and employees in the country.[8]

Compulsory interest arbitration has never been applied to those covered by the National Labor Relations Act, and it is contrary to the intent of that law. At the time of its passage, the Act's proponents in the Senate pointedly noted that they "wishe[d] to

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[8] The only employers that the National Labor Relations Act excludes are the "United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 152(2). The only employees excluded are agricultural laborers, domestic service workers, individuals employed by their parent or spouse, independent contractors, supervisors, and those whose employers are subject to the Railway Labor Act. *Id*. § 152(3).

dispel any false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms." Senate Comm. On Education and Labor, National Labor Relations Board, S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935). Indeed, the proponents "stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because *the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory*." *Id*. (emphasis added).

Much like the Compulsion Regime in California, the Employee Free Choice Act institutes compulsory interest arbitration, to be performed by panels without any administrative safeguards. For example, the bill simply directs that if mediation efforts fail, the parties will be referred to an arbitration board "established in accordance with such regulations as prescribed by the [Federal Mediation and Conciliation] Service," which renders a decision binding on the parties for two years. H.R. 800 § 3(3) (110th Cong., 2007). The Federal Mediation and Conciliation Service, a federal agency run by a single presidential appointee, has wide latitude to prescribe regulations. *See* Rosen, *supra*, at 46-47. Like the Compulsion Regime, the Employee Free Choice Act would allow the arbitration panel complete discretion whether to consider comparable wages or benefits, or terms and conditions of employment in the collective bargaining agreements of similarly situated employers. *Id*. at 57. Under the bill, the federal government would impose collective bargaining agreements on newly-organized employers, while competitors in the same industry with pre-existing

contracts or no union presence would not be subject to these government mandates. *Id*. at 56.

With thousands of mediators imposing unique collective bargaining agreements on thousands of private employers and employees, the adoption of California's Compulsion Regime in other states or by Congress would constitute an assault on the safeguards against arbitrary government power which the Framers intended to preserve in the Constitution. This Court should review the lower court's holding to check this potential flood of assaults upon the right to equal protection.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

DATED: May, 2018.

Respectfully submitted,

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