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 OF SILVIA LOPEZ AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

TERENCE J. PELL
MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave. NW
Suite 625
Washington, DC 20036

MICHAEL A. CARVIN
Counsel of Record
VIVEK SURI
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Amicus Curiae Silvia Lopez

QUESTION PRESENTED

Whether the State of California may impose a contract on one private employer and its employees through non-consensual, compulsory arbitration, thereby abrogating the workers' rights to determine their own bargaining representative, without violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Silvia Lopez has worked for petitioner Gerawan Farming, Inc. as a seasonal farmworker. While working at Gerawan, Ms. Lopez led the worker movement against respondent United Farm Workers (Union). Among other things, Ms. Lopez mobilized workers, organized protests, collected signatures for a petition to decertify the Union, and filed the petition before respondent Agricultural Labor Relations Board (Board). Ms. Lopez is now President of Pick Justice, a new farmworker rights movement that opposes and seeks to replace United Farm Workers.

Ms. Lopez has an interest in the constitutionality of the compulsory contract that has been imposed on Gerawan's workers, since the contract subjects the workers to (among other things) compulsory representation by a union for which the workers never voted, a loss of labor rights, and a reduction in take-home pay.*

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* In accordance with Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of the filing of this brief in compliance with Supreme Court Rule 37.2, and each has consented in writing to the filing of this brief.

INTRODUCTION

In this case, a state official (1) unilaterally imposed comprehensive employment restrictions on *amicus* and her fellow workers, reducing their take-home pay and eliminating their right to strike, (2) forced *amicus* and her fellow workers to associate with, subsidize, and cede bargaining power to a union that the workers had tried to decertify, only to be thwarted by the state's refusal to count their ballots, (3) in a proceeding that *amicus* and her fellow workers could not even observe, let alone join as participants. The California Supreme Court nonetheless held that this stark deprivation of *amicus'* due process and associational rights did not even raise a cognizable constitutional injury—never mind three concededly indistinguishable decisions in which this Court had squarely condemned such forced impositions of collective-bargaining agreements. The state supreme court justified this cavalier defiance of this Court's binding precedents with the blithe assertion that, when this Court rejected a substantive-due-process right to be free from minimum-wage and maximum-hour legislation (a right embodied in *Lochner* v. *New York*, 198 U.S. 45 (1905)), it somehow also "repudiated," *sub silentio*, the decisions foreclosing forcing particular collective bargaining agreements on unwilling individuals. (Pet. App. 18.) That ruling is plainly erroneous. In broad strokes, whereas *Lochner* struck down a state's general law to protect workers against the employer's exploitation, the compulsory-contract cases struck down a state's particularized efforts to restrict workers' rights through selective and procedurally unfair unilateral fiat. This Court should review the California Supreme Court's decision to clarify both that the

demise of *Lochner* does not signal the demise of all due-process and associational rights in the employment context, and that only this Court may overrule its precedents.

SUMMARY OF ARGUMENT

Farmworkers like *amicus* harvest, pack, and ship fruits for petitioner Gerawan Farming, Inc. For the seventeen years leading up to 2012, they bargained with their employer on their own, without the involvement of a union. This arrangement worked quite well, since they earned the highest wages in the industry. But in 2012, respondent United Farm Workers of America appeared on the scene. The Union had won an election to become the workers' certified bargaining representative in 1990, but had inexplicably abandoned the workers and stopped all contact with the company starting in 1995. (Pet. 9.)

Soon after resurfacing, the Union forced Gerawan into compulsory arbitration held under the auspices of respondent Agricultural Labor Relations Board. After a series of sessions, the mediator imposed an "agreement" on both Gerawan and its workers. This agreement required the workers to pay fees to the Union, prohibited the workers from striking, and stripped some workers of seniority. The effect of the newly imposed union fees was to *reduce* most workers' take-home pay. (Pet. 10–14.)

The Board and mediator did all of this without the workers' involvement or approval. The mediator prohibited the workers from even observing (let alone participating in) the arbitration sessions. When hundreds of workers traveled to Sacramento to protest the imposition of an unwanted "agreement," the Board

turned them away. A majority of the workers eventually forced an election to decertify the Union as their bargaining representative—but the Board refused to count the ballots. (Pet. 14–16.)

The upshot is simple: The State of California has compelled Gerawan's workers to work under an "agreement" that reduces their take-home pay, limits their seniority benefits, and forces them to pay fees to a union that have protested and tried to get decertified—all without an opportunity even to observe the relevant proceedings, let alone to participate in them.

This indefensible treatment of Gerawan's workers violates the workers' constitutional rights. In a series of three cases, this Court has held that a state contravenes the Due Process Clause by imposing employment terms on an unwilling party. *See Charles Wolff Packing Co.* v. *Court of Industrial Relations of Kansas* (*Wolff I*), 262 U.S. 522 (1923); *Dorchy* v. *Kansas*, 264 U.S. 286 (1924); *Charles Wolff Packing Co.* v. *Court of Industrial Relations of Kansas* (*Wolff II*), 267 U.S. 552 (1925) (collectively *Wolff*). California has done just that here: It has required Gerawan and its workers to submit to employment terms that they do not want.

Yet the California Supreme Court disregarded these cases. The California Supreme Court reasoned that this Court "repudiated" *Wolff* when it renounced *Lochner*. (Pet. App. 18.)

The purpose of this *amicus curiae* brief is to show that the California Supreme Court erred when it equated *Wolff* with *Lochner*. The Due Process Clause prohibits denying anyone "liberty" without "due process" of "law." *Wolff* involves more "liberty," less "process," and less "law" than *Lochner*. That explains why

Justices Holmes and Brandeis—surely no fans of *Lochner*—joined all three cases in the *Wolff* trilogy, and why Justice Brandeis even wrote the opinion of the Court in one of them. The abandonment of *Lochner* thus in no way suggests the repudiation of *Wolff*.

The California Supreme Court was bound to follow *Wolff*. In any event, even if overturning *Lochner* did somehow undermine *Wolff*, "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). This Court should grant certiorari and reverse the judgment below.

ARGUMENT

During the so-called *Lochner* era, this Court held in a series of cases that state regulation of the terms of employment violates the "liberty of contract" guaranteed by the Due Process Clause. "The doctrine that prevailed in *Lochner* … and like cases … has long since been discarded." *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963).

This does not mean, however, that every single due-process case decided between 1905 and 1937 has been discarded. After all, the "liberty of contract" cases form just one strand of this Court's due-process jurisprudence. Other strands of due-process jurisprudence developed during the same era retain their vitality today. Examples include due-process limits on:

- Vague laws. *See International Harvester Co.* v. *Kentucky*, 234 U.S. 216 (1914); *Johnson* v. *United States*, 135 S. Ct. 2551 (2015); *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018); *id.* at 1223 (Gorsuch, J., concurring in part).

- Laws restricting parents' rights. *See Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000).
- Retroactive reopening of expired statutes of limitations. *See William Danzer & Co.* v. *Gulf & Ship Island R.R. Co.*, 268 U.S. 633 (1925); *Stogner* v. *California*, 539 U.S. 607, 632 (2003).
- Imposition of taxes by non-legislative entities. *See Londoner* v. *Denver*, 210 U.S. 373 (1908); *Missouri* v. *Jenkins*, 495 U.S. 33, 67 (1990).

The *Wolff* trilogy likewise involves a different strand of due-process doctrine than *Lochner*. In fact, Justice Holmes, who famously dissented in *Lochner*, joined the opinion of the Court in all three cases in the *Wolff* trilogy. Justice Brandeis, also no friend of *Lochner*, *wrote the opinion of the Court* in one of the three cases (*Dorchy*), and joined the opinion of the Court in the other two. This is because *Lochner* involved general laws designed to protect workers against employers' abuse, while, as the facts here vividly illustrate, compelled contracts directly infringe the worker's economic and (more important) associational rights. That being so, Samuel Gompers, President of the American Federation of Labor and likewise no friend of *Lochner*, called the Kansas compulsory-arbitration law invalidated in *Wolff* an "un-American slave law." *Debate Between Samuel Gompers and Henry J. Allen at Carnegie Hall, 28 May 1920*, at 41 (1920). Clearly, then, the separate strand of due-process doctrine at issue in *Wolff* remains good law today.

I. *Wolff* and this case differ from *Lochner* because they involve more "liberty"

The application of the Due Process Clause turns, first, on "the importance of the interest at stake." *Turner* v. *Rogers*, 564 U.S. 431, 445 (2011). *Wolff* and this case involve different—and more important—liberty interests than *Lochner*. *See* David A. Schwarz, *Compelled Consent:* Wolff Packing *and the Constitutionality of Compulsory Arbitration*, NYU Journal of Law & Liberty (October 2018) (forthcoming) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3174842).

First, and most obviously, a compulsory collective bargaining agreement infringes the right to speak and to associate. An agreement of this kind inherently forces workers to treat the union as their representative during bargaining with the employer. That amounts to "compelled association." *Knox* v. *Service Employees*, 567 U.S. 298, 309 (2012). Such an agreement also may—and, in this case, does—force workers to pay fees to support the union's inherently political activities. That amounts to a "compulsory subsid[y] for private speech." *Id.* at 310.

These interests set *Wolff* and this case apart from *Lochner*. The *Lochner* cases involved regulation of hours, pay, and working conditions—not speech and association. "The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639

(1943). The reason is simple: "The Constitution does not enact Mr. Herbert Spencer's Social Statics. It does enact the First Amendment." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011) (citations omitted).

Second, a compulsory collective bargaining agreement affects the "freedom of labor." *Wolff I*, 262 U.S. at 542. For example:

- A compulsory *collective*-bargaining agreement inherently eliminates an employee's right to individually bargain with the employer. An individual worker may negotiate on the basis of his own best interests. In contrast, a union has leeway to "subordinate the interests of an individual employee to the collective interests of … the bargaining unit." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 269 (2009). Indeed, a union has "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944).
- A compulsory collective-bargaining agreement affects the right to strike. "Collective-bargaining contracts frequently have included certain waivers of the employees' right to strike." *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 356 (1956). The forced contract in this case includes such a waiver.
- A compulsory collective-bargaining agreement affects the right to redress for employment grievances. A union generally has "discretion" when performing its functions under "the collective-bargaining system." *Electrical Workers*

v. *Foust*, 442 U.S. 42, 51 (1979). As a result, a worker has little ability to "force unions to process … claims" that the unions wish to drop. *Id.*

- A compulsory collective-bargaining agreemeent affects the right to vote on employment terms. Workers ordinarily may vote on collective-bargaining agreements. *See NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 73 (1953). The contract here, however, takes effect without submission to the workers for their approval. Cal. Labor Code § 1164.
- The compulsory collective-bargaining agreement in this case even affects the right to hold the bargaining representative accountable for its actions. Workers ordinarily have the right to "petition … for a decertification election, at which they would have an opportunity to choose no longer to be represented by a union." *Brooks* v. *NLRB*, 348 U.S. 96, 100–01 (1954). The forced contract here takes away that right; it prohibits farmworkers from seeking to decertify the union until the final year of the agreement. Cal. Labor Code § 1156.7(c).

Again, these interests set *Wolff* and this case apart from *Lochner*. A worker's interests in bargaining in his own best interests, in taking collective action, in pressing his own grievances, in voting, and in holding his bargaining representative to account are far more important than his supposed "interest" in working longer hours for less pay.

The loss of these labor rights is particularly serious in this case. Where either the union or the agreement enjoys majority support, the state can claim that

the sacrifice of individual workers' labor rights is necessary to enable the union to promote the best interests of the general workforce. There is no indication here, however, that either the Union or the contract enjoys majority support. Quite the contrary, the workers have never had an opportunity to vote on the forced contract, and they have tried to decertify the Union, only to be thwarted by the Board's refusal to count the ballots. The Union and the contract are thus apt to advance the Union's own interests rather than the interests of the bargaining unit—as they do here by granting the Union agency fees while reducing the workers' take-home pay. That seriously infringes the workers' rights.

Third, a compulsory collective bargaining agreement involves a far-reaching deprivation of economic and other liberties. An agreement of this kind involves a total government takeover of all of the operations of the workplace—hours and breaks, pay and seniority, working conditions, and more. An agreement of this kind also leaves the workers and the employer no flexibility at all, since it dictates *precisely* how long the employee must work, how much he must be paid, and so on.

Once more, contrast this sweeping deprivation of liberty with the more modest effect on liberty at issue in *Lochner*. In the *Lochner* cases, the state imposed general minimum requirements affecting a discrete element of the employment relationship: hours (*Lochner*, 198 U.S. 45); wages (*Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923)); professional qualifications (*Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928)); or pensions (*Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935)). The state did not, as

in this case, purport to dictate every single term of the employment relationship. Moreover, in the *Lochner* cases, the state imposed floors and ceilings: a *maximum* of so many hours of work (*Lochner*, 198 U.S. 45); a *minimum* of so many dollars of pay (*Adkins*, 261 U.S. 525); and so on. The state did not say that every baker must work exactly 60 hours a week for exactly $0.25 an hour. The State of California has done exactly that here: It has gone beyond general police-power legislation of the sort involved in *Lochner*, and has engaged in outright central planning of one particular workplace. There can be no doubt that this is a more serious intrusion on liberty than the intrusion in *Lochner*.

II. *Wolff* and this case differ from *Lochner* because they involve less "process"

The application of the Due Process Clause also turns on the "fairness and reliability" of the "procedures" that the state uses before taking away liberty. *Mathews* v. *Eldridge*, 424 U.S. 319, 343 (1976). *Wolff* and this case involve less fair and less reliable procedures than *Lochner*.

When a legislature enacts a general law that regulates employment, "the legislative determination [itself] provides all the process that is due." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). "But where the legislature of a state, instead of fixing the [rules of employment] itself, commits to some subordinate body the duty of determining" the terms of employment for a particular employer, due process requires more. *Londoner*, 210 U.S. at 385. After all, as Justice Gorsuch recently explained, the Due Process Clause means that the Government may not deprive

a person of liberty "without affording him the benefit of (at least) those customary procedures to which freemen were entitled by the old law of England." *Dimaya*, 138 S. Ct. at 1224 (Gorsuch, J., concurring in part). The old law of England allowed Parliament to restrict liberty through general laws; it did not allow subordinate officials to do so in the absence of further procedural safeguards. This allocation of power reflects the principle that "liberty requires accountability." *Department of Transportation* v. *Association of American Railroads*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). "When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences." *Id.*

In *Lochner*, the New York legislature enacted a general law restricting hours of work in bakeries. 198 U.S. at 52. There was no delegation of authority to a subordinate agency to fix the hours of work for a particular employer. As a result, "the legislative determination provide[d] all the process that [was] due." *Logan*, 455 U.S. at 433.

Not so in *Wolff*. The Court emphasized there that the relevant rules "ha[d] not been determined by the Legislature." 262 U.S. at 542. Quite the contrary, they had been "determined under the law by a subordinate agency." *Id.* On the basis of that subordinate agency's "findings and prophecy," the company's "workers" were to be deprived of "a most important element of their freedom of labor." *Id.*

So too here. The relevant rules have not been determined by the California Legislature. They have been determined by a "subordinate agency"—in fact, a

single subordinate officer. On the basis of that subordinate official's "findings and prophecy," Gerawan's "workers" are to be deprived of "a most important element of their freedom of labor." *Id.*

The process in this case is all the more inadequate because the state failed to comply with "the fundamental requirement of due process": Providing Gerawan's workers the "opportunity to be heard at a meaningful time and in a meaningful manner." *Eldrige*, 424 U.S. at 333. The workers asked for leave to intervene in the mediation, but the Board denied their request. They asked for permission to observe the mediator's closed-door sessions, but the mediator barred their entry. They then asked for permission, at the very least, to observe—in silence—the mediator's on-the-record sessions, but the Board rejected even that request, on the grounds that their presence was not in the public interest. Adding insult to injury, Gerawan's workers could not even challenge these proceedings before the Board or in Court; under California law, only the employer or the Union could petition for review. Cal. Lab. Code § 1164.3.

The California Supreme Court sought to justify these procedural outrages by claiming that the Union adequately represented the workers' interests. That argument is plainly wrong. One "fundamental" and "general" rule is that each person is entitled to represent his own interests. *Taylor* v. *Sturgell*, 553 U.S. 880, 898 (2008). The "discrete exceptions" to that principle apply only in "limited circumstances" not applicable here. Specifically, due process is satisfied if a *bona fide* "fiduciar[y]" represents the individual's interest. *Id.* A union could be thought to fall within this limited exception if a majority of the workers vote for

it and approve the contract it bargains. But here, as noted, California barred employees from determining whether a majority supported the Union, and it gave workers no opportunity to disapprove the imposed contract. Since there is no indication here that most workers support the Union or agreed to make the Union their proxy, the Union's presence at the mediation hearing cannot excuse the workers' exclusion from this dispositive proceeding.

Making matters worse, the Union suffers from an intolerable conflict of interest that precludes it from adequately representing the workers. The forced contract in this case empowers and enriches the Union: It allows the Union to seize fees from unwilling workers, requires Gerawan to fire workers who refuse to subsidize the Union, and even bars workers from seeking to decertify the Union until the final year of the contract. (Pet. 22.) "It is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative." *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974). At the same time, the forced contract weakens and impoverishes the workers: It forces them to associate with a union they do not want, to pay union fees, to relinquish the right to strike and to seek decertification, to accept a reduction in take-home pay, and to lose seniority. It makes no sense to say that the Union can adequately represent the workers under these circumstances. This is particularly obvious because the workers have strived to *decertify* the Union as their representative (an objective that was defeated only because the Board refused to count the ballots).

Finally, California denied the workers the opportunity even to challenge these basic due-process violations in court. Having been denied a voice of their own, the workers must depend on Gerawan to raise their rights in this litigation. (For this reason, Gerawan is correct to note that it has standing to seek redress for violations, not only of its own rights, but also the rights of its employees. *See* Pet. 21 n.10.)

In sum, *Wolff* and (to an even greater extent) this case involve a much less fair and much less reliable process than *Lochner*.

III. *Wolff* and this case differ from *Lochner* because they involve less "law"

The Due Process Clause, finally, requires due process of "law"—a word that connotes some degree of generality. The *Lochner* cases involved general laws: *no* baker may work longer than sixty hours a week, *no* employer may pay less than minimum wage, *no* employer may impose yellow-dog contracts. In stark contrast, *Wolff* and this case involve selective deprivations of liberty. In *Wolff*, Kansas imposed employment terms on the Wolff Packing Company—and only the Wolff Packing Company. Here, California has imposed employment terms on Gerawan and its workers—and only Gerawan and its workers.

1. The text of the Due Process Clause supports treating selective deprivations with more suspicion than general laws. The Clause allows the Government to take away a person's life, liberty, or property only with "due process of *law*." Laws establish "general rules for the government of society." *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810) (Marshall, C.J.). They are "general and public." *Vanzant* v. *Waddel*, 2 Yer. 260, 270

(Tenn. 1829) (Catron, J.). Indeed, the "concept" of "law" implies "some measure of generality." *Patchak* v. *Zinke*, 138 S. Ct. 897, 920 (2018) (Roberts, C.J., dissenting). An "ACT of the Legislature" that violates these "great first principles" "cannot be considered" "a law," for "it is against all reason and justice, for a people to entrust a Legislature with SUCH powers." *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) (opinion of Chase, J.).

2. The history of the Due Process Clause supports this reading. "The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276 (1855). Traditionally, "law of the land" has been understood to require some measure of generality. An enactment that applied only to a fixed and identifiable class of people would not qualify as the law of the land. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012).

Daniel Webster explained this point when arguing the Dartmouth College case before this Court:

> By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land.

Dartmouth College v. *Woodward*, 4 Wheat. 518, 581–82 (1819) (argument of counsel).

Webster was far from alone. During the decades leading up to the adoption of the Fourteenth Amendment, courts, lawyers, and scholars alike agreed that selective deprivations of liberty and property do not qualify as the law of the land, and hence do not provide due process of law. Chapman & McConnell, 121 Yale L.J. at 1733–34.

3. This Court's precedents reinforce these conclusions. This Court's earliest case addressing the Fifth Amendment's Due Process Clause declared: "a special act of Congress, passed afterwards, depriving [someone] of [property] … certainly could not be regarded as due process of law." *Bloomer* v. *McQuewan*, 14 How. 539, 553 (1852). "It would be hard to summarize … due process doctrine more succinctly." Chapman & McConnell, 121 Yale L.J. at 1755.

The Court developed the point in *Hurtado* v. *California*, 110 U.S. 516 (1884). It explained there:

> It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law," … so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to

> another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation.

Id. at 535–36.

The very next year, the Court again ruled: "The [Due Process Clause] means, therefore, that there can be no proceeding against life, liberty, or property … without the observance of … general rules." *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 708 (1884).

These precedents remain valid to this day. In one recent case, a plurality of this Court reaffirmed "*Hurtado* [and] its principle of generality," and quoted its statement that "law … must be not a special rule for a particular person or a particular case, but … the general law, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." *United States* v. *Winstar Corp.*, 518 U.S. 839, 897–98 (1996) (opinion of Souter, J., joined by Stevens, O'Connor, and Kennedy, JJ.). More broadly, the Court has recognized that "those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons." *United States* v. *Lovett*, 328 U.S. 303, 317 (1946). Put simply, the law today, no less than the law a century ago, continues to reflect "the Framers' concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 242 (1995) (Breyer, J., concurring in the judgment).

To be sure, this Court has upheld Congress' authority to enact private laws for the benefit of particular individuals. The critical feature of these laws is that they *benefit* rather than *harm* the affected individuals. "'Private statutes' do not 'deprive' anyone of 'life, liberty, or property,'" and thus do not violate the guarantee of due process. Chapman & McConnell, 121 Yale L.J. at 1734. Moreover, when the legislature "grants particular individuals relief or benefits," "the danger of oppressive action that [the Constitution] was designed to avoid is not implicated." *Plaut*, 514 U.S. at 242 (Breyer, J., concurring in the judgment).

4. *Wolff* involved the very kind of selective deprivation of liberty that this strand of due-process jurisprudence prohibits. In *Wolff*, the Court invalidated a "system of compulsory arbitration" through which the state imposed bespoke contracts extending no further than a given employer and its workers. *Wolff II*, 267 U.S. at 569. The Court noted that the state did "*not* … regulate wages or hours of labor either generally or in particular classes of business." *Id.* at 565 (emphasis added). And it explicitly refused to decide whether the same requirements "would be valid" if they had been made "either general or applicable to all businesses of a particular class." *Id.* at 569. There can be no doubt, in short, that *Wolff* rested—at least in part—on the due-process "principle of generality" (*Winstar*, 518 U.S. at 898 n.43).

This case, too, involves a similarly selective deprivation of liberty. The collective bargaining agreement imposed in this case affects only one employer: Gerawan. It affects only one group of workers: Gerawan's workers. Put simply, Gerawan and its workers are

subjected to "a distinct, unequal, individualized set of rules" that nobody else is required to obey.

The *Lochner* cases, by contrast, all involved general rather than selective laws. *Lochner* involved a general law prohibiting all bakers from working for more than sixty hours a week. 198 U.S. 45. *Adkins* involved general regulations setting minimum wages for all workers in particular industries. 261 U.S. 525 *Louis K. Liggett Co.* involved a general law requiring all pharmacy owners to be licensed pharmacists. 278 U.S. 105. *Alton Railroad* involved a general law regulating railroad pensions. 295 U.S. 330.

These distinctions make all the difference. In the first place, the prohibition upon selective deprivations of liberty has (as explained above) a firm grounding in the text and history of the Due Process Clause. *Lochner* does not; nothing in the Clause's text or history suggests that courts have the authority to review the wisdom of general, prospective economic legislation.

In the second place, the prohibition on selective deprivations of liberty respects democratic values in a way that *Lochner* does not. As Justice Jackson famously explained, striking down a "substantive law" under the Due Process Clause "frequently disables all government … from dealing with the conduct in question," and "leaves ungoverned and ungovernable conduct which many people find objectionable." *Railway Express Agency* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). In contrast, invalidating a selective law "does not disable any governmental body from dealing with the subject at hand," but instead "merely means that the prohibition or regulation must have a broader impact." *Id.* This requirement is "salutary." *Id.* "The framers of the Constitution knew, and

we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id.* At the same time, "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Id.*

* * *

In sum, *Wolff* and *Lochner* are quite different—which, again, is why Justices Holmes and Brandeis joined the former but vehemently opposed the latter. The *Lochner* cases were about the use of the legislative process to adopt general laws that take away only minimal liberty. *Wolff* and this case, by contrast, concern the use of unfair and unreliable executive process to adopt highly selective decrees that take away wide-ranging and vitally important associational, expressive, and other liberties. *Lochner* was wrong, but *Wolff* was right. At the very least, *Wolff* differs sufficiently from *Lochner* that the California Supreme Court had no authority to deem it a dead letter. The orderly administration of the rule of law depends on this Court's vigilantly enforcing and reaffirming the principle that this Court alone is authorized to overturn its precedents.

This Court should grant Gerawan's petition to confirm that *Wolff* remains good law—or, at a minimum, to confirm that it remains "this Court's prerogative alone to overrule one of its precedents." *Khan*, 522 U.S. at 20.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

TERENCE J. PELL
MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave. NW
Suite 625
Washington, DC 20036

MICHAEL A. CARVIN
Counsel of Record
VIVEK SURI
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Amicus Curiae Silvia Lopez

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