No. 17-1375

In the Supreme Court of the United States

GERAWAN FARMING, INC.,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE AGRICULTURAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over this case at the present time because there is no final state judgment within the meaning of 28 U.S.C § 1257(a).

2. Whether the California Supreme Court correctly ruled that the Due Process and Equal Protection Clauses of the Fourteenth Amendment do not prohibit a State from establishing a mandatory arbitration process to craft the initial labor contract between agricultural employers and farmworkers in certain circumstances.

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JURISDICTION

The judgment of the California Supreme Court was entered on November 27, 2017. Pet. App. 1. On February 8, 2018, Justice Kennedy extended the time for filing a petition for a writ of certiorari to March 28, 2018, and the petition was filed on that date. The petition invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). Pet. 3.

As discussed below (at 11-14), the judgment of which petitioner seeks review remands petitioner's case to the state court of appeal for further proceedings. The judgment is not final within the meaning of Section 1257(a), and this Court lacks jurisdiction to review it.

STATEMENT

1. a. Since 1975, California has recognized the collective bargaining rights of agricultural workers. In enacting the Agricultural Labor Relations Act (ALRA), the state Legislature sought "to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations," and "to bring certainty and a sense of fair play to a[n] . . . unstable and potentially volatile condition in the state." 1975 Cal. Stat., ch. 1, § 1, p. 4013; Pet. App. 4.[1] The ALRA establishes "collective-bargaining rights for agricultural employees" and declares it "to

[1] Before the ALRA's enactment, agricultural labor relations in California were marred by damaging strikes, boycotts, and violence. *See, e.g.*, Roberts, *Fear and Tension Grip Salinas Valley in Farm Workers' Strike*, N.Y. Times, Sept. 6, 1970, at 32, https://tinyurl.com/yafgsec4; *Union Office Is Bombed*, N.Y. Times, Nov. 5, 1970, at 59, https://tinyurl.com/yar38wro; Caldwell, *Picket Shot, Many More Arrested in Grape Strike*, N.Y. Times, Aug. 3, 1973, at 29, https://tinyurl.com/yaxnto49.

be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives." Cal. Lab. Code § 1140.2.

To further these goals and address particular challenges facing California's agricultural industry, the Legislature diverged from the model of the federal National Labor Relations Act in several respects. *See* Pet. App. 44-45.[2] For example, the ALRA prohibits an employer from bargaining with an uncertified union. *See* Cal. Lab. Code § 1153(f). It authorizes only employees or unions acting on employees' behalf to seek an election, while the NLRA permits employers to do so. *Compare* Cal. Lab. Code § 1156.3(a) *with* 29 U.S.C. § 159(c)(1)(B). And under the ALRA, only employees may seek to decertify a union, while the NLRA allows an employer to withdraw recognition of a certified union unilaterally in certain circumstances. *See* Cal. Lab. Code § 1156.7(c); Pet. App. 45.

Once a labor union is selected by a majority of employees in an election certified by the state Agricultural Labor Relations Board (respondent here), it becomes the exclusive representative of all employees "for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment." Cal. Lab. Code §§ 1156, 1156.2.

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[2] Agricultural laborers are not covered by the NLRA. 29 U.S.C. § 152(3).

b. Over the first 25 years of experience with the ALRA, employer resistance and other factors led to nearly 60 percent of union elections never resulting in contracts. Pet. App. 5-6. In 2002, the California Legislature sought to address this failure in part by amending the Act to authorize "mandatory mediation and conciliation" (MMC). The Legislature declared "a need . . . for a mediation procedure in order to": (1) "ensure a more effective collective bargaining process . . . , and thereby more fully attain the purposes of the [ALRA]"; (2) "ameliorate the working conditions and economic standing of agricultural employees"; (3) "create stability in the agricultural labor force"; and (4) "promote California's economic well-being by ensuring stability in its most vital industry." Pet. App. 7 (quoting 2002 Cal. Stat., ch. 1145, § 1, p. 7401); *see* Cal. Lab. Code §§ 1164 *et seq.*

MMC is a mandatory "interest arbitration" process through which bargaining disputes over the terms of an initial labor contract are resolved with the help of a mediator. Pet. App. 7. Interest arbitration has been successfully used for decades to resolve collective bargaining disputes in a variety of settings.[3]

Contrary to the representations of petitioner and its *amici*, either an agricultural employer or a certified labor union may invoke the MMC process when certain prerequisites are met. Cal. Lab. Code §§ 1164(a), 1164.11; *see* Pet. App. 8. Specifically, where, as here, the union was certified before 2003, either party may request interest arbitration 90 days after a renewed bargaining demand, when: "(a) the parties have failed

[3] *See generally* Elkouri & Elkouri, How Arbitration Works (7th ed. 2012), Ch. 22 (Arbitration of Interest Disputes); UFW Cal. Sup. Ct. Br. 30-35, https://tinyurl.com/y8hjtoao (discussing history of interest arbitration and collecting authorities).

to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain, (b) the employer has committed an unfair labor practice, and (c) the parties have not previously had a binding contract between them." Cal. Lab. Code § 1164.11; *see id.* § 1164(a), Pet. App. 8.[4] If these criteria are satisfied, the Board must order the parties to arbitration "before a neutral, agreed-upon mediator." Pet. App. 8; *see* Cal. Lab. Code § 1164(b).

If the parties reach an agreement on all contract terms, the process ends without further Board action. *See* Cal. Code Regs. tit. 8, § 20407(e). If, however, the parties are unable to agree on all terms, the mediator resolves any disputed items and issues a report establishing "the final terms of a[n initial] collective bargaining agreement." Cal. Lab. Code § 1164(d); *see id.* § 1164(c); Cal. Code Regs. tit. 8, §§ 20407(a)-(d); Pet. App. 8.

In setting the terms of that initial labor contract, the mediator is directed to assess "those factors commonly considered" in labor negotiations, including: (1) the "stipulations of the parties," (2) the "financial condition of the employer," (3) any labor contracts "covering similar agricultural operations," (4) wages, benefits, terms, and conditions of employment "in comparable firms or industries in geographical areas with similar economic conditions," and (5) the "average consumer prices for goods and services according to the California Consumer Price Index, and the overall cost of living, in the area where the work is performed." Cal. Lab. Code § 1164(e); *see* Pet. App. 8-9.

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[4] Different requirements apply to unions certified after January 1, 2003, or by a Board order based on employer misconduct during an election or decertification drive. *See* Cal. Lab. Code §§ 1164(a)(2)-(4); Cal. Code Regs. tit. 8, §§ 20407(b)-(d).

The report must specify "the basis for the mediator's determination" of any disputed issue and must "be supported by the record." Cal. Lab. Code § 1164(d); *see* Pet. App. 8.

If the mediator's report is acceptable to the parties, it takes immediate effect as a final order of the Board. Cal. Lab. Code § 1164.3(b); *see* Pet. App. 8. If either party is dissatisfied, it may seek review from the Board and the state appellate courts. Pet. App. 9.

Upon petition of either party, the Board must reject any contract provision that (1) "is unrelated to wages, hours, or other conditions of employment"; (2) "is based on clearly erroneous findings of material fact"; or (3) "is arbitrary and capricious in light of the . . . findings of fact." Cal. Lab. Code § 1164.3(a); *see* Pet. App. 9-10, 38-39. And the entire report must be rejected if it was "procured by corruption, fraud, or other undue means," the mediator was corrupt, or "the rights of the petitioning party were substantially prejudiced by the misconduct of the mediator." Cal. Lab. Code § 1164.3(e); *see* Pet. App. 10, 39.

If still dissatisfied after the Board's review, either party may petition for a writ of review in the California Court of Appeal or California Supreme Court to determine "on the basis of the entire record" whether: (1) the Board "acted without, or in excess of, its powers or jurisdiction"; (2) the Board "has not proceeded in the manner required by law"; (3) the Board's decision "was procured by fraud or was an abuse of discretion"; or (4) the Board's decision "violates any right of the petitioner under the Constitution of the United States or the California Constitution." Cal. Lab. Code § 1164.5(b); Pet. App. 9-10, 39.

2. The contract at issue in this case followed years of unsuccessful bargaining between the parties. The United Farm Workers of America was elected by Gerawan's employees in 1990, and certified by the Board as their exclusive bargaining representative in 1992. Pet. App. 11. Despite bargaining attempts in 1994 and 1995, the parties never reached an initial collective bargaining agreement. *Id.* at 11-12.

"For reasons not apparent in the record, neither the UFW nor Gerawan attempted to communicate or restart negotiations [from 1995] until October 12, 2012, when the UFW served Gerawan with a renewed demand to bargain." Pet. App 12. The parties held more than 10 bargaining sessions in early 2013, but remained unable to reach an agreement. *Id.*

The UFW requested referral to MMC. Pet. App. 12. Gerawan opposed the request on numerous grounds, including its contention that the UFW had forfeited its certification as the exclusive bargaining representative of Gerawan's employees through an extended period of inactivity. *Id.* The Board rejected this "abandonment" defense as inconsistent with the ALRA and foreclosed by state law. *Id.* at 12-13. The Board thus "took no evidence and made no findings concerning the UFW's alleged absence." *Id.* at 13. The Board thereafter determined the statutory prerequisites were met and ordered the parties to arbitration. *Id.* at 12.

The parties jointly selected an experienced mediator. Pet. App. 13, 40. After several sessions, the parties remained unable to reach an agreement on various contract terms. *Id.* at 13. As required by Labor Code section 1164(a), after several hearings to consider the parties' positions and supporting evidence,

the mediator submitted a report to the Board resolving the disputed terms. *Id.*

Gerawan objected to the report, and the Board ultimately remanded six provisions to the mediator for further consideration. Pet. App. 13. With the mediator's assistance, the parties reached agreement on those six terms, and the mediator issued a second report. *Id.* Neither party objected to the mediator's second report, which became the final order of the Board—and the parties' initial contract—on November 19, 2013. *Id.*; *see* Cal. Lab. Code § 1164.3(d).

3. a. Gerawan filed a petition for review in the California Court of Appeal. Pet. App. 13; *see* Cal. Lab. Code § 1164.5(a). It alleged that the ALRA's mandatory arbitration procedure violated equal protection, substantive and procedural due process, the Takings Clause, and the Contracts Clause. Pet. App. 13, 62, 108; *see also Gerawan Farming, Inc. v. ALRB*, No. F068526 (Cal. Ct. App. Mar. 15, 2018), https://tinyurl.com/yb2slccd.[5] The court of appeal ruled that the ALRA "on its face" violated equal protection, relying primarily on a dissenting opinion from an earlier state intermediate appellate case. Pet. App. 112-120. The court did not adjudicate Gerawan's other constitutional claims. *Id*. at 109.

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[5] Gerawan also raised claims under parallel provisions of the California Constitution, and a number of other state law claims, including that the statutory criteria for ordering the parties to MMC were not satisfied, that abandonment is a valid defense, and improper delegation of legislative power. Pet. App. 13-14, 16, 62-64, 108-109. Petitioner raised only the latter two claims in the state supreme court, which ruled against Gerawan. Pet. App. 30-54.

b. The California Supreme Court reversed. Pet. App. 1-54. It addressed Gerawan's equal protection and substantive due process claims. *Id.* at 16-30.[6] The court noted that Gerawan "characterized its challenge as a facial attack on the MMC statute," and that "'[t]he standard for a facial constitutional challenge to a statute is exacting.'" Pet. App. 16 (citation omitted).

As to due process, the court reasoned that the *Lochner*-era "liberty of contract" rationale that Gerawan advanced had been effectively overruled by this Court. Pet. App. 18 (citing, *inter alia*, *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937)). It also rejected Gerawan's contention that two of this Court's other precedents, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), prohibited compulsory arbitration. It reasoned that those cases were decided on "statutory grounds and said nothing about compulsory arbitration's constitutionality." Pet. App. 19.

As to equal protection, the court determined that rational basis review applied because the statute involved social and economic policy, rather than classification along suspect lines or fundamental rights. Pet. App. 19-21 (citing, *inter alia*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). The court rejected Gerawan's argument that contracts resulting from mandatory interest arbitration "discriminate[] against *each* individual agricultural employer." Pet. App. 23-25. It explained that, under this Court's precedents, "laws regulating a small number of individuals, or even a class of one, are not necessarily suspect." *Id.* at 24. The court held that Gerawan's "class of one"

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[6] The state supreme court did not rule on petitioner's procedural due process claims. Pet. App. 16-19.

claim failed, even assuming it could be brought, because Gerawan could not demonstrate that it had been treated differently from other similarly situated employers, or that California lacked a rational basis for any difference in treatment. *Id*. at 26. It reasoned that the mediator's "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," and that the mediator's discretion in crafting the initial labor contract was sufficiently "channeled" by statutory factors. *Id*. at 27-28.

Because "[t]he court [of appeal] did not resolve Gerawan's other constitutional claims," the California Supreme Court "remand[ed] for further proceedings." Pet. App. 15, 54.

c. On remand, Gerawan has told the California Court of Appeal that the court "must address the remaining constitutional challenges," because when the court initially "struck down the MMC statute, it did not address all the constitutional arguments raised." Pet. Cal. Ct. App. Br. 7, 8 (Feb. 5, 2018). Gerawan has further contended that such a decision is "essential to the constitutional application of the MMC statute." *Id*. at 11.

Approximately two weeks before Gerawan filed its certiorari petition, the California Court of Appeal set the remanded case for oral argument in October 2018. The court's order observed that it was:

> appropriate for us to address the unresolved constitutional issues . . . [which] include whether the MMC statute and the Board's order enforcing it violated (i) the Takings

> Clause of the U.S. and California Constitutions, (ii) the Contract[s] Clause of the U.S. and California Constitutions, and/or (iii) procedural due process.

Gerawan Farming, Inc. v. ALRB, No. F068526 (Cal. Ct. App. Mar. 15, 2018), https://tinyurl.com/yb2slccd.

4. The labor contract at issue in this case has never been enforced. Although the three-year contract nominally took effect in November 2013 (and expired in June 2016), the state court of appeal previously ordered any proceedings to enforce the contract stayed. *Gerawan Farming, Inc. v. ALRB*, No. F068526 (Cal. Ct. App. Oct. 23, 2014), https://tinyurl.com/yb2slccd. Only after Gerawan's claims are resolved, and only if it is unsuccessful, could it be required to implement the contract's terms. Moving forward, the parties could then negotiate a new contract outside the MMC process. As noted above, MMC is a limited remedy generally available only for first contracts. *See also Hess Collection Winery v. ALRB*, 140 Cal. App. 4th 1584, 1600 (Cal. Ct. App. 2006) ("The scheme is actually limited in scope. It applies only to the initial bargaining efforts of an employer and collective bargaining agent.").[7]

ARGUMENT

The California Supreme Court has remanded this case to the state court of appeal for further proceedings. No court has yet addressed Gerawan's federal

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[7] Certain terms of a collective bargaining agreement must be maintained pending the parties' negotiations for a successor agreement until they reach either a new agreement or an impasse in bargaining. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198-199 (1991); Cal. Lab. Code § 1148 (requiring Board to follow applicable NLRA precedents).

constitutional challenges to the state Agricultural Labor Relations Act under the Takings Clause, the Contracts Clause, or procedural due process. Under these circumstances, there is no final state judgment that this Court has jurisdiction to review.

In any event, a number of petitioner's themes and assertions relate to issues not presented by the present case. Its claim of a conflict with this Court's precedents rests on cases whose reasoning was abandoned decades ago. The court below properly rejected petitioner's claims of unequal treatment; and whether to authorize mandatory interest arbitration in particular circumstances, such as those that exist here, is a policy matter for the state Legislature. There is no reason for further review.

1. a. This Court's jurisdiction to review state court decisions on federal questions is limited to the review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Under this "firm final judgment rule," the state court's decision must have "effectively determined the entire litigation." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81, 84 (1997); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-487 (1975). The decision below is not final in this sense.

Far from determining the entire litigation, the state supreme court's decision here remands for adjudication of Gerawan's remaining federal constitutional challenges. Pet. App. 15, 54. Gerawan has told the state appellate court that resolution of its remaining federal claims is "essential to the constitutional application of the MMC statute." Pet. Cal. Ct. App. Br. 11 (Feb. 5, 2018). That court has set oral argument for October 2018. If Gerawan prevails on one issue or another, it may have no further reason to seek review.

If it does not, then it may seek further review from the state supreme court and, if necessary, from this Court. Such a future petition would, unlike this one, present all of Gerawan's federal claims for possible review at one time.

In these circumstances, the current decision remanding the case for further proceedings does not constitute an "effective determination of the litigation." *Jefferson*, 522 U.S. at 81 (decision not final where state supreme court decision "affected only two of the four counts in petitioner's complaint" and "remanded the case for further proceedings"); *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam) (dismissing petition for lack of jurisdiction where state court had remanded case for trial on remaining issues). This Court thus lacks jurisdiction to review it.

b. This case does not fall within any exception to the final judgment rule. As a threshold matter, the Court has recognized that such exceptions generally apply when remand proceedings "would not require the decision of other federal questions." *Cox*, 420 U.S. at 477; *Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (*Cox* exceptions apply when there are "no other federal issues to be resolved"). As the Court has explained, "where the remaining litigation may raise other federal questions that may later come here, . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews." *Radio Station WOW v. Johnson*, 326 U.S. 120, 127 (1945).

In any event, none of the four exceptions discussed in *Cox* applies here. First, this is not a case where "there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. The

California Supreme Court's equal protection and due process rulings do not determine the outcome of Gerawan's challenges under the Takings Clause, the Contracts Clause, and procedural due process. That is why that court remanded to have the state appellate court decide those issues in the first instance.

Second, this is not a case where "the federal issue . . . will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Such cases generally involve remand for ancillary proceedings where the federal issue remains separable and distinct. *See, e.g., Radio Station WOW*, 326 U.S. at 124-127 (accounting on remand would not affect finality of federal issue); *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U.S. 362, 371-372 (1914) (similar); *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 381 n.5 (2003) (remand for attorney fees did not interfere with court's jurisdiction). The remand here involves substantive federal claims, not resolution of ancillary issues.

Third, this is not a case where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case" on remand. *Cox*, 420 U.S. at 481. In such cases, "if the party seeking interim review . . . were to lose on the merits . . . the governing state law would not permit him again to present his federal claims for review." *Id.*; *see, e.g., Kansas v. Marsh*, 548 U.S. 163, 168-170 (2006) (collecting cases). Here, nothing in California law or the nature of the remand proceedings would prevent review of Gerawan's present equal protection and due process claims at some later time, once all of its federal constitutional challenges have been addressed by the California courts.

Finally, this case does not involve "further proceedings pending in [state court in] which the party seeking review here might prevail on the merits on nonfederal grounds" and a showing that delaying review would "seriously erode federal policy." *Cox*, 420 U.S. at 482; *Flynt*, 451 U.S. at 622 (requiring "identifiable federal statutory or constitutional policies which would [be] undermined by the continuation of the litigation in the state courts"). The remand proceeding here directly involves resolution of additional federal questions. Although Gerawan also has "unresolved" state law claims pending on remand, they mirror its federal claims. *Gerawan Farming, Inc. v. ALRB*, No. F068526 (Cal. Ct. App. Mar. 15, 2018), https://tinyurl.com/yb2slccd. Further, "there is no identifiable federal policy that will suffer if the state . . . proceeding goes forward." *See, e.g., Flynt*, 451 U.S. at 622 (resolution of equal protection claim "can await final judgment without any adverse effect upon important federal interests"). As *Flynt* explained, "[a] contrary conclusion would permit the fourth exception to swallow the rule. Any federal issue finally decided on an interlocutory appeal in the state courts would qualify for immediate review." *Id.*

As was true in *Jefferson*, "[t]his case fits within no exceptional category" to the Court's final judgment rule. 522 U.S. at 84. Rather, "[i]t presents the typical situation in which the state courts have resolved some but not all of petitioners' claims." *Id.*; *Flynt*, 451 U.S. at 621 (dismissing where "it appears that other federal issues will be involved" on remand). The Court accordingly lacks jurisdiction to consider Gerawan's claims at the present time.

2. Even if there were jurisdiction, this case would not warrant review. To begin with, the petition repeatedly presents unsubstantiated factual assertions and legal theories unrelated to the issues that would actually be before the Court if review were granted.

First, petitioner cannot properly present any claim that mandatory interest arbitration infringes on the "free association" rights of its employees. Pet. 1, 3, 19, 22; *see also* Lopez Br. 7-8; Angeles Br. 8-11. Courts are rightly suspicious "when faced with [claims of] an employer's benevolence as its workers' champion against their certified union," and "[t]here is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). But even assuming Gerawan could properly litigate such a claim on behalf of its employees, no court has yet adjudicated the question.[8]

Second, the UFW's purported "abandonment" of Gerawan's workers has no bearing on the facial constitutional challenges in the petition. *See* Pet. 2, 9, 14, 17, 21, 34, 36. In deciding whether a law is facially invalid, this Court considers only the statute's facial requirements, and a plaintiff "can only succeed . . . by 'establishing that no set of circumstances exists under which the [statute] would be valid.'" *Wash. State*

[8] Petitioner's related complaint that the ALRA's mandatory interest arbitration process does not permit employees to ratify the resulting contract likewise has not been addressed by the courts below. *See* Pet. 1, 13, 15, 25, 36; Pac. Leg. Found. Br. 3-4; Lopez Br. 9-10; Angeles Br. 11. As a matter of state law, the ALRA does not require employee ratification. Further, under federal labor law, "[s]uch ratification is required only if the union's constitution or by-laws or the agreement itself so provides." *E.g.*, *White v. White Rose Food*, 237 F.3d 174, 182 (2d Cir. 2001).

Grange v. Wash. State Republican Party, 552 U.S. 442, 449-450 (2008). Moreover, what petitioner presents as fact remains an unproven allegation. In separate proceedings, the ALRB determined that Gerawan lacked a "factual record to support its abandonment argument." *Gerawan Farming, Inc.*, 44 ALRB No. 1 (2018), at 46, https://tinyurl.com/yd4nrefj; *Gerawan Farming, Inc. v. ALRB*, No. F077033 (Cal. Ct. App.), https://tinyurl.com/yby5ywt4. In any event, the California Supreme Court unanimously held—as a matter of state law—that a union's absence alone does not terminate its certification as the exclusive bargaining representative. Pet. App. at 41-45, 54; *Arnaudo Bros., L.P. v. ALRB*, 22 Cal. App. 5th 1213, 232 Cal. Rptr. 3d 367, 378 (Cal. Ct. App. 2018) ("[T]he abandonment defense is not recognized in California.").

Third, the vacated decertification election also has no bearing on any issue before the Court. *See* Pet. 2, 14-16, 25. As Gerawan concedes, the election is the subject of a different ALRB decision and of ongoing proceedings. *See* Pet. 15 n.7; Pet. Supp. Br. 1; *Gerawan Farming, Inc.*, 42 ALRB No. 1 (2016), at 69, https://tinyurl.com/yafys2du (dismissing decertification election because of "Gerawan's unlawful and/or objectionable conduct," which "tainted the entire decertification process"). On May 30, 2018, the state court of appeal vacated the Board's order in that proceeding, and remanded for reconsideration. Pet. Supp. App. 1-3, 180-181. That decision is not yet final, and could be subject to further proceedings in the state courts.

Fourth, petitioner's complaint that its workers could not participate in or observe the MMC process is not before the Court. *See* Pet. 10; *see also* Lopez Br. 2,

13-14; Angeles Br. 5-6. This too is the subject of ongoing litigation. *See Gerawan Farming, Inc.*, 39 ALRB No. 11 (2013), https://tinyurl.com/yc25rhnd; *Gerawan Farming, Inc. v. ALRB*, No. F076148 (Cal. Ct. App.), https://tinyurl.com/y9p95wa9; *see also* Pet. App. 60 n.7.

Fifth, Gerawan's repeated assertion that its workers "consistently earn the highest wages in the industry" is at best incomplete, and ultimately irrelevant to Gerawan's facial constitutional challenges. *See* Pet. 9, 21-22, 32, 34. The mediator noted that Gerawan's wage survey showed it paid "the highest general labor rates among the employers surveyed," but explained that the survey was "not based on total compensation" and did not account for the value of employee benefits, including health insurance. Certified Record (CR) 415. One of the contracts submitted by Gerawan showed, for example, that another employer "not only pays slightly higher general labor rates" but "also pays $2.704 per hour" additional for a medical plan. *Id.*

Finally, Gerawan's objections to several of the specific contract terms determined by the mediator—many of which it purports to assert on its employees' behalf—raise issues of state law that are pending before the state court of appeal in other proceedings. *See* Pet. 2, 11-13, 21-22, 32, 34, 36; Pet. Cal. Ct. App. Br. 53-60 (Feb. 13, 2014). They too are not before this Court.

3. As to questions properly presented by the present petition, there is no reason for further review. Petitioner principally argues that the California Supreme Court's decision conflicts with the *Wolff* line of cases, in which petitioner asserts this Court held that it was unconstitutional for a State to compel interest arbitration. Pet. 1, 26-31; *see Wolff Packing Co.*

v. Indus. Court (*Wolff I*), 262 U.S. 522 (1923); *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Wolff Packing Co. v. Indus. Court* (*Wolff II*), 267 U.S. 552 (1925). But those cases do not supply the governing constitutional standard.

To begin with, even on their own terms, the *Wolff* cases did not establish any bright-line rule that compulsory arbitration violates due process. *See* Pet. 29-30. The Court held that Kansas's "attempts to fix wages and compel arbitration were constitutionally impermissible because the industries there (i.e., meat packing and coal mining) were not sufficiently 'clothed with a public interest,' to justify these regulations." *Country-Wide Ins. Co. v. Harnett*, 426 F. Supp. 1030, 1033 (S.D.N.Y.), *aff'd* 431 U.S. 934 (1977). It was the nature of the regulated industries—not simply the compulsory arbitral process—that the Court held rendered the law unconstitutional as applied. *See, e.g.*, *Wolff I*, 262 U.S. at 544; *Dorchy*, 264 U.S. at 289; *Wolff II*, 267 U.S. at 568-569.

In *Nebbia v. New York*, 291 U.S. 502, 536-537 (1934), this Court expressly rejected the *Wolff* cases' "public affectation" analysis. It also rejected the proposition that state-imposed contract terms per se offend due process. *Id.* at 528 (statutes imposing contract terms "are within the state's competency"). "That wages and hours can be fixed by law is no longer doubted." *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949) (collecting cases).

Gerawan acknowledges *Nebbia*'s rejection of the "public affectation" doctrine, but contends that "*Wolff* did not rest its holding on this basis" and "[n]o decision of this Court suggests otherwise." Pet. 29 n.12. That is incorrect. This Court has repeatedly recognized that the constitutional basis for the *Wolff* cases was

their "public affectation" analysis. *See, e.g.*, *Wolff II*, 267 U.S. at 563-569; *Williams v. Std. Oil Co.*, 278 U.S. 235, 239 (1929), *overruled in part on other grounds by Olsen v. Nebraska*, 313 U.S. 236 (1941); *Nebbia*, 291 U.S. at 536; *Lincoln Fed.*, 335 U.S. at 536.

In any event, the *Wolff* cases were decided at the "zenith" of this Court's use of the "freedom of contract" rationale to nullify legislation, alongside *Lochner v. New York*,[9] *Adair v. United States*,[10] *Coppage v. Kansas*,[11] *Adkins v. Children's Hospital*,[12] and *Ribnik v. McBride*.[13] *See generally* Williams, *The Compulsory Settlement of Contract Negotiation Labor Disputes*, 27 Tex. L. Rev. 587, 620-621 (1949). For many years since that time, however, "[t]his Court . . . has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases." *Lincoln Fed.*, 335 U.S. at 536; *Phelps Dodge Corp.*, 313 U.S. at 187 ("The course of decisions in this Court since *Adair* . . . and *Coppage* . . . have completely sapped those cases of their authority.").

Petitioner observes that the *Wolff* cases have not been expressly overruled. *See* Pet. 2, 28, 30. But this Court has repeatedly declined to "return . . . to the[ir] due process philosophy," which it has "deliberately discarded." *Lincoln Fed.*, 335 U.S. at 537. Gerawan

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[9] 198 U.S. 45 (1905), *abrogation recognized in Ferguson v. Skrupa*, 372 U.S. 726 (1963).

[10] 208 U.S. 161 (1908), *overruled in part by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

[11] 236 U.S. 1 (1915), *overruled in part by Phelps Dodge Corp.*, 313 U.S. 177.

[12] 261 U.S. 525 (1923), *overruled in part by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[13] 277 U.S. 350 (1928), *overruled in part by Olsen,* 313 U.S. 236.

does not identify a single case since the 1930s that relies on the *Wolff* cases or their due process analysis to hold any law unconstitutional.

Under the different standard that has prevailed for the last 70 years, the ALRA's mandatory interest arbitration process easily withstands constitutional scrutiny. Such economic legislation does not violate due process if it is supported by a rational basis. *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). Here, "[t]he Legislature was aware that the ALRA had failed to promote collective bargaining agreements, finding that almost 60 percent of union representation elections did not result in a first contract." Pet. App. 21-22. "In light of the 'peculiar problems with the collective bargaining process between agricultural employers and agricultural employees,' the Legislature reasonably could have concluded that a mediation process followed by binding arbitration in the event of a bargaining impasse would 'correct' the ALRA's failure and facilitate the adoption of first contracts." Pet. App. 22 (citation omitted). "The Legislature also reasonably could have believed that facilitating first contracts furthers the goal of 'ensuring stability' in the agricultural industry." Pet. App. 22. Due process requires nothing more.

4. Petitioner's equal protection claim likewise does not warrant further review. According to petitioner, the individualized labor contracts produced by mandatory interest arbitration violate equal protection because they "discriminate[] against *each* individual agricultural employer *within* the covered class of employers." Pet. App. 23; *see* Pet. 31-34. But as this Court has explained, "'[e]ven laws that impose a duty or liability upon a single individual . . . are not on that

account invalid.'" *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 (2016) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995)). Rather, "[l]aws narrow in scope, including 'class of one' legislation, . . . violate the Equal Protection Clause" only "if arbitrary or inadequately justified." *Id.* at 1327 n.27 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

Petitioner complains that "[e]ach workplace subjected to MMC will have its own minimum-wage law, its own maximum-hour law, [and] its own rules for handling workplace issues." Pet. 33. But this Court has recognized that labor contracts are necessarily individualized to specific workplaces and that they appropriately establish "the common law of . . . a particular plant." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 579 (1960) (collective bargaining agreements "call[] into being . . . the common law of a particular industry or of a particular plant"). The ALRA's individualized processes are consistent with this understanding and are rationally related to California's legitimate interest in promoting labor stability. Pet. App. 27.

Collective bargaining is an inherently individualized process because each employer and bargaining unit will have unique needs and concerns. "[C]ontract terms appropriate for a 25-employee family farm may make little sense at a 5,000-employee agricultural corporation, and reasonable wages and benefits will necessarily vary across company size, crop, and geographic region." Pet. App. 27. Given that each labor dispute is unique, it is rational for state law, in the limited circumstances in which mandatory interest arbitration is authorized, to direct the mediator to craft

agreements tailored to the particular needs of the parties, after consideration of neutral statutory criteria designed to minimize "arbitrary or irrational differences." Pet. App. 28; *see* Cal. Lab. Code § 1164(e). If the mediator oversteps, prompt review by the Board and state courts are additional safeguards.

Petitioner and its *amici* assert that the ALRA's statutory criteria provide insufficient guidance to the mediator. Pet. 31-32; NFIB Small Bus. Ctr. Br. 12-13; Pac. Legal Found. Br. 5-6. To be sure, arbitrary or discriminatory treatment is "possible under the MMC statute, just as it is possible with respect to a host of governmental functions that involve discretionary decisionmaking." Pet. App. 29. But the mere possibility that an employer could be treated unfairly in some hypothetical circumstance "is not enough to declare the MMC statute facially unconstitutional." Pet. App. 30; *see, e.g.*, *Wash. State Grange*, 552 U.S. at 449-450 (courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases").

And "Gerawan has raised no as-applied challenge in this case." Pet. App. 30. "Gerawan does not claim to have evidence that it was treated differently . . . from similarly situated agricultural employers that have undergone the MMC process, or that a similarly situated agricultural employer even exists." *Id.* There is accordingly no basis for arguing that the individualized contract crafted by the mediator violated equal protection.[14]

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[14] Petitioner's *amici* urge review "to demarcate the boundaries of the *Engquist* exception to *Olech*," which holds that certain forms of discretionary decisionmaking are not properly subject to a "class of one" equal protection claim. Pac. Legal Found. Br. 13-

5. Finally, petitioner's policy disagreement with California's limited use of mandatory interest arbitration does not support review. The California Supreme Court accorded appropriate deference to the state Legislature's policy choices, holding that the purpose and design of mandatory interest arbitration under the ALRA is rationally related to California's legitimate interest in promoting labor stability in its vital agricultural industry by facilitating the conclusion of first contracts. Pet. App. 21-23, 27-29. If Gerawan disagrees with the Legislature's choices, its concerns are properly addressed through the political process.

That "[m]ost cases of compulsory interest arbitration are in the public sector" does not suggest any constitutional limitation. *See* Pet. 30 n.13. As the California Supreme Court explained, the relative rareness of mandatory procedures in the private sector likely stems not from the repudiated *Wolff* cases, but from this Court's "determination that the NLRA, which preempts most state labor regulation, does not authorize compulsory arbitration." Pet. App. 19; *see, e.g.*, *Jones & Laughlin*, 301 U.S. at 45. But that the NLRA currently "does not envision such a process" does not mean the Constitution forbids it. *H.K. Porter*, 397 U.S. at 109.

If anything, the relative rareness of compulsory interest arbitration in the private sector is another factor weighing against review in this case. The ALRA authorizes mandatory interest arbitration only in the

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16; *see Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 603-604 (2008). But the California Supreme Court expressly declined to decide whether *Engquist* barred a class-of-one equal protection challenge to the ALRA. Pet. App. 26. It held that even if such a claim could be brought, it would fail because "the MMC statute does not facially violate equal protection." *Id.*

agricultural context, and only under limited circumstances. *See* Cal. Lab. Code §§ 1164(a), 1164.11; Cal. Code Regs., tit. 8, § 20407. There is no indication that other States are poised to enact similar legislation for industries not covered by federal law. And while petitioner suggests that Congress might amend the NLRA to allow "compulsory interest arbitration on a far broader scale than California allows" (Pet. 35), fifteen years of failed proposals hardly suggests any imminent federal policy change. For the moment, even if this case were presently final in the state courts, there would be no compelling argument for review.

CONCLUSION

The petition for a writ of certiorari should be dismissed or denied.

Respectfully submitted,

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