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 IN OPPOSITION OF RESPONDENT UNITED FARM WORKERS OF AMERICA

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QUESTIONS PRESENTED

California amended its Agricultural Labor Relations Act in 2002 to create a mandatory mediation and conciliation ("MMC") process to resolve disputes between unions and employers about the terms of an initial collective bargaining agreement. The California Supreme Court unanimously rejected petitioner's claims that the MMC statute, on its face, violates substantive due process and equal protection. The questions presented here are:

1. Does this Court have jurisdiction to review the California Supreme Court's decision as a final judgment or decree, even though the decision remands the case for adjudication of petitioner's other constitutional challenges to the same statute?

2. Do substantive due process principles that this Court repudiated decades ago prevent the California Legislature from requiring interest arbitration, if necessary, to resolve a labor dispute about employment terms for farmworkers?

3. Is the MMC statute a facial violation of the Equal Protection Clause because the statute provides for the resolution of individual labor contract disputes based on rational factors and the facts and circumstances of the individual dispute?

CORPORATE DISCLOSURE STATEMENT

Respondent United Farm Workers of America is not a corporation. Respondent has no parent corporation, and no corporation or other entity owns any stock in respondent.[1]

[1] The United Farm Workers of America was the real party in interest in the state court proceedings below and is a respondent in this Court under Supreme Court Rule 12.6.

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JURISDICTION

This Court lacks jurisdiction because the California Supreme Court's decision is not a final judgment or decree for purposes of 28 U.S.C. §1257.

STATEMENT OF THE CASE

1. MMC statute

California's Agricultural Labor Relations Act ("ALRA"), Cal. Labor Code §1140 *et seq*., adopted in 1975, regulates labor relations between agricultural workers and their employers. Congress exempted agricultural workers from the National Labor Relations Act ("NLRA"), *see* 29 U.S.C. §152(3), so state legislatures retain full authority to regulate agricultural labor relations.

The ALRA provides for a state agency, the Agricultural Labor Relations Board ("ALRB"), to oversee secret ballot elections by which workers may elect or remove collective bargaining representatives. Labor Code §§1156, 1156.3, 1156.7. If workers elect a union representative, the employer and union have a mutual obligation "to bargain collectively in good faith" about "wages, hours, and other terms and conditions of employment" and to reduce any agreements to writing. *Id*. §§1153(e), 1155.2(a). The ALRA also prohibits various unfair labor practices and authorizes the ALRB to adjudicate unfair labor practice charges. *Id*. §§1153-1155.3, 1160.

After the ALRA's adoption, many farm worker bargaining units voted for union representation, but their employers, through unfair labor practices, legal delays, and obstinacy, often made contract negotiations a futile exercise. As of 2002, most bargaining units that voted for union representation had never

obtained initial collective bargaining agreements. Pet. App. 5-6.

The California Legislature amended the ALRA in 2002 to include a mandatory mediation and conciliation ("MMC") process to resolve disputes about the terms of initial collective bargaining agreements. Labor Code §§1164-1164.13; Cal. Stats. 2002, ch. 1145, §2. The Legislature found that the amendments were necessary to "ensure a more effective collective bargaining process … and thereby more fully attain the purposes of the [ALRA], ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California's well-being by ensuring stability in its most vital industry." Cal. Stats. 2002, ch. 1145, §1.

The 2002 amendments permit a certified union or the employer to request referral to MMC when the parties have never had an initial contract. Labor Code §1164(a). If the union was certified prior to 2003 and the employer has committed an unfair labor practice, either party may request referral to MMC after waiting at least 90 days after service of "a renewed demand to bargain." *Id.* §§1164(a)(1), 1164.11. Upon receipt of a request, the ALRB refers the parties to an experienced neutral for assistance in reaching an initial contract through mediation. *Id.* §1164(b). During the mediation, the parties make an evidentiary record supporting their positions. *Id.* §1164(b), (c).

If mediation fails to produce a complete agreement, the MMC statute provides for resolution of the remaining issues by the mediator through interest arbitration. Labor Code §1164(d). The statute directs the mediator to "consider those factors commonly considered in similar proceedings," including:

> (2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union's wage and benefit demands.
>
> (3) The corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements.
>
> (4) The corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed.
>
> (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.

Labor Code §1164(e). The mediator must submit a report to the ALRB that recommends resolution of the disputed contract terms, "include[s] the basis for the mediator's determination," and is "supported by the record." Labor Code §1164(d).

Either party may seek review of the mediator's report before the ALRB on the ground that the report contains a provision that is "unrelated to wages, hours, or other conditions of employment," "is based on clearly erroneous findings of material fact," or "is arbitrary or capricious." Labor Code §1164.3(a). If

such grounds are established, the ALRB remands the report to the mediator for revisions and further mediation. *Id*. §1164.3(c). If the parties again do not resolve the remaining disputes, the mediator submits a second report to the ALRB. *Id*. The parties may then invoke the review process again. *Id*. §1164.3(d).

If no party seeks review, or the ALRB concludes that objections to the mediator's report lack merit, the ALRB issues a final order establishing the terms of the initial labor contract. Labor Code §1164.3(b), (d). The ALRB's final order is then subject to review by a court of appeal or the California Supreme Court. *Id*. §1164.5.

2. Gerawan MMC proceeding

The United Farm Workers of America ("UFW") is the certified representative of the agricultural employees of Gerawan Farming, Inc. ("Gerawan"), a large grower in Fresno and Madera counties. Pet. App. 11. The ALRB certified UFW as the workers' representative in 1992, after UFW prevailed in a secret-ballot election. *Gerawan Ranches*, 18 ALRB No. 5 (1992). Gerawan committed unfair labor practices before, during, and after that election, including intentionally hiring and laying off workers to try to influence the election results and failing to bargain in good faith afterwards. *Gerawan Ranches*, 18 ALRB No. 5 (1992); *Gerawan Ranches*, 18 ALRB No. 16 (1992); *see also Gerawan Farming,* 39 ALRB No. 5 (2013). UFW was never able to obtain an initial collective bargaining agreement with Gerawan. *Gerawan Farming*, 39 ALRB No. 5, at 2.

UFW served Gerawan with a renewed demand to bargain in 2012. Pet. App. 12. After 10 further bargaining sessions were unsuccessful in producing an

agreement, UFW invoked the MMC statute, and the ALRB referred the parties to an experienced mediator they had agreed upon. Pet. App. 12-13, 131.[2] Mediation also proved unsuccessful in producing an agreement on all terms of a contract. Pet. App. 131. The mediator therefore issued a report to the ALRB containing his resolution of the disputed contract terms. Pet. App. 132.

Gerawan objected to the mediator's report, and the ALRB remanded the matter to the mediator for further proceedings regarding six provisions. Pet. App. 132. The parties were able to agree on all six provisions, and the mediator issued a second report. *Id.* No party sought review of the mediator's second report. *Id.*

On November 19, 2013, the ALRB issued its final order adopting the mediator's second report and fixing the terms of the MMC contract. Pet. App. 131-33. The MMC contract provides farmworkers with wage increases, fringe benefits, and other improvements in working conditions, as well as a grievance and arbitration procedure to protect them from unfair treatment. Certified Record ("C.R.") 357-609 (Sept. 28, 2013 mediator report); C.R. 745-47 (Nov. 6, 2013 meditator's second report). The MMC contract was to

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[2] Gerawan erroneously suggests that UFW was responsible for the failure of the bargaining process after service of the renewed demand to bargain. Pet. at 10. In fact, the ALRB found Gerawan guilty of "bad faith 'surface bargaining'" in violation of the ALRA and ordered Gerawan to provide make whole relief to the workers. *Gerawan Farming*, 44 ALRB No. 1 (2018).

have a three-year duration running from July 1, 2013, through June 30, 2016. C.R. 412.[3]

3. Court proceedings below

a. Gerawan petitioned for review of the ALRB's final order in the state court of appeal in Fresno. Gerawan's petition raised multiple challenges to the MMC statute, to the ALRB's decision to refer the parties to MMC, and to the terms of the MMC contract. The court of appeal issued an order staying "any proceedings to enforce the [final order]" pending review. October 23, 2014 Order in Case No. F068526. As a result, the MMC contract was never implemented. *Gerawan Farming*, 44 ALRB No. 1, at 4.

On May 14, 2015, the court of appeal issued a decision overturning the ALRB's final order. Pet. App. 55-130. The court of appeal held that the MMC statute "on its face violates equal protection principles." Pet. App. 120. The court of appeal also held that the MMC statute unlawfully delegates legislative authority, and that the ALRB wrongly concluded that an employer cannot object to a certified union's request for referral to the MMC process by contending that the union previously abandoned the bargaining unit. Pet. App. 86-108, 120-26. The court of appeal did not reach the other legal claims raised by Gerawan in its petition for a writ of review.

b. Both UFW and the ALRB petitioned the California Supreme Court to review the court of appeal's

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[3] Gerawan devotes part of its petition to attacking the terms of the MMC contract. Pet. at 11-13. But the California Supreme Court addressed "only a facial attack on the MMC statute" and explained that Gerawan did not "articulate[] an as-applied challenge based on the specific terms of the contract imposed by the [ALRB's] final order." Pet. App. 16.

rulings. The California Supreme Court granted the petitions, limiting "[t]he issues to be briefed and argued … to the issues raised in the petitions for review." August 19, 2015 Order in Case No. S227243. On November 27, 2017, the California Supreme Court issued a unanimous decision reversing the court of appeal. Pet. App. 1-54.

Although the California Supreme Court had limited its grant of review to the issues resolved by the court of appeal, Gerawan's "lead argument in its briefing [was] that compulsory arbitration in the private sector is categorically impermissible because it forces employers into arbitration without their consent." Pet. App. 17. The California Supreme Court viewed this as "essentially a claim that the MMC statute violates substantive due process" and rejected the claim because it was premised on a "restrictive view of the police power [that] was completely repudiated" by this Court in the 1930s. Pet. App. 18.

The California Supreme Court also rejected Gerawan's claim that the MMC statute, on its face, violates equal protection principles under the federal and state constitutions by providing for individualized determinations of the terms of MMC contracts. Pet. App. 19-30. The court reasoned that "the Legislature had a rational basis for enacting the MMC statute to facilitate collective bargaining agreements," *id.* at 19, that the use of "individualized determinations [is] rationally related to the Legislature's legitimate interest in ensuring the collective bargaining agreements are tailored to the unique circumstances of each employer," *id.* at 27, and that the statutory factors for the mediator to consider in resolving disputes, *see supra* at 3, would "further the

MMCs purposes while minimizing arbitrary or irrational differences." Pet. App. 28. The court further reasoned that the possibility of arbitrary treatment during the MMC process, "which is possible with respect to a host of governmental functions that involve discretionary decisionmaking," does not make the statute unconstitutional "on its face." Pet. App. 30.

The California Supreme Court also held that "the MMC statute did not unconstitutionally delegate legislative authority in violation of the California Constitution," because the Legislature "resolved the fundamental policy issues and provided sufficient guidance and procedural safeguards." Pet. App. 30, 41. Finally, the court held that the ALRB was correct in interpreting the ALRA to mean that an employer cannot raise, as a defense to a certified union's request for referral to MMC process, a claim that the union previously abandoned the bargaining unit, because only workers can vote to decertify a union. Pet. App. 41-54.[4] The California Supreme Court therefore "reverse[ed] the judgment of the Court of Appeal and remand[ed] for further proceedings." Pet. App. 54.

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[4] Because the ALRB summarily dismissed Gerawan's "abandonment" argument, the ALRB "took no evidence and made no findings" on this issue during the proceedings below. Pet. App. 12-13. In a subsequent proceeding, an ALRB administrative law judge found that Gerawan had no "factual record to support its abandonment argument," only "self-serving cries of anguish," and that Gerawan never had any interest in bargaining with UFW. *Gerawan Farming*, 44 ALRB No. 1 (2018) (ALJ Decision at 46).

REASONS FOR DENYING REVIEW

Gerawan seeks review of a California Supreme Court decision that rejected its substantive due process and equal protection challenges to the MMC statute. But that decision remands the case for consideration of Gerawan's other challenges to the same statute. Because the state court decision is not the "final" judgment or decree, this Court lacks jurisdiction.

In any event, the questions presented are not worthy of this Court's review. The California Supreme Court's unanimous decision simply applies settled precedent, and there is no conflict in the lower courts. This Court emphatically repudiated decades ago the line of substantive due process cases that limited legislative authority to set employment terms for private businesses. This Court's settled precedents also hold that individualized treatment, by itself, does not violate equal protection if there is a rational basis for such treatment. The petition should therefore be denied.

I. This Court lacks jurisdiction because the state court decision is not the final judgment.

1. This Court's certiorari jurisdiction to review state court rulings extends only to "final judgments and decrees." 28 U.S.C. §1257. The California Supreme Court's decision is not "final" for purposes of 28 U.S.C. §1257 because there are still unresolved constitutional challenges to the MMC statute pending before the state court of appeal. *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 78 (1997) (to be reviewable, a state court decision must be "final as an

effective determination of the litigation" (citation, internal quotation marks omitted)).

Gerawan challenged the ALRB's final order on multiple grounds, including by claiming that the MMC statute violates procedural due process, the Takings Clause, and the Contract Clause. The court of appeal did not address those claims because the court of appeal struck down the MMC statute for other reasons. The California Supreme Court's decision below "reverse[d] the judgment of the Court of Appeal and remand[ed] for further proceedings." Pet. App. 54. On March 15, 2018, the court of appeal issued an order setting a hearing on the remaining constitutional issues:

> [S]everal constitutional issues relating to the MMC statute were not addressed by this court because … it seemed unnecessary to do so in light of the other grounds that we found to be dispositive. Since the Supreme Court has reversed this court on those matters and remanded the case to us for further proceedings, it is appropriate for us to address the unresolved constitutional issues. The unresolved issues would appear to 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 Clause of the U.S. and California Constitutions, and/or (iii) procedural due process. The court will hear oral argument on the unresolved constitutional issues in this case in October of 2018, on a date and time to be subsequently determined.…

UFW Appendix 1-2.

That being so, the California Supreme Court's decision is not the final state court ruling; nor does the decision fall within the narrow circumstances that justify exceptions from the normal jurisdictional rules of finality. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-85 (1975). If the state courts reject Gerawan's remaining challenges, Gerawan can seek this Court's review of its federal claims later. *City of Tarrant*, 522 U.S. at 82. On the other hand, "this is not a case in which the federal issue … will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting*, 420 U.S. at 480. Nor can it credibly be claimed that a "refusal immediately to review the state court decision [would] seriously erode federal policy." *Cox Broadcasting,* 420 U.S. at 482. The MMC statute has been in effect for 15 years and has been applied before. *See, e.g., Hess Collection Winery v. Agricultural Labor Relations Bd.*, 140 Cal.App.4th 1584 (2006) (rejecting the same substantive due process and equal protection challenges to the MMC statute that Gerawan seeks to raise here).

2. Even if Gerawan had a colorable argument that this case falls within an exception to normal finality principles, Gerawan forfeited that argument by failing to present it in its petition. "In cases where finality of the state court judgment presents a serious jurisdictional problem, the matter should be presented as a Question Presented and then candidly discussed in the petition for certiorari …. Indeed, since finality … is of jurisdictional dimensions, … petitioner [is] obligated by the Supreme Court rules to discuss such a finality problem in the certiorari petition...." Eugene Gressman*, et al.*, *Supreme Court Practice* 154 (9th Ed. 2007).

Gerawan is aware of the jurisdictional issue. UFW pointed it out in successfully opposing Gerawan's motion to the California Supreme Court for a stay of the remittitur pending a certiorari petition.[5] Yet Gerawan still hid the jurisdictional issue in its petition, thereby precluding a response to its argument for jurisdiction (if any) and depriving this Court of the benefit of the adversary process in deciding whether to grant review. Had Gerawan candidly addressed jurisdiction in its petition, moreover, this Court may not have called for a response to the petition in the first place. The failure to candidly address jurisdiction in a petition for certiorari wastes the resources of opposing parties and this Court, so such behavior should be discouraged.

3. The interlocutory posture of this case also makes it a poor vehicle for review because, if review were granted, the case could become moot before this Court issued its decision. The state court of appeal intends to hear argument in October 2018 on Gerawan's other challenges to the MMC statute, *see supra* at 10, and that court must issue its decision within 90 days thereafter. *See* Cal. Const., Art. VI, Sec. 19.

II. The petition does not present a question worthy of the Court's review.

Even if the Court had jurisdiction, the substantive due process and equal protection claims addressed by the California Supreme Court are not worthy of further review. There is no conflict in the lower courts, and the California Supreme Court's unanimous decision faithfully applies this Court's settled precedents.

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[5] UFW's Opposition to Motion to Stay Remittitur (Dec. 18, 2017) in Case No. S227243.

A. Gerawan's substantive due process claim does not present a serious question.

Gerawan's primary submission is that the Court should grant review to resolve a perceived conflict with "the *Wolff* trilogy." Pet at. 1 (citing *Wolff Packing Co. v. Indus. Court* (*Wolff I*), 262 U.S. 522 (1923); *Dorchy v. Kansas*, 264 U.S. 268 (1924); *Wolff Packing Co. v. Indus. Court* (*Wolff II*), 267 U.S. 552 (1925)). But this Court already repudiated the relevant substantive due process reasoning in the *Wolff* trilogy, so there is no serious question for review.

1. The *Wolff* trilogy concerned the Kansas Industrial Relations Act, adopted to insure "continuity of operation and production in certain businesses." *Wolff II*, 267 U.S. at 563. To that end, the Act created an administrative agency to settle through compulsory arbitration disputes about wages and work hours. The agency's orders were binding on owner and employees "even to the point of preventing them from agreeing on any change in the terms fixed therein, unless the agency approves." *Id.* at 565. Moreover, the Act prohibited an owner from ceasing operations (with "illusory" exceptions) and prohibited an employee from "agree[ing] with his fellows to quit." *Wolff I*, 262 U.S. at 534. Thus, the Act did not "merely" require owner and employees to "respect the terms [set by the agency] if they continue the business" but "constrain[ed] them to continue the business on those terms." *Wolff II*, 267 U.S. at 569.

This Court held that the Kansas Industrial Relations Act could not constitutionally be applied to an ordinary business because, under the Due Process Clause, "the business is one which the state was without power to compel the owner and employees to

continue." *Wolff II*, 267 U.S. at 568; *see also Wolff I*, 262 U.S. at 541. The Court declared that state authority to "secure continuity of a business against the owner …. [and] upon the employee …. can only arise when an investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service." *Wolff I*, 262 U.S. at 541; *see also Wolff II*, 267 U.S. at 568.

This Court also reasoned in *Wolff I* that Kansas could not empower an agency to resolve employment disputes through interest arbitration because the Due Process Clause precludes the government from fixing wages for ordinary private businesses. *Wolff I*, 262 U.S. at 534 (relying on *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)); *see also Wolff I,* 262 U.S. at 537 ("It has never been supposed … that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."). The Court later repudiated that substantive due process reasoning, however, and it is now settled law that employment "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 391.

Thus, as this Court subsequently explained:

> In *[Wolff I*] the Court invalidated a state law which in part provided a method for a state agency to fix wages and hours.… In invalidating *this part* of the state act, this Court construed the due process clause as forbidding legislation to fix hours and wages …. The

> Court also relied on a distinction between businesses according to whether they were or were not 'clothed with a public interest.' … This latter distinction was rejected in *Nebbia v. People of State of New York*, 291 U.S. 502 (1934).… That wages and hours can be fixed by law is no longer doubted since *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Darby*, 312 U.S. 100, 125 (1941); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 187 (1941).

Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co., 335 U.S. 525, 535-36 (1949) (emphasis supplied).

2. California's MMC statute does not require "owners or workers … to continue in continuity of operations" by compelling owners to remain in business or forbidding workers from quitting en masse. The MMC statute therefore does not raise the same due process issue presented by this part of the Kansas Industrial Relations Act.

The MMC statute does provide for mandatory interest arbitration, if necessary, to set employment terms. But, as this Court already has explained, "in invalidating *this part*" of the Kansas law, *Wolff I* relied on "a due process philosophy that has been deliberately discarded," and state authority to regulate employment terms "is no longer doubted." *Lincoln Fed. Labor Union*, 335 U.S. at 536-37 (emphasis supplied). As such, there is no serious issue for review.

3. Gerawan urges that, even if state legislatures have authority to regulate employment terms for private businesses, substantive due process principles

should still preclude a legislature from requiring interest arbitration to set those terms. But Gerawan does not point to any of this Court's post-1930s decisions that provide any support whatsoever for that substantive due process theory.[6] Rather, this Court has made clear, many times, that state legislatures "have broad scope to experiment with economic problems" and that the Court "emphatically refuses to go back to the time" when the Court relied on "the vague contours of the Due Process Clause" to strike down laws "regulatory of business and industrial conditions," thereby "subject[ing] the State[s] to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure." *Ferguson v. Skrupa*, 372 U.S. 726, 729-32 (1963) (citations, internal quotation marks omitted).

Nor does Gerawan point to a conflict between the California Supreme Court's decision on this substantive due process issue and the post-*Lochner*-era decision of any other lower court.[7] Further review is therefore not warranted.

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[6] As the California Supreme Court explained, this Court's decisions interpreting the NLRA to prohibit compulsory interest arbitration "said nothing about compulsory arbitration's constitutionality." Pet. App. 19.

[7] Gerawan concedes that state legislatures have experimented with compulsory interest arbitration to resolve labor disputes in the few private industries not covered by federal labor law. *See* Pet. at 30 & n. 13; *see also* J. Joseph Lowenberg, "Compulsory Arbitration in the United States" at 142-49, in *Compulsory Arbitration: An International Comparison* (J. Joseph Lowenberg, *et al*., eds., D.C. Heath 1976); *Mount St. Mary's*

B. Gerawan's equal protection claim does not present a serious question.

Gerawan also asks this Court to grant review to address its contention that the MMC statute violates equal protection on its face by providing for the individualized resolution of labor contract disputes. Pet. at 31-34. But many government actions involve individualized treatment based on the circumstances of particular situations, including criminal prosecutions and sentencing, zoning and other land use regulations, rent control, some utility rate setting, banking regulation, copyright royalties, and public employment decisions.

The California Supreme Court was unquestionably correct that, under this Court's settled precedents, such systems are not all unconstitutional on their face. Pet. App. 24. "The Fourteenth Amendment does not require the uniform application of legislation to objects that are different." *Ft. Smith Light & Traction Co. v. Bd. of Imp. of Paving Dist. No. 16*, 274 U.S. 387, 391-92 (1927).

There are contexts in which it is possible to challenge government action as an equal protection violation on a "class of one" theory, but even in those contexts the plaintiff must show more than that the government action applies only to the plaintiff. The plaintiff must also show "that she has been intentionally treated differently from those similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech,* 528

Hosp. v. Catherwood, 26 N.Y.2d 493 (1970) (compulsory interest arbitration for private non-profit hospitals).

U.S. 562, 564 (2000). Here, Gerawan cannot show from the face of the MMC statute that it is "similarly situated" in all relevant respects to other agricultural employers with MMC contracts and that differences in the terms of these MMC contracts lack any "rational basis."[8]

The California Legislature rationally could conclude that providing for interest arbitration if union and employer cannot agree on all terms of a collective bargaining agreement would improve the collective bargaining process by encouraging the parties to negotiate in good faith. The Legislature also rationally could conclude that interest arbitration is the best method to fix disputed contract terms, if necessary, because employers' operations will vary, and the priorities of different employers and groups of workers will be different. The factors that the Legislature directed mediators to consider in resolving disputes are rational factors commonly used by interest arbitrators, and they include the collective bargaining agreements and employment terms for similar employers. *See supra* at 3. That being so, the MMC statute provides a rational dispute resolution process and does not violate equal protection on its face.

Gerawan seeks support for its equal protection argument from Justice Jackson's concurring opinion in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Pet. at 34), but Justice Jackson's opinion says nothing about a system that rationally

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[8] Gerawan urges that the specific terms of the MMC contract here lack a rational basis. Pet. at 32, 34. The California Supreme Court, however, addressed only a facial challenge to the MMC statute and expressly did not decide whether a party can assert a cognizable "as applied" equal protection challenge to an MMC contract. Pet. App. 26, 30.

provides for tailoring orders to the facts of each case. The ordinance in *Railway Express* prohibited advertisements on vehicles unless the advertisements promoted the vehicle owner's business, and Justice Jackson agreed with the majority that the ordinance satisfied the rational basis test. *Id*. at 117.

In sum, the California Supreme Court's ruling on the equal protection issue does not merit further review.

C. Gerawan raises issues that would be beyond the scope of review.

The only federal issues addressed by the state courts below were whether the MMC statute violates substantive due process and equal protection on its face. As such, other issues raised by Gerawan do not provide a basis for granting the petition.

1. Gerawan urges that its farmworkers do not want union representation or a contract that improves their wages and benefits. The ALRA has a process, however, for the workers themselves to petition for representation elections and to vote by secret ballot to certify and decertify union representatives without interference from their employers. Labor Code §§1156.3, 1156.7*; see also Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (recognizing that the National Labor Relations Board is "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union").

The ALRB dismissed the decertification petition to which Gerawan refers because the ALRB found that Gerawan itself illegally supported the petition, "and in so doing, unlawfully undermined the very principle

of free choice it so earnestly argue[d] that the decertification effort represented." *Gerawan Farming*, 42 ALRB No. 1, at 9 (2016). Gerawan's challenge to that ALRB decision is the subject of separate proceedings in the state courts.[9]

2. Gerawan urges that the MMC contract would violate workers' associational rights. But neither the specific terms of the MMC contract nor a freedom-of-association claim were addressed by the courts below. Moreover, the MMC contract was never implemented and already expired. *See supra* at 6.

Similarly, Gerawan complains that the MMC contract would not have sufficiently increased 2013 wages to offset union dues. Gerawan fails to disclose, however, that Gerawan unilaterally increased wages twice in March 2013 after UFW served a renewed demand to bargain. C.R. 414-15. Moreover, Gerawan's claim that its employees received the highest wages in the industry is misleading because, as the mediator found, other employers provided medical benefits that gave workers higher total compensation. C.R. 415.

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[9] The ALRB found that, after UFW served its renewed demand for bargaining in 2012, Gerawan committed multiple unfair labor practices to illegally assist and support a decertification campaign. *Gerawan Farming*, 42 ALRB No. 1. Among other things, Gerawan hired *amicus* Silvia Lopez, the live-in girlfriend of one of its supervisors, and gave Lopez and other decertification supporters "a virtual sabbatical" to gather signatures rather than perform farm work. *Id*. at 8-9, 11, 30. When the signature gathering effort still was unsuccessful, Gerawan allowed Lopez and her allies to block company entrances to solicit signatures. *Id*. at 32-37. The state court of appeal recently reversed some of the ALRB's findings and remanded the case for further consideration, *see* Gerawan Supplemental Appendix, but that decision is not yet final and those proceedings are not part of this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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June 15, 2018

APPENDIX

TABLE OF APPENDICES

Appendix 1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

Nos. F068526, F068676

GERAWAN FARMING, Inc.,
Petitioner,
v.
AGRICULTURAL LABOR RELATIONS BOARD,
Respondent;
UNITED FARM WORKERS OF AMERICA,
Real Party in Interest.

Order filed March 15, 2018

ORDER

After remittitur was issued by the Supreme Court in *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1160, which decision reversed this court and remanded the matter "for further proceedings consistent with [its] opinion," we issued an order directing the parties to advise us of what further proceedings, if any, were necessary. Having received and considered the parties' responses to our inquiry, the court agrees that in its original opinion in this matter, several constitutional issues relating to the MMC statute were not addressed by this court because, at that time, it seemed unnecessary to do so in light of the other grounds that we found to be dispositive. Since the Supreme Court has

reversed this court on those matters and remanded the case to us for further proceedings, it is appropriate for us to address the unresolved constitutional issues. The unresolved issues would appear to 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 Clause of the U.S. and California Constitutions, and/or (iii) procedural due process. The court will hear oral argument on the unresolved constitutional issues in this case in October of 2018, on a date and time to be subsequently determined. Thus, submission is vacated. No further briefing should be submitted unless requested by this court. Our intention at this time is to rely upon the existing/original briefing in this matter. If any further or supplemental briefing is needed on any particular issues, this court will so notify the parties.

HILL, P.J.