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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Nearly a century ago, this Court concluded that states may not impose contracts on private employers and employees through "compulsory arbitration." *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) (collectively, "*Wolff*" or "the *Wolff* trilogy"). Nor may they "single out" an employer and its workforce "in an arbitrary and irrational fashion." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988); *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000). As the Petition established, California's mandatory mediation and conciliation ("MMC") scheme is inconsistent with fundamental due process and equal protection principles and irreconcilable with this Court's holdings. Petitioner's arguments for granting certiorari remain unrebutted.

Respondents do not dispute that California's MMC process implicates significant liberty and property interests. The "agreement" imposed here requires Gerawan Farming, Inc. ("Gerawan") to change wages and modify conflict-resolution policies, and forces employees to pay dues to a union they have tried to decertify. Those terms—and there are more—resulted from a system of compulsory arbitration just like the one invalidated in *Wolff*.

Respondents do not attempt to distinguish the MMC scheme from the one *Wolff* invalidated. Instead, like the court below, Respondents claim *Wolff* has been "repudiated," without pointing to any decision of this Court that casts the slightest doubt on *Wolff*. That is reason enough to grant certiorari. Even if this

Court wishes to reconsider *Wolff*, certiorari is still warranted, for only this Court may overrule its precedents.

Respondents fare no better under the Equal Protection Clause. As the appeals court concluded below, the MMC statute is the "very antithesis of equal protection." Pet.App.118. Respondents try desperately to concoct a "rational basis" to support the statute, but the arbitrariness of regulating terms for a single workplace is inherent in the scheme.

Respondents do not contest Gerawan's standing to vindicate its employees' rights. Pet.21 n.10. They argue only that courts should be "suspicious" when an employer acts as the workers' "champion." ALRB.Opp.15; UFW.Opp.16. That may often be true—but not here, where the MMC "agreement" forces the workers to pay 3% of their wages, without their vote, to a union that abandoned them for almost two decades.[1] Only days after seeing the terms of the MMC "contract," thousands of Gerawan workers petitioned to decertify the union. Pet.14-15. This Court should be "suspicious" of the entities that have refused *for five years* to count their ballots,[2] and intend

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[1] Respondents assert there is no "factual record" of abandonment. ALRB.Opp.15-16; UFW.Opp.8 n.4. Nonsense. The Court of Appeal's opinion stated flatly: "After [February 1995], UFW did not contact Gerawan again until late 2012." Pet.App.59; *see also* Pet'r.Supp.App.4 n.5 ("Workers at the hearing below consistently testified that the first time they heard of a union at Gerawan was in 2012 or 2013.").

[2] After Gerawan filed this Petition, the Court of Appeal issued a decision declaring the ALRB's refusal to count the ballots from the November 2013 decertification election "arbitrary or punitive (or both)." Pet'r.Supp.App.8-9.

to use the MMC process to forestall another decertification effort for the duration of the coerced "agreement."

Absent a defense on the merits, Respondents urge denial of review because the decision below purportedly is not a "final judgment" under 28 U.S.C. §1257. Not so. The California Supreme Court has conclusively decided that Gerawan and its employees have no constitutional right to avoid state-ordered contracting, which means this case is over for all practical purposes. All that remain on remand are as-applied challenges to specific provisions of the MMC "contract," and a procedural challenge to the dual role of the mediator-arbitrator. Meanwhile, Gerawan's workers continue to suffer from what the lower court called a "crisis of representation," Pet.App.100-01—in which the workers are forced to contribute to a union that most never voted for and a majority petitioned to decertify. *Cf. Janus v. AFSCME*, No. 16-1466, slip op.8 (U.S. June 27, 2018). This Court should reject Respondents' pleas for further delay.

I. The Decision Below Violates The Fourteenth Amendment And Conflicts With This Court's Precedent.

A. The Agricultural Labor Relations Board ("ALRB") and the United Farm Worker of America ("UFW") have little to say regarding the liberty and property interests at stake. That is unsurprising, as the MMC statute undoubtedly deprives farm owners

and farmworkers of liberty and property without due process of law.[3] Pet.21-25.

The MMC order obliges Gerawan—and *only* Gerawan—to increase wages, notwithstanding that Gerawan already pays wages demonstrably higher than competitors. It forces Gerawan's employees to pay 3% of their earnings to a union that abandoned them for nearly two decades, a clear violation of precious liberties. *See Janus*, slip op.8. It abolishes Gerawan's real-time dispute-resolution system and demands other operational changes. And by force of law, it precludes the workers from filing a petition to decertify the UFW until the final year of the "contract," Pet.App.52-53, thereby compelling the workers to associate with the union for years against their will. *See Janus*, slip op.8.

None of these "contract" terms applies generally to California's agricultural industry, or even to local competitors. They were imposed on one workplace by a state-imposed "mediator," who exercised virtually plenary authority under a "vague law[]" that not only "invite[s] arbitrary power," but guarantees it. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). While states may deprive citizens of liberty and property through due process *of law*, they may not "depriv[e] citizens of … liberty[] or property[] through … arbitrary coercion." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

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[3] There is no dispute that MMC "contracting" involves state action.

B. In the *Wolff* trilogy, this Court thrice unanimously rejected a Kansas regulatory scheme indistinguishable from the MMC statute. The Court concluded that the state's imposition of contract terms on a single workplace violates due process, *repeatedly* identifying the system of "compulsory arbitration" as the core of the constitutional violation. *See Wolff I*, 262 U.S. at 541 ("Without this joint compulsion, the whole theory and purpose of the act would fail."); *Dorchy*, 264 U.S. at 291 (explaining that any component of the Kansas law that was an "intimate part of the system of compulsory arbitration" would necessarily "fall[] with it"); *Wolff II*, 267 U.S. at 569 (noting that Kansas' attempt to impose hours restrictions at a single firm was "merely a feature of the system of compulsory arbitration" and therefore unconstitutional). Had the court below adhered to precedent, *Wolff* would have provided a clear answer.

The California Supreme Court did not suggest any distinction between *Wolff* and this case. Nor do Respondents.[4] Instead, Respondents claim *Wolff* has been "repudiated." ALRB.Opp.23; UFW.Opp.13. Those pronouncements are mystifying, because neither Respondent points to any decision of this Court holding (or even hinting) that forced contracting via compulsory arbitration is constitutionally valid. Indeed, a decade after *Wolff*, this Court upheld the

[4] The UFW suggests *Wolff* does not apply because the MMC statute does not "compel[] owners to remain in business or forbid[] workers from quitting en masse." UFW.Opp.15. If due process is satisfied as long as employers and employees are free to abandon their livelihoods, there is essentially nothing the state cannot do.

National Labor Relations Act "under the Due Process Clause and [o]ther [c]onstitutional [r]estrictions" precisely because it "does not compel agreements between employers and employees." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43-45 (1937). Far from being "repudiated," *Wolff* and *Jones & Laughlin* together set the metes-and-bounds of modern labor law.

The ALRB does not trouble to mention *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the only decision of this Court cited below as repudiating *Wolff*. Pet.App.18. The UFW does cite *West Coast Hotel*, but only for the anodyne proposition that "wages and hours can be fixed by law." UFW.Opp.15. Gerawan never suggested otherwise. *Wolff* was not about the "regulat[ion] [of] wages or hours of labor either generally or in particular classes of business." *Wolff II*, 267 U.S. at 565. Indeed, the Court expressly declined to address whether Kansas' regulations "would be valid had [they] been conferred independently of the system [of compulsory arbitration] and made either general or applicable to all businesses," "for that was not done." *Id.* at 569.

Both Respondents rely on *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949), but that case—never discussed by the court below—does not help them. ALRB.Opp.18; UFW.Opp.14-15. *Lincoln* involved state laws forbidding employers from discriminating against prospective employees based on their membership (or not) in a union. 335 U.S. at 527-28. In upholding those laws, the Court distanced itself from "certain language" from *Wolff I—i.e.*, that case's "distinction

between businesses according to whether they were or were not 'clothed with a public interest.'" *Id.* at 535. But the Court had no reason to address *Wolff*'s compulsory-arbitration holding, because that was not the issue in *Lincoln*. And the *Lincoln* Court expressly noted it was *not* addressing "[c]onsiderations involved in the constitutional validity" of the Kansas act that "are not relevant here." 335 U.S. at 536 n.6.

Absent any authority "repudiating" *Wolff*, the ALRB suggests those cases should not govern because they "were decided at the 'zenith'" of the *Lochner* era, and following *Wolff* would resurrect the coercive "yellow dog" contracts of *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915), and the "freedom of contract" defense to generally applicable law recognized in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). ALRB.Opp.19. But "like most apocalyptic warnings" involving *Lochner*, "this one proves a false alarm." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). Each *Wolff* decision was unanimous; none cited *Lochner*, *Adair*, or *Coppage*; all were joined by the three *Adkins* dissenters; and one was written by Justice Brandeis, the Court's leading critic of the *Lochner-Adair-Coppage* line of cases. *Cf. TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 455 (1993) ("While respondents 'unabashedly' denigrate those cases as '*Lochner*-era precedents,' they overlook the fact that the Justices who had dissented in the *Lochner* case itself joined those opinions."). Ironically, it is the MMC statute that, in this context, imposes coercive arbitration on workers and employers, at the behest of a union that stands to gain financially at the

expense of both workers and owners. *See Epic*, 138 S. Ct. at 1634-35 (Ginsburg, J., dissenting).

The bottom line is *Wolff* controls this case. No matter how much the California Supreme Court may have believed (erroneously) that "subsequent cases … raised doubts about [*Wolff*'s] continuing vitality," this Court's "decisions remain binding precedent until [this Court] see[s] fit to reconsider them." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

C. Respondents' equal protection arguments are equally flawed. Respondents do not dispute 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." ALRB.Opp.20-21; UFW.Opp.17. The ALRB even concedes such differential treatment will "necessarily" occur. ALRB.Opp.21. Such "arbitrary" and "dispar[ate] … treatment … between classes of individuals whose situations are arguably indistinguishable" is exactly what the Equal Protection Clause protects against. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974); *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008).

Respondents search without success for *some* "rational basis" supporting the imposition of disparate rules on a single workplace. The UFW contends the legislature "rationally could conclude" that the MMC statute "would improve the collective bargaining process." UFW.Opp.18. But it is difficult to imagine how a statute that *terminates* the bargaining process "improves" it. The ALRB, meanwhile, attempts to analogize to the mediation and arbitration procedures often voluntarily adopted by employers and unions in

a collective bargaining agreement. ALRB.Opp.21. That is a non-sequitur. Just because private entities craft individualized rules to govern their own activities does not mean the *state* has good reasons to do the same through coercion. *See United Steelworkers of Am. v. Warrior & New Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

The real problem on this facial challenge is that the MMC statute does not even purport to govern by means of a general rule, or take equality of treatment into account. The UFW's analogy to rent control underscores that problem. It is true that rent control schemes entail "individualized treatment" of each property. UFW.Opp.17. But the individualized results are the product of detailed statutory factors designed to identify "a just and reasonable rent." Pet.App.121. By contrast, the MMC statute provides "no goal [for the 'mediator'] to aim for," which means "no one would ever know if the mediator hit the correct target or even came close." Pet.App.120-22.

As the Court of Appeal concluded below, it is "unavoidable that even similar employers will be subject to significantly different outcomes" under the MMC statute, and "the results would not only be unequal, but also arbitrary." Pet.App.118. That is an equal protection violation.

II. There Are No Obstacles To Reviewing This Important Issue.

Respondents downplay the broader importance of this case, suggesting the "rareness of compulsory arbitration in the private sector" counsels against

certiorari. ALRB.Opp.23; UFW.Opp.9. But "[p]erhaps the most telling indication of the severe constitutional problem with the [MMC statute] is the lack of historical precedent for [it]." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010).[5] Respondents' efforts are belied by the numerous *amici* supporting the petition. Defying 100 years of labor-law jurisprudence, the California Supreme Court concluded that neither the Due Process nor Equal Protection Clauses prevents the government from imposing contracts on private employers and employees—and it did so, no less, in a case involving the "most vital industry" in the state with the largest economy. Pet.App.7. Furthermore, "the negative effects of the Compulsion Regime could easily spread to infect other jurisdictions," because "California is a regulatory leader" nationwide. PLF.Br.6; Pet.35.

Unable to deny this case's importance, Respondents claim the decision below is not a "final judgment" under 28 U.S.C. §1257(a). ALRB.Opp.14; UFW.Opp.9-12. That argument is unavailing. As explained in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), this Court routinely finds jurisdiction under §1257 when "the highest court of a State has

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[5] Respondents also attempt to raise factual disagreements where none exist. ALRB.Opp.15-17; UFW.Opp.19-20. For example, the ALRB contests Gerawan's statement that Gerawan pays the highest wage rates among its competitors by pointing to "another employer" that pays "slightly higher general labor rates." ALRB.Opp.17. But as the "mediator" found, that "other employer" is a boutique vineyard 150 miles away in Monterey—not a competitor. CR.362-63. Regardless, these factual quibbles have no bearing on the pure question of constitutional law presented.

finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come."

That "pragmatic" approach is particularly apt here. *Id.* at 486. This "case is for all practical purposes concluded," *id.* at 479, because the California Supreme Court has already rejected Gerawan's federal claim that state-compelled "contracting" is unconstitutional, thereby rendering the imposition of an MMC "agreement" a foregone conclusion. *See, e.g.*, *Pierce Cty. v. Guillen*, 537 U.S. 129, 142 (2003) ("the Washington Supreme Court's ruling on the federal … issue is 'conclusive' and 'the outcome of further proceedings preordained'"); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306-07 (1989) (holding reviewable a state-court decision rejecting Fifth Amendment challenge to general rate-setting scheme even though individual rate order was not yet finalized). Put differently, the "federal issue" presented here was "finally decided by the highest court in the State," and that issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad.*, 420 U.S. at 480. Denying certiorari "would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court," it would "result in a completely unnecessary waste of time and energy" for the lower courts. *Id.*

Respondents nevertheless insist the decision below is not "final" because Gerawan could theoretically obtain vacatur of this *particular* MMC "agreement." ALRB.Opp.11; UFW.Opp.12. Even setting aside that vacatur would just lead to another

MMC "agreement" raising the same constitutional concerns, Respondents' arguments suggest only that this case falls into another one of the *Cox Broadcasting* categories, not that this Court lacks jurisdiction. As Respondents' submissions confirm, the state courts have yet to resolve various challenges to the MMC order under the California Constitution, *see, e.g.*, UFW.Supp.App.2, which means they could decide this case on "nonfederal grounds." *Cox Broad.*, 420 U.S. at 482. That would leave the decision below, upholding compulsory arbitration and repudiating *Wolff*, as a final holding on an important matter of federal law. The more sensible course is to recognize jurisdiction exists under §1257, grant certiorari, and reverse the decision below. That is precisely the path this Court has taken in similar circumstances. *See Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) ("Without immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue and as a result 'there would remain in effect the unreviewed decision of the State Supreme Court' holding that the California statute does not conflict with [federal law]. On the other hand, reversal of [the] state court judgment in this setting will terminate litigation of the merits of this dispute.").

In short, nothing prevents this Court from deciding whether states really can dictate the terms of private contracts without obtaining the parties' consent. If the answer is no, as *Wolff* holds, the decision below must be reversed. But even if the answer is yes, certiorari is still warranted, "for it is this Court's prerogative alone to overrule one of its

precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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