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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
10 FRESNO DIVISION

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12 FOWLER PACKING COMPANY, INC.; )  
GERAWAN FARMING, INC., )  
13 )  
Plaintiffs, )  
14 )  
v. )  
15 )  
DAVID M. LANIER, in his official capacity )  
16 as Secretary of the California Labor and )  
Workforce Development Agency; )  
17 CHRISTINE BAKER, in her official )  
capacity as the Director of the Department )  
18 of Industrial Relations; JULIE A. SU, in her )  
official capacity as California Labor )  
19 Commissioner, )  
20 Defendants. )

No. 1:16-cv-00106-AWI-SMS

**BRIEF AMICUS CURIAE**

Judge: The Hon. Anthony W. Ishii

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The California Legislature enacted Assembly Bill 1513 (adding Section 226.2 to the California Labor Code) to provide relief for businesses facing sudden and unforeseen liability in the wake of recent California judicial decisions interpreting the state’s minimum wage law and its application to piece-rate compensation. *See Gonzalez v. Downtown LA Motors LP*, 215 Cal. App. 4th 36, 50 (2013) (holding that the common practice of averaging piece-rate compensation over the hours that the employee worked is illegal); *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864, 872 (2013) (holding that the common practice of not separately compensating rest periods using a piece-rate formula is illegal). AB 1513’s safe harbor allows businesses to avoid statutory damages if they promptly pay back some wages in accordance with *Gonzalez* and *Bluford*. *See* Cal. Lab. Code § 226.2. To secure the support of the United Farm Workers (the union) for the bill, the Legislature excluded Plaintiffs Fowler Packing Company and Gerawan Farming from AB 1513’s safe harbor. *See* Compl. ¶ 8.

AB 1513’s carve-out violates the United States Constitution’s Bill of Attainder Clause, which is designed to prevent Congress and state legislatures from determining guilt and inflicting punishment upon individuals without a judicial trial.<sup>1</sup> *See Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468 (1977). This constitutional guarantee was so central to the Founders that it was one of the few provisions which ran against both Congress, U.S. Const. art. I, § 9, cl. 3, and state legislatures, *id.* art. I, § 10, cl. 1. According to the Framers’ design, the imposition of liability on specific individuals would be a judicial, not a legislative, power. As Chief Justice John Marshall put it, “[i]t is the peculiar province of the legislature to prescribe general rules of society; the application of those rules to individuals [is] the duty of other departments.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). To that end, the constitutional prohibition on bills of attainder serves the larger liberty-protecting goal of separation of powers. *United States v. Brown*, 381 U.S. 437, 442 (1965) (“[T]he Bill of Attainder Clause was intended not as a narrow, technical (and

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<sup>1</sup> The California courts construe the state constitution’s Bill of Attainder Clause, Cal. Const. art. I, § 9, congruently with the federal clause. *See Law School Admission Council, Inc. v. State*, 222 Cal. App. 4th 1265, 1298-99 (2014). Accordingly, for the reasons set forth in the text, AB 1513 violates the state as well as the federal Constitution.

1 | therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of  
2 | powers.”); *see also* Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 Wis. L. Rev. 1203,  
3 | 1237-40 (2010) (the prohibition against bills of attainder, like other clauses ensuring the separation  
4 | of powers, ensures individual liberty).

5 | A law constitutes a bill of attainder if it (1) singles out particular parties and (2) imposes  
6 | punishment on those parties without trial. *SeaRiver Maritime Financial Holdings, Inc. v. Mineta*,  
7 | 309 F.3d 662, 668 (9th Cir. 2002) (citing *Nixon*, 433 U.S. at 425). As set forth below, AB 1513  
8 | does both.<sup>2</sup> It is unconstitutional.

9 | I

10 | **AB 1513 SINGLES OUT PLAINTIFFS BY USING**  
11 | **PLAINTIFFS’ PAST, IRREVERSIBLE CONDUCT TO**  
12 | **DRAW CARVE-OUTS TO THE SAFE HARBOR PROVISION**

13 | Assembly Bill 1513 contains all the hallmarks of a bill of attainder. The legislation  
14 | (i) applies to easily ascertainable individuals, (ii) regulates past conduct, and (iii) focuses on  
15 | irrevocable acts. *See SeaRiver*, 309 F.3d at 669-72 (using these factors in determining that a law  
16 | impermissibly targeted specific individuals).

17 | **A. Although AB 1513 Does Not Mention Plaintiffs By Name,**  
18 | **Its Carve-Outs Were Plainly Designed To Target Plaintiffs**

19 | AB 1513 targets both Fowler and Gerawan specifically. The law prevents Fowler from  
20 | taking advantage of the safe harbor by means of a so-called “ghost worker” carve-out. *See* Cal.  
21 | Lab. Code § 226.2(g)(5). That carve-out excludes from the safe harbor “[c]laims for paid rest or  
22 | recovery periods or pay for other nonproductive time that were made in any case filed prior to  
23 | April 1, 2015,” when the case contained “an allegation that the employer had intentionally stolen,  
24 | diminished, or otherwise deprived employees of wages through the use of fictitious worker names  
25 | or names of workers that were not actually working.” *Id.* The only lawsuit that fits this description  
26 | is a lawsuit that the United Farm Workers’ General Counsel filed against Fowler. Compl. ¶ 28. In

27 | <sup>2</sup> For purposes of the motion to dismiss, Defendants contest only the second element. *See* Mot. to  
28 | Dismiss at 18-20 (focusing solely on the issue of whether AB 1513 imposes “punishment” within  
the meaning of the Bill of Attainder Clause).

1 short, AB 1513’s ghost worker carve-out is mere shorthand for the General Counsel’s claim against  
2 Fowler, and only that claim.

3 It is a similar story with respect to Gerawan. AB 1513 carves out from its safe harbor any  
4 claim that was “asserted in a court pleading prior to March 1, 2014.” Given that AB 1513 deals  
5 only with lawsuits filed after *Bluford* (which was decided May 8, 2013), the carve-out period  
6 amounts to less than a year. The only lawsuit affected is the General Counsel’s action against  
7 Gerawan, which was filed just three weeks before the cut-off date. Compl. ¶ 26. Hence, AB 1513  
8 satisfies the first specificity element of the bill of attainder test, notwithstanding that the law does  
9 not mention Fowler and Gerawan by name. *Cf. Brown*, 381 U.S. at 461 (“It was not uncommon  
10 for English acts of attainder to inflict their deprivation . . . by description rather than name.”).

11 **B. AB 1513’s Carve-Outs Are Defined by Past Conduct, and Their  
12 Retroactive Effect Reveals an Important Hallmark of a Bill of Attainder**

13 AB 1513 applies retrospectively because it looks to past events to determine the availability  
14 of its safe harbor. The law was enacted in October 2015. But its carve-out for Fowler applies only  
15 to claims containing ghost worker allegations made *before* April 1, 2015. Similarly, the Gerawan  
16 carve-out applies only to lawsuits filed *before* March 1, 2014. Thus, AB 1513 is retroactive on its  
17 face.

18 Retroactive laws are disfavored because they “present[] serious fairness and efficiency  
19 concerns.” Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv.  
20 L. Rev. 1055, 1056 (1997); *see also* Guido Calabresi, *Retroactivity: Paramount Powers and*  
21 *Contractual Changes*, 71 Yale L.J. 1191, 1191 n.2 (1962) (“Fairness is the ultimate test of the  
22 validity of retroactive laws.”) (internal quotations omitted). Such disfavor is particularly apt with  
23 respect to the retroactivity involved with bills of attainder such as AB 1513. When statutory  
24 liability is untethered “to a prospective risk to a larger and more defined class,” there is no  
25 “generalized effect” to “temper[] the concerns of ‘tyranny’ by the ‘multitude.’” *SeaRiver*, 309 F.3d  
26 at 670-71 (quoting *Brown*, 381 U.S. at 443). Thus, even if AB 1513’s carve-outs would otherwise  
27 be permissible if purely prospective, their retroactive effect weighs heavily in favor of a  
28 determination that AB 1513 is a bill of attainder.

1 **C. AB 1513’s Carve-Outs Target and Penalize Irreversible Conduct**

2 Whether a law targets and penalizes irreversible conduct is a central factor in the specificity  
3 inquiry under the Bill of Attainder Clause. *See Selective Service System v. Minnesota Public*  
4 *Interest Research Group*, 468 U.S. 841, 848 (1984). AB 1513’s carve-outs satisfy that  
5 requirement, because they hinge upon the wage claims against Gerawan and ghost worker claims  
6 against Fowler, all of which in turn are tied to irreversible, past conduct.

7 Comparing AB 1513 to the Supreme Court’s leading Bill of Attainder cases from the Civil  
8 War dealing with “irreversibility” confirms that conclusion. For example, in *Cummings v.*  
9 *Missouri*, 71 U.S. 277 (1866), the Supreme Court invalidated a state constitutional provision that  
10 compelled those seeking to serve as priests to swear an oath that they had never assisted or  
11 sympathized with the Confederacy. *Id.* at 316-17. Similarly, in *Ex Parte Garland*, 71 U.S. 333  
12 (1866), the Court voided a law requiring attorneys to swear that they had never aided Confederate  
13 soldiers. *Id.* at 334-35. The Supreme Court subsequently explained that the key defect in these  
14 laws was that “the persons in the group disqualified were defined entirely by irreversible acts  
15 committed by them.” *Selective Service*, 468 U.S. at 848. The same is true of AB1513’s carve-outs.

16 The bill of attainder analysis reasonably focuses on whether a law punishes irreversible  
17 conduct. Laws of this sort tear away the “veil of ignorance” that normally accompanies legislation  
18 and thus invite corrupt legislative purposes to infect lawmaking. Akhil Reed Amar, *Attainder and*  
19 *Amendment 2: Romer’s Rightness*, 95 Mich. L. Rev. 203, 222 (1996). They therefore “enable[]  
20 legislatures to launch surgical strikes against unpopular groups, confident that such burdens will  
21 not affect favored constituents upon whom the legislator depends.” Roderick M. Hills, Jr., *Is*  
22 *Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar’s Analysis of*  
23 *Romer*, 95 Mich. L. Rev. 236, 242 (1996). Voiding such laws, like AB 1513, serve the worthy  
24 purpose of preventing legislation at the behest and benefit of special interests.

25 In sum, there can be little doubt that the AB 1513 carve-outs, which exclude Fowler and  
26 Gerawan—and *only* Fowler and Gerawan—from the safe-harbor provision, were crafted specifically  
27 to accomplish that improper purpose. By focusing on past, irreversible conduct, the Legislature

28 ///



1 sought to avoid liberty-guarding limitations that accompany generally applicable laws. In so doing,  
2 the Legislature enacted a bill that satisfies the specificity component of a bill of attainder.

## 3 II

### 4 HISTORICAL MEANING, THE LACK OF A 5 NONPUNITIVE LEGISLATIVE PURPOSE, AND A 6 LEGISLATIVE RECORD REFLECTING PUNITIVE 7 INTENT DEMONSTRATE THAT AB 1513 IMPOSES 8 PUNISHMENT ON PLAINTIFFS WITHOUT JUDICIAL TRIAL

9 To determine whether a statute imposes punishment, courts consider “(1) whether the  
10 challenged statute falls within the historical meaning of legislative punishment; (2) whether the  
11 statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to  
12 further nonpunitive legislative purposes; and (3) whether the legislative record evinces a  
13 congressional intent to punish.” *Selective Service*, 468 U.S. at 852. AB 1513 not only singles out  
14 Fowler and Gerawan, it also inflicts *punishment* on them sufficient to constitute a bill of attainder.

15 A statute need not satisfy all three factors to constitute a bill of attainder. For example, the  
16 “inquiry does not end” even if the challenged law “does not inflict punishment in its historical  
17 sense.” *Id.* at 853. Courts also must determine whether the statute “can be reasonably said to  
18 further nonpunitive goals.” *Id.* at 854. Here, however, all three factors lead to the same conclusion:  
19 AB 1513 punishes Fowler and Gerawan.

#### 20 A. AB 1513’s Carve-Outs Are Analogous to Punishments 21 Traditionally Prohibited by the Bill of Attainder Clause and 22 Thus Their Invalidation Would Further the Clause’s Purposes

23 The California Legislature’s behavior in singling out Fowler and Gerawan is eerily  
24 reminiscent of pernicious practices in England and colonial America, which provide “a ready  
25 checklist of deprivations [that] fall within the proscription of” the Bill of Attainder Clause. *Nixon*,  
26 433 U.S. at 473. In the seventeenth century, the British Parliament presided over specific cases,  
27 heard evidence on criminal charges, and then voted on the guilt of the accused. *See, e.g., Fenwick’s*  
28 *case*, (1696) 13 How. St. Tr. 537 (H.C.). Colonial legislatures adopted this practice, and frequently  
enacted special legislation that “modif[ied] the position of named parties before the law.”  
Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. 247, 258  
(1914). Those legislatures “extend[ed] their deliberations to the cases of individuals” so frequently

1 that many “consider[ed] an application to the legislature, as a shorter and more certain mode of  
2 obtaining relief from hardships and losses, than the usual process of law.” *A Report of the*  
3 *Committee of the Council of Censors* 6 (Phila. 1784).

4 Legislative interferences with private rights “were evils which had more than perhaps  
5 anything else, produced” the Constitutional Convention. 1 *The Records of the Federal Convention*  
6 *of 1787*, at 134 (Max Farrand ed., 1911) (Madison). The Framers were appalled at the “many  
7 instances” in which colonial legislatures “decided rights which should have been left to judicial  
8 controversy.” Thomas Jefferson, *Notes on the State of Virginia* 126 (Shuffelton ed. 1999). The Bill  
9 of Attainder Clause specifies that although such practices were acceptable in England around the  
10 time of the Star Chamber, they defied the constitutional principles of this Nation.

11 A bill of attainder was originally understood narrowly to mean a parliamentary act  
12 sentencing specified individuals to death. *Brown*, 381 U.S. at 441. Yet as early as 1810, the  
13 Supreme Court had extended the list of punishments prohibited by the Clause to include such lesser  
14 sanctions as imprisonment, banishment, and confiscation of property. *See Fletcher*, 10 U.S.  
15 (6 Cranch) at 138. Employing such a flexible interpretation of the punitive element to the Bill of  
16 Attainder Clause analysis is warranted. It helps to prevent an enterprising legislature “from  
17 circumventing the clause by cooking up newfangled ways to punish disfavored individuals or  
18 groups.” *BellSouth Corp. v. FCC*, 144 F.3d 58, 65 (D.C. Cir. 1998). That in turn serves the  
19 Clause’s role in protecting the separation of powers. *See* Thomas B. Griffith, Note, *Beyond*  
20 *Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 Va. L. Rev. 475, 481 (1984)  
21 (noting that the Supreme Court’s Bill of Attainder cases during the Civil War era “viewed the bill  
22 of attainder clause as part of a larger scheme to guaranty procedural due process by ensuring the  
23 separation of legislative and judicial functions”).

24 Viewed from this perspective, AB 1513’s carve-outs are punitive, even if they could  
25 plausibly be characterized as the mere denial of a benefit. *But see* Mot. to Dismiss at 18  
26 (contending that the denial of a benefit can never constitute a bill of attainder). In *United States v.*  
27 *Lovett*, 328 U.S. 303 (1946), the Supreme Court held that a federal statute barring the use of  
28 government funds to pay three specified government employees deemed by the House to have

1 engaged in “subversive activities” was a bill of attainder.<sup>3</sup> *Id.* at 315. That a denial of federal funds  
2 hardly resembles pains of death and corruption of blood traditionally associated with bills of  
3 attainder posed no difficulty. The Court explained that laws which deny benefits to ascertainable  
4 individuals inflict punishment, for purposes of the Bill of Attainder Clause, just as much as more  
5 traditionally punitive actions. *See id.*

6 Commentators have reached the same conclusion. Alexander Hamilton argued that,  
7 regardless of the degree of deprivation, bills of attainder should be prohibited because they  
8 substitute “a new and arbitrary mode of prosecution” for an “ancient and highly esteemed one,  
9 recognized by laws and the constitution.” Alexander Hamilton, *A Second Letter from Phocion*  
10 (1784), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON 530, 544 (Harold C. Syrett &  
11 Jacob E. Cooke eds., 1962) (spelling modernized). John Hart Ely made the same point nearly two  
12 centuries later in deeming a so-called “right-privilege dichotomy” to be inconsistent with the  
13 underlying rationale of the Bill of Attainder Clause. *See Comment, The Bounds of Legislative*  
14 *Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330, 359-60  
15 (1962).

16 Adherence to the artificial dichotomy between direct punishment and deprivation of a  
17 benefit fails to acknowledge that, just as much as the outright infliction of punishment, the denial  
18 of a privilege can carry with it a strong stigma. That was an evil the Bill of Attainder Clause was  
19 meant to avoid. *See Amar, supra*, at 224 n.81 (The Attainder Clause, “historically speaking, [was]  
20 tightly bound up with concerns about stigma and ‘corrupt’ or ‘degraded’ ‘blood’”). Such a stigma  
21 is present here: the Legislature adjudged Fowler and Gerawan to be unworthy of a protection that  
22 every other California employer enjoys. The public naturally would view that deprivation as a  
23 legislative declaration that Fowler and Gerawan are guilty of egregious conduct. But no court has

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24  
25 <sup>3</sup> Because *Lovett* was decided before the cases in which the Supreme Court held that individuals  
26 have a constitutionally protected property interest in continuing public employment, the decision  
27 does not address whether the legislative deprivation of a benefit would violate due process. Rather,  
28 as explained in the text, what moved the *Lovett* Court was the fact that a legislative body, rather  
than a court, had terminated the plaintiffs’ eligibility. *See Lovett*, 328 U.S. at 316. So too here, the  
California Legislature, not a court, adjudicated Fowler and Gerawan’s guilt by denying them the  
safe harbor otherwise generally open to California piece-rate employers.

1 so found. Classifying AB 1513’s carve-outs as punitive would therefore serve the purposes  
2 underlying the prohibition on bills of attainder.

3 **B. AB 1513’s Carve-Outs, When Viewed**  
4 **in Terms of the Type and Severity of the Burdens**  
5 **Imposed, Do Not Further a Nonpunitive Legislative Purpose**

6 Another indication that AB 1513 constitutes a bill of attainder is that its carve-outs do not  
7 constitute a “legitimate regulation of conduct.”<sup>4</sup> *Selective Service*, 468 U.S. at 851. The statute’s  
8 purpose is to allow California businesses the opportunity to avoid massive liability in the aftermath  
9 of unforeseen appellate court decisions. Because the carve-outs exclude Fowler and Gerawan from  
10 this otherwise generally applicable opportunity, they fail to advance any legitimate nonpunitive  
11 objective.<sup>5</sup> *Cf. Foretich v. United States*, 351 F.3d 1198, 1224 (D.C. Cir. 2003) (a regulatory  
12 singling out “belies the claim that [the Legislature’s] purposes were nonpunitive”).

13 Defendants contend otherwise on the ground that any punishment meted out to Fowler and  
14 Gerawan is “attributable to [their] own actions in failing to pay employees.” Mot. to Dismiss at 20.  
15 But an allegedly wrongful past act will be at issue in every bill of attainder case. *See* David P.  
16 Restaino, Comment, *Conditioning Financial Aid on Draft Registration: A Bill of Attainder and*  
17 *Fifth Amendment Analysis*, 84 Colum. L. Rev. 775, 779 (1984) (acts of attainder “commonly  
18 included a declaration of guilt for some past wrong”). Thus, the Defendants’ argument would mean  
19 that no law could ever be a bill of attainder. Moreover, that Fowler’s and Gerawan’s potential  
20 liability is attributable to their past actions is just as true for the other businesses that qualify for the

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22 <sup>4</sup> Despite Defendants’ contentions to the contrary, *see* Mot. to Dismiss at 18, this standard is  
23 tougher than the rational basis review used in the typical equal protection or due process challenge.  
24 That is because the Bill of Attainder Clause requires courts to look beyond the rational relationship  
25 of the statute to a legitimate public purpose for “less burdensome alternatives by which [the]  
26 legislature . . . could have achieved nonpunitive objectives.” *Nixon*, 433 U.S. at 482.

27 <sup>5</sup> Allowing such targeted regulation undercuts the “effective practical guaranty against arbitrary and  
28 unreasonable government” that results from requiring laws “which officials would impose upon  
a minority [to] be imposed generally.” *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112  
(1949) (Jackson, J., concurring). Because isolated groups do not wield the political power  
necessary to stave off laws targeted at them, the Bill of Attainder Clause ensures that they cannot  
be deprived of their rights until “after an impartial trial pursuant to a duly enacted and generally  
applicable rule.” Anthony Dick, Note, *The Substance of Punishment Under the Bill of Attainder*  
*Clause*, 63 Stan. L. Rev. 1177, 1211 (2011).

1 safe harbor. If that fact were enough to defeat a Bill of Attainder Clause challenge, then no safe  
2 harbor exclusion could ever be overturned, no matter how vindictively crafted.

3 **C. The Legislative Record, Which Contains Statements**  
4 **by AB 1513’s Author That the Bill Reflects a Legislative**  
5 **Determination That Plaintiffs Were “Potential Bad Actors,”**  
6 **Reinforces the Conclusion That AB 1513 Is a Bill of Attainder**

7 The third factor for determining whether a bill of attainder is punitive is whether the  
8 legislative record evinces an intent to punish. *See SeaRiver*, 309 F.3d at 676-77. This factor  
9 “differ[s] from the second only in inviting a journey through legislative history.” *BellSouth Corp.*,  
10 144 F.3d at 67. In applying this factor, it is appropriate to bear in mind that “a formal legislative  
11 announcement of moral blameworthiness or punishment” is not “necessary to an unlawful bill of  
12 attainder.” *Nixon*, 433 U.S. at 480.

13 Because the carve-outs were forced through the Legislature at the eleventh-hour without  
14 sufficient time for debate, the legislative record is scant. But the legislative statements that do exist  
15 support the conclusion that the Legislature intended to punish Fowler and Gerawan by excluding  
16 them from AB 1513’s safe harbor. Indeed, the bill’s author admitted that the “carve-outs were  
17 necessary to maintain the support of labor,” and that the Legislature was determining that Fowler  
18 and Gerawan were “potential bad actor[s].” Compl. ¶ 8.

19 Of course, the statement of a single legislator is not “overwhelming evidence of penal  
20 intent,” and does not by itself show that the statute is punitive. *Consolidated Edison Co. of*  
21 *New York, Inc. v. Pataki*, 292 F.3d 338, 355 (2d Cir. 2002). But combined with the other evidence  
22 showing a punitive intent, the legislative record reinforces the conclusion that AB 1513’s carve-outs  
23 constitute a bill of attainder. *See id.* (“[A] substantial part of the legislation cannot be justified by  
24 any legislative purpose but punishment.”). Accordingly, based on historical meaning, the absence  
25 of legitimate nonpunitive purposes, and the legislative record, AB 1513 imposes “punishment”  
26 within the meaning of the Bill of Attainder Clause.

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1 **CONCLUSION**

2 For the foregoing reasons, AB 1513 is unconstitutional as a bill of attainder. The motion  
3 to dismiss should be denied.

4 DATED: April 1, 2016.

5 Respectfully submitted,

6 DAMIEN M. SCHIFF  
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