No. 21-

In the Supreme Court of the United States

LION RAISINS, INC. AND LION FARMS LLC, PETITIONERS

v.

KAREN ROSS, AS SECRETARY OF DEPARTMENT OF FOOD AND AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's voting rights jurisprudence permits the government to empower a private association (here, an agricultural cooperative) to cast all its members' votes as a bloc on the theory that such voting schemes are subject to rational-basis review and the government may "give greater influence to some voters as long as the apportionment of power is not 'wholly irrelevant' to the [government's] objectives."

CORPORATE DISCLOSURE STATEMENT

Lion Raisins, Inc. and Lion Farms, LLC have no parent corporations; nor does any publicly held company own 10% or more of either petitioner's stock.

RELATED PROCEEDINGS

California Court of Appeal, Third Appellate District

> *Lion Raisins, Inc., et al* v. *Karen Ross*, *as Secretary, etc.*, Case No. C086206 (May 25, 2021)

Superior Court of Sacramento County, California

> *Lion Raisins, Inc., et al* v. *Ross*, Case Nos. 03AS05313 & 02AS01618 (Nov. 9, 2017)

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INTRODUCTION

This case concerns the special privilege of certain private associations—here, agricultural cooperatives—to aggregate the votes of their members in government-run elections that determine what regulatory regime will govern their industry.

Under the California Marketing Act of 1937 and its federal counterpart, the Agricultural Marketing Agreement Act of 1937, the government may issue marketing orders "regulat[ing] all persons engaged in the marketing, processing, distributing, or handling of the commodity," if and only if the order is approved by voters in an industry referendum. App. 6a-7a. In these referenda, individual farmers vote for themselves, but cooperative associations may bloc vote on behalf of all their members—meaning cooperatives may cast votes for members who either would not otherwise vote or would vote for the opposite outcome. Cal. Food & Agric. Code § 58999; 7 U.S.C. § 608c(12). Such marketing orders routinely pit the interests of the industry's largest players against the interests of small and mid-sized farmers and those who sell specialty products for niche markets. See, *e.g.*, *Horne* v. *Dep't of Agric.*, 576 U.S. 350 (2015); *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457 (1997).

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court held that equal protection requires giving each individual voter an equally weighted vote. Presumptively, that principle does not allow favored private associations to aggregate the votes of their members and vote them as a bloc, without regard to the members' wishes.

In *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730 (1973) and *Ball* v. *James*, 451 U.S. 355, 366 (1981), this Court carved out a narrow exception to its "one person, one vote" rule for "special-purpose districts" where the franchise is limited to a subset of the population who would disproportionately bear the burdens and benefits of the special purpose jurisdiction's activities. *Town of Lockport, New York* v. *Citizens for Cmty. Action at Local Level, Inc.*, 430 U.S. 259, 266 (1977). But even within these special districts, "the classification of voters into 'interested' and 'noninterested' groups must still be reasonably precise." *Ibid.* "[T]he validity of the classification depend[s] upon whether the group interests [are] sufficiently different to justify total or partial withholding of the electoral franchise from one of them." *Id.* at 267. If "the interests of the two groups * * * are sufficiently similar," then a State may not "distinguish[] between them by artificially narrowing or weighting the electoral franchise." *Id.* at 267-268.

The court below ignored that limitation, upholding California's bloc voting system for raisin farmers under mere rational basis review. In so doing, the court exacerbated an open three-way split among the state and federal courts and opened the door for large producers to vote for regulations—effectively including taxes—that favor themselves at the expense of their smaller competitors.

At issue is the California Raisin Marketing Order, first issued in 1998. (This Court encountered its federal counterpart in *Horne*, *supra*.) That year, two major cooperative associations collectively representing a majority of raisin producers proposed the order and drafted its terms, guaranteeing themselves favorable rules and a majority of the seats on the industry board

charged with administering the order. App. 10a-11a. Then, in the referendum, the two cooperatives bloc voted for the marketing order they had drafted, causing it to take effect. App. 12a.

Petitioner Lion Raisins, the largest independent raisin farm in the United States, believes that it is seriously disadvantaged by the collective marketing policies of the California Raisin Marketing Board ("the Board"). Like many independent growers, Lion has consistently voted against the marketing order and the cooperative's agents who form the board's majority. Yet it has just as consistently been outvoted by the bloc voting of the two dominant cooperatives.

In 2002, Lion challenged the marketing order in state court, later amending its complaint to raise both state constitutional issues and a federal equal protection challenge to the bloc voting system. Lion's assessments have been placed in escrow pending the outcome of this case.

In a decision published in relevant part, the California Court of Appeal upheld the bloc-voting statute against Lion's equal protection challenge. Drawing on *Salyer*'s and *Ball*'s exception for special purpose districts, the court concluded that marketing order referenda involve "a governmental body performing a specialized government function that has a disproportionate effect on a definable segment of the community." App. 32a.

Crucially, however, in applying *Salyer* and *Ball*, the court chose *not* to take into account the bloc voting rule. The court deemed it sufficient that the marketing order disproportionately affects raisin producers *in general*, relative to the public, and that all "raisin producers[] are enfranchised by the voting scheme."

App. 36a. The court accordingly applied mere rational basis scrutiny. *Ibid.* Only then did the court ask whether "cooperative marketing associations [should have] disproportional voting power." App. 37a. Without mentioning the economic conflict between independents and cooperatives, the court followed California Supreme Court precedent holding that "[v]oting power may be apportioned in ways that give greater influence to some voters as long as the apportionment of power is not '"wholly irrelevant"' to the objectives of the statute." App. 37a (quoting *S. Cal. Rapid Transit Dist.* v. *Bolen*, 822 P.2d 875, 890 (Cal. 1992)). The court thus upheld the bloc-voting statute as "rationally related to the legitimate governmental purposes of encouraging producers to join cooperative marketing associations." App. 37a-38a.

That is like saying a labor union could bloc vote all its members' votes in an election for a special purpose labor board, because that encourages unionization.

The decision below flouts this Court's equal protection jurisprudence and deepens a lower-court split on the applicable equal protection standard in this context. When statutes "deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinction made are not applicable." *Kramer* v. *Union Free Sch. Dist.*, 395 U.S. 621, 627-628 (1969). Properly understood, a deferential rationality standard applies only if the court finds *both* that "the purpose of the District is sufficiently specialized and narrow" *and* that its regulatory activities bear disproportionately on those provided with electoral advantage. *Ball*, 451 U.S. at 362. The court

below, however, never asked whether the apportionment scheme disproportionately affects the favored group over the others. App. 35a-37a.

It is not alone. There is a three-way split among the lower courts on the equal protection rule for evaluating disproportionate voting power. Some courts, including the Second and Fifth Circuits and the Illinois and New Mexico high courts, correctly consider whether the scheme "disproportionately benefit[s] those granted the weighted vote." *Fumarolo* v. *Chicago Bd. of Educ.*, 566 N.E.2d 1283, 1293 (Ill. 1990). A second group of courts, including the Seventh and Ninth Circuits and the Iowa Supreme Court, does not consider at all whether there is a disproportionate effect if they find that the vote concerns a body with limited, special-purpose powers. See *Cecelia Packing Corp.* v. *U.S. Dep't of Agric./Agric. Mktg. Serv.*, 10 F.3d 616, 624 (9th Cir. 1993). A third group of courts, including the California and Florida Supreme Courts, like the court below, analyze only whether there is a disproportionate effect on "those enfranchised" as compared to "those excluded by a given voting scheme." *Bolen*, 822 P.2d at 881 (Cal.); App. 36a. Only this Court can resolve the split.

The problem of bloc-voting in marketing orders, moreover, is important, widespread, and recurring. There are dozens of federal and state marketing orders, affecting billions of dollars in agricultural and economic activity. Marketing orders have been controversial since their introduction and have generated numerous legal challenges warranting this Court's review. *E.g.*, *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Fla. Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960); *Glickman*, *supra*;

United Foods, *supra*; *Horne*, *supra*. Abuse of such orders, enabled by bloc voting, is rampant. There are "many combinations" of marketing order terms, the Justice Department has observed, that "can obviously be designed to be more or less favorable to a dominant cooperative seeking to protect or increase its market share"—"[e]ven without predatory motives." U.S. Department of Justice, *Milk Marketing: A Report of the U.S. Department of Justice To the Task Group on Antitrust Immunities* 332-33 (Jan. 1977).

Lower courts have struggled with the *Salyer-Ball* exception for special purpose districts, calling the test "difficult" (*Kessler* v. *Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 103 (2d Cir. 1998)) and "wavering and indistinct" (*Pittman* v. *Chicago Bd. of Educ.*, 64 F.3d 1098, 1102 (7th Cir. 1995)). Over time, special purpose districts have proliferated—there are 38,000 today—as have their many deviations from the bedrock principle of one person, one vote. This Court's guidance is needed to provide clarity in this important area, and to prevent the right to vote from being "so diluted" as to become "a charade." *Kessler*, 158 F.3d at 126 (Weinstein, J., dissenting).

OPINIONS BELOW

The California Court of Appeal's opinion (App. 1a-45a) is reported at 279 Cal. Rptr. 3d 222. The California Supreme Court's order denying a petition for review (App. 46a) is not reported. The California Superior Court's decision (App. 47a-72a) is unreported.

JURISDICTION

The judgment below issued on May 25, 2021. The California Supreme Court denied review on September 1, 2021. Justice Kagan extended the time to file a

petition for certiorari to and including January 28, 2022 (No. 21A136). The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV:

> No State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Cal. Food & Agric. Code § 58999:

> In finding whether the marketing order or major amendment to it is assented to in writing or approved or favored by producers pursuant to the provisions of this chapter, the director shall consider the approval of any nonprofit agricultural cooperative marketing association, which is authorized by its members so to assent, as being the assent, approval, or favor of the producers that are members of, or stockholders in, that nonprofit agricultural cooperative marketing association.

Other relevant provisions of the California Marketing Act of 1937 (Cal. Food & Agric. Code, § 58601 et seq.) (the CMA) and the California Raisin Marketing Order are reproduced in the appendix, *infra*, at App. 73a-116a.

STATEMENT

A. Marketing orders

Like its federal counterpart, the California Marketing Act authorizes fruit and vegetable marketing orders. Cal. Food & Agric. Code §§ 58615, 58712,

58741, 58743, 58881.[1] Marketing orders are "regulations governing marketing matters for the producers and handlers of agricultural commodities" (*Gerawan Farming, Inc.* v. *Lyons*, 12 P.3d 720, 727 (Cal. 2000) ("*Gerawan I*")) and "a species of economic regulation that has displaced competition in a number of discrete markets." *Glickman*, 521 U.S. at 461. The original purpose of these New Deal programs was "to raise and support prices" of agricultural commodities. *Gerawan I*, 12 P.3d at 727; see also *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 346 (1984) (same for federal marketing orders). These statutes could well be "the world's most outdated law[s]." Tr. of Oral Arg. at 48-49, *Horne* v. *Dep't of Agric.*, 569 U.S. 513 (2013) (No. 12-123) (Kagan, J.).

The California Marketing Act authorizes marketing orders that control, among other things, the quantity or quality of any commodity produced for market. Cal. Food & Agric. Code §§ 58881-58888. Marketing orders may also establish "plans for advertising and sales promotion." *Id.* § 58889(a). They are, in essence, a government-mandated and government-enforced cartel. Virtually everything they do would be illegal if not exempted from the antitrust laws.

"The expenses of administering such orders" are "'paid from funds collected pursuant to the marketing order.'" *Glickman*, 521 U.S. at 461 (quoting 7 U.S.C. § 608c(6)(I)); Cal. Food & Agric. Code § 58921. The "annual rate of assessments to cover the expenses of

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[1] Federal and state marketing orders coexist, so long as the state orders do not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141 (1963).

administration, inspection services, research, and advertising and promotion" is set by industry boards. *Glickman*, 521 U.S. at 462. These assessments are taxes by another name, as the full "taxing power of the State is used to collect" them. California Department of Food & Agriculture, *California Marketing Programs* 3 (2013). Indeed, "[a]ny assessment" collected under the Act "is a personal debt * * * due and payable to the [Secretary]." Cal. Food & Agric. Code § 58929.

The assessments can be substantial. For a marketing order that includes compelled advertising, the assessment can be up to 6.5% of a producer's gross sales. *Id.* § 58924 (up to 2.5% for administrative expenses); *id.* § 58925 (up to 4% for advertising and sales promotion). Such assessments often run into the millions of dollars even for smaller independent producers, and might easily swallow most or all of a producer's profit. *E.g.*, *Glickman*, 521 U.S. at 464 (dispute over "$3.1 million in past due assessments").

Each individual order is initiated by industry and can enter into force with the assent of a bare majority of producers. Cal. Food & Agric. Code § 58993(b). Once approved, it binds all producers in the covered geographic area, regardless of whether they supported it. Violating a California marketing order triggers civil and criminal penalties, including fines and up to six months' imprisonment. *Id.* §§ 59233-59234; see also App. 102a. There are also monetary "penalt[ies]" of up to 50% for late or unpaid assessments. *Id.* § 58930. Because marketing orders might otherwise violate competition laws, California grants them a "complete defense" to state antitrust and unfair trade practice claims. *Id.* § 58655.

In sum, marketing orders are "a government-sponsored cartel" (Peter Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. Rev. 462, 469 (2013)), backed by the State's taxing and police powers and enforced by civil and criminal penalties.

B. Bloc voting by cooperatives

All the vices of marketing orders are compounded by the dominant position of agricultural cooperatives, which the statutory scheme entrenches at the expense of smaller producers. The California Marketing Act and its federal counterpart permit marketing cooperatives to bloc vote on their members' behalf. Cal. Food & Agric. Code § 58999; 7 U.S.C. § 608c(12).

"Because there will not infrequently be a single cooperative corporation that dominates the production of the commodity, this provision can effectively grant such cooperatives veto power over the adoption or amendment of a marketing order when it elects to bloc vote. The cooperative's power is enhanced because, through its bloc vote, it can vote on behalf of those of its members who oppose a marketing order requirement as well as those who are apathetic and would not ordinarily vote." Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 13 (1995).

Cooperatives are not legally required to "poll * * * individual producer members." *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588, 599 (1939). The cooperative's board "has the power to approve or disapprove * * * without submission of the matter to the

producer-stockholders." *Curll* v. *Dairymen's Coop. Sales Ass'n*, 132 A.2d 271, 274 (Pa. 1957).

Cooperatives' special exemptions from antitrust laws magnify their control. As one presidential commission observed, "[s]ignificant potential for anticompetitive effects exists throughout the agricultural marketing order and agreement system," with the combination of "the marketing order system" and antitrust immunity "significant[ly] increas[ing]" cooperatives' market power. *Report to the President and the Attorney General by the National Commission for Review of Antitrust Laws and Procedures* 266 (Jan. 22, 1979).

Marketing orders and cooperatives can thus form a dangerous "double combination." John A. Jamison, *Marketing Orders, Cartels, and Cling Peaches: A Long-Run View* 120, Food Research Institute Studies, Vol. IV No. 2 (1966). Because of the bloc voting rule, a controlling majority—in reality, a minority—in a single large cooperative can dictate price, quantity, and promotion requirements for an entire industry. See *id.* at 125 (remarking that, for the cling peach marketing order, "many of the same individuals are members of the marketing order Advisory Board and the cooperatives' boards of directors").

C. The Raisin Marketing Order

Sun-Maid and the Raisin Bargaining Association are two cooperatives that collectively represent a majority of raisin producers. App. 10a; see Brief of Sun-Maid Growers of California and The Raisin Bargaining Ass'n as *Amici Curiae* in Support of Respondent 2, *Horne* v. *U.S. Dep't of Agric.*, No. 14-275 (April 8, 2015) (touting a combined "60%" market share). In 1998,

they proposed a marketing order governing raisin producers containing rules that guaranteed them a majority of the seats on the industry board charged with administering the order. App. 11a & n.6. In the referendum required to issue the marketing order, they bloc voted in favor of the order they had drafted, causing it to take effect. App. 12a.

The Marketing Order is administered by the 15-member Board. App. 81a. "In practice," eight to 10 of these 15 members have represented Sun-Maid and the Raisin Bargaining Association. App. 11a n.6. The Board determines the amount to assess each grower in the raisin industry annually and how to use the funds collected, principally for advertising, sales promotion, and research. App. 99a-101a. The Marketing Order taxes all producers to fund advertising that lauds the products of the cooperatives and ignores or even implicitly disparages the products of independent producers such as petitioner Lion Raisins, which often have different qualities and are marketed for different uses. These kinds of compulsory "advertising and promotion programs" drive many independent producers out of business while padding cooperatives' profits. See Jamison, *supra*, at 136.

D. The proceedings below

Lion is a family-owned and operated business that grows and markets raisins. From its humble beginnings in 1903, Lion has grown to become California's largest independent raisin farm.

Lion sued in California state court, challenging various marketing order provisions, including the bloc voting provision. Among other things, Lion sought an injunction against future assessments and a refund of

all assessments paid (currently held in escrow) since the 1999-2000 crop year. App. 3a.

After a bench trial, the trial court entered judgment against the Secretary, concluding the Marketing Order was invalid because there was insufficient evidence that it was necessary to address severe economic conditions in the raisin industry. The California Court of Appeal reversed, holding that a finding of severe economic conditions was irrelevant to its legality. *People ex rel. Ross* v. *Raisin Valley Farms LLC*, 193 Cal. Rptr. 3d 246, 255 (Cal. Ct. App. 2015).

On remand, the trial court entered judgment for the Secretary, denying the remaining challenges to the Marketing Order. As relevant here, the trial court rejected Lion's voting rights claim because "[t]he vote does not involve the election of officials who will exercise general governmental power over the entire geographic area to be served to which the strict scrutiny standard would apply." App. 60a (citing *Cecelia Packing*, 10 F.3d at 624). According to the court, the bloc voting provision survived constitutional scrutiny because it "is rationally related to a legitimate government interest" in agricultural efficiency and marketing by "encourag[ing] growers to join cooperatives." App. 62a. Lion appealed.

E. The decision below

Lion argued below that the bloc voting statute violated "the 'one person, one vote' principle articulated in *Reynolds* v. *Sims*" by "essentially allow[ing] cooperative marketing associations to stuff the ballot box, thereby 'diluting' the votes of independent producers and 'disenfranchising' the dissenting members of the cooperative associations." App. 32a. In a decision

published in relevant part, the California Court of Appeal affirmed. App. 30a-38a.

The court began by noting that "there is a recognized exception to the 'one person, one vote' requirement when the election relates to a governmental body performing a specialized governmental function that has a disproportionate effect on a definable segment of the community." App. 32a (citation omitted). "When these conditions are met," strict scrutiny does not apply, and "voting power 'may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions' without violating the guarantee of equal protection." App. 32a-33a (quoting *Bolen*, 822 P.2d at 881).

As to whether the marketing order involved specialized governmental functions, the court concluded that "[v]oting in referendums on marketing orders does not involve the election of officials who will exercise general governmental powers." App. 35a. Rather, it "involves the establishment of an advisory board, which has limited authority and performs specialized administrative functions generally related to the marketing, processing, distributing, or handling of agricultural commodities," with the raisin board administering only the "research and promotion of raisins." *Ibid.* Thus, "the raisin Board" was a "'special-purpose'" governmental unit." App. 35a.

Turning to *Bolen*'s second prong, the court concluded that there are "genuine differences in the interests of those enfranchised and those disenfranchised under the legislation." App. 36a. Those "primarily affected" by the Marketing Order were raisin producers (undifferentiated), and raisin producers

were "enfranchised." *Ibid.* All others were "substantially less affected." *Ibid.*

The court dismissed the "cooperative marketing associations[']disproportional voting power" as irrelevant to the *Salyer-Ball* analysis. App. 37a. Applying a hyper-weak version of rational basis review, the court announced that "[v]oting power may be apportioned in ways that give greater influence to some voters as long as the apportionment of power is not 'wholly irrelevant' to the objectives of the statute." *Ibid*. (quoting *Bolen*, 822 P.2d at 890). That is a shocking statement—that the State can intentionally give some voters more voting power than others in service of the State's policy goals. The court easily concluded that the bloc voting statute was "rationally related to the legitimate governmental purposes of encouraging producers to join cooperative marketing associations," which "contribut[es] to more stable and efficient markets." App. 37a.

After briefing was completed in the court below, a referendum terminated the raisin marketing order, with Sun-Maid bloc voting to terminate and the Raisin Bargaining Association bloc voting to continue the order, resulting in a 53.4 to 46.6 % majority to terminate.[2] The case is not moot, however, both because Lion's $7,072,990.81 in withheld assessments, which are held in escrow, depend on the outcome of the case, and because these cooperatives have the power to revive the order at any time.

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[2] *Marketing Order for California Raisins to be Terminated Based Upon Outcome of Producer Referendum*, https://it.cdfa.ca.gov/igov/docs/2021%200504%20Termination%20Notice%20-%20Final%20-%20Signed.pdf.

The California Supreme Court denied Lion's petition for review. App. 46a.

REASONS FOR GRANTING THE PETITION

I. The lower courts are divided three ways over how to analyze unequal voting power under *Salyer-Ball*'s special-purpose district exception to the one-person, one-vote rule.

It has been 40 years since this Court has addressed the scope and meaning of the *Salyer-Ball* exception to this Court's one-person, one-vote rule. In the intervening years, the lower courts have struggled to discern the contours of that exception and to determine how it applies to special-purpose units and bloc voting. The resulting body of caselaw reflects an entrenched three-way split on that question. Legislatures seeking to design electoral schemes, lower courts seeking to evaluate their constitutionality, and the affected private parties all need this Court's guidance.

In holding that the *Salyer-Ball* exception does not require that those benefiting from weighted voting be disproportionately affected by the special purpose district's regulatory activities, the decision below exacerbates this three-way split. App. 36a & n.23. Only this Court can clarify the circumstances in which the Fourteenth Amendment's one-person, one-vote mandate may yield. To put the split in context, however, we begin by reviewing this Court's precedent and the governing rules that it establishes.

A. With a narrow exception, this Court's precedents require equality among voters.

"[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to

race, sex, economic status, or place of residence within a State." *Reynolds*, 377 U.S. at 560-561. States must "justify departures from th[is] basic standard of equality among voters." *Ibid.* Indeed, "when [this Court is] reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the court can conceive of a 'rational basis' for the distinction made are not applicable." *Kramer*, 395 U.S. at 627-628.

In *Hadley* v. *Junior College District*, 397 U.S. 50 (1970), this Court adhered to the one-person-one-vote rule even in a context where some voters were plainly more affected by the governing institution than others. Missouri law apportioned electoral districts for junior college trustees based on the number of eligible attendees rather than by population. The trustees were authorized to make employment decisions, form contracts, issue bonds, levy taxes and fees, supervise and discipline students, review petitions to annex school districts, condemn private property, "and in general manage the operations of the junior college." *Id.* at 53. The Court held that Missouri's law denied the equal right to vote. Although the trustees' powers were "not fully as broad as those of the" general government, "the trustees perform[ed] important governmental functions" that were "general enough and ha[d] sufficient impact" to trigger the principle of "one man, one vote." *Id.* at 53-54. Yet the Court acknowledged "that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* * * * might not be required." *Id.* at 56.

Then came *Salyer*, which marked the first time the Court adopted a special-purpose district exception to the one-person, one-vote rule. At issue was the Tulare Lake Basin Water Storage District, which covered 193,000 acres of California farmland and contained only 77 residents. 410 U.S. at 723. While vested with the ability to hire and fire employees, make contracts, issue bonds, condemn property, and cooperate with other agencies, the Tulare District otherwise "ha[d] relatively limited authority." *Id.* at 728 & n.7. "Its primary purpose, indeed the reason for its existence, [wa]s to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin." *Id.* at 728. The district "provide[d] no other general public services" of "the type ordinarily financed by a municipal body." *Id.* at 728-729.

Equally importantly, the district's actions "disproportionately affect[ed] landowners." *Id.* at 729. The entire cost of its operations was assessed against the land in proportion to the benefits received, and any delinquent payments became a lien on the land itself. *Ibid.* "In short, there [wa]s no way that the economic burdens of district operations c[ould] fall on residents *qua* residents." *Ibid.* Consequently, the Court held that the district was exempt from *Reynolds*' strict requirements. *Id.* at 728. Instead, the Court found a rational basis for permitting only landowners to vote in the district's elections and for apportioning such votes based on the assessed value of the land.

In a later case, the Court explained that "the classification of voters into 'interested' and 'noninterested' groups must still be reasonably precise." *Town of Lockport*, 430 U.S. at 266. "[T]he validity of the classification depend[s] upon whether the group interests [are] sufficiently different to justify total or partial

withholding of the electoral franchise from one of them." *Id.* at 267. If "the interests of the two groups * * * are sufficiently similar," then a State may not "distinguish[] between them by artificially narrowing or weighting the electoral franchise." *Id.* at 267-268.

Then, in *Ball*, the Court confronted another water reclamation district that restricted the franchise to landowners and apportioned voting power based on the amount of land a voter owned. 451 U.S. at 357. Unlike the 77-member Tulare District, however, the Salt River Project Agricultural Improvement and Power District covered nearly half of Arizona's population. *Id.* at 365. And whereas the operating costs of the Tulare District were assessed against the land, the Salt River District funded its activities through the sale of electric power and had become one of the largest electric providers in the State. *Id.* at 365-366. Nevertheless, the Court upheld the district by a 5-4 vote, reasoning that those "distinctions d[id] not amount to a constitutional difference." *Id.* at 366.

As in *Salyer*, the Court concluded that the Salt River District disproportionately affected "the specific class of people whom the system ma[de] eligible to vote." *Id.* at 370. Only landowners committed capital to the district, and only they were subject to liens and acreage-based taxes. *Ibid.* Hence, the Court upheld the district's voting scheme "because it [bore] a reasonable relationship to its statutory objectives." *Id.* at 371. *Ball*, a 5-4 decision with a sharp dissent from Justice White, has been much criticized, and represents the doctrine's outer edge.

B. The decision below adds to a chaotic body of case law around the *Salyer-Ball* exception that requires this Court's intervention.

Lower courts have wrestled with the *Salyer-Ball* exception, expressing confusion and doubt. The Second Circuit has observed that "application of this test has been difficult." *Kessler*, 158 F.3d at 103. A distinguished Seventh Circuit panel has opined that "[t]he line between" a general and a special purpose district "is wavering and indistinct," and "[w]e are not even certain that it is the correct line." *Pittman*, 64 F.3d at 1102 (Posner, Flaum, and Easterbrook, JJ.). The California Supreme Court has observed that "[n]o one reviewing this area of the high court's equal protection jurisprudence can fail to be impressed with the result in *Ball* * * * because it illustrates the majority's steadfast willingness to adhere to the *Salyer* analysis in the face of a record presenting such compelling, if 'constitutionally irrelevant,' facts." *Bolen*, 822 P.2d at 883.

The *Salyer-Ball* exception has also been the subject of academic criticism explaining that it "lacks analytical rigor and leads to arbitrary results" (Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 Colum. L. Rev. 365, 438 (1999)), "can be easily manipulated" (Richard C. Schragger, *The Limits of Localism*, 100 Mich. L. Rev. 371, 448 (2001)), and has "left lower courts confused" (Richard Briffault, *Who Rules at Home: One Person/One Vote and Local Governments*, 60 U. Chi. L. Rev. 339, 366 (1993)). This confusion has led lower courts to split on the exception's key elements.

1. One set of courts—including two circuits and two state high courts—considers whether the scheme "disproportionately benefit[s] those granted the weighted vote." *Fumarolo*, 566 N.E.2d at 1293 (Ill.); see also *League of United Latin Am. Citizens* v. *Edwards Aquifer Auth.*, 937 F.3d 457, 469 (5th Cir. 2019) (*LULAC*); *Kessler*, 158 F.3d at 107 (2d Cir.); *Wilson* v. *Denver*, 961 P.2d 153, 162 (N.M. 1998).

In *Fumarolo*, for example, the Illinois Supreme Court invalidated a scheme that gave parents of schoolchildren the right to elect a majority of each local school council. 566 N.E.2d at 1290. Under *Salyer-Ball*'s second prong, the court asked "whether the functions of the [special] district disproportionately benefited those given the weighted votes." *Id.* at 1298. The court held that parents were not disproportionately benefited by the local school councils because the "cost[s]" fell "directly or indirectly on virtually all community residents" and the benefits of well-administered schools accrued to "nonparent residents," "parents with children not yet of school age," and "parents of children who attend private schools." *Ibid.* Thus, "strict scrutiny" applied. *Id.* at 1297.

The Second Circuit takes the same approach. In *Kessler*, that court analyzed the voting scheme for the Grand Central Business Improvement District. 158 F.3d at 93. By statute, real property owners were entitled to elect "*not less than a majority*" of the board of directors, with commercial lessees, residential lessees, and city officials choosing the remainder. *Ibid.*

The court held that the district had "limited authority" given its "limited goal of improving the area for business," "the fact that [it was] not the primary provider of the limited * * * services it perform[ed],"

and "the City's control over [its] performance." *Id.* at 107. Then, turning to *Salyer-Ball*'s second prong, the court concluded that the district had "a substantially greater effect on property owners than on nonowning residents." *Ibid.* "Most significantly," the district's assessments "f[ell] directly on property owners and only property owners." *Ibid.* While residents might "be indirectly burdened" if property owners "pass[ed] all or part of the cost of the assessment to their tenants," residents still had a vote and a "voice" that was "proportion[ate]" to their interests. *Ibid.* The court thus upheld the program, but only after assessing its relative effects on property owners as compared to other residents.

The Fifth Circuit employs a similar analysis. The court in *LULAC* considered a law that allowed residents of sparsely populated rural districts to elect the majority of the Edwards Aquifer Authority's board of directors. 937 F.3d at 461. Residents of a large urban county elected the remaining minority of directors. *Ibid.* The court held that the Authority served a "special limited purpose" because its powers were "expressly tailored to protecting the quantity and quality of groundwater in the Edwards Aquifer," it could not "levy *ad valorem* property or sales taxes or oversee such public functions as schools, housing, zoning, transportation, roads, or health and welfare services," and even its "discretion to grant a permit [wa]s quite limited." *Id.* at 466.

Even though the urban residents had a vote, however, the Fifth Circuit still scrutinized whether the rural residents "most empowered" by the law were "disproportionately impact[ed]" under *Salyer-Ball*'s second prong. *Id.* at 469. It reasoned that the aquifer authority's "functions ha[d] a lopsided effect" on the

rural counties for four reasons. *Ibid.* First, "per capita [water] usage [wa]s significantly higher in those counties." *Ibid.* Second, Texas property owners have an ownership interest in groundwater, and the rural county landowners "own[ed] an outsized share of aquifer water." *Ibid.* Third, rural county residents "disproportionately feel the weight of the [authority's] regulatory power" because its water quality regulations governed zones mostly located in the rural counties. *Id.* at 469-470. Fourth, a "central purpose[]" of the authority was "the protection of endangered species," and most of the authority's conservation efforts were focused on the rural counties. *Id.* at 470. The court thus upheld the law only after concluding that "'the effect of the entity's operations on'" the "advantaged class of voters" was "'disproportionately greater than the effect on those' with diminished voting power." *Ibid.* (quoting *Ball* 451 U.S. at 371).

2. A second set of courts that includes the Seventh and Ninth Circuits and the Iowa Supreme Court does not apply *Salyer-Ball*'s second prong if they find, under the first prong, that the vote concerns a body with limited, special-purpose powers. See *Cecelia Packing*, 10 F.3d at 624 (9th Cir.); *Pittman*, 64 F.3d at 1102 (7th Cir.); *Polk Cty. Bd. of Supervisors* v. *Polk Commonwealth Charter Comm'n*, 522 N.W.2d 783, 790 (Iowa 1994) (holding that because a mayors' commission "does not exercise general governmental power * * * the one person, one vote constitutional principle is not violated").

In *Cecelia Packing*, independent orange handlers and anonymous members of the Sunkist orange marketing cooperative challenged two federal marketing orders for oranges. 10 F.3d at 618. Under the federal

Agricultural Marketing Agreement Act, marketing cooperatives may bloc vote on behalf of their members. Plaintiffs brought an equal protection challenge to two Sunkist bloc votes. *Id.* at 619-620. "As a result of Sunkist's large bloc vote," which accounted for more than 80% of the votes cast, both referenda passed. *Id.* at 620.

Applying *Salyer* and *Ball*, the Ninth Circuit considered only the exception's first prong. *Id.* at 624-625. It reasoned that "voting in a referendum concerning a marketing order is not 'a bedrock of our political system,'" and that the marketing order had "relatively limited authority" and was "not 'what might be thought of as normal governmental authority.'" *Ibid.* (quoting *Reynolds*, 377 U.S. at 562, and *Salyer*, 410, 728, 729). Having decided to review the bloc voting rule "under the rational relationship test," it held that the rule served the rational purpose of "encourag[ing] orange producers to join [bloc voting] cooperatives." *Id.* at 625.

Likewise, the Seventh Circuit in *Pittman* reviewed an amended version of the local school council voting scheme struck down by the Illinois Supreme Court in *Fumarolo*. 64 F.3d at 1100. The amended law allowed "all adult residents of the school's district and all parents whether or not residents" to "vote for all classes of members of the council." *Ibid.* But of the elected members of the council, "six had to be parents and the other two residents." *Ibid.* A group of resident principals sued, alleging that their right to vote had been "unconstitutionally bobtailed by the provision reserving six offices for parents and only two for residents." *Ibid.* The court held that the council was a "special-purpose governmental body" because it had "no power to tax." *Id.* at 1102-1103. Rather, all it did was "select

a principal and determine school expenditures" for "a single school." *Ibid.* The Seventh Circuit concluded that the law was "not rendered invalid by the 'one man, one vote' rule" without addressing *Salyer-Ball*'s second prong. *Ibid.*

3. A third set of courts, including both the California and Florida Supreme Courts as well as the court below, considers only the differences in interest between "those enfranchised and those excluded by a given voting scheme," but not voting inequalities among those with a vote. *S. Cal. Rapid Transit Dist.* v. *Bolen*, 822 P.2d 875, 881 (Cal. 1992); App. 36a; see also *State* v. *Frontier Acres Cmty. Dev. Dist. Pasco Cty.*, 472 So. 2d 455, 457 (Fla. 1985).

The California Supreme Court considers only "whether the class of eligible voters enfranchised is disproportionately affected by the election issue," and not whether those with weighted votes are themselves disproportionately affected. *Bolen*, 822 P.2d at 884. *Bolen* involved a referendum on special benefit assessment districts created to help defray the costs of a mass transit system through assessments on owners of commercial property. *Id.* at 875. Although the transit district could establish the assessment districts without voter approval, its actions were subject to referendum if requested by the owners of 25% of the assessed value of real property within the district. *Ibid.* By statute, voting in such a referendum was limited to the real property owners subject to the assessments, and voting power was apportioned based on the property's assessed value. *Ibid.*

The court in *Bolen* approved this voting scheme. The special benefit districts had no notable governmental powers; they were "little more than formalistic,

geographically defined perimeters" to "'denote[] the land area benefited by the proposed improvements and to be assessed for the costs thereof.'" *Id.* at 883. And the "'activities' of the assessment districts—the raising of revenue to defray in part the cost of Metro Rail—w[ould] affect disproportionately owners of commercial property." *Id.* at 887. Thus, the court concluded that the benefit assessment districts were special-purpose districts subject to rational basis review.

Only after deciding to apply rational basis review did the court consider the "scheme of weighted voting." *Id.* at 890. The court acknowledged that a different apportionment "might be more 'equitable' in that it would tend to equalize the burden of assessments and voting power," but held that the State "has wide latitude within which to draw lines before a reviewing court can say it has crossed over into the zone of complete irrelevancy." *Ibid.*

Applying the same approach, the Florida Supreme Court has rejected an equal protection challenge to a statute authorizing the establishment of community development districts involving elections "by district landowners on a one-vote-per-acre basis." *Frontier Acres*, 472 So. 2d at 456. It reasoned that the districts served a "single, narrow" purpose of development "adequate community infrastructure" and that the districts had a "disproportionate effect" on landowners "to the exclusion of other residents." *Id.* at 456-457.

Following *Bolen*, the court below applied a similar analysis that lumped together all "raisin producers" as "enfranchised by the voting scheme" and compared their interests to "[t]hose excluded from voting * * * , such as raisin handlers and other commodity produc-

ers." App. 36a; see also *id.* at 36a n.23. Acknowledging Lion's charge that bloc voting "gives cooperative marketing associations disproportional voting power," the court responded that "[v]oting power may be apportioned in ways that give greater influence to some voters as long as the apportionment of power is not "'wholly irrelevant'" to the objectives of the statute." App. 37a (quoting *Bolen*, P.2d at 890).

Only this Court can resolve the lower-court split over the permissibility of weighted voting schemes, including bloc voting.

II. Review is needed to ensure that marketing orders and special purpose districts governing billions of dollars of economic activity respect the requirements of equal protection.

The importance of granting review is even clearer in light of the proliferation of special purpose districts and the far-reaching and troubling effects of marketing orders, which "have been controversial since their introduction." Gov't Accountability Office, *The Role of Marketing Orders in Establishing and Maintaining Orderly Marketing Conditions*, at 6 (July 31, 1985). Marketing orders have generated a host of legal challenges warranting review by this Court. *E.g.*, *Rock Royal*, 307 U.S. at 533; *Fla. Lime & Avocado Growers*, 362 U.S. at 74; *Glickman*, 521 U.S. at 460, 463; *Horne*, 576 U.S. at 351. Special purpose districts too have frequently generated challenges. It is easy to see why.

A. Marketing orders regulate wide swaths of American agriculture and their abuses have evoked criticism from all quarters.

First, marketing orders are widespread. There are currently more than 30 federal marketing orders,

scores more at the state level,[3] and statutory authority to regulate even more commodities. Federal law authorizes marketing orders for dozens of commodities, including milk and most fruits and vegetables. See 7 U.S.C. § 608c(2) (listing commodities eligible for marketing orders). California law is even broader, permitting marketing orders for "any commodity" (Cal. Food & Agric. Code § 58741) of the "more than 400 commodities" produced in California.[4]

Second, these marketing orders regulate multi-billion-dollar segments of the U.S. economy. In California alone, state-level marketing orders regulate "67%" of the agricultural industry. California Department of Food & Agriculture, *California Marketing Programs* at 2. The value of California's regulated commodities in 2013 was $31 billion. *Ibid*. Even setting aside the regulations' other impacts, the assessments imposed to fund the orders add up. In 2017, California farmers alone paid nearly $318 million in state and federal assessments. Hoy F. Carman, *Marketing California's Agricultural Production*, in California Agriculture: Dimensions and Issues, ch. 14, at 313 (2018).

California itself holds a special place in American agriculture. Many crops subject to marketing orders

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[3] See*, e.g.,* U.S. Dep't of Agric., *Commodities Covered by Marketing Orders*, https://www.ams.usda.gov/rules-regulations/moa/commodities (listing 29 fruit and vegetable marketing orders, not including various milk marketing orders).

[4] Cal. Dep't of Food & Agriculture, *California Agricultural Production Statistics*, https://www.cdfa.ca.gov/Statistics/.

are grown mostly in that State. Indeed, California-grown raisins account for 99.5% of U.S. raisins and 40% of raisins grown globally. *Horne* v. *U.S. Dep't of Agric.*, 673 F.3d 1071, 1075 n.7 (9th Cir. 2012). Both sets of lower courts with jurisdiction over California have upheld bloc voting. App. 35a-38a; *Cecelia Packing*, 10 F.3d at 623.

At bottom, bloc voting entrusts the regulation of an entire sector of the American economy to a handful of cooperatives who can (and do) exercise the powers of the state to the benefit of their own interests and the detriment of their competitors. They are textbook examples of the collective action problem: concentrated benefits for a few big players, with the costs borne by smaller competitors and the public.

Third, marketing orders have drawn widespread criticism. Across multiple administrations, marketing orders have drawn fire from the U.S. Justice Department for exhibiting "the flaws one would expect in an attempt to supplant a well-functioning market with self-interested regulation devised by producers and enforced by the federal government." *Comments of the Department of Justice, Call for Additional Proposals for a Marketing Order for Red Tart Cherries under the Agricultural Marketing Agreement Act* 3 (Nov. 8, 1993). Indeed, the Department has specifically warned of the dangers of bloc voting, noting that depending on the cooperative's size, it may have "an absolute veto over the issuance or amendment of a marketing order," "can unilaterally vote out an order," or "can control the issuance and terms of an order." U.S. Department of Justice, *Milk Marketing. A Report of the U.S. Department of Justice To the Task Group on Antitrust Immunities* 331-332 (January 1977). There are "many combinations" of marketing order terms,

the Department has observed, that "can obviously be designed to be more or less favorable to a dominant cooperative seeking to protect or increase its market share," and "[e]ven without predatory motives, a cooperative with the prerequisite voting strength can be expected to advocate provisions most favorable to the cooperative's marketing position and practices." *Id.* at 332-333.

Fourth, abuse of marketing orders, enabled by bloc voting, has been rampant. One prominent example involved Sunkist's abuse of the navel orange marketing order. This order had volume control rules (known as "prorate") that limited the quantity of oranges that a handler could ship to market in a given week. See Dennis M. Gaab, *California-Arizona Citrus Marketing Orders: Examples of Failed Attempts to Regulate Markets for Agricultural Commodities*, 5 San Joaquin Agric. L. Rev. 119, 128 (1995).

Sunkist controlled "about 50% of the market" and "maintained five seats" on the industry board—one shy of a six-vote majority. *Id.* at 132. Prorate allotments were allocated by district, and Sunkist was able to manipulate the prorate so that the districts "dominated by Sunkist growers[] were granted sufficiently large prorate bases relative to production that they were not, as a practical matter, restricted by prorate allotments." *Id.* at 133. The prorate provisions were wildly unpopular in the industry; they continued only because Sunkist—in apparent violation of its own bylaws—bloc voted. *Id.* at 133-134; see also *U.S. ex rel. Sequoia Orange Co.* v. *Sunland Packing House Co.*, 912 F. Supp. 1325, 1330 (E.D. Cal. 1995). Bloc voting and the AMAA thus "effectively delegated to Sunkist the power to set sales quotas," a kind of "private lawmaking." Lisa Schultz Bressman, *Schechter Poultry*

at the Millennium: A Delegation Doctrine for the Administrative State, 109 Yale L.J. 1399, 1429-1430 (2000); see *Sequoia Orange Co.* v. *Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992) (noting "Sunkist's alleged domination of the industry through bloc voting"). The Ninth Circuit upheld the orange marketing order and rejected an equal protection challenge to Sunkist's bloc vote in *Cecelia Packing*, 10 F.3d at 623.[5]

"Through bloc-voting, Sunkist allegedly perpetuated prorate, while many independent growers and packinghouses, as well as some Sunkist members, opposed prorate and other forms of federal regulation of the industry." *Sequoia*, 912 F. Supp. at 1330.

Similarly, the almond marketing order governed an industry where one large cooperative, Blue Diamond, dominated the direct-to-consumers snack almond market, with most smaller producers serving the ingredient segment for cereals, bakeries, candies, and the like. *Cal-Almond, Inc.* v. *U.S. Dep't of Agric.*, 14 F.3d 429, 438 (9th Cir. 1993). Bloc voting enabled Blue Diamond to control the Almond Marketing Board, which devoted assessments extracted from the entire industry to advertisements aimed at the snack almond market. Making matters worse, the Board allowed producers who ran brand advertising substantially similar to the Board's generic snack almond ads (so-called "creditable advertising") to deduct the cost of those brand ads from their own assessments. *Id.* at

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[5] The prorate provisions of the marketing order, and industry attempts to cheat the prorate led to dozens of False Claims Act lawsuits. See *Sequoia*, 912 F. Supp. at 1331-34. The controversy generated by these suits ultimately led to the termination of the prorate. See *ibid.*

433 (citing 7 C.F.R. § 981.441). The result? Blue Diamond's advertising budget went to its own brand ads, and the advertising from the Board went to generic snack almond ads, which related almost exclusively to Blue Diamond products.

These abuses have generated frequent challenges. See *supra* at 27. But this Court's past decisions upholding marketing orders against constitutional challenges have described the challenges as "mere" objections of "one or more producers" that cannot "overrid[e] the judgment of the majority of market participants." *Glickman*, 521 U.S. at 477. Indeed, this Court has sometimes presumed a democratic process that does not exist. See *id.* at 476 ("At least a majority of the producers in each of the markets in which such advertising is authorized must be persuaded that it is effective, or presumably the programs would be discontinued.").

B. Since *Ball*, special purpose districts have proliferated and, like marketing orders, are abused by those disproportionately empowered by their voting schemes.

These kinds of abuses are not limited to marketing orders, but rather are representative of special purpose districts more generally. In the water district at issue in *Salyer*, a single corporation controlled "a majority" of the votes. 410 U.S. at 735 (Douglas, J., dissenting). It voted against flood control measures that would have prevented a severe flood of the water district in 1969 because those flood measures would have diverted flood water to agricultural land that the corporation controlled outside the district. *Id.* at 736. As a result, nearly 90,000 acres in the water district were flooded, putting the home of one resident—who did

not get to vote—"15½ feet below the water level." *Id.* at 737-738. "Suffrage so diluted is a charade." *Kessler*, 158 F.3d at 126 (Weinstein, J., dissenting).

Unfortunately, special purpose districts have proliferated even as they have been abused. A 2017 report by the U.S. Census Bureau estimated that there are more than 38,000 special purpose districts nationwide. U.S. Census Bureau, *From Municipalities to Special Districts, Official Count of Every Type of Local Government in 2017 Census of Governments* at 3 (Oct. 29, 2019). Residents of these districts need clear guidance on whether they have a say in their government, and States and lower courts need guidance on the constitutional requirements that govern such districts. This case is an ideal vehicle to provide such guidance.

III. The decision below is wrong.

Review is also warranted because the decision below flouts this Court's equal protection jurisprudence, misreads *Salyer*'s and *Ball*'s special-purpose district exception, and entrenches an outdated and corrupt system of agricultural marketing orders. This Court should grant review and reverse.

A. First, the court below incorrectly assumed that the Raisin Marketing Board is merely "an advisory board." App. 35a. Not so. Although the board is nominally "advisory," the marketing order's regulations are *not*: "Regulations, when issued, have the force and effect of law. A great responsibility is thus put upon advisory boards." California Dep't of Food & Agriculture, *California Agricultural Marketing Programs: A Detailed Overview* 8 (April 2018).

Under the California Marketing Act, the subject of the referenda is the "marketing order," including its

regulatory terms. Cal. Food & Agric. Code § 58993. Thus, at stake in every referendum is "the power to regulate." *Gerawan Farming, Inc.* v. *Kawamura*, 90 P.3d 1179, 1195 (Cal. 2004). Indeed, the Act declares itself to be "the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state." Cal. Food & Agric. Code § 58653; see also California Department of Food & Agriculture, *California Agricultural Marketing Programs: A Detailed Overview* at 8 (April 2018) ("The marketing act provides for use of the police power of the state for the purpose of protecting the health, peace, safety and general welfare of the people of the state.").

Indeed, violating the terms of a marketing order triggers civil and criminal penalties, including a fine of up to $1,000 and imprisonment of up to six months. Cal. Food & Agric. Code §§ 59233-59234; see also App. 102a. This Court has never endorsed a special purpose district involving the power to make laws enforceable by criminal penalties.

Moreover, the areas of agriculture that a marketing order may regulate are sweeping. Most strikingly, marketing orders can "control, among other things, the quantity of quality of any commodity produced for market." App. 6a. It would be as if the water districts in *Salyer* and *Ball* could control the quantity and quality of all water consumed in California and Arizona.

The referenda also invoke the "taxing power of the State." California Department of Food & Agriculture, *California Marketing Programs* 3 (2013). These taxes are significant—up to 6.5% of a producer's gross sales. Cal. Food & Agric. Code § 58924; Cal. Food & Agric. Code § 58925. And as Chief Justice Marshall put it,

"[t]he power to tax involves the power to destroy." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

B. Second, bloc voting cooperatives are not disproportionately affected by the marketing orders. Each producer is directly affected by the marketing order in the same way; every producer is subject to the same regulations and pays assessments at the same rate. Yet cooperatives are empowered to bloc vote and stuff the ballot box with the votes of cooperative members who would not otherwise vote or would vote differently. See Cal. Food & Agric. Code § 58999. And indeed, in many referenda, the bloc vote of one or two cooperatives might be the only votes that matters. See App. 10a (noting that the Raisin Bargain Association and Sun-Maid "collectively represent[] a majority of the producers"); *Cecelia Packing*, 10 F.3d at 620 ("Sunkist's large bloc vote" accounted for 80% of votes cast); United States Department of Justice, *Milk Marketing*, supra, at 331-332. But cooperatives are not the only parties affected by the marketing order.

C. Applying strict scrutiny to bloc voting would alter the result here. California has never asserted that bloc voting could survive strict scrutiny. Even if the State could contrive some compelling interest in empowering cooperatives to bloc vote, any such interest could be served by the less restrictive alternative of allowing individual cooperative members to opt in to each bloc vote. Cf. *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2466-2467 (2018).

CONCLUSION

For the foregoing reasons, certiorari should be granted.

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