No. 21-1068

In the Supreme Court of the United States

LION RAISINS, INC. AND LION FARMS LLC,
Petitioners,

v.

KAREN ROSS,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), this Court recognized an exception to the one-person-one-vote principle for elections relating to special-purpose governmental entities whose activities disproportionately affect a discrete segment of the population. The question presented is:

Whether that exception applies to a referendum asking a State's producers of one agricultural commodity whether to adopt a marketing order establishing research and promotional programs supporting that specific product.

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STATEMENT

A. Legal Background

The California Marketing Act and its federal counterpart, the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.*, authorize the establishment of industry-specific programs that support the development and maintenance of robust markets for certain agricultural products. *See generally United States v. Rock Royal Co-op*, 307 U.S. 533 (1939); *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468 (2000). Both acts provide for the adoption of "marketing orders," a form of regulation of producers or handlers of particular commodities. Cal. Food & Agric. Code § 58741; *see* 7 U.S.C. § 608c.

While early California marketing orders were directed primarily toward managing surpluses, commodity grading, and trade practices, today they focus mainly on research and promotion. *See* Cal. Dep't of Food & Agriculture, *California Marketing Programs* at 1.[1] Under California law, a marketing order may establish "plans for advertising and sales promotion to maintain present markets or to create new or larger markets for any commodity that is grown in this state[.]" Cal. Food & Agric. Code § 58889(a). An order may also establish research programs regarding production and other issues relating to a commodity. *Id.* §§ 58892, 58892.1. Authorized programs are funded through mandatory assessments on producers covered by the order. *Id.* § 58921; *see also id.* §§ 58924, 58925, 58926 (rate caps on assessments).

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[1] *Available at* https://tinyurl.com/2xsrexx9 (last visited March 31, 2022).

California marketing orders are administered by the California Department of Food and Agriculture. Cal. Food & Agric. Code § 58712. The Department appoints members of advisory boards to "assist" it with those responsibilities. *Id.* § 58841; *see also id.* § 58846 (enumerating board duties). Advisory board members generally must represent the industry affected by the marketing order. *Id.* § 58842; *see also id.* § 58843 (allowing appointment of one public member). For marketing orders affecting raisin producers, the Department must appoint one person to represent "cooperative bargaining associations," *id.* § 58842.5, which are farmer associations organized to "group bargain[] between [their] producer members" and handlers or processors, *id.* § 54401.

A marketing order may be adopted only with the formal approval of both the Department and the affected producers. Pet. App. 7a-8a. When the Department believes that a proposed marketing order will further the policies of the California Marketing Act, it must provide notice to affected producers, hold a public hearing, consider relevant evidence, and make specific findings. Cal. Food & Agric. Code §§ 58771, 58773, 58774, 58782, 58783, 58813; *see* Pet. App. 7a-8a.

If the Department makes the required findings, the proposed marketing order must be approved by a supermajority of affected producers before it can take effect. *People ex rel. Ross v. Raisin Valley Farms LLC*, 240 Cal. App. 4th 1254, 1258 (2015); Pet. App. 8a. State law provides that the Department may determine whether the proposed order has the requisite support either by seeking written assents or through a referendum. *See* Cal. Food & Agric. Code §§ 58786, 58787, 58994. For a proposed marketing order to be

implemented in a referendum, at least 40 percent of eligible producers must vote. *Id.* § 58993(c). The implementation referendum must also "be approved by either (1) at least 65 percent of the voters, representing not less than 51 percent of the total quantity of the commodity produced for market, or (2) at least 51 percent of the voters, representing not less than 65 percent of the total quantity of the commodity produced for market." Pet. App. 8a; *see* Cal. Food & Agric. Code § 58993(c).

In determining whether a referendum has attained sufficient support, the Department "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." Cal. Food & Agric. Code § 58999. A cooperative marketing association may "bloc-vote" under this provision only if it demonstrates to the Department that its by-laws vest the association with authority to vote on its members' behalf. *See* Cal. Dep't of Food & Agriculture, *Policies for Marketing Programs* 16 (5th ed. Oct. 2020).[2] Any association that decides to bloc-vote in a particular referendum must also provide the Department with a motion of its board of directors approving that decision, the association's position on the referendum, and the association's decision regarding whether individual members may vote outside the bloc. *Id.*

A marketing order may be terminated through procedures that are similar to—"and in some instances

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[2] *Available at* https://tinyurl.com/2p88upra (last visited March 31, 2022).

considerably more liberal" than—the "democratic means" provided for adoption of an order. *Voss v. Superior Court*, 46 Cal. App. 4th 900, 919 (1996). For example, the Department must discontinue a marketing order if termination is requested in writing by at least 51 percent of the producers that are directly affected by the order, provided that those producers account for at least 51 percent of the volume of the affected commodity. Cal. Food & Agric. Code § 59082; *see also id.* § 59085 (requiring Department to hold hearing any time it finds that a substantial number of affected persons oppose a marketing order, and to either "terminate, suspend, or submit for amendment or reapproval" the order or make finding of insufficient opposition).

B. Factual and Procedural Background

1. a. In 1998, two associations of California raisin producers proposed the adoption of a marketing order to help increase demand for California raisins. Pet. App. 10a. After a public hearing, the Department found that the proposed order would further the objectives of the California Marketing Act, approved the order, and submitted it to a referendum of affected raisin producers. *Id.* at 11a-12a.

In conducting that referendum, the Department concluded that the two associations that had proposed the order—the Raisin Bargaining Association (RBA) and the Sun-Maid Growers of California—were entitled to vote on behalf of their members under Section 58999 of the Act. Pet. App. 12a. RBA is a nonprofit agricultural cooperative association that bargains with raisin packers and sells its members' raisins to packers at the negotiated price. *Id.* at 29a-30a. RBA's bylaws "specifically authorize it to 'assent in writing or otherwise, on behalf of the members of

the RBA and all producers of products marketed or to be marketed by the RBA, to any marketing order or amendment thereto.'" *Id.* at 29a (alterations and ellipses omitted). Sun-Maid is an agricultural cooperative association that processes and markets its members' raisins. *See id.* at 10a.

In the 1998 referendum, both RBA and Sun-Maid decided to vote on behalf of their respective members—but each also allowed its members to "'opt out'" and vote separately if they preferred to do so. Pet. App. 12a. A sufficient number of California raisin producers favored the proposed order, and it was approved. *Id.*

Consistent with the terms of the marketing order, the Department conducted continuation referenda in 2001, 2006, and every five years thereafter to determine if producers supported continuing the marketing order. *See infra* p. 6; Pet. App. 12a. In 2001, neither RBA nor Sun-Maid chose to vote on behalf of its members, and producers still overwhelmingly favored continuation of the order. Pet. App. 12a. In the 2006 referendum, both RBA and Sun-Maid voted on behalf of their members, and the order was again approved for continuation. *Id.* The order was approved for continuation in 2011 and 2016 as well.

b. The marketing order established research and promotional programs for California raisins. Pet. App. 90a-94a. The research programs included studies and analyses of production costs, harvesting technologies, pest control, and "the dietetic value of raisins and products containing raisins," among other topics. *Id.* at 90a-91a. The promotional programs included communications designed to inform the general public about "the production, availability, uses, healthful properties or other information regarding raisins." *Id.*

at 91a-92a. The order required the Department to conduct a new referendum every five years to determine whether producers wanted the programs to continue. *Id.* at 107a-108a; *see also id.* at 108a (providing that order will continue if majority of voting producers favor continuation).

The order also established the 15-member California Raisin Marketing Board to administer the terms of the order "[s]ubject to the Department's approval." Pet. App. 81a, 87a, 105a. The order required thirteen of the Board members to represent producers' interests, one to represent the largest cooperative bargaining association, and one to represent the general public. *Id.* at 81a. It provided that the thirteen producer-members be nominated by cooperative marketing associations, cooperative bargaining associations, and independent producers in proportion to the share of raisins marketed by each of these three groups. *Id.* at 11a, 82a-84a. In practice, this allocation resulted in independent producers typically holding five to six of the nonpublic member seats, Sun-Maid members occupying three to four seats, RBA members holding four to five seats, and RBA itself holding one seat. *Id.* at 11a n.6.

The Board's duties under the order included assisting the Department in collecting the data needed to carry out the order, recommending administrative rules relating to the order, and recommending a budget and uniform assessment of no more than 4 percent of the value of a producer's annual output. Pet. App. 87a-88a, 99a-100a; *see also id.* 87a-89a (additional duties). The Department was tasked with fixing the assessment rate, after making a finding that it was lawful, "proper[,] and equitable." *Id.* at 100a-

101a. The Department was also responsible for reviewing acts of the Board that any producer believed were "detrimental or adverse" to its interests, and for declaring as "without force and effect" any act by the Board that was unlawful or that implemented the marketing order "in an unreasonably discriminatory, unfair or inequitable manner[.]" *Id.* at 104a-105a.

2. Petitioners are two companies that produce and market raisins. In 2002, they sued the Department's Secretary seeking declaratory and injunctive relief against enforcement of the raisin marketing order and a refund of assessments paid since the 1999-2000 crop year. Pet. App. 3a, 13a. As amended, their complaint alleged various claims under state and federal law, including that the Department's decision to allow RBA to bloc-vote conflicted with the California Marketing Act and reflected an invalid exercise of the State's police power. *Id.* at 14a.

a. After a bench trial, the state trial court initially entered judgment for petitioners. Pet. App. 15a. The court held that the marketing order was invalid under state law because the record lacked evidence demonstrating that it was needed to address adverse economic conditions "so severe as to threaten the continued viability of the industry." *Id.* The state court of appeal reversed, concluding that California law required such a finding only for marketing orders that restrict supply, and that the raisin marketing order contained no such restriction. *See id.* at 16a.

b. On remand, the trial court rejected petitioners' remaining theories and entered judgment in favor of the Department. Pet. App. 17a. With respect to petitioners' challenge to the conduct of the referendum, the court held that the Department had properly in-

terpreted state law in permitting RBA to vote on behalf of its members. *Id.* at 50a-58a. The court reasoned that RBA marketed members' raisins and therefore qualified as an "agricultural cooperative marketing association" under Section 58999. *Id.* at 54a-58a. The court also rejected petitioners' claim that, by allowing RBA to vote on its members' behalf, the statute unconstitutionally favored growers who joined the association. *Id.* at 58a-62a.

c. The state court of appeal affirmed. Pet. App. 1a-45a. It first agreed with the trial court that RBA qualified as a "cooperative marketing association" entitled to vote on behalf of its members under Section 58999. *Id.* at 28a-30a.

Next, the court considered petitioners' claim that Section 58999 violates the Equal Protection Clause by giving cooperative marketing associations the ability to bloc-vote. Pet. App. 30a-38a. It observed that petitioners' complaint did not use the term "'equal protection'" and instead alleged "an improper exercise of the police power." *Id.* at 30a n.18. But the court "liberally construe[d] the complaint to include a claim that the statute is an invalid exercise of the police power because it violates the right to equal protection under the law." *Id.*

The court recognized that, under *Reynolds v. Sims*, 377 U.S. 533 (1964), each person's vote in a representative election "must be approximately equal in weight to that of any other person." Pet. App. 32a. The court further explained that in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), this Court identified an exception to that one-person-one-vote requirement when an election relates to a governmental entity performing specialized functions

that have a disproportionate effect on a definable subset of the population. Pet. App. 32a-34a; *see Salyer*, 410 U.S. at 728; *Ball*, 451 U.S. at 364-371. In such cases, *Reynolds*' "strict demands . . . do not apply[.]" Pet. App. 32a (internal quotation marks omitted).

Applying these authorities, the court of appeal held that petitioners' challenge to Section 58999 was not subject to strict scrutiny. Pet. App. 35a. Unlike elections for national, state, or local representatives, a referendum on a proposed agricultural marketing order "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." *Id.* "And the functions of the Board at issue in this case are even more limited, relating only to the research and promotion of raisins." *Id.*

The court of appeal further explained that "there are genuine differences in the interests of those enfranchised and those disenfranchised under the legislation." Pet. App. 36a (footnote omitted). Although petitioners had failed to discuss this part of the constitutional analysis in their opening brief in the court of appeal, the court declined to treat the issue as forfeited, reasoning that the Department had fully addressed it in a supplemental brief. *Id.* at 36a n.22. The court concluded that those primarily affected by the order are raisin producers—who are enfranchised under the scheme—and that those excluded from the vote (such as handlers and other commodity producers) "are substantially less affected." *Id.* at 36a (footnote omitted).

The court of appeal also addressed petitioners' theory that strict scrutiny applied to their claim that

California law improperly dilutes the votes of independent producers. Pet. App. 37a. Petitioners did not contend that the State's decision to weight producers' votes in part based on the quantity of raisins produced reflected an impermissible departure from the one-person-one-vote standard. Nor did they assert that state law gives any greater weight to the votes of individual producers that choose to join a cooperative marketing association. Rather, petitioners' theory was that, by allowing cooperative marketing associations to bloc-vote on behalf of their members, the State unconstitutionally diluted the voting strength of independent producers. *See id.* The court of appeal rejected that theory, explaining that, under *Salyer* and *Ball*, "when the strict demands of the 'one person, one vote' principle do not apply, the apportionment of voting power among the enfranchised is subject to rational basis review." *Id.* Petitioners' challenge failed under that standard because Section 58999 is rationally related to the legitimate governmental purposes of encouraging producers to join cooperative marketing associations, promoting orderly and efficient marketing of commodities, and reducing economic waste. *Id.* at 37a-38a.

d. The California Supreme Court denied review. Pet. App. 46a.

3. After briefing but before decision in the court of appeal, the Department conducted another referendum to determine whether producers wanted the marketing order to continue in effect. A majority of producers voted against continuation, and the order was terminated effective July 31, 2021. *See* Cal. Dep't of Food & Agriculture, *Marketing Order for California*

Raisins to be Terminated Based Upon Outcome of Producer Referendum (May 4, 2021).[3]

ARGUMENT

The state court of appeal properly applied this Court's settled precedents in concluding that one-person-one-vote principles applicable in representative elections did not apply to referenda asking raisin producers whether they wanted to establish or continue research and promotional programs to support the state raisin industry. Petitioners assert that the decision below "exacerbated an open three-way split," Pet. 2, but the lower court's holding does not conflict with holdings of other courts. Indeed, as petitioners eventually acknowledge, the only other appellate court to address a similar challenge to bloc-voting in a marketing order referendum reached the same conclusion. This would also be a poor vehicle to consider the constitutional issues framed in the petition: The challenged marketing order has been terminated. And petitioners' challenge to the bloc-voting procedures at issue here is fundamentally different from a standard vote-dilution claim that challenges a law assigning different weights to the votes of different individuals.

1. The court of appeal correctly applied this Court's precedents in rejecting petitioners' equal protection challenge.

a. In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that state legislative districts with unequal populations violate the fundamental principle that each person's vote is entitled to equal weight in a representative election. State apportionment schemes

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[3] *Available at* https://tinyurl.com/yybbsxkn (last visited March 31, 2022).

that deviate from this rule "receive close scrutiny." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *see also id.* at 627 (denial of franchise must be "necessary to promote a compelling state interest").

But the Court later clarified that *Reynolds*' strict rule of voting equality does not apply to governmental entities with narrow, specialized functions that disproportionately affect a specific class of voters. In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), the Court considered the constitutionality of rules governing the election of directors of a local water storage district that gave only landowners the right to vote and that apportioned voting power among them according to the assessed valuation of each owner's land. *Id.* at 724-725, nn. 5 & 6. The Court explained that the water district, "although vested with some typical governmental powers, ha[d] relatively limited authority." *Id.* at 728 (footnote omitted). The district provided no general public services such as education, roads, housing, "or anything else of the type ordinarily financed by a municipal body." *Id.* at 728-729. Rather, its primary purpose was to acquire, store, and distribute water for agricultural purposes. *Id.* at 728. In addition, the district's actions "disproportionately affect[ed] landowners." *Id.* at 729. Because the costs of district projects were assessed against land, "there [was] no way that the economic burdens of district operations [could] fall on residents qua residents[.]" *Id.* Accordingly, the district, "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group," was an "exception to the rule laid down in *Reynolds*[.]" *Id.* at 728.

The Court also held that weighting the vote according to land value complied with the Constitution's

equal protection guarantee. *Salyer*, 410 U.S. at 733-734. Under the system, several small landowners had only one vote, while a large corporate landowner could cast nearly 38,000. *Id.* at 733. This allocation of voting power did not offend the Constitution because the Court could not say that it was "not rationally based." *Id.* at 734; *see also Associated Enters., Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743, 744-745 (1973) (per curiam) (rejecting similar equal protection challenge to similar regime).

The Court reached a similar conclusion in *Ball v. James*, 451 U.S. 355 (1981). That case addressed a system for electing directors of an Arizona water reclamation district under which only landowners were eligible to vote and their voting power was apportioned according to acres owned. *Id.* at 357. The Court explained that the question in the case was "whether the purpose of the District is sufficiently specialized and narrow and whether its activities bear on landowners so disproportionately as to distinguish the District from those public entities whose more general governmental functions demand application of the *Reynolds* principle." *Id.* at 362. The Court answered the question in the affirmative. The district's "relatively narrow" functions, which focused on storing and delivering water to landowners, were not "the sort of governmental powers that invoke the strict demands of *Reynolds*." *Id.* at 366-367. Moreover, the effect of district operations on landowners was disproportionately greater than on others, because only landowners committed capital to the district or were subject to liens and to the district's "acreage-based taxing power." *Id.* at 370-371. The "peculiarly narrow function" of the district and "the special relationship" between the district and "one class of citizens"

"release[d] it from the strict demands of the one-person, one-vote principle." *Id.* at 357.

After reaching that conclusion, the Court analyzed the challengers' equal protection claim under the rational basis standard. *See Ball*, 451 U.S. at 371. The challenged voting system satisfied that standard "because it [bore] a reasonable relationship to its statutory objectives." *Id.* Arizona could "rationally make the weight of [landowners'] vote dependent upon the number of acres they own[ed], since that number reasonably reflect[ed] the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District's water operations." *Id.* (footnote omitted).

b. Applying these precedents, the intermediate court of appeal correctly held that the raisin marketing order involved the kind of special-purpose functions especially affecting a defined segment of the community that are not subject to *Reynolds*' one-person-one-vote command. Pet. App. 35a-36a.

To begin with, the marketing order referenda did not involve general governmental powers such as maintaining streets, operating schools, or providing for residents' health and welfare. *See Ball*, 451 U.S. at 366. It involved a "peculiarly narrow" question, *id.* at 357, of whether to adopt producer-funded research and marketing programs to promote the sale of California raisins. It did not resemble the kinds of elections to which this Court has held that the one-person-one-vote principle applies. *See, e.g.*, *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 205-206, 209-212 (1970) (referendum to issue general obligation bonds to finance city sewer system, parks, police buildings, and libraries, among other municipal improvements); *Avery v. Midland County*, 390 U.S. 474, 476, 484-485

(1968) (election of officials with authority to, *inter alia*, adopt county budget, administer welfare services, establish jail, and build roads and bridges).

Petitioners emphasize that the marketing order is a form of regulation and that it authorized the imposition of mandatory assessments on producers. *See* Pet. 33-35. But the order's regulatory reach extended to establishing and implementing research and marketing programs for the raisin industry. *Supra* pp. 5-7. It did not impose any quantity, quality, or other similar controls on raisin growers, *see* Pet. 34, or regulate the public at large. And while the order provided for mandatory assessments on producers, this Court has recognized that "the power to levy and collect special assessments" does not itself "create . . . general governmental authority" that requires conformance with one-person-one-vote requirements. *Ball*, 451 U.S. at 366 n.11; *see also id.* at 359-360 (special district authorized "to raise money through an acreage-proportionate taxing power").

In addition, the marketing order disproportionately affected raisin producers. The order's research and marketing activities benefited state raisin growers; and those growers were the only entities subject to assessments. *See Salyer*, 410 U.S. at 729 (operations of special district primarily affected land and cost of district projects assessed against landowners).

Petitioners do not dispute that raisin producers as a class were especially affected by the raisin marketing order referenda. They argue instead that the court of appeal was required to apply strict scrutiny because the order did not disproportionately impact the cooperative marketing associations that were permitted to bloc-vote in the referenda on whether to implement or

continue the marketing order. *See* Pet. 3-5, 35. As explained above, however, both *Salyer* and *Ball* applied rational basis review to claims that a voting system allocated unequal weight to a portion of the enfranchised class. *See Salyer*, 410 U.S. at 734; *Ball*, 451 U.S. at 371. The strict standard adopted in *Reynolds* did not apply to either claim because the activities of the challenged water districts especially affected the class of eligible landowners and the districts exercised limited, specialized functions. *See Salyer*, 410 U.S. at 728-730; *Ball*, 451 U.S. at 366-371. The Court thus "proceeded to inquire simply whether the statutory voting scheme based on land valuation at least bore some relevancy to the statute's objectives." *Ball*, 451 U.S. at 364 (discussing *Salyer*) (footnote omitted).[4]

2. Petitioners likewise do not identify any conflict of authority warranting this Court's review.

As petitioners eventually acknowledge (*see* Pet. 29), the only other appellate court to have considered a one-person-one-vote challenge to bloc-voting in marketing order referenda reached the same conclusion. In *Cecelia Packing Corp. v. United States Department of Agriculture/Agricultural Marketing Service*, 10 F.3d 616 (9th Cir. 1993), the court of appeals applied *Salyer* and *Ball* and held that a federal marketing or-

[4] The court of appeal correctly declined to apply strict scrutiny to petitioners' vote-dilution claim; but in any event, any requirement that the referendum disproportionately affect cooperative marketing associations would be satisfied. This Court has previously recognized that cooperative marketing associations have "a vital interest in the establishment of an efficient marketing system." *United States v. Rock Royal Co-op*, 307 U.S. 533, 559 (1939); *cf.* Pet. App. 56a-57a (RBA takes title to members' raisins and then sells them to packers).

der referendum for the orange industry was not subject to one-person-one-vote requirements. *Id.* at 624-625. The court reasoned that the orange marketing order involved "relatively limited authority," and that "voting in a referendum concerning a marketing order is not a bedrock of our political system like voting in an election for national, state or local legislative representatives." *Id.* at 624 (internal quotation marks omitted). Like the court below, it applied the rational basis standard and rejected the constitutional challenge. *Id.* at 624-625.

The other cases cited by petitioners, moreover, do not reflect an "entrenched three-way" conflict in the lower courts. *See* Pet. 16. To begin with, none of the other cases involved bloc-voting or any other similar form of proxy voting. Nor do petitioners assert that those cases create a square conflict on whether any particular type of election must conform to the one-person-one-vote standard. Rather, petitioners contend that courts have taken different analytical approaches to evaluating vote-dilution claims. *Id.* at 21-27. But even that argument overlooks significant differences in the voting structures at issue and the constitutional challenges advanced in the cases on which the petition relies.

Petitioners first argue that a handful of courts have analyzed one-person-one-vote claims by considering whether a challenged election scheme "'disproportionately benefit[ed] those granted the weighted vote.'" Pet. 21; *see id.* at 21-23 (collecting cases). Those cases generally involved elections in which all residents were eligible to vote but voting power was unevenly distributed among them. For example, in *League of United Latin American Citizens v. Edwards Aquifer Authority*, 937 F.3d 457 (5th Cir. 2019), an

election for directors of a conservation and reclamation district was open to all voters, but the challenged law gave less weight to the votes cast by residents in a particular county. *Id.* at 461-462. Likewise, in *Kessler v. Grand Central District Management Ass'n*, 158 F.3d 92 (2d Cir. 1998), the challenged scheme granted property owners and nonowner-residents alike the right to vote for directors of a local business district, but guaranteed owners majority representation. *Id.* at 97; *see also Fumarolo v. Chicago Bd. of Educ.*, 566 N.E. 2d 1283 (Ill. 1990) (nonparents' votes diluted in some school council elections).[5] In those cases, plaintiffs argued that the malapportionment violated one-person-one-vote requirements, and the courts addressed those claims by determining whether the differential voting power could be justified by the governmental entity's specialized functions and especial effect on those with the weighted vote.

Petitioners argue that those cases stand in contrast with another category of decisions in which courts considered "the differences in interest between 'those enfranchised and those excluded by a given voting scheme,' but not voting inequalities among those with a vote." Pet. 25; *see id.* at 25-27. But the decisions that petitioners describe as falling in that category involved different types of election structures and different sorts of challenges. In *State v. Frontier Acres Community Development District Pasco County*, 472 So. 2d 455 (Fla. 1985), for example, the law restricted the vote to landowners and allotted votes among them

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[5] In *Fumarolo*, nonparents were denied the franchise in some school council elections. 566 N.E. 2d at 1290-1291. But the court applied the same analysis in considering whether the dilution of some nonparents' votes and the denial of other nonparents' votes complied with equal protection guarantees. *See id.* at 1294-1299.

on a per-acre basis. *Id.* at 456-457. The court considered whether the exclusion of nonowner-residents complied with the Constitution, but it never addressed a claim (like those at issue in petitioners' first category of cases) that the scheme unlawfully diluted votes within the enfranchised class. *See id.* at 457.

In *Southern California Rapid Transit District v. Bolen*, 1 Cal. 4th 654 (1992), the court considered a challenge to an election to establish a transit-related assessment district in which only commercial property owners were eligible to vote and the votes were distributed according to the assessed value of their property. *Id.* at 660. The court held that the law could properly exclude those without the vote because the assessment district lacked general governmental powers and its activities disparately affected commercial property owners. *Id.* at 669-670, 673-675. As petitioners note (Pet. 26), the court considered a challenge to the method for weighing votes among the enfranchised after deciding to apply rational basis review. *See Bolen*, 1 Cal. 4th at 665-675. But it appears that the court was not asked to apply strict scrutiny based on the claimed malapportionment. *See* Intervenors' Opposing Br. on Merits at 16, 1990 WL 10029735 (Oct. 15, 1990) (arguing that dilution claim is subject to rational basis review).

Petitioners are also mistaken in discerning another distinctive category of cases (listed as their "second" category), under which courts halt the constitutional analysis "if they find . . . that the vote concerns a body with limited, special-purpose powers," without ever evaluating whether those functions disproportionately impact those with electoral advantage. Pet. 23; *see id.* at 23-25. In one of the cited cases, *Pittman v. Chicago Board of Education*, 64 F.3d 1098

(7th Cir. 1995), the court did consider whether the challenged election system disparately affected the parents whose votes were accorded greater weight. *Id.* at 1102 (considering argument that "education affects everybody"); *id.* at 1103 ("interest of the public at large" is "attenuated"). The court considered those facts as part of its analysis of whether the challenged local school councils were specialized governmental bodies. *Id.* at 1101. But that simply reflects that the two inquiries overlap—as this Court has recognized, *see Ball*, 451 U.S. at 370. It does not reflect any sort of deviation in approach that would warrant this Court's intervention.

Petitioners also describe *Polk County Board of Supervisors v. Polk Commonwealth Charter Commission*, 522 N.W. 2d 783 (Iowa 1994), as falling in their "second" category; but that case likewise does not support their arguments. The court there expressly acknowledged that *Salyer* and *Ball* call for consideration of whether the governmental body's "activities disproportionately affect a specific group of individuals." *Id.* at 788. And the court's ultimate holding appeared to rest, at least in part, on what it regarded as a distinct "threshold determination of whether the body performs governmental functions" at all. *Id.*; *see also id.* (court considers *Salyer-Ball* exception "[i]f the entity at issue does hold governmental power"). In that case, the challenged commission's "quiddity [was] advisory," *id.* at 789, and not subject to one-person-one-vote requirements, *see id.* at 790.[6]

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[6] Petitioners also cite *Cecelia Packing*, 10 F.3d 616. *See* Pet. 23-24. As explained above, the holding in that case is consistent with the decision below. *Supra* pp. 16-17.

Apart from their split allegations, petitioners highlight language from a few lower-court decisions expressing uncertainty about the application of *Salyer* and *Ball*. Pet. 20. But the quoted excerpts addressed how to identify whether a particular entity exercises general governmental authority as opposed to limited or specialized authority. *See Kessler*, 158 F.3d at 103; *Pittman*, 64 F.3d at 1102; *Bolen*, 1 Cal. 4th at 668-669. Those concerns are not relevant here because petitioners do not dispute that the State could properly restrict the franchise to raisin producers; instead they centrally complain about the distribution of voting power within that limited, specialized class.

3. Petitioners do not identify any other persuasive basis for plenary review in this case. As the petition recognizes (at 15), the challenged raisin marketing order is no longer in effect. *Supra* pp. 10-11. Accordingly, even if petitioners are correct that a live Article III controversy remains, neither they nor any other raisin producer in California faces any ongoing assessments or any other purported harm from the research and promotional programs that were established under the now-terminated order.

This would be a poor case for considering the broader constitutional issues raised in the petition for other reasons as well. Petitioners did not reference the Equal Protection Clause in their complaint, Pet. App. 30a n.18, and their later-developed theory does not resemble a typical vote-dilution claim. In a typical vote-dilution case, the malapportionment is prescribed in the challenged scheme itself, such as a system that awards votes based on assessed value of property, county of residence, or property ownership. *See, e.g.*, *Salyer*, 410 U.S. at 725 (allotting votes according to assessed land valuation); *LULAC*, 937 F.3d

at 461-462 (allocating seats on regional board by county); *Kessler*, 158 F.3d at 97-98 (creating voting classes based on property ownership). Here, in contrast, the votes of independent producers are given the same weight as those of producers that choose to join a cooperative marketing association. The purported misallocation is not based on unequally weighted *votes*, but rather on a procedural mechanism that allows eligible voters to make the voluntary decision to give their proxy to a cooperative marketing association by voluntarily becoming a member of that association. *See supra* p. 3; *cf. Salyer*, 410 U.S. at 733 (discussing availability of proxy-voting in water district election scheme).

Petitioners contend that the constitutionality of bloc-voting with respect to marketing order referenda in California is significant in and of itself because of the number of agricultural commodities subject to the California Marketing Act. Pet. 28. In the Department's experience, however, bloc-voting occurs in relatively few state marketing order referenda because most agricultural commodity products affected by a California marketing order lack cooperative marketing associations of significant member size. And with respect to the referenda at issue here, involving whether to adopt or continue research and promotional programs to support the state raisin industry, this Court's settled precedents make clear that the strict demands of *Reynolds* do not apply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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