No. 21-1068

# 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*

## REPLY TO BRIEF IN OPPOSITION


STEFFEN N. JOHNSON
PAUL N. HAROLD
*Wilson Sonsini Goodrich & Rosati, PC*
*1700 K Street, NW*
*Washington, DC 20006*
*(202) 973-8800*

BRIAN C. LEIGHTON
*Law Offices of Brian C. Leighton*
*755 N. Peach Avenue*
*Clovis, CA 93611*
*(559) 297-6190*

MICHAEL W. MCCONNELL
*Counsel of Record*
*Wilson Sonsini Goodrich & Rosati, PC*
*650 Page Mill Road*
*Palo Alto, CA 94304*
*(650) 493-9300*
*mmcconnell@wsgr.com*

*Counsel for Petitioners*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## REPLY TO BRIEF IN OPPOSITION

Respondent does not deny that agricultural marketing orders regulate large swaths of the economy, that large cooperatives use marketing orders to rig competition in their favor, or that these endemic abuses are made possible by bloc voting. See Pet. 27-33; CATO Amicus Br. 3-7. Nor does respondent have any answer to the widespread criticism of cooperative-dominated marketing orders from academics, a presidential commission, the Department of Justice, judges, and Justices of this Court. See Pet. 10-11, 29-30; CATO Amicus Br. 10-13. It is thus undisputed that the decision below permits dominant cooperatives to regulate and tax their smaller, independent competitors, a power they use ruthlessly to their advantage. Respondent's only defense is the dubious claim that this Court's precedents permit it. If that were true, it would be an argument *for* certiorari, not against it.

Respondent all but admits the existence of a split. She concedes that four courts—two circuits and two state high courts—"determin[e] whether the differential voting power c[an] be justified by the governmental entity's * * * especial effect on those with the weighted vote." Opp. 18. That is the approach advocated by petitioner (Pet. 16-19, 35) and *rejected* by the court below (App. 36a).

Not that the court below is alone. The Florida Supreme Court takes the same approach as California, meaning the two States with the most agricultural marketing orders are in accord and the conflict is wide open and inescapable. Pet. 25-27. Respondent downplays the split by suggesting that these decisions do not mean what they say. Opp. 19. But that is not what she said in her briefing below. She told the court

that California Supreme Court precedent dictated the outcome here because, "[a]s explained in *Salyer*, *Ball*, and *Bolen*, th[e] question is subject to rational basis review." Respondent's Supp. Br. 6 (July 9, 2019).

Respondent largely ignores the third branch of the split—courts, including the Ninth Circuit, that subject weighted voting schemes to mere rational basis scrutiny after "consider[ing] only the [*Salyer-Ball*] exception's first prong" and without any consideration of disproportionate effect. Pet. 24. Respondent notes that the Ninth Circuit "reached the same conclusion" as the court below (Opp. 16), but does not defend its rationale.

Respondents' opposition thus creates no genuine doubt that the question presented is important or that the lower courts are deeply divided on how to answer it. Moreover, the decision below answers the question in a way that is egregiously wrong. See CATO Amicus Br. 1-11. As respondent is compelled to acknowledge (Opp. 14), the marketing order here entailed "regulatory" power, imposed significant "mandatory assessments," carried the threat of civil and criminal penalties, and regulated 99.5% of U.S. raisin production. See also Pet. 33-35; CATO Amicus Br. 3-7. Thus, contrary to the court below, the raisin marketing order *does* invoke general governmental powers, and the principles of equality in voting rights *do* apply.

Worse, the favored voters—cooperatives permitted to bloc vote for all their members—are not in any way disproportionately affected by the marketing order. They are subject to precisely the same rules, precisely the same assessments, and precisely the same interferences with market judgment. It is just that the interests of cooperatives are typically antithetical to

those of independents. Cooperatives benefit from the marketing order because it is structured and administered for their benefit, to the injury of independent raisin farmers. Pet. 10-12, 14-15, 30-32.

It is undisputed that there are no obstacles to review of the question presented. Respondent says bloc voting is not "typical" in special purpose districts generally and occurs in "relatively few" California marketing order referenda. Opp. 21-22. But as *Salyer*, *Ball*, and a host of lower-court decisions confirm, weighted voting is typical. And respondent's self-serving, citation-free claim that bloc-voting cooperatives are relatively few is contradicted by public data and the mass of cases and criticism involving bloc voting in marketing orders. Respondent also notes that the marketing order was terminated shortly before the court below ruled, but $7 million of Lion's withheld assessments turn on the outcome of this case, respondent continues to pursue enforcement against other independent farmers, and the last time a raisin marketing order expired, cooperatives bloc voted to adopt a new one just four years later. App. 9a-12a.

The State makes no secret of its reason for permitting cooperatives to bloc vote: to incentivize farmers to join these politically connected groups. But equal protection principles are designed to prevent States from rigging elections to favor some interest groups over others. Only when the regulatory scheme bears disproportionately on some and not on others may the government give one group a voting advantage. Here, there is no doubt that raisin farmers as a whole (and not the general public) are entitled to vote on the marketing order, because the order imposes assessments and rules only on raisin farmers. But within the class

of raisin farmers, it violates equal protection to let cooperatives aggregate their members' votes while leaving independent farmers to cast separate ballots. Pet. 35. As this Court explained in *Town of Lockport, New York* v. *Citizens for Cmty. Action at Local Level, Inc.*—which, tellingly, respondent never *cites*—"the classification of voters into 'interested' and 'noninterested' groups must still be reasonably precise," and "the group interests" must be "sufficiently different to justify total or partial withholding of the electoral franchise." 430 U.S. 259, 266-267 (1977).

This Court's review is needed to make that clear, and this case is an excellent vehicle for correcting this injustice and resolving the confusion around the scope of the special-purpose-district exception to one-person, one-vote.

## I. The lower courts are divided three ways, and respondent cannot harmonize the decisions.

A. Respondent's attempt (at 16-21) to make sense of the lower courts' disarray only confirms the split. The courts have split three ways, with four courts correctly considering whether the voting scheme disproportionately affects those granted the weighted vote, three courts not considering disproportionate effect at all if the district has limited, special-purpose powers, and two courts considering only whether the scheme disproportionately affects those enfranchised as compared to those excluded from voting. See Pet. 20-27.

Decisions of the Second and Fifth Circuits and the Illinois and New Mexico high courts squarely conflict with the decision below. Pet. 21-23. Those courts permit weighted voting only when the regulatory scheme "disproportionately benefit[s] those granted the weighted vote." *Fumarolo* v. *Chicago Bd. of Educ.*,

566 N.E.2d 1283, 1293 (Ill. 1990). Respondent's rejoinder is puzzling. While denying the split, she accurately notes that these decisions "generally involved elections" where "voting power was unevenly distributed among [voters]." Opp. 17. She further agrees that these courts "determin[e] whether the differential voting power c[an] be justified by the governmental entity's * * * especial effect on those with the weighted vote." Opp. 18. But that analysis does not *refute* the split; it *confirms* it. See Pet. 21-23.

Respondent does not dispute that the high courts of Florida and California—the States with the most marketing orders—permit unequal voting within the class of voters in special districts. As she admits, the Florida decision involved a law that allotted votes "on a per-acre basis" and upheld the law without considering this differential voting power "within the enfranchised class." Opp. 19. Respondent implies that the differential voting power was not at issue. *Ibid.* It was: the plaintiff challenged the allocation of votes "on a one-vote-per-acre basis." *State* v. *Frontier Acres Cmty. Dev. Dist. Pasco Cty.*, 472 So. 2d 455, 456 (Fla. 1985).

According to respondent, the court in *Southern California Rapid Transit District* v. *Bolen*, 822 P.2d 875 (Cal. 1992), was "not asked" to apply strict scrutiny based on the weighted voting scheme. Opp. 19 (citing Intervenors' Opposing Br. on Merits 16, 1990 WL 10029735 (Oct. 15, 1990)). But weighted voting was squarely at issue. See Petition for Review 12, 1990 WL 10042735 (June 8, 1990) (stating that the case "concern[ed] the constitutionality of weighted voting in special purpose elections"). And regardless, *Bolen* passed on the question and the court here was

bound by that decision. App. 34a-38a. Indeed, respondent stressed below that, under *Bolen*, "the apportionment of the vote among the enfranchised voters is subject to rational basis review." Respondent's Supp. Br. 9-10 (July 9, 2019).

These decisions thus plainly conflict with those of the Second and Fifth Circuits and the Illinois and New Mexico high courts, and respondent utterly fails to discredit this split. That alone warrants certiorari.

B. Respondent next contends that there is no "distinctive [third] category of cases" where courts "halt the constitutional analysis" after finding that "'the vote concerns a body with limited, special-purpose powers.'" Opp. 19 (quoting Pet. 23). This conclusion requires a strained misreading of the cases.

According to respondent, the Seventh Circuit in *Pittman* "did consider whether the challenged election system disparately affected the parents whose votes were accorded greater weight," but did so "as part of its analysis" of the first prong, which is understandable because "the two [prongs] overlap." Opp. 20 (citing *Pittman* v. *Chicago Bd. of Educ.*, 64 F.3d 1098, 1102-1103 (7th Cir. 1995)). But this strange parsing of *Pittman* only confirms that it conflicts with the decision below, which did not consider the disparate effect on voters with a weighted vote.

Respondent says the Iowa Supreme Court's decision is outside the split because it correctly stated the test and its "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." Opp. 20 (quoting *Polk Cty. Bd. of Supervisors* v. *Polk Commonwealth Charter Comm'n*, 522 N.W.2d 783, 788 (Iowa 1994)). Not

so. What the court treated as a threshold issue was the absence of "*general* governmental powers," placing it squarely within the split. 522 N.W.2d at 790 (emphasis added).

Finally, respondent brushes off *Cecelia Packing Corp.* v. *U.S. Dep't of Agric./Agric. Mktg. Serv.*, 10 F.3d 616 (9th Cir. 1993)—where the Ninth Circuit rejected a challenge to bloc voting in a federal marketing order—as having "reached the same conclusion" as the decision below. Opp. 16. But the Ninth Circuit reached that conclusion by an entirely different path: It stopped its analysis after concluding that the marketing order there had "relatively limited authority" and was "not 'what might be thought of as normal governmental authority.'" 10 F.3d at 624-625. Thus, the court never considered whether cooperatives—or even producers generally—were disproportionately affected. Indeed, respondent conceded "*Cecelia Packing*'s silence" on this issue below. Respondent's Supp. Br. 7 (July 9, 2019).

Respondent's last argument—that these decisions involve different "voting structures"—is of no moment. Opp. 17. The precise application need not be identical. Every case cited in the petition shares the same basic feature: a voting structure in which some voters have disproportionate voting power. Pet. 16-27. On the question of whether, and to what extent, such disproportionate voting power must be justified, the lower courts are in disarray. This Court should intervene.

**II. The decision below is clearly wrong.**

Respondent's defense of the decision below on the merits is no more convincing. According to her, although bloc voting empowers cooperatives, it is suffi-

cient under this Court's precedents that "raisin producers *as a class* [a]re especially affected" by the marketing order. Opp. 15 (emphasis added). This makes no sense: equal protection applies to sub-groups no less than large groups.

Respondent's argument rests on the notion that "both *Salyer* and *Ball* applied rational basis review to claims that a voting system allocated unequal weight to a portion of the enfranchised class." Opp. 16 (citing *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 734 (1973); *Ball* v. *James*, 451 U.S. 355, 371 (1981)). Like the decision below, however, respondent misreads those decisions and ignores this Court's other precedent.

Both *Salyer* and *Ball* involved weighted voting schemes. Pet. 18-19. In both cases, the Court found that landowners were disproportionately affected by the special purpose district's activities, and that the district's burdens fell disproportionately on larger landowners with more weighted votes. *Salyer*, 410 U.S. at 729 (costs assessed "in proportion to" benefits received); *Ball*, 451 U.S. at 370 ("acreage-based taxing power"). Respondent breezes by these parts of the Court's reasoning.

Respondent also ignores the most relevant precedent—*Town of Lockport*—which confirms that the scheme must disproportionately affect the voters with weighted votes. See Pet. 2, 18-19 (citing *Town of Lockport*, 430 U.S. at 266). That decision—which respondent never cites, let alone discusses—explains that "the classification of voters into 'interested' and 'noninterested' groups must still be reasonably precise" and that "the group interests" must be "sufficiently different to justify the total or partial withholding of the

electoral franchise." *Town of Lockport*, 430 U.S. at 266-267.

The decision below flouts that holding. No one can seriously suggest that cooperatives are disproportionately affected by marketing orders like the one here. Indeed, respondent does not dispute that all producers are subject to the same regulations and pay assessments at the same rate. Pet. 35. What differs is who benefits: Cooperatives use marketing orders to impose disproportionate costs on independent producers like Lion, here by taxing all producers to fund research and marketing that benefits the cooperatives' products. See Pet. 30-32; CATO Amicus Br. 8-13; App. 68a. Respondent declares that cooperatives "have 'a vital interest in the establishment of an efficient marketing system,'" but never explains how that same interest (whether vital or pernicious) is not shared by all producers and the public. Opp. 16 n.4 (quoting *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 559 (1939)).

In truth, the voting system for marketing orders is a transparent means of allowing a powerful interest group favored by the legislature to dominate its industry without regard to the actual desires of the industry's individual members. Indeed, the State trumpets the fact that the voting scheme is designed to coerce "producers to join cooperative[s]." App. 37a. Allowing cooperatives to cast their members' votes—even if those members would have abstained or voted no—stacks the deck in favor of one electoral outcome. This Court's review is needed to confirm that the Fourteenth Amendment prohibits that result.

## III. The question presented is recurring and exceptionally important, and this case is an excellent vehicle to address it.

Respondent's grab-bag of other arguments against review is equally unpersuasive.

A. By respondent's lights, the raisin marketing order involves merely the "'peculiarly narrow' question of whether to adopt producer-funded research and marketing programs to promote the sale of California raisins," and not any "general governmental powers." Opp. 14. But this peculiarly strained characterization cannot be squared with features of the marketing order that respondent does not dispute.

Respondent admits that the raisin marketing order was "regulatory" and imposed significant "mandatory assessments." Opp. 15 (citing Pet. 33-35); see also CATO Amicus Br. 3-7. And respondent does not dispute (nor could she) that the marketing order was an "exercise of the police power[]" (Cal. Food & Agric. Code § 58653), that violations of its terms carried civil and criminal penalties, including fines and imprisonment (Cal. Food & Agric. Code §§ 59233-59234), or that the order regulated raisins statewide, which 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)). These powers—and the even more sweeping quantity and quality control measures authorized by the CMA and federal and state equivalents (Pet. 8)—are *at least* comparable in importance and scope to those of a junior college's board of trustees. See *Hadley* v. *Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 51 (1970).

B. Without elaborating, respondent declares that marketing orders do not "resemble" the districts "to

which this Court has [applied] the one-person-one-vote principle." Opp. 14. But this failure to elaborate is telling. That respondent cannot articulate a standard beyond "resembl[ance]" (*ibid.*) for deciding what governmental powers require one-person-one-vote confirms what many critics have said all along: the *Salyer-Ball* test "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); see also Pet. 20. This Court should take this opportunity to clarify and invigorate the test.

C. Respondent notes (Opp. 21) that the challenged marketing order was recently terminated. But as respondent admits (*ibid.*), this poses no obstacle to review. It is undisputed that a live controversy remains because Lion's $7 million in withheld assessments depend on the outcome of this case, and respondent is still pursuing enforcement against other independent farmers. Pet. 15; App. 3a. Nor does respondent deny that other marketing orders in force are controlled by bloc-voting cooperatives, or that Sun-Maid and RBA could obtain a new raisin marketing order at any time. Pet. 15. Indeed, the previous raisin marketing order was terminated in 1994, only to be resurrected in 1998. App. 9a-10a. The question presented thus remains of vital importance to Lion, other independent farmers, and the agricultural industry as a whole.

D. Finally, citing only her "experience," respondent asserts that "bloc voting occurs in relatively few" California "referenda because most agricultural commodity products affected by a California marketing order lack cooperative marketing associations of significant member size." Opp. 22. If this assertion were true, one would expect specifics—not just a vague,

self-serving statement. The number of bloc votes is not public, but recent public data show that California has many large cooperatives: "127 co-ops conducting $14.9 billion worth of business." USDA Cooperative Services Branch, *Iowa, Minnesota, California top states for ag co-op business volume* (Feb. 11, 2022).[1] And that is to say nothing of the cooperatives in other States empowered to bloc vote under federal and state laws. Indeed, the decades-long history of cases and criticism of bloc voting in marketing orders demonstrates that it is widespread and recurring.

## CONCLUSION

For the foregoing reasons, and those stated in the petition, certiorari should be granted.

[1] Available at: https://content.govdelivery.com/accounts/USDARD/bulletins/30a3e41.

Respectfully submitted,

STEFFEN N. JOHNSON
PAUL N. HAROLD
*Wilson Sonsini Goodrich & Rosati, PC*
*1700 K Street, NW*
*Washington, DC 20006*
*(202) 973-8800*

BRIAN C. LEIGHTON
*Law Offices of Brian C. Leighton*
*755 N. Peach Avenue*
*Clovis, CA 93611*
*(559) 297-6190*

MICHAEL W. MCCONNELL
*Counsel of Record*
*Wilson Sonsini Goodrich & Rosati, PC*
*650 Page Mill Road*
*Palo Alto, CA 94304*
*(650) 493-9300*
*mmcconnell@wsgr.com*

*Counsel for Petitioners*

APRIL 2022