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,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of California, Third Appellate District

BRIEF OF THE CATO INSTITUTE AND THE NFIB SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* SUPPORTING PETITIONERS

Karen Harned
Rob Smith
NFIB SMALL BUSINESS LEGAL CENTER
555 12th Street, NW
Washington, DC 20004
(202) 314-2061

Clark Neily
Counsel of Record
Trevor Burrus
Nicole Saad Bembridge
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 425-7499
cneily@cato.org

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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."

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato has participated as amicus curiae in numerous cases before federal courts. Cato also works to defend individual rights through publications, lectures, conferences, public appearances, and the annual *Cato Supreme Court Review*.

The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. NFIB is the Nation's leading small business association, representing members in Washington, D.C., and all fifty state capitals. To fulfill its role as the voice for small business, the NFIB SBLC frequently files *amicus* briefs in cases that affect small businesses.

This case concerns *amici* because the California Marketing Act creates state-sponsored cartels and empowers dominant industry interests to regulate

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[1] Rule 37 statement: All parties were timely notified of and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

and tax their competitors. This undermines the fundamental constitutional guarantee of representative government.

SUMMARY OF ARGUMENT

To promote the public interest in equitable marketing and to mitigate against "unfair competition," the California Marketing Act (CMA) authorizes fruit and vegetable marketing orders that regulate production and impose taxes to fund research, development, and advertising. Cal. Food & Agric. Code §§ 58811, 58813, 58652. *Voss v. Superior Court*, 46 Cal. App.4th 900, 907 (Cal. App. 5th Dist., June 20, 1996). But the bloc-voting schemes these marketing orders use effectively give dominant raisin cooperatives the authority to regulate and tax their smaller, independent competitors. Cal. Food & Agric. Code § 58999. Under the bloc-voting scheme, independent raisin producers are required—subject to the full taxing power of the state—to pay assessments that fund programs contrary to their own interests. Rather than mitigating unfair competition, then, bloc voting creates a system whereby those who set the tax are unaccountable to those who pay it. This is fundamentally at odds with the principles of representative government.

The CMA is a relic of the push towards cartelization that was characteristic of the New Deal. It is a state-level counterpart to the federal Agricultural Marketing Agreement Act, which has been called "the world's most outdated law." Tr. of Oral Arg. at 48–49, *Horne v. Dep't of Agric.,* 569 U.S. 513 (2013) (No. 12-123) (Kagan, J.). The economic

harms these government-sponsored cartels cause is exacerbated by bloc voting. State-run elections effectively rigged in favor of dominant cooperatives remove any pretense of competition, allowing large firms to restrict access to their markets and to tax their competitors into obscurity.

This Court has already limited several of these anticompetitive New Deal relics. *See Horne v. Dep't of Agric.,* 576 U.S. 351 (2015). And some lower courts have expressed skepticism about the legitimacy of these irrelevant and undemocratic policies. *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J., concurring). But, lacking guidance from this Court, many cartels remain, harming small businesses and consumers alike. This Court should grant certiorari to realign the CMA with the fundamental principles of representative government and to reinvigorate competition in a sheltered industry.

ARGUMENT

I. THE CALIFORNIA MARKETING ACT'S BLOC-VOTING PROVISION UNDERMINES REPRESENTATIVE GOVERNMENT

Perhaps the most basic principle of our constitutional order is that a legitimate government derives its "Powers from the Consent of the Governed," and the exercise of legislative and executive authority is vested in persons chosen "*really* and not *nominally*" by the people. Declaration of Independence para. 2 (U.S. 1776); *1 The Papers of Alexander Hamilton*, 1768–1778, 254–56 (Harold C.

Syrett ed., 1961). Yet under the CMA, the government empowers large cooperatives to regulate and tax their smaller, independent competitors. Cal. Food & Agric. Code § 58999. This creates a system whereby those who set the tax are unaccountable to those who pay it. This is not representative government.

The CMA authorizes fruit and vegetable marketing orders "regulat[ing] all persons engaged in the marketing, processing, distributing, or handling of the commodity" after the order is approved by affected agricultural voters in a government-run industry referendum. *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 478–79 (Cal. 2000); Cal. Food & Agric. Code § 58999. Marketing orders may include provisions restricting quantity, limiting grade, size, or quality, and imposing taxes to fund research, development, and advertising. Cal. Food & Agric. Code §§ 58811, 58813. Unsurprisingly, these orders are rarely in the interests of or supported by independent producers like Lion Raisins.

Rather than a popular vote, the referenda are conducted through a bloc-voting scheme whereby individual farmers vote for themselves while cooperative associations vote on behalf of all their members. Cal. Food & Agric. Code § 58999. 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." 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). By virtue of their market share, large cooperatives pass each referendum they draft—and block each referendum they oppose—becoming the de facto regulators of the entire industry. The winners of these government-run referenda are using the power of the state to regulate their competitors. This is little more than state-sponsored regulatory capture. Such circumstances where law is "consistently or repeatedly directed away from the public interest and toward the interests of" the dominant firms is illegal in almost all circumstances outside the CMA. Richard A. Posner, "The Concept of Regulatory Capture: A Short, Inglorious History," *in Preventing Regulatory Capture: Special Interest Influence and How to Limit it*, 49, 53–54 (Daniel Carpenter & David A. Moss eds., 2014).

In the instant case, the Raisin Bargaining Association (RBA) and Sun-Maid, California's two largest raisin cooperatives, proposed the California Marketing Order of 1998, drafted its terms, and passed the referendum through a bloc vote. Petitioner's Br. at 12. Section 58601 of the Order requires all raisin 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's, which often have different qualities and are marketed for different uses." *Id.* Lion Raisins, like other independent producers, opposed this order. *Id.* at 3. But its vote did not matter because the bloc-voting provision enables taxation without representation.

Furthermore, expenses of administering marketing orders are "paid from funds . . . collected

pursuant to the marketing order." Cal. Food & Agric. Code § 58921. A fifteen-member board, eight to ten of whom have represented Sun-Maid and the RBA since 1998, determines the amount to assess each grower annually and how to use the funds collected. These assessments are taxes by another name because the full "taxing power of the State is used to collect" the fees. Cal. Dep't of Food & Agric., "California Marketing Programs" (2013).[2] "[A]ny assessment" collected under the act "is a personal debt . . . due and payable to the [Secretary]." Cal. Food & Agric. Code § 58929.

Petitioners note that these assessments can be substantial, up to 6.5 percent of a producer's gross sales. Petitioner's Br. at 9. Nonpayment results in California civil penalties and possibly jail time, which can put independent producers out of business. *Id.* at 34*; Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 464 (1997) (involving a dispute over "$3.1 million in past due assessments"). This Court has long recognized "that the people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws . . . and that the duty or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure." *Thomas v. Gay*, 169 U.S. 264, 276–77 (1898). But a dissenting voter in a system that is effectively rigged against smaller competitors is denied that right.

In laying taxes, "there is perhaps no legislative act in which greater opportunity and temptation are

[2] https://bit.ly/3hfbttw.

given to a predominant party to trample on the rules of justice." The Federalist No. 10, at 45. (James Madison) (Clinton Rossiter ed., 1961). Here, the RBA and Sun-Maid exercise governmental power to force smaller competitors to pay for advertising which disparages their products. Petitioner's Br. at 12. This is an injustice that should not stand in a system of representative government.

As keepers of the public fisc, the government has an obligation to represent taxpayers' interests. This principle has undergirded our representative democracy since before the Founding. In a rebuke of the tyranny that the English exercised by taxing the colonies without providing representation in Parliament, the Stamp Act Congress passed a resolution that "no taxes ever have been, or can be constitutionally imposed on [the colonies], but by their respective legislatures." Resolution of the Stamp Act Congress (1765). Informed by the same principle, the Articles of Confederation gave the confederation government no power to tax because the people had no direct representation in Congress under the Articles. Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 San Diego L. Rev. 249, 254 (1997). Representation is a necessary bulwark against tyranny, but the CMA flouts this principle by insulating from democratic accountability those with the power to tax and regulate.

II. MARKETING ORDERS CREATE GOVERNMENT-SPONSORED CARTELS THAT HARM CONSUMERS

The CMA is a relic of the New Deal, a state counterpart to President Franklin D. Roosevelt's federal Agricultural Marketing Agreement Act of 1937 (AMAA). Trevor Burrus, *New Legal Challenges to U.S. Agricultural Cartels: The* Horne *Decision*, 35 Cato J. 658 (Fall 2015). The CMA was passed in the same year as the AMAA to promote the public interest in "equitable methods" and to address "unreasonable and unnecessary economic waste" from "unfair competition." Cal. Food & Agric. Code § 58652; *Voss*, 46 Cal. App.4th at 907. But mitigating "unfair competition" was intended only to benefit producers, not consumers. In so doing, the CMA's marketing orders—like the AMAA's—created government-sponsored cartels which harm small competitors and consumers alike.

President Roosevelt believed "fierce" competition was driving prices and wages down, causing the deflation that plagued the era. Burton W. Folsom, Jr., *New Deal or Raw Deal? How FDR's Economic Legacy Has Damaged America* 60–75 (2008). He sought to replace it with "fair" competition by encouraging "cooperation" between members of the same industry. *Id.* at 65. But "cooperation" under the marketing orders is government-sponsored cartelization by another name. *Id.*

The New Deal-era push toward cartelization was a stark departure from both modern economic theory and the antitrust policies of just a few decades earlier. Before the CMA and AMAA passed, the federal

government enacted a slew of anti-monopoly, anti-cartel, "trust-busting" laws like the Sherman Antitrust Act. Trevor Burrus, "Rebel Farmers and Government Cartels: How the New Deal Cartelized U.S. Agriculture," Cato-at-Liberty Blog, April 24, 2015.[3] (Hereinafter Burrus, "Rebel Farmers.") In fact, the CMA, like the AMAA, was careful to grant affected industries a "complete defense" to state antitrust and unfair trade practice claims. Cal. Food & Agric. Code § 58655. This "highlight[s] the fact that such collusion, if undertaken outside the auspices of the government, would blatantly violate antitrust laws." Burrus, "Rebel Farmers." 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).

By impeding competition, these government-sponsored cartels operate to American consumers' detriment. *Glickman*, 521 U.S. at 469 (finding marketing orders promulgated under the AMAA displaced competition in several markets). The original purpose of these New Deal programs was to raise prices of agricultural commodities during a period of deflation. Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste: The Marketing Order Program,* Regulation, May/June 1985 (discussing the purpose of marketing orders to manipulate prices in favor of

[3] https://bit.ly/3t5LxWM.

growers' profits). The deflation of the 1930s is long gone, but the AMAA and CMA still exist to distort the market and hold prices artificially high. "While many marketing orders no longer explicitly restrict quantities which may be sold, the requirements set forth in most orders do so implicitly because farmers cannot sell certain produce if it fails to pass inspection and meet the marketing order's requirements." Gabriella Beaumont-Smith, "The Produce Cartels," Cato-at-Liberty Blog (December 21, 2021).[4] The California marketing order for grapes, for example, limits how many grapes can fall off the bunch sold in the state. *Id.* California grapes tend to be less sweet, causing fewer to fall off, whereas farmers in Mexico grow sweeter varieties of grapes that tend to fall off the bunch more easily. *Id.* As a result, those bunches that have lost too many grapes do not pass inspection and cannot be sold to Americans. *Id.* By controlling how many grapes must be attached to the stems, California grape farmers protect themselves from competition and have deprived American consumers of the opportunity to pay lower prices and enjoy more varieties of fruit. *Id.* Eliminating marketing orders so that competition and trade can flourish would thus benefit consumers.

New Deal-era agricultural cartels have been controversial since their inception. Numerous cases of waste and abuse prompted questions as to marketing orders' wisdom and legality, culminating in several cases warranting this Court's review. U.S. Gov't Accountability Off., GAO-RCED-85-57, *Report to the*

[4] https://bit.ly/3JOvAuP.

Congress: The Role of Marketing Orders in Establishing and Maintaining Orderly Marketing Conditions 1 (1985); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538–51 (1935) (unanimously finding "codes of fair competition" for intrastate industries violated the Commerce Clause and were an unconstitutional delegation of legislative power); *Glickman*, 521 U.S. at 469 (finding marketing orders promulgated under the AMAA displaced competition in several markets); *Horne*, 576 U.S. at 361 (finding an AMAA program which empowered an industry cartel to arbitrarily seize producers' raisins without compensation violated the Takings Clause); *see also 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). Always on shaky ground as a matter of law and policy, it is time that these constitutionally dubious agricultural cartels expire.

But more than just controversial, these programs have become so detached from reality as to be both arbitrary and plain silly. Justices and judges have often poked fun at them in court. When the takings of the Raisin Administrative Committee (RAC) came before this Court in *Horne,* Chief Justice Roberts joked that the mafia-like RAC might "come up with the truck" and "get the shovels" and "take their raisins, probably in the dark of night." Tr. of Oral Arg. at 30, *Horne v. Dep't of Agric.,* 576 U.S. 351 (2015) (No. 14-275). In similar nod to the coercive power of the RAC, Justice Scalia quipped, "your raisins or your life." *Id.* at 31. Likewise, another New Deal "code of fair competition" that required a butcher to reach into the chicken coop and grab the first chicken that touched

his hand in order to prevent "destructive price cutting" drew laughter from the Court and the audience during argument. Burrus, "Rebel Farmers"; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 519. The CMA also creates discordant outcomes via the bloc-voting rule, forcing independent growers to foot the bills for advertisements that disparage them and for regulations which harm them. Cal. Food & Agric. Code §§ 58601, 58999.

Some courts have criticized these antiquated New Deal relics. In a case concerning another AMAA marketing order, D.C. Circuit Judge Janice Rogers Brown, joined by Judge David Sentelle, wrote that "America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s." *Hettinga*, 677 F.3d at 480 (Brown, J., concurring). Notably, the panel itself ruled against the aggrieved farmer because of binding precedent from this Court that precluded the relief sought from an unjustifiably oppressive marketing regime. *Id.* at 477. Likewise, past members of this Court have decried marketing orders' anticompetitive effects, remarking that "central planning was thought to work very well in 1937, and Russia tried it for a long time." Tr. of Oral Arg. at 50, *supra* (No. 14-275) (Scalia, J.). The CMA, which offers the same anticompetitive ills as its federal counterpart, should engender skepticism for the same reason. *Gerawan Farming*, 24 Cal. 4th 468, 476–80

(finding that the AMAA did not regulate any more heavily or broadly than the CMA).

As vividly illustrated by this case, the social and economic harms these government-sponsored cartels cause is exacerbated by bloc voting. State-run elections effectively rigged in favor of dominant cooperatives remove any pretense of competition, allowing the biggest firms to restrict access to their markets and to tax their competitors into obscurity.

Furthermore, the consequences of marketing orders are profound, widespread, and recurrent. Dozens of them exist at the federal and state levels, affecting billions of dollars in agricultural activity. U.S. Gov't Accountability Off., *Report to the Congress*, *supra* at 20–35. Though lower courts seem inclined to retire many of these orders for jurisprudentially sound reasons, they lack guidance from this Court. Thus, most remain in place, harming small businesses and consumers alike. *Hettinga*, 677 F.3d at 480. CMA-enabled cartels are anti-democratic relics of the New Deal that should be retired. Peter Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy,* 58 S.D. L. Rev. 462, 469 (2013).

CONCLUSION

This Court should grant review to correct California's unconstitutional bloc-voting system, to reinvigorate competition in a sheltered industry, and to realign the system with the fundamental principles of representative government.

Respectfully submitted,

Karen Harned
Rob Smith
NFIB SMALL BUSINESS LEGAL CENTER
555 12th Street, NW
Washington, DC 20004
(202) 314-2061

Clark Neily
Counsel of Record
Trevor Burrus
Nicole Saad Bembridge
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 425-7499
cneily@cato.org

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