No. 13-169

In the Supreme Court of the United States

NICOLAS MARTIN,

Petitioner,

v.

CARL BLESSING, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE CENTER FOR INDIVIDUAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does an objecting class member have standing to challenge a discriminatory class certification order?

2. Did the district court's class certification order imposing race and sex requirements on class counsel violate the Fifth Amendment to the United States Constitution?

3. Is an attorney's race or sex pertinent to his or her ability to represent a class?

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INTEREST OF AMICUS CURIAE[1]

The Center for Individual Rights ("CIR") is public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in the Supreme Court. It has a particular interest in and has participated in numerous cases concerning what it views as unconstitutional racial classifications by government. *See*, *e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *LaRoque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), *cert. denied*, *Nix v. Holder*, 133 S. Ct. 610 (2012); *Dynalantic v. Department of Defense*, 885 F. Supp. 2d 237 (D.D.C. 2012); *United States v. Brennan*, 650 F.3d 65 (2d Cir. 2011); *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001). CIR has participated as *amicus curiae* in numerous United States Supreme Court cases relevant to the issue in this case. Recently, CIR filed amicus briefs and/or represented in this Court in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); and *Fisher v. Univ. of Texas*, 133 S. Ct. 2411 (2013); and represented a respondent (supporting petitioner) in *Schuette v. Coalition to Defend Affirmative Action*, Case No. 12-682.

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[1] *Amicus curiae* files this brief with consent by all parties, with 10 days' prior written notice; the petitioners have lodged their blanket consent with the Clerk, and *amicus* has lodged the respondents' written consents with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel contributed monetarily to preparing or submitting this brief.

SUMMARY OF ARGUMENT

For all practical purposes, plaintiffs-respondents' brief in opposition ("Pls' BIO") concedes the gross unconstitutionality of the judicial order at issue. They insist that there is no evidence that "class counsel's staffing of the case was affected in any way by the District Court's request that the staffing reflect the diversity of the class." Pls' BIO at 5. That is, the order at issue, they claim, was entirely unnecessary. But, of course, necessity is one of the prerequisites for narrow tailoring and constitutionality. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2420 (2013) ("Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity."); *United States v. Paradise*, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity of the relief and the efficacy of alternative remedies . . ."). It was the District Court's obligation to show that the race-conscious order he issued was necessary, rather than petitioner's obligation to show that it affected any staffing decision. (Plaintiffs-respondents do not identify any plausible way for petitioner to have procured such evidence.)

In an effort to turn lemons into lemonade, the BIO insists that the uselessness of the judicial order somehow should be counted in its favor (or, at least, counted against the petition). That is, they argue that a pointless effort at racial balancing is somehow superior to one that actually is aimed at serving a legitimate government interest. But that is contrary to years of this Court's jurisprudence that racial

remedies should be used only when needed to serve a compelling governmental interest, and, then, only as a last resort.

For this reason, among others, the district court order requiring class counsel to reflect the race and gender metrics of the class violates the equal protection component of the Fifth Amendment's Due Process Clause. Facial racial classifications are subject to strict scrutiny and are constitutional only if they are narrowly tailored to serve a compelling governmental interest. Here, there is no compelling governmental interest to justify the imposition of racial quotas on class counsel; the courts below did not identify one, and plaintiffs-respondents do not try to devise one to fill that gap. Moreover, the race and sex of class counsel are not matters pertinent to counsel's ability to fairly and adequately represent the interests of the class and accordingly, are impermissible considerations under Rule 23.

The Second Circuit's standing analysis below ignored important procedural rights granted by the Fifth Amendment of the United States Constitution and Rule 23, as well as this Court's longstanding precedent holding that one who is denied a procedural right need not show that he was "injured," because he would have obtained a different or more favorable substantive outcome had the proper procedures been followed.

ARGUMENT

In a class certification order in *In re J.P. Morgan*, Judge Baer first imposed an unprecedented race and gender requirement on class counsel. *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007). He first referred to the discretion that Rule 23 gives courts to consider "any other factors relevant to counsel's ability to fairly and adequately represent the interests of the class." *Id.* Then, based upon a simple statement (unsupported by any evidence) that the class "includes thousands of Plan participants, both male and female, *arguably* from diverse racial and ethnic backgrounds" (emphasis added), he went on to state

> Therefore, I believe it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel that I appoint. A review of the firm biographies provides some information on this score. Here, it appears that gender and racial diversity exists, to a limited extent, with respect to the principal attorneys involved in this case. Co-lead counsel has met this Court's diversity requirement—i.e., that at least one minority lawyer and one woman lawyer with requisite experience at the firm be assigned to this matter.

Id.

A few years later, in *Spagnola v. Chubb Corp.*, 264 F.R.D. 76 (S.D.N.Y. 2010), Judge Baer again faced a large proposed class consisting of homeowners insurance policy holders. He denied a motion to certify the class, in part based upon a finding that

the named plaintiffs did not adequately represent the class. Before reaching this conclusion, however, he pointed out the lack of information about the race and gender makeup of the proposed class counsel:

> Defendants raise no argument to challenge the expertise or competence of [proposed class counsel] to litigate this case. However, it is worth noting that, as this Court has held in the past, because "[t]he proposed class includes thousands of [policyholders], both male and female, arguably from diverse racial and ethnic backgrounds . . . it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel." Here [proposed counsel] has provided no information—firm resume, attorney biographies, or otherwise—on this score.

Id. at 96 n.23 (quoting *J.P. Morgan*, 242 F.R.D. at 277).

Later, in *In re Gildan Activewear*, after finding again that the proposed class "includes thousands of participants, both male and female, arguably from diverse backgrounds," and that it is "therefore important to all concerned that there is evidence of diversity, in terms of race and gender, in the class counsel I appoint," Judge Baer ordered class counsel to "make every effort to assign to this matter at least one minority lawyer and one woman lawyer." Class Action Order, *In re Gildan Activewear Inc. Sec. Litig.*, No. 08 Civ. 5048 (S.D.N.Y. Sept. 20, 2010), at http://amlawdaily.typepad.com/GildanOrder.pdf.

In the case at bar, Judge Baer went further, this time in connection with a class of satellite radio subscribers. In his order certifying the class, Judge Baer again simply cited to his prior decision in *J.P. Morgan* and stated as follows:

> In consideration of other matter pertinent to counsel's ability to fairly and adequately represent the class, and in accordance with my previous opinions on this score, [proposed counsel] should ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics. *See In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007).

Pet. App. 34a-35a. (hereinafter "Order"). Thus, the order here went further than his prior "requirement" of "mak[ing] every effort" to assign "one minority lawyer" and "one woman lawyer" to the case. Rather, class counsel had to "ensure" that the lawyers on the case "reflect the class composition" in terms of race and sex. Tellingly, at no point in the case at bar (or in the earlier line of cases) did Judge Baer identify the required compelling interest to justify his order. Judge Baer has continued in this practice in later class actions as well. *See Pub. Employees' Retirement Sys. of Mississippi v. Goldman Sachs Group, Inc.*, 280 F.R.D. 130, 142 n.6 (S.D.N.Y. 2012); *N.J. Carpenters Health Fund v. Residential Capital, LLC*, 2012 WL 4865174, at *4 n.5 (S.D.N.Y. Oct. 15, 2012).

Judge Baer stands alone among federal judges in this practice. *See* Michael H. Hurwitz, *Judge Harold*

Baer's Quixotic Crusade for Class Counsel Diversity, 17 Cardozo J.L. & Gender 321, 327 (2011).

I. THE CIRCUIT COURT'S STANDING ANALYSIS IGNORES IMPORTANT PROCEDURAL RIGHTS

On appeal, the Second Circuit concluded that petitioner Nicolas Martin, a member of the class allegedly being represented by class counsel, lacked standing to object to the discriminatory manner in which the district court appointed class counsel because he "never contend[ed] that class counsel's representation was actually inferior." Pet. App. 7a. According to the circuit court, this means that he "failed to state an injury-in-fact" and thus lacked standing. This analysis ignores repeated holdings by this Court (as well as numerous courts of appeals) that one who is denied a procedural right need not show that he would have obtained a different or more favorable substantive outcome had the proper procedures been followed.

At the outset, two obvious points deserve emphasis. First, Martin *did* argue, in substance, that the attorneys' representation was "actually inferior." After all, Martin argued that the settlement agreement was unfair to him and other unnamed class members, in part because class counsel elevated their own interests in obtaining fees above the interests of the class members. If that argument does not allege "actually inferior" representation, it is hard to know what would.

Second, the circuit court's analysis is utterly counterintuitive. If a district judge selected class counsel based upon some other arbitrary characteris-

tic such as a minimal height, or the first letter of the attorney's last name, it is hard to believe that unnamed class members would lack standing to challenge that order unless they could show that the tall or letter-selected attorneys' representation was "actually inferior" to the representation of some hypothetical attorneys of random heights and last names.

And that is because both Rule 23(g)(1) and the Due Process Clause of the Fifth Amendment provide class members with procedural rights. Rule 23(g)(1) provides that a court certifying a class "must appoint class counsel," must consider various factors relating to the adequacy of the representation, and may consider "any other matter *pertinent* to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(A),(B) (emphasis added). The plain corollary is that the district court may *not* consider matters that are *not* pertinent to counsel's ability to fairly and adequately represent the class. And that rule provides class members with procedural rights. If the district court considers matters that are not pertinent to counsel's ability to represent class members, then it has violated those rights. Under this Court's precedent, a party alleging that procedural rules were not followed need not show that the decision-maker's substantive determination would have been different if the proper procedures had been followed. *FEC v. Akins*, 524 U.S. 11 (1998).

"There is this much truth to the assertion that 'procedural rights' are special." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992) (plurality op.). In *Lujan*, this Court considered a challenge to an interpretation of the Environmental Protection Act by

the Secretary of the Interior that limited the application of the requirement that federal agencies consult with the Secretary to those actions affecting domestic species. The plurality considered three questionable links between the interpretation and the actual survival of threatened species that the plaintiffs claimed would affect their interests: (1) other federal agencies were not before the Court, and thus would not be bound by any holding that the Secretary's U.S.-only interpretation of the law was incorrect, (2) even if they were required to consult with the Secretary, they were not bound to adhere to the Secretary's view of whether their funding threatened any species, and (3) even if they agreed with the Secretary, and withdrew funding from foreign-based projects, it was no guarantee that the projects would not proceed or that endangered species would fare better.

As to the second link, though, the plurality concluded that plaintiffs were alleging the violation of a "procedural right" (*i.e.*, the right to have federal agencies consult with the Secretary). It specifically disclaimed any reliance on the weakness of *that* link, and concluded that if the agencies were bound to consult with the Secretary, whether the Secretary could ultimately convince the agencies of his views was irrelevant to standing. *Lujan*, 504 U.S. at 573 n.7 (plurality op.) ("[W]e do not rely, in the present case, upon the Government's argument that *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.") (emphasis in original).

Similarly, in *FEC v. Akins*, 524 U.S. 11 (1998), plaintiffs challenged the Federal Election Commission's determination that the American Israel Pub-

lic Affairs Committee (AIPAC) was not a "political committee" under federal election law. The plaintiffs, political opponents of AIPAC, ultimately wanted information about AIPAC that AIPAC would have been obligated to disclose were it deemed a political committee and the FEC chose to seek the information from it. (That is, if AIPAC were deemed a "political committee" and chose not to disclose the information, the FEC could have exercised its prosecutorial discretion and sought it from AIPAC.) The Court rejected the argument that plaintiffs lacked standing because the FEC could decline to seek the information from AIPAC even should the Court agree with plaintiffs' understanding of "political committee." *Id*. at 25. The Court pointed to the general practice of requiring reconsideration of agency decisions that were made upon a misapprehension of the proper legal standards, or where there was a failure to follow proper procedures. A plaintiff alleging that procedural rules were not followed need not show that the decision-maker's substantive determination would have been different if the proper procedures had been followed.

Other circuit courts, most notably the D.C. Circuit in administrative law cases, have stressed this aspect of standing. *E.g.*, *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (plaintiff who alleged that Secretary of the Army failed to comply with certain provisions of the National Environmental Policy Act and National Historic Preservation Act that required him to consider the environmental and historic property impact before transferring certain property to developers had standing; "Preparation of an environmental impact statement will never 'force' an agency to change the course of action it proposes.

The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.").

The Due Process Clause of the Fifth Amendment, including its equal protection component, serves a function similar to Rule 23(g). A criminal defendant who is deprived of due process need not show that he would have been acquitted had due process requirements been met. Indeed, some violations of due process–*e.g.*, a biased decision-maker–are sufficiently egregious that they automatically require a new trial. Nor does it matter that someone else was also deprived of due process. As the jury selection cases cited by petitioner demonstrate, discrimination against a potential juror automatically results in the deprivation of the litigant's due process rights.

The Second Circuit ignored the vital procedural rights that the laws governing appointment of class counsel bestow, and accordingly, gravely erred in concluding that Martin did not have standing to challenge the order in this case. This Court should grant the petition to reiterate that standing to object to the clear violation of procedural rights does not depend on whether the violation caused a particular substantive outcome. Nor does an objecting class member have to show that class counsel provided "actually inferior" representation in comparison to some hypothetical set of attorneys.

II. THE DISTRICT COURT'S ORDER REQUIRING CLASS COUNSEL TO REFLECT THE RACE AND GENDER METRICS OF THE CLASS VIOLATES THE PRINCIPLES OF EQUAL PROTECTION.

A. JUDICIAL ORDERS ARE SUBJECT TO THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

Although the Fifth Amendment contains no explicit right to equal protection, it forbids discrimination that is so unjustifiable as to violate due process, and this Court's approach to Fifth Amendment equal protection claims "has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (citing *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment had it been implemented by a State, then the same classification, when imposed by a component of the federal government, violates the due process requirements of the Fifth Amendment. *Johnson v. Robison*, 415 U.S. 361, 366 (1974). *See also*, *Richardson v. Belcher*, 404 U.S. 78, 81 (1971). Judicial orders "have long been held to be state action governed by the Fourteenth Amendment." *Palmore v. Sidoti*, 466 U.S. 429, 433 n.1 (1984); *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). *Cf. United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (subjecting race conscious federal court remedial order to strict scrutiny).

B. RACIAL CLASSIFICATIONS ARE INHERENTLY SUSPECT AND ARE SUBJECT TO STRICT SCRUTINY.

The central purpose of the equal protection principle is to prevent the government from purposefully discriminating between individuals on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 642 (1993). *See also Palmore*, 466 U.S. at 432 ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."). Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). *See also Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (Racial classifications threaten to "stigmatize" and "incite racial hostility."). Race-based classifications "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting). Race neutrality is the "driving force of the Equal Protection Clause" and racially based classifications are permitted only as a last resort. *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009). Race and ethnic distinctions of any sort are "inherently suspect" and call for "the most exacting judicial examination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (plurality opinion); *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.). Thus, "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it

does not conflict with constitutional guarantees." *Wygant*, 476 U.S. at 273-74 (plurality opinion); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980).

The standard of review under the equal protection component of the Fifth Amendment's Due Process Clause ensures that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 224 (1995). The standard of review "is not dependent on the race of those burdened or benefited by a particular classification"; all are subject to strict scrutiny. *Gratz v. Bollinger*, 539 U.S. 244, 269 (2003). *See also Bakke*, 438 U.S. at 295-99 (opinion of Powell, J.) (stating that the level of scrutiny does not change simply because the classification operates against a group not traditionally discriminated against, or because the classification is benign).

Strict scrutiny is a two prong test. First, any racial classification "must be justified by a compelling government interest"; second, "the means chosen by the State to effectuate its purpose must be narrowly tailored to the achievement of that goal." *Wygant*, 476 U.S. at 274; *Fullilove*, 448 U.S. at 480. In the case at bar, Judge Baer's race requirement satisfies neither prong and, therefore, violates the equal protection principle.

Likewise, gender-based classifications are only permitted upon a demonstration of an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 531 (1996). While slightly less onerous than the standard for racial classifications, the bur-

den to justify a sex classification is demanding, and it rests entirely on the state. *Id.* at 533 (citation omitted). In order to satisfy this burden, the state must show

> at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

C. THERE IS NO GOVERNMENTAL INTEREST SUFFICIENT TO JUSTIFY RACE AND SEX BALANCING OF CLASS COUNSEL.

The Supreme Court has recognized only two compelling interests sufficient to support racial discrimination: remedying intentional past discrimination and diversity in higher education. *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-22 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). *See also Wygant*, 476 U.S. at 276 (societal discrimination is insufficient as a basis for imposing discriminatory remedies). Neither of these compelling interests is present here. Curiously, neither in the order at issue here, nor in *J.P. Morgan* or its

progeny, has Judge Baer identified any compelling governmental interest to support his actions. In *J.P. Morgan*, the court simply stated a belief that "it is important to all concerned that there is evidence of diversity, in terms of race and gender" of class counsel. *In re J.P. Morgan*, 242 F.R.D. at 277.

At no point in this case has the district court identified any evidence of prior discrimination in appointing class counsel either in that court or in any other court. Nor has the court pointed to any evidence that class counsel in previous cases has failed to fairly and adequately represent class members because of their race or sex. The district court, referring to Rule 23's permissive considerations of "other matter pertinent to counsel's ability to fairly and adequately represent the class," simply ordered the firms involved to staff the case to "reflect the class composition in terms of relevant race and gender metrics." Pet. App. 35a. Indeed, the reference to "counsel's ability to fairly and adequately represent the class" strongly suggests that the court was not trying to remedy any past or present intentional discrimination.

Since the district court here failed to identify any important governmental interest, let alone a compelling governmental interest, we are left to speculate as to what precise goal Judge Baer sought to achieve. One logical inference is that he believes that class counsel that reflects the race and gender metrics of the class will better represent the class. However, the court heard no evidence on this issue and made no findings of fact to support this conclusion. Another possibility is that the court believed that certain members of the class have racial prejudices or biases

leading them to prefer class counsel of the same race or sex. Giving effect to these prejudices is constitutionally impermissible. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations . . . . We have little difficulty concluding that they are not.").

D. THE ORDER REQUIRING CLASS COUNSEL TO REFLECT THE "RACE AND GENDER METRICS" OF THE CLASS IS NOT NARROWLY TAILORED.

Even if this Court determines there is a compelling governmental interest sufficient to impose race and sex requirements on class counsel, the order in this case must be vacated because it is not narrowly tailored. To survive the narrow tailoring inquiry, "the means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

The race and sex balancing ordered in this case has no connection whatsoever to the government's interest in fair and adequate representation for the class or to any inferred interest in diversity. Assuming *arguendo* that some type of diversity results in better representation for the class, the court here made no determination that ordering counsel to re-

flect the race and gender metrics of the class was necessary in this case in order to achieve that kind of diversity. Indeed, plaintiffs-respondents insist that it was *not* necessary. BIO at 5 (stating that class counsel "employ[s] a significant number of women and minority lawyers and assembled the best legal team they could, which (even before the District Court's class certification order) included women and minorities."). Further, the record contains no finding by the court as to a lack of race and sex diversity prior to imposing its order. Precisely because there was no showing an order was necessary to achieve Judge Baer's diversity goals, it must fail any narrow tailoring inquiry.

Moreover, a race and sex balancing requirement like this could be applied indefinitely, with courts considering the race and sex makeup of every class, then ordering class counsel in each case to reflect the precise race and gender metrics of the class, leading to absurd results in many cases. Quite often, discrimination cases are brought by classes wholly made up of females, Asians, Hispanics, or whites. Using Judge Baer's logic the plaintiffs' class in *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), a class made up entirely of Mexican farm laborers, should have been represented by a legal team consisting solely of Mexican Americans. Such a requirement would be clearly unconstitutional. *See Parents Involved*, 551 U.S. at 731 ("An interest linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture.*"*); *Grutter*, 539 U.S. at 342 (hold-

ing that a system of racial preferences "must" have a sunset provision because they are "potentially so dangerous that they may be employed no more broadly than the interest demands," leading to the conclusion that "enshrining a permanent justification for racial preferences would offend this fundamental equal protection principal."). Here, as in *Croson*, one of the chief problems with the race and sex formula is that it has no logical endpoint. *Croson*, 488 U.S. at 498.

III. THE DISTRICT COURT'S ORDER REQUIRING CLASS COUNSEL TO REFLECT THE RACE AND GENDER METRICS OF THE CLASS VIOLATES RULE 23.

Upon certifying a class, a court must appoint class counsel, pursuant to Fed. R. Civ. P. 23(g)(1). Rule 23(g)(1)(A) sets out certain factors that the court must consider; none of them are at issue here. Rather, Judge Baer proceeded to include race and sex requirements in his certification order and purported to find his power to do so in another subsection of the rule, Fed. R. Civ. P. 23(g)(1)(B), which permits the court to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Notably, rather than making any findings as to why appointing a female and minority attorneys to the class counsel team was "pertinent to counsel's ability to fairly and adequately represent the interests of the class," the court simply referred to its previous decisions, all relying upon a completely unsupported belief that "it is important to all concerned" that class counsel is diverse in terms of race and sex. Pet. App. 35a. citing *J.P. Morgan*, 242 F.R.D. at 277.

CONCLUSION

The Second Circuit clearly erred when it held that Martin lacked standing to challenge the discriminatory order appointing class counsel, because standing to challenge a deprivation of procedural rights does not depend on a showing that the litigant was "injured" because he would have obtained a different or more favorable substantive outcome had proper procedures been followed. Moreover, this Court has wisely recognized that a completely equal society will not, in every one of its spheres, mirror the sex and racial makeup of its inhabitants, and there is no evidence to suggest that the government has a compelling interest to try and make it so here. Accordingly, this Court should grant the petition for *certiorari* in this case, and reverse the judgment of the Second Circuit.

Respectfully submitted,

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